



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

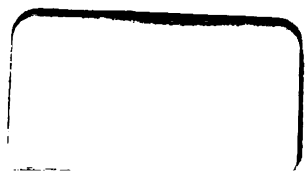
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



THE
PACIFIC REPORTER,
VOLUME 61,

CONTAINING ALL THE DECISIONS OF THE

SUPREME COURTS OF CALIFORNIA, KANSAS, OREGON, WASHINGTON,
COLORADO, MONTANA, ARIZONA, NEVADA, IDAHO, WYOMING,
UTAH, NEW MEXICO, OKLAHOMA, AND COURTS OF
APPEALS OF COLORADO AND KANSAS.

PERMANENT EDITION.

JUNE 7—AUGUST 30, 1900.

ST. PAUL:
WEST PUBLISHING CO.
1900.

COPYRIGHT, 1900,
BY
WEST PUBLISHING COMPANY.
(61 Pac.)

PACIFIC REPORTER, VOLUME 61.

JUDGES

OF THE

COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME.

ARIZONA—Supreme Court.

WEBSTER STREET, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

FLETCHER M. DOAN. RICHARD E. SLOAN.
GEORGE R. DAVIS.

CALIFORNIA—Supreme Court.

WILLIAM H. BEATTY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

THOMAS B. McFARLAND. JACKSON TEMPLE.
RALPH C. HARRISON. F. W. HENSHAW.
C. H. GAROUTTE. WALTER VAN DYKE.

Supreme Court Commissioners.

JOHN HAYNES. WHEATON A. GRAY.
E. W. BRITT.¹ J. A. COOPER.
N. P. CHIPMAN. GEORGE H. SMITH.²

COLORADO—Supreme Court.

JOHN CAMPBELL, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

LUTHER M. GODDARD. WILLIAM H. GABBERT.

Court of Appeals.

JULIUS B. BISSELL, PRESIDENT.

JUDGES.

ADAIR WILSON. CHARLES I. THOMSON.

IDAHO—Supreme Court.

JOSEPH W. HUSTON, CHIEF JUSTICE.

JUSTICES.

RALPH P. QUARLES. ISAAC N. SULLIVAN.

KANSAS—Supreme Court.

FRANK DOSTER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

W. A. JOHNSTON. WILLIAM R. SMITH.

¹ Resigned April 7, 1900.

² Term began April 21, 1900.

KANSAS—Court of Appeals.

Northern Department.

JOHN H. MAHAN, PRESIDING JUDGE.

ASSOCIATE JUDGES.

ABJAH WELLS.

SAMUEL W. McELROY.

Southern Department.

A. W. DENNISON, PRESIDING JUDGE.

ASSOCIATE JUDGES.

B. F. MILTON.

MANFORD SCHOONOVER.

MONTANA—Supreme Court.

THEO. BRANTLY, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

WILLIAM H. HUNT.*

WM. T. PIGOTT.

R. LEE WORD.†

NEVADA—Supreme Court.

M. S. BONNIFIELD, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

W. A. MASSEY.

C. H. BELKNAP.

NEW MEXICO—Supreme Court.

WILLIAM J. MILLS, CHIEF JUSTICE. (4th Dist.)

ASSOCIATE JUSTICES.

JOHN R. McFIE (1st Dist.)

F. W. PARKER. (3d Dist.)

J. W. CRUMPACKER. (2d Dist.)

CHARLES A. LELAND. (5th Dist.)

OKLAHOMA—Supreme Court.

JOHN H. BURFORD, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JOHN L. McATEE.

BAYARD T. HAINER.

CLINTON F. IRWIN.

BENJ. F. BURWELL.

OREGON—Supreme Court.

CHARLES E. WOLVERTON, CHIEF JUSTICE.‡

ROBERT S. BEAN, CHIEF JUSTICE.‡

ASSOCIATE JUSTICES.

ROBERT S. BEAN.‡

FRANK A. MOORE.

CHARLES E. WOLVERTON.

UTAH—Supreme Court.

GEORGE W. BARTCH, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

JAMES A. MINER.

ROBERT N. BASKIN.

* Resigned June 4, 1900.

† Term began June 4, 1900.

‡ Ceased to be Chief Justice July 2, 1900.

§ Became Chief Justice July 2, 1900.

WASHINGTON—Supreme Court.

MERRITT J. GORDON, CHIEF JUSTICE.[†]

R. O. DUNBAR, CHIEF JUSTICE.[‡]

ASSOCIATE JUSTICES.

R. O. DUNBAR.[‡]

T. J. ANDERS.

JAMES B. REAVIS.

MARK A. FULLERTON.

WILLIAM H. WHITE.[‡]

WYOMING—Supreme Court.

CHARLES N. POTTER, CHIEF JUSTICE.

ASSOCIATE JUSTICES.

SAMUEL T. CORN.

JESSE KNIGHT.

[†] Resigned June 1, 1900.

[‡] Term began June 1, 1900.

[‡] Became Chief Justice June 1, 1900.

CASES REPORTED.

	Page		Page
Adams v. City of Modesto (Cal.).....	957	Bartagnolli, Italian-Swiss Agricultural Col-	
Adams v. Warren (Colo. Sup.).....	609	ony v. (Wyo.).....	1020
Adams, Church v. (Or.).....	639	Bash, Blewett v. (Wash.).....	770
Agricultural Land Co., Baker v. (Kan.		Bassett v. Fairchild (Cal.).....	791
Sup.).....	412	Bastian, Greenwalt v. (Kan. App.).....	513
Aikins v. Stadell (Kan. App.).....	325	Bates, State v. (Utah).....	995
Ajax Min. Co., Potter v. (Utah).....	999	Batz, Miller & Lux v. (Cal.).....	935
Albuquerque Land & Irrigation Co. v. Gu-		Bay City Building & Loan Ass'n v. Broad	
tierrez (N. M.).....	357	(Cal.).....	368
Allen v. Florence & C. C. R. Co. (Colo.		Bean, Peterson v. (Utah).....	213
App.).....	491	Beasley, Stevens v. (Kan. App.).....	762
Allen v. Hopkins (Kan. Sup.).....	750	Bedell, Christy v. (Kan. App.).....	1095
Allen, Horsman v. (Cal.).....	796	Belle v. Brown (Or.).....	1024
Allen, San Jose Land & Water Co. v.		Belt v. Belt (Kan. Sup.).....	1130
(Cal.).....	1083	Beltaire v. Rosenberg (Cal.).....	916
Altura Gold Mill & Mining Co., Farmers'		Bergdahl v. People (Colo. Sup.).....	228
Exch. Bank v. (Cal.).....	1077	Beronio v. Ventura County Lumber Co.	
American Bonding & Trust Co. of Balti-		(Cal.).....	958
more, Md., v. Scott (Kan. App.).....	873	Betz v. People's Building, Loan & Saving	
American Inv. Co. v. Coulter (Kan. App.)	820	Ass'n (Utah).....	334
American Nat. Bank v. Barnard (Colo.		Bevans, Jordan v. (Kan. App.).....	985
App.).....	200	Big Creek Tp., Neosho County, Johnson v.	
A. M. Holter Hardware Co. v. Ontario Min.		(Kan. App.).....	456
Co. (Mont.).....	3	Bingel v. Brown (Colo. App.).....	435
A. M. Holter Hardware Co. v. Ontario Min.		Bingler v. Mutual Benefit Life Ins. Co.	
Co. (Mont.).....	8	(Kan. App.).....	673
Anaheim Union Water Co. v. Jurupa Land		Bird, Kirkman v. (Utah).....	338
& Water Co. (Cal.).....	80	Bird, Reid, Murdoch & Co. v. (Colo. App.)	353
Anderson v. Metropolitan St. R. Co. (Kan.		Bishop v. Brown (Colo. App.).....	50
App.).....	982	Bishop, City of Leadville v. (Colo. App.)...	58
Anderson, Funk v. (Utah).....	1006	Bishop, Meyer v. (Cal.).....	919
Anderson, Hansen v. (Utah).....	219	Black, City of Ottawa v. (Kan. App.).....	985
Anderson, Ott v. (Kan. App.).....	330	Black, Hardwick v. (Cal.).....	381
Andrews, State v. (Kan. Sup.).....	808	Blackburn v. Balance (Kan. App.).....	1132
Andrews Banking Co., Ballou v. (Cal.)...	102	Blair v. Boswell (Or.).....	341
Anthony v. Mott (Kan. App.).....	509	Blewett v. Bash (Wash.).....	770
Anthony Investment Co. v. Law (Kan.		Bliler v. Boswell (Wyo.).....	867
Sup.).....	745	Blinn Lumber Co. v. Walker (Cal.).....	664
Appel v. State (Wyo.).....	1015	Blize, State v. (Or.).....	735
Applegate v. Young (Kan. Sup.).....	402	Blocker, Ristine v. (Colo. App.).....	486
Arcata & M. R. R. Co., Cameron v. (Cal.)...	955	Board of Com'rs of Arapahoe County v.	
Armstrong, Seymour v. (Kan. App.).....	675	Rocky Mountain News Printing Co. (Colo.	
Arnett, People v. (Cal.).....	930	App.).....	494
Arnold v. Producers' Fruit Co. (Cal.).....	283	Board of Com'rs of Cloud County v. Vick-	
Asbell, State v. (Kan. Sup.).....	690	ers (Kan. Sup.).....	391
Ashcraft v. Powers (Wash.).....	161	Board of Com'rs of D County v. Sauer	
Atchison, T. & S. F. R. Co. v. Conlon (Kan.		(Okl.).....	367
App.).....	321	Board of Com'rs of El Paso County, Col-	
Atchison, T. & S. F. R. Co., Dangerfield		burn v. (Colo. App.).....	241
v. (Kan. Sup.).....	405	Board of Com'rs of El Paso County, Mc-	
		Intyre v. (Colo. App.).....	237
Baer v. Ballingall (Or.).....	852	Board of Com'rs of Garfield County v. Isen-	
Bailey, In re (Okl.).....	922	berg (Okl.).....	1067
Bailey, Union Casualty & Surety Co. of St.		Board of Com'rs of Geary County v. Mis-	
Louis, Mo., v. (Kan. App.).....	452	souri, K. & T. R. Co. (Kan. Sup.).....	693
Baker v. Agricultural Land Co. (Kan. Sup.)	412	Board of Com'rs of Gray County, Naylor v.	
Baker v. Sinclair (Wash.).....	170	(Kan. App.).....	763
Balance, Blackburn v. (Kan. App.).....	1132	Board of Com'rs of Harper County v. Cole	
Baldasari, City of Denver v. (Colo. App.)..	190	(Kan. Sup.).....	403
Bales, Dickinson v. (Kan. Sup.).....	403	Board of Com'rs of Montrose County, First	
Ballingall, Baer v. (Or.).....	852	Nat. Bank v. (Colo. Sup.).....	226
Ballou v. Andrews Banking Co. (Cal.).....	102	Board of Com'rs of Shawnee County, Dol-	
Ballou, Wise v. (Cal.).....	574	man v. (Kan. App.).....	312
Bank of Santa Fé v. Drew (Kan. App.)...	1131	Board of Com'rs of Washita County, Cecil	
Banks, City of Kansas City v. (Kan. App.)	333	v. (Okl.).....	1065
Barnard, American Nat. Bank v. (Colo.		Board of Education of City of Las Vegas,	
App.).....	200	Romero v. (N. M.).....	109
Barnhart v. Edwards (Cal.).....	176	Board of Election Com'rs of City and Coun-	
Bartley, Brokaw v. (Kan. App.).....	320	ty of San Francisco, Britton v. (Cal.)....	1115
Barr, Rader v. (Or.).....	1027	Bonestell v. Bowie (Cal.).....	78
Barr, Rader v. (Or.).....	1127	Bonner v. Powell (Idaho).....	138
Barratt, Hudson v. (Kan. Sup.).....	737	Booth, Willis v. (Or.).....	1135
Barsalou, Boucher v. (Mont.).....	1134	Boston & M. Consol. Copper & Silver Min.	
		Co., Forrester v. (Mont.).....	309

	Page		Page
Boswell, Blair v. (Or.)	341	Cherokee & Pittsburg Coal & Mining Co. v. Dickson (Kan. App.)	450
Boswell, Biller v. (Wyo.)	867	Chezum v. Claypool (Wash.)	157
Boucher v. Barsalou (Mont.)	1134	Chicago, R. I. & P. R. Co. v. Fernie (Kan. Sup.)	1131
Bower, Nipp v. (Kan. App.)	448	Chicago, R. I. & P. R. Co. v. Scheinkoenig (Kan. Sup.)	414
Bowersock, Johnston v. (Kan. Sup.)	740	Chicago, R. I. & P. R. Co., Sanders v. (Okla.)	1075
Bowie, Bonestell v. (Cal.)	78	Christopher v. Condodge (Cal.)	174
Boyce v. Cupper (Or.)	642	Christy v. Bedell (Kan. App.)	1095
Boyer, Mutual Reserve Fund Life Ass'n v. (Kan. Sup.)	387	Church v. Adams (Or.)	639
Bradley, First Nat. Bank v. (Kan. Sup.)	129	Churchill, Hibernia Savings & Loan Soc. v. (Cal.)	278
Branch, Douglass v. (Kan. App.)	1132	City and County of San Francisco, First Nat. Bank v. (Cal.)	778
Brandon, Douglass v. (Kan. App.)	1132	City and County of San Francisco, Germania Trust Co. v. (Cal.)	178
Brantley v. State (Wyo.)	139	City and County of San Francisco, Mackay v. (Cal.)	382
Braun v. Woollacott (Cal.)	801	City of Denver v. Baldassari (Colo. App.)	190
Breding v. Williams (Or.)	858	City of Greeley, Foster v. (Colo. App.)	482
Bree v. Wheeler (Cal.)	782	City of Kansas City v. Banks (Kan. App.)	333
Bridge v. Main St. Hotel Co. (Kan. Sup.)	754	City of Kansas City v. Gray (Kan. Sup.)	746
Brittain Dry-Goods Co. v. Merkel (Kan. App.)	675	City of Kansas City v. Orr (Kan. Sup.)	397
Britton v. Board of Election Com'rs of City and County of San Francisco (Cal.)	1115	City of Kansas City v. Wyandotte Gas Co. (Kan. App.)	317
Broad, Bay City Building & Loan Ass'n v. (Cal.)	368	City of Leadville v. Bishop (Colo. App.)	58
Brokaw v. Bartley (Kan. App.)	320	City of Modesto, Adams v. (Cal.)	957
Brossard v. Morgan (Idaho)	1031	City of New Whatcom v. Roeder (Wash.)	767
Broughan v. Broughan (Kan. App.)	874	City of Oakland v. Hart (Cal.)	779
Brown, Belle v. (Or.)	1024	City of Ottawa v. Black (Kan. App.)	985
Brown, Bingel v. (Colo. App.)	435	City of Ottawa v. McCreery (Kan. App.)	986
Brown, Bishop v. (Colo. App.)	50	City of Seattle, Dowling v. (Wash.)	709
Brown, Muldrick v. (Or.)	428	Civic Federation v. Salt Lake County (Utah)	222
Brown, St. Louis & S. F. R. Co. v. (Kan. App.)	457	Clancy, State v. (Mont.)	987
Brown, Scott v. (Kan. App.)	460	Clark v. Clark (Colo. App.)	479
Brown, Wyoming Nat. Bank v. (Wyo.)	465	Clark v. Oyharzabal (Cal.)	1119
Buchanan, In re (Cal.)	1120	Clark v. State (Kan. App.)	814
Buckman, Smith v. (Wash.)	31	Clarke v. Fast (Cal.)	72
Burchinell, Duncan v. (Colo. App.)	61	Claypool, Chezum v. (Wash.)	157
Burkhalter v. Nuzum (Kan. App.)	310	Clearwater Short-Line R. Co. v. San Garde (Idaho)	137
Burnham, Samuels v. (Kan. App.)	755	Coates, State v. (Wash.)	726
Burns, Ramsey v. (Mont.)	129	Colburn v. Board of Com'rs of El Paso County (Colo. App.)	241
Burr, Davis v. (Kan. App.)	1132	Cole, Board of Com'rs of Harper County v. (Kan. Sup.)	403
Burr, Field v. (Cal.)	665	Cole, Denny v. (Wash.)	38
Burrows, St. Louis & S. F. R. Co. v. (Kan. Sup.)	430	Coleman v. Perry (Mont.)	129
Burt v. Moore (Kan. App.)	332	Colorado Iron Works, Taylor v. (Colo. Sup.)	233
Butcher, Currey v. (Or.)	631	Commercial Inv. Co., Wheeler v. (Wash.)	715
Butler, Spreckels v. (Cal.)	378	Commercial Nat. Bank v. Chambers (Utah)	500
Butte Hardware Co., Mahoney v. (Mont.)	1134	Comstock, In re (Okla.)	921
Butterfield, Crystal Palace Flouring-Mills Co. v. (Colo. App.)	479	Condodge, Christopher v. (Cal.)	174
Cache County v. Jensen (Utah)	303	Conlon, Atchison, T. & S. F. R. Co. v. (Kan. App.)	321
Cahill, Decker v. (Okla.)	1101	Connaway, Netherlands American Mortg. Bank v. (Idaho)	590
Caine, Culmer v. (Utah)	1008	Conrad Nat. Bank v. Great Northern R. Co. (Mont.)	1
California Imp. Co., Stewart v. (Cal.)	280	Continental Building & Loan Ass'n v. Hutton (Cal.)	273
Cameron v. Arcata & M. R. R. Co. (Cal.)	955	Continental Ins. Co., Palmer v. (Cal.)	784
Cannon v. Serrel (Colo. App.)	187	Continental Oil Co., Appeal of (Mont.)	8
Cannon, Monroe v. (Mont.)	863	Cook, Diamond Coal Co. v. (Cal.)	578
Canyon County, Taylor v. (Idaho)	521	Cook, Larabee v. (Kan. App.)	815
Caplice Co., Teague v. (Mont.)	1134	Cook, Stacy v. (Kan. Sup.)	399
Carmichael v. Pierce (Okla.)	583	Coonan v. Loewenthal, two cases (Cal.)	940
Carpenter v. Furrey (Cal.)	369	Corcoran, State v. (Idaho)	1034
Carpenter v. San Francisco Sav. Union (Cal.)	92	Corey, Merritt v. (Wash.)	171
Carpenter, Farm Inv. Co. v. (Wyo.)	258	Cortelyou v. Jones (Cal.)	918
Carpenter, Van Wagenen v. (Colo. Sup.)	698	Coulter, American Inv. Co. v. (Kan. App.)	820
Carpy v. Dowdell (Cal.)	1126	Coulter, Petrie v. (Okla.)	1058
Carpy, Dowdell v. (Cal.)	948	County Bank v. Goldtree (Cal.)	785
Carter, Eastwood v. (Kan. App.)	510	Court of Appeals of Colorado, Ingersoll v. (Colo. Sup.)	594
Case v. Cherokee Lanyon Spelter Co. (Kan. Sup.)	406	Court of Appeals of Colorado, People v. (Colo. Sup.)	592
Case v. Cherokee Lanyon Spelter Co. (Kan. Sup.)	1130	Court of Appeals of Colorado, People v. (Colo. Sup.)	594
Cecil v. Board of Com'rs of Washita County (Okla.)	1065	Craig, Douglass v. (Kan. App.)	320
Cedar Mill Co., Ritchey v. (Wash.)	160	Crane, McIntosh v. (Kan. App.)	331
Cevada v. Miera (N. M.)	125	Crary v. Field (N. M.)	118
Chamberlin, In re (Kan. Sup.)	805		
Chamber of Commerce, Ladd v. (Or.)	1127		
Chambers, Commercial Nat. Bank v. (Utah)	560		
Chapman v. Hughes (Cal.)	76		
Cherokee Lanyon Spelter Co., Case v. (Kan. Sup.)	406		
Cherokee Lanyon Spelter Co., Case v. (Kan. Sup.)	1130		

	Page		Page
Crawford, State v. (Kan. App.)	816	Ely, Morse v. (Wash.)	1135
Creasey, Swift & Co. v. (Kan. App.)	314	Emigrant Ditch Co., Last Chance Water-	
Crossen v. Oliver (Or.)	885	Ditch Co. v. (Cal.)	960
Crystal Palace Flouring-Mills Co. v. But-		Emigrant Ditch Co., Lower Kings River	
terfield (Colo. App.)	479	Water-Ditch Co. v. (Cal.)	1130
Culmer v. Caine (Utah)	1008	Emigrant Ditch Co., People's Ditch Co. v.	
Cunningham v. Smith (Kan. App.)	458	(Cal.)	1130
Cupper, Boyce v. (Or.)	042	Engelkemeier, Pierce v. (Okl.)	1047
Currey v. Butcher (Or.)	631	Engelkemieer, Veseley v. (Okl.)	924
Curtis v. Schell (Cal.)	951	Ensign v. Haet (Kan. App.)	823
		Entz, Kanter v. (Kan. App.)	818
Daly v. Ruddell (Cal.)	1080	Estrel v. Deibl (Kan. App.)	1132
Dangerfield v. Atchison, T. & S. F. R. Co.		Etchepare, Murray v. (Cal.)	930
(Kan. Sup.)	405	Eureka T. G. M. Co., Shively v. (Cal.)	939
Daniels v. Johnson (Cal.)	1107	Evans, Fleming & Ayrest Co. of Chicago v.	
Darville v. Mayhall (Cal.)	276	(Kan. App.)	503
David, Underwood v. (Wyo.)	1012	Ewing, Kramer v. (Okl.)	1064
Davidson v. Hunter (Utah)	556		
Davis, In re (Kan. Sup.)	809	Fairchild, Bassett v. (Cal.)	791
Davis v. Burr (Kan. App.)	1132	Fair's Estate, In re (Cal.)	184
Davis, Jordan v. (Okl.)	1063	Falk v. Decou (Kan. App.)	760
Davis, St. Vincent's Institute for the In-		F. A. Lux Brewing Co., Krug v. (Cal.)	1125
sane v. (Cal.)	476	Fanning v. Gilliland (Or.)	636
Davis, St. Vincent's Institution for the In-		Farmers' Exch. Bank v. Altura Gold Mill &	
sane v. (Cal.)	477	Mining Co. (Cal.)	1077
Davis, State Sav. Bank v. (Wash.)	43	Farmers' Exch. Bank v. Morse (Cal.)	1088
Dayton v. McAllister (Cal.)	913	Farmers' & Traders' Nat. Bank v. Wood-	
De Bord v. People (Colo. Sup.)	599	ell (Or.)	837
Decker v. Cahill (Okl.)	1101	Farm Inv. Co. v. Carpenter (Wyo.)	258
Decou, Falk v. (Kan. App.)	760	Fast, Clarke v. (Cal.)	72
Deihl, Estrel v. (Kan. App.)	1132	Fay, Rauer v. (Cal.)	90
Delaplane v. Marshall (Kan. Sup.)	1131	Ferd. Heim Brewing Co., De Tarr v. (Kan.	
Dellinger v. Vineyard (Mont.)	1134	Sup.)	689
Denning v. Yount (Kan. Sup.)	803	Fernie, Chicago, R. I. & P. R. Co. v. (Kan.	
Denny v. Cole (Wash.)	38	Sup.)	1131
Denton v. Groves (Kan. App.)	815	Fidelity Mut. Life Ass'n of Philadelphia,	
Denver Consol. Tramway Co., Griffith v.		Pa., Methvin v. (Cal.)	1112
(Colo. App.)	46	Fidelity Trust Co. v. Palmer (Wash.)	158
Denver & R. G. R. Co. v. Spencer (Colo.		Fidelity & Casualty Co. v. Thompson (Cal.)	94
Sup.)	606	Fieid v. Burr (Cal.)	603
De Tarr v. Ferd. Heim Brewing Co. (Kan.		Fieid, Cray v. (N. M.)	118
Sup.)	689	Finch v. Kent (Mont.)	653
Detemple v. Mitchell (Colo. App.)	434	Finnup, Garfield Tp., Finney County, v.	
Deves, State v. (Kan. App.)	511	(Kan. App.)	812
Diamond Coal Co. v. Cook (Cal.)	578	First Nat. Bank v. Board of Com'rs of	
Dickinson v. Bales (Kan. Sup.)	403	Montrose County (Colo. Sup.)	226
Dickson, Cherokee & Pittsburg Coal & Min-		First Nat. Bank v. Bradley (Kan. Sup.)	129
ing Co. v. (Kan. App.)	450	First Nat. Bank v. City and County of San	
District Court of First Judicial District,		Francisco (Cal.)	778
Raleigh v. (Mont.)	991	First Nat. Bank, Fleischner v. (Or.)	345
Dobbs v. State (Kan. Sup.)	408	First Nat. Bank v. Foster (Wyo.)	466
Dole, Standard Steam Laundry v. (Utah)	1103	First Nat. Bank v. Hays (Idaho)	287
Dolman v. Board of Com'rs of Shawnee		First State Bank, Kansas State Bank v.	
County (Kan. App.)	312	(Kan. App.)	868
Doty v. Irwin-Phillips Co. (Colo. App.)	188	Fisher v. Zumwalt (Cal.)	82
Doty, Shepard v. (Kan. App.)	870	Fiske, Seaton v. (Cal.)	666
Douglas v. Muse (Kan. Sup.)	413	Fitzwater v. National Bank (Kan. Sup.)	684
Douglass v. Branch (Kan. App.)	1132	Flanagan, Urquide v. (Idaho)	514
Douglass v. Brandon (Kan. App.)	1132	Fleischner v. First Nat. Bank (Or.)	345
Douglass v. Craig (Kan. App.)	320	Fleming & Ayrest Co. of Chicago v. Evans	
Douglass v. Lieberman (Kan. App.)	313	(Kan. App.)	503
Douglass v. Willard (Cal.)	572	Florence & C. C. R. Co., Allen v. (Colo.	
Dowdell v. Carpy (Cal.)	948	App.)	491
Dowdell, Carpy v. (Cal.)	1126	Fluker, Smith v. (Kan. Sup.)	1131
Dowling v. City of Seattle (Wash.)	709	Fogarty v. Fogarty (Cal.)	570
Drew, Bank of Santa Fe v. (Kan. App.)	1131	Fontana v. Pacific Can Co. (Cal.)	580
Driver v. Salt Lake & O. Gas & Elec-		Ford, Hippen v. (Cal.)	929
tric Light Co. (Utah)	733	Ford, Kelley v. (Kan. App.)	679
Duncan v. Burchinell (Colo. App.)	61	Forrester v. Boston & M. Consol. Copper &	
Duncan v. Fulton (Colo. App.)	244	Silver Min. Co. (Mont.)	309
Dunham, Hansen v. (Kan. Sup.)	394	Foster v. City of Greeley (Colo. App.)	482
Dunn v. Yakish (Okl.)	928	Foster, First Nat. Bank v. (Wyo.)	466
Durham, Rose v. (Okl.)	1100	Foust v. Territory (Okl.)	923
Durham, Streight v. (Okl.)	1096	Freitas, Newman v. (Cal.)	907
		Fresno Flume & Irrigation Co., Sample v.	
Eagle, Lawton v. (Kan. App.)	868	(Cal.)	1085
Eagle Life Ass'n, Richter v. (Mont.)	878	Fulton, Duncan v. (Colo. App.)	244
Eagle Min. Co., Herron v. (Or.)	417	Funk v. Anderson (Utah)	1006
Earl, Toland v. (Cal.)	914	Furrey, Carpenter v. (Cal.)	360
Eastwood v. Carter (Kan. App.)	510		
Edwards, Barnhart v. (Cal.)	176	Gano v. Martin (Kan. App.)	460
Eickhoff v. Eickhoff (Colo. Sup.)	225	Gans v. Steele (Idaho)	286
Eisenhart v. McGarry (Colo. App.)	56	Garcia v. Territory (N. M.)	207
Eldodt v. Territory (N. M.)	105	Gardner v. Wasco County (Or.)	834
Elliot, State v. (Kan. App.)	981	Garfield Tp., Finney County, v. Finnup	
Ellis, Smith v. (Idaho)	695	(Kan. App.)	812

	Page		Page
Garnett, People v. (Cal.).....	1114	Hoagland, Hale v. (Kan. App.)	314
Gentry, Pacific Live-Stock Co. v. (Or.)....	422	Hoblawetz, Swift & Co. v. (Kan. App.)....	969
Germania Trust Co. v. City and County of San Francisco (Cal.).....	178	Hoffman v. Steffey (Kan. App.).....	822
Getto-McClung Boot & Shoe Co., Western Union Tel. Co. v. (Kan. App.).....	504	Hohenshell v. South Riverside Land & Wa- ter Co. (Cal.).....	371
Gianelli, Sanguinetti v. (Cal.).....	1106	Hohl, McClung v. (Kan. App.).....	507
Gibson, Witcher v. (Colo. App.).....	192	Hollingsworth, Stewart v. (Cal.).....	936
Gilliland, Fanning v. (Or.).....	636	Holter Hardware Co. v. Ontario Min. Co. (Mont)	3
Goff, State v. (Kan. App.).....	680	Holter Hardware Co. v. Ontario Min. Co. (Mont.)	8
Goff, State v. (Kan. Sup.).....	683	Home Life Ins. Co., Harrigan v. (Cal.)....	99
Goldman, William W. Kendall Boot & Shoe Co. v. (Kan. App.).....	1134	Hook v. Los Angeles R. Co. (Cal.).....	912
Goldtree, County Bank v. (Cal.).....	785	Hooper, Tallmadge v. (Or.).....	349
Gordon, Harper v. (Cal.).....	84	Hooper, Tallmadge v. (Or.).....	1127
Gorham, Hutchinson v. (Or.).....	431	Hoopes, Thorpe v. (Kan. App.).....	1134
Gottstein v. Wist (Wash.).....	715	Hopkins, Allen v. (Kan. Sup.).....	750
Gray, City of Kansas City v. (Kan. Sup.)..	746	Horsman v. Allen (Cal.).....	796
Gray, Schuster v. (Kan. App.).....	819	Hotaling v. Monteith (Cal.).....	95
Great Northern R. Co., Conrad Nat. Bank v. (Mont.)	1	Houser & Haines Mfg. Co. v. Hargrove (Cal.)	660
Greenwalt v. Bastian (Kan. App.).....	513	Howard v. Hibbs (Wash.).....	159
Greenwood v. Hassett (Cal.).....	173	Howard v. People (Colo. Sup.).....	595
Gresienger v. McCarter (Kan. App.).....	507	Hubbell, Orange County Fruit Exchange v. (N. M.).....	121
Grubling v. Rhodd (Kan. App.).....	1133	Hudson v. Barratt (Kan. Sup.).....	737
Griffith v. Denver Consol. Tramway Co. (Colo. App.).....	46	Hudson v. Hudson (Cal.).....	773
Griffith v. Maxwell (Wash.).....	708	Hudson, Randolph v. (Ok.).....	1103
Grinstead, State v. (Kan. App.).....	975	Hudson River State Hospital, Palmer v. (Kan. App.)	506
Grinstead, State v. (Kan. App.).....	976	Hughes, Chapman v. (Cal.).....	76
Grinstead, State v. (Kan. App.).....	980	Hunt v. Jetmore (Kan. App.).....	325
Gross, Williams v. (Cal.).....	934	Hunter, Davidson v. (Utah).....	556
Groves v. Groves (Wyo.).....	866	Hurlev v. O'Neill (Mont.).....	658
Groves, Denton v. (Kan. App.).....	815	Hutchinson v. Gorham (Or.).....	431
Gutierrez, Albuquerque Land & Irrigation Co. v. (N. M.).....	357	Hutchinson, State Bank v. (Kan. Sup.)...	443
		Hutchinson v. Yahn (Kan. App.).....	458
Hagan v. Sheridan (Kan. App.).....	756	Hutton, Continental Building & Loan Ass'n v. (Cal.)	273
Hale v. Hoagland (Kan. App.).....	314	Hutton, McClain v. (Cal.).....	273
Hale v. Stenger (Wash.).....	156	Hyde, State v. (Wash.).....	719
Hamil, Hanenkratt v. (Ok.).....	1050		
Hamilton & Rourke Co., Sibson v. (Wash.)	162	Imlay, State v. (Utah).....	557
Hand v. Soodeletti (Cal.).....	373	Ingersoll v. Court of Appeals of Colorado (Colo. Sup.)	594
Hanenkratt v. Hamil (Ok.).....	1060	Ireland v. Mackintosh (Utah).....	901
Hansen v. Anderson (Utah).....	219	Iron Springs Co., Weir v. (Colo. Sup.)....	610
Hansen v. Dunham (Kan. Sup.).....	394	Irwin-Phillips Co., Doty v. (Colo. App.)...	188
Hardman v. Portsmouth Sav. Bank (Kan. App.)	984	Isenberg, Board of Com'rs of Garfield Coun- ty v. (Ok.).....	1067
Hardman, Portsmouth Sav. Bank v. (Kan. Sup.)	1131	Italian-Swiss Agricultural Colony v. Bartag- nolli (Wyo.).....	1020
Hardwick v. Black (Cal.).....	381		
Hargrove, Houser & Haines Mfg. Co. v. (Cal.)	660	Jarman v. Rea (Cal.).....	790
Harker v. Scudder (Colo. App.).....	197	Jay v. School Dist. No. 1 of Cascade Coun- ty (Mont.).....	250
Harper v. Gordon (Cal.).....	84	J. B. Watkins Land-Mortgage Co. v. Mul- len (Kan. Sup.).....	385
Harrigan v. Home Life Ins. Co. (Cal.)....	99	Jenkins, State v. (Wash.).....	141
Hart, City of Oakland v. (Cal.).....	779	Jensen, Cache County v. (Utah).....	303
Hart, Ensign v. (Kan. App.).....	823	Jetmore, Hunt v. (Kan. App.).....	325
Haskell, Toy v. (Cal.).....	89	John Caplice Co., Teague v. (Mont.).....	1134
Hassett, Greenwood v. (Cal.).....	173	John S. Brittain Dry-Goods Co. v. Merkel (Kan. App.)	675
Hatcher v. Myers (Kan. App.).....	1133	Johnson v. Big Creek Tp., Neosho County (Kan. App.)	456
Havely, Portland Trust Co. v. (Or.).....	346	Johnson v. Mina Rica Gold Min. Co. (Cal.)	76
Hays v. Stewart (Idaho).....	591	Johnson, Daniels v. (Cal.).....	1107
Hays, First Nat. Bank v. (Idaho).....	287	Johnston v. Bowersock (Kan. Sup.).....	740
Helber v. Spokane St. R. Co. (Wash.)....	40	Jones v. Steelman (Wash.).....	764
Helena & L. Smelting & Reduction Co. v. Lynch (Mont.)	1134	Jones, Cortelyou v. (Cal.).....	918
Henderson v. Henderson (Or.).....	136	Jones, O'Rourke v. (Wash.).....	709
Hendrie & Bolthoff Mfg. Co., Standley v. (Colo. Sup.)	600	Jordan v. Davis (Ok.).....	1033
Henne v. Los Angeles County (Cal.).....	1081	Jordon v. Bevans (Kan. App.).....	985
Hennessey, McGuigan v. (Mont.).....	1	June, State v. (Kan. Sup.).....	804
Herbein v. Moore (Ok.).....	1000	Jurupa Land & Water Co., Anaheim Union Water Co. v. (Cal.).....	80
Herron v. Eagle Min. Co. (Or.).....	417		
Hetherington, Park v. (Kan. App.)	328	Kaffer v. Walters (Kan. App.).....	323
Hibbs, Howard v. (Wash.).....	159	Kansas State Bank v. First State Bank (Kan. App.)	868
Hibernia Savings & Loan Soc. v. Churchill (Cal.)	278	Karasek v. Peior (Wash.).....	33
Hickey's Estate, In re (Cal.).....	475	Kauter v. Entz (Kan. App.).....	818
Higgins v. San Diego Sav. Bank (Cal.)....	943	Keith v. Thisler (Kan. App.).....	758
Higgins, Rees v. (Kan. App.).....	500	Kelley v. Ford (Kan. App.).....	679
Hilberg, State v. (Utah).....	215		
Hilts v. Hilts (Or.).....	855		
Hippen v. Ford (Cal.).....	929		
Hitchcock, Powers v. (Cal.).....	1076		

	Page		Page
Kelsey, Randall v. (Idaho).....	515	McBride v. Newlin (Cal.).....	577
Kendall Boot & Shoe Co. v. Goldman (Kan. App.).....	1134	McCarrick, McPherson v. (Utah).....	1004
Kent, Finch v. (Mont.).....	653	McCarter, Gresienger v. (Kan. App.).....	507
Kepley v. Sheehan (Kan. App.).....	333	McClain v. Hutton (Cal.).....	273
Kern County v. Lee (Cal.).....	1124	McClung v. Hohl (Kan. App.).....	507
Killhonic v. Nuss (Mont.).....	648	McClure v. People (Colo. Sup.).....	612
King v. Mollohan (Kan. Sup.).....	685	McCornack, Wilson v. (Okla.).....	1068
Kirkman v. Bird (Utah).....	338	McCreery, City of Ottawa v. (Kan. App.).....	986
Kirman v. Powning (Nev.).....	1090	McDonald, Ready v. (Cal.).....	272
Knight v. Rhoades (Kan. App.).....	869	McGarry, Eisenhart v. (Colo. App.).....	56
Kokott, Ullery v. (Colo. App.).....	189	McGee, Stites v. (Or.).....	1129
Kornstett, State v. (Kan. Sup.).....	805	McGinnis, Territory v. (N. M.).....	208
Kramer v. Ewing (Okla.).....	1004	McGowan v. Smith (Wash.).....	713
Kreuzberger, Starr v. (Cal.).....	787	McGuigan v. Hennessy (Mont.).....	1
Kroeger, People's Building, Loan & Savings Ass'n v. (Utah).....	559	McInerney, Moran v. (Cal.).....	575
Krug v. F. A. Lux Brewing Co. (Cal.).....	1125	McInerney, Moran v. (Cal.).....	948
Kruger, State v. (Idaho).....	463	McIntosh v. Crane (Kan. App.).....	331
		McIntyre v. Board of Com'rs of El Paso County (Colo. App.).....	237
Lack, Wheeler v. (Or.).....	849	Mackay v. City and County of San Francisco (Cal.).....	382
Ladd v. Chamber of Commerce (Or.).....	1127	Mackey v. Wyckoff (Kan. App.).....	1133
Lamson v. Valles (Colo. Sup.).....	231	Mackin v. Portland Gas Co. (Or.).....	134
Larabee v. Cook (Kan. App.).....	815	Mackintosh, Ireland v. (Utah).....	901
Lasater, Tessendorf v. (Kan. App.).....	328	McManus v. Smith (Or.).....	844
Lasater, Tessendorf v. (Kan. App.).....	677	McManus v. Walters (Kan. Sup.).....	686
Lashell, State v. (Kan. App.).....	678	McMurray, People v. (Colo. Sup.).....	226
Last Chance Water-Ditch Co. v. Emigrant Ditch Co. (Cal.).....	960	McPherson v. McCarrick (Utah).....	1004
Law, Anthony Investment Co. v. (Kan. Sup.).....	745	Madison Tp., Greenwood County, v. Scott (Kan. App.).....	987
Lawrence v. Times Printing Co. (Wash.).....	166	Mahoney v. Butte Hardware Co. (Mont.).....	1134
Lawton v. Eagle (Kan. App.).....	868	Mahoney, State v. (Mont.).....	647
Leavenworth Light & Heating Co., Walter v. (Kan. App.).....	327	Main St. Hotel Co., Bridge v. (Kan. Sup.).....	754
Lee v. Stanard (Colo. App.).....	234	Main St. & A. P. R. Co. v. Los Angeles Traction Co. (Cal.).....	937
Lee, Kern County v. (Cal.).....	1124	Mallory v. Parker (Kan. App.).....	1133
Lemmon v. Sibert (Colo. App.).....	202	Mallory v. See (Cal.).....	1123
Lever, Susewind v. (Or.).....	644	Manning, Winans v. (Kan. Sup.).....	393
Lew v. Lucas (Or.).....	344	Mansur & Tebbetts Implement Co. v. Willet (Okla.).....	1066
Lewis v. Provident Loan & Trust Co. (Kan. App.).....	1133	March, Topeka Capital Co. v. (Kan. App.).....	876
Lewis v. Silver King Min. Co. (Utah).....	860	Mark v. Superior Court of City and County of San Francisco (Cal.).....	436
Lewis and Clarke County, Wade v. (Mont.).....	879	Marriott, Skeen v. (Utah).....	296
Lieberman, Douglass v. (Kan. App.).....	313	Marshall, Delaplane v. (Kan. Sup.).....	1131
Lieuallen v. Mosgrove (Or.).....	1022	Martin, Gano v. (Kan. App.).....	460
Linda Vista Irr. Dist., People v. (Cal.).....	86	Martin, Thayer v. (Kan. App.).....	511
Lindsay, State v. (Mont.).....	883	Marti's Estate, In re (Cal.).....	964
Linforth v. White (Cal.).....	910	Mason, State v. (Mont.).....	861
Lippincott v. Rich (Utah).....	526	Matson, Simon v. (Nev.).....	478
Little, In re (Utah).....	899	Maxwell, Griffith v. (Wash.).....	708
Liverpool & L. & G. Ins. Co. v. Perrin (N. M.).....	124	Mayhall, Darville v. (Cal.).....	276
Livingston, Miller v. (Utah).....	569	Mayher, Wheeler v. (Colo. App.).....	623
Locy, Turner v. (Or.).....	342	Meador v. Missouri Pac. R. Co. (Kan. Sup.).....	442
Loewenthal, Coonan v., two cases (Cal.).....	940	Melde v. Reynolds (Cal.).....	982
Lombard v. Wade (Or.).....	856	Mendelson v. Mendelson (Or.).....	645
London & San Francisco Bank v. Moore (Cal.).....	376	Menger v. North British & Mercantile Ins. Co. (Kan. App.).....	874
Loney, Reed v. (Wash.).....	41	Merani, Rauer v. (Cal.).....	76
Long v. Pierce County (Wash.).....	142	Merchants' Ad-Sign Co. v. Los Angeles Bill-Posting Co. (Cal.).....	277
Long, Millheiser v. (N. M.).....	111	Merkel, John S. Brittain Dry-Goods Co. v. (Kan. App.).....	675
Long, Williams v. (Cal.).....	1087	Merrill, Pierce v. (Cal.).....	64
Longfellow v. Smith (Kan. App.).....	875	Merrill, Pierce v. (Cal.).....	67
Loofbourov, Pacific Press Pub. Co. v. (Cal.).....	944	Merritt v. Corey (Wash.).....	171
Lorenzen, Ex parte (Cal.).....	68	Methvin v. Fidelity Mut. Life Ass'n of Philadelphia, Pa. (Cal.).....	1112
Los Angeles Bill-Posting Co., Merchants' Ad-Sign Co. v. (Cal.).....	277	Metropolitan St. R. Co., Anderson v. (Kan. App.).....	982
Los Angeles County, Henne v. (Cal.).....	1081	Meyer v. Bishop (Cal.).....	919
Los Angeles R. Co., Hook v. (Cal.).....	912	Miera, Covada v. (N. M.).....	126
Los Angeles R. Co., Wolfskill v. (Cal.).....	775	Miles v. Wells (Utah).....	534
Los Angeles Traction Co., Main St. & A. P. R. Co. v. (Cal.).....	937	Miller v. Livingston (Utah).....	569
Lower Kings River Water-Ditch Co. v. Emigrant Ditch Co. (Cal.).....	1130	Miller v. Pickering (Kan. App.).....	975
Lucas, Lew v. (Or.).....	344	Miller v. Smith (Idaho).....	824
Lucey, State v. (Mont.).....	994	Miller & Lux v. Batz (Cal.).....	935
Lux Brewing Co., Krug v. (Cal.).....	1125	Millheiser v. Long (N. M.).....	111
L. W. Blinn Lumber Co. v. Walker (Cal.).....	664	Mims, State v. (Or.).....	888
Lynch, Helena & L. Smelting & Reduction Co. v. (Mont.).....	1134	Mina Rica Gold Min. Co., Johnson v. (Cal.).....	76
		Missouri, K. & T. R. Co., Board of Com'rs of Geary County v. (Kan. Sup.).....	693
Maass v. Phillips (Okla.).....	1057	Missouri, K. & T. R. Co., Trimble v. (Kan. App.).....	449
McAllister, Dayton v. (Cal.).....	913	Missouri Pac. R. Co. v. Phelps (Kan. App.).....	672
McBean v. McBean (Or.).....	418	Missouri Pac. R. Co., Meador v. (Kan. Sup.).....	442
McBee, State v. (Kan. App.).....	1093		

	Page		Page
Mitchell, Detemple v. (Colo. App.).....	434	Orr, City of Kansas City v. (Kan. Sup.)..	397
Mollohan, King v. (Kan. Sup.).....	685	Osborn v. Russell (Kan. App.).....	1134
Monroe v. Cannon (Mont.).....	863	Oswego Tp. v. Woodruff (Kan. App.).....	449
Montana Cent. R. Co., Nolan v. (Mont.)...	880	Ott v. Anderson (Kan. App.).....	330
Montana Union R. Co., Wastl v. (Mont.)..	9	Owen v. Pomona Land & Water Co. (Cal.)	472
Monteith, Hotaling v. (Cal.).....	95	Oyharzabal, Clark v. (Cal.).....	1119
Montelius Piano Co., Tilley v. (Colo. App.)	483		
Moore, Burt v. (Kan. App.).....	332	Pacific Can Co., Fontana v. (Cal.).....	580
Moore, Herbein v. (Okla.).....	1060	Pacific Live-Stock Co. v. Gentry (Or.)....	422
Moore, London & San Francisco Bank v.		Pacific Press Pub. Co. v. Loofbourrow (Cal.)	944
(Cal.).....	376	Palmer v. Continental Ins. Co. (Cal.)....	784
Moran v. McInerney (Cal.).....	575	Palmer v. Hudson River State Hospital	
Moran v. McInerney (Cal.).....	948	(Kan. App.).....	506
Morgan, Brossard v. (Idaho).....	1031	Palmer, Fidelity Trust Co. v. (Wash.).....	158
Morgan, State v. (Utah).....	527	Park v. Hetherington (Kan. App.).....	328
Moroni & Mt. Pleasant Irr. Ditch Co., West		Parker, Mallory v. (Kan. App.).....	1133
Point Irr. Co. v. (Utah).....	16	Parkhurst v. Sharp (Kan. App.).....	531
Morris, Western Union Tel. Co. v. (Kan.		Parry Mfg. Co., Smith v. (Kan. App.).....	906
App.).....	972	Patison v. Pratt (Cal.).....	783
Morrow v. Smith (Okla.).....	366	Patry, North American Ry. Const. Co. v.	
Morse v. Ely (Wash.).....	1135	(Kan. App.).....	871
Morse, Farmers' Exch. Bank v. (Cal.).....	1088	Peck, Smith v. (Cal.).....	77
Mosgrove, Lieuallen v. (Or.).....	1022	Peier, Karasek v. (Wash.).....	33
Mott, Anthony v. (Kan. App.).....	509	Penn v. Oldhauber (Mont.).....	649
Mt. Pleasant Commercial & Savings Bank,		Penny, Richardson v. (Okla.).....	584
Tripler v. (Utah).....	25	People v. Arnett (Cal.).....	930
Moyer, Washington Nat. Bank v. (Wash.)	712	People v. Court of Appeals of Colorado	
Muldrick v. Brown (Or.).....	428	(Colo. Sup.).....	592
Mulkins v. United States (Okla.).....	925	People v. Court of Appeals of Colorado	
Mullaly v. Townsend (Cal.).....	950	(Colo. Sup.).....	594
Mullen, J. B. Watkins Land-Mortgage Co.		People v. Garnett (Cal.).....	1114
v. (Kan. Sup.).....	385	People v. Linda Vista Irr. Dist. (Cal.).....	86
Mulvane v. Sedgley (Kan. App.).....	971	People v. McMurray (Colo. Sup.).....	226
Murphy, State v. (Idaho).....	462	People v. Puttman (Cal.).....	961
Murray v. Etchepare (Cal.).....	930	People v. Roach (Cal.).....	574
Muse, Douglas v. (Kan. Sup.).....	413	People v. Vann (Cal.).....	776
Mutual Ben. Life Ins. Co., Bingler v. (Kan.		People v. Walker (Cal.).....	800
App.).....	673	People, Bergdahl v. (Colo. Sup.).....	228
Mutual Reserve Fund Life Ass'n v. Boyer		People, De Bord v. (Colo. Sup.).....	599
(Kan. Sup.).....	387	People, Howard v. (Colo. Sup.).....	595
Myers, Hatcher v. (Kan. App.).....	1133	People, McClure v. (Colo. Sup.).....	612
		People, Wiederrecht v. (Colo. Sup.).....	225
National Bank, Fitzwater v. (Kan. Sup.)..	684	People's Building, Loan & Saving Ass'n,	
Naylor v. Board of Com'rs of Gray County		Betz v. (Utah).....	334
(Kan. App.).....	703	People's Building, Loan & Savings Ass'n v.	
Nelson, Northern Pac. R. Co. v. (Wash.)...	703	Kroeger (Utah).....	559
Nesbitt v. Northern Pac. R. Co. (Wash.)...	141	People's Ditch Co. v. Emigrant Ditch Co.	
Netherlands American Mortg. Bank v.		(Cal.).....	1130
Connaway (Idaho).....	590	Perkins, Ridenour-Baker Grocery Co. v.	
Newcomb, Raymond v. (N. M.).....	205	(Kan. App.).....	459
Newlin, McBride v. (Cal.).....	577	Perrin, Liverpool & L. & G. Ins. Co. v. (N.	
Newman v. Freitas (Cal.).....	907	M.).....	124
Newton, Appeal of (Mont.).....	3	Perry, Coleman v. (Mont.).....	129
New York Life Ins. Co., Westerfield v.		Peterson v. Bean (Utah).....	213
(Cal.).....	667	Petrie v. Coulter (Okla.).....	1058
Nipp v. Bower (Kan. App.).....	448	Phelan v. Smith (Wash.).....	31
Nippert v. Warneke (Cal.).....	96	Phelps, Missouri Pac. R. Co. v. (Kan. App.)	672
Nodine v. Wright (Or.).....	734	Phenix Ins. Co. of Brooklyn, N. Y., v.	
Nolan v. Montana Cent. R. Co. (Mont.)...	880	Smith (Kan. App.).....	501
North American Ry. Const. Co. v. Patry		Phillips, Maass v. (Okla.).....	1057
(Kan. App.).....	871	Pichoir's Estate, In re (Cal.).....	1130
North American Transportation & Trading		Pickering, Miller v. (Kan. App.).....	975
Co., Ransberry v. (Wash.).....	154	Pierce v. Engelkemeier (Okla.).....	1047
North British & Mercantile Ins. Co., Men-		Pierce v. Merrill (Cal.).....	64
ger v. (Kan. App.).....	874	Pierce v. Merrill (Cal.).....	67
Northern Pac. R. Co. v. Nelson (Wash.)...	703	Pierce v. Rock Creek Gold-Min. Co. (Or.)...	348
Northern Pac. R. Co., Nesbitt v. (Wash.)...	141	Pierce, Carmichael v. (Okla.).....	583
Northern Pac. R. Co., Smith v. (Wash.)...	255	Pierce County, Long v. (Wash.).....	142
Northwestern & P. Hypotheek Bank v.		Pingree, Thum v. (Utah).....	18
Rauch (Idaho).....	516	Platte Val. Irr. Co., Wright v. (Colo. Sup.)	603
Nuss, Killhonic v. (Mont.).....	648	Pocatello Water Co. v. Standley (Idaho)...	518
Nuzum, Burkhalter v. (Kan. App.).....	310	Pomona Land & Water Co., Owen v. (Cal.)	472
		Porter, Wills v. (Cal.).....	1109
O'Donnell, State v. (Or.).....	892	Porter's Estate, In re (Cal.).....	659
Ogilvie v. Ogilvie (Or.).....	627	Portland Gas Co., Mackin v. (Or.).....	134
Olden, Williams v. (Idaho).....	517	Portland Trust Co. v. Havelly (Or.).....	346
Oldhauber, Penn v. (Mont.).....	649	Portsmouth Sav. Bank v. Hardman (Kan.	
Oliver, Crossen v. (Or.).....	885	Sup.).....	1131
O'Neill, Hurley v. (Mont.).....	658	Portsmouth Sav. Bank, Hardman v. (Kan.	
Ontario Min. Co., A. M. Holter Hardware		App.).....	984
Co. v. (Mont.).....	3	Potter v. Ajax Min. Co. (Utah).....	999
Ontario Min. Co., A. M. Holter Hardware		Powell, Bonner v. (Idaho).....	138
Co. v. (Mont.).....	8	Power v. Sla (Mont.).....	468
Orange County Fruit Exchange v. Hubbell		Powers v. Hitchcock (Cal.).....	1076
(N. M.).....	121	Powers, Ashcraft v. (Wash.).....	161
O'Rourke v. Jones (Wash.).....	709	Powning, Kirman v. (Nev.).....	1090

	Page		Page
Pratt v. Ratliff (Okl.)	523	Salt Lake & O. Gas & Electric Light Co.,	
Pratt, Patison v. (Cal.)	783	Driver v. (Utah)	733
Pratt, Territory v. (N. M.)	104	Sample v. Fresno Flume & Irrigation Co.	
Producers' Fruit Co., Arnold v. (Cal.)	283	(Cal.)	1085
Provident Loan & Trust Co., Lewis v. (Kan. App.)	1133	Samuels v. Burnham (Kan. App.)	755
Prudential Ins. Co. of America, Smislaert v. (Colo. Sup.)	598	Sanders v. Chicago, R. I. & P. R. Co. (Okl.)	1075
Pueblo of Nambe v. Romero (N. M.)	122	San Diego Inv. Co. v. Shaw (Cal.)	1082
Puttman, People v. (Cal.)	961	San Diego Sav. Bank, Higgins v. (Cal.)	943
Putze, State v. (Kan. App.)	1134	San Francisco Sav. Union, Carpenter v. (Cal.)	92
Rader v. Barr (Or.)	1027	San Francisco & S. J. V. R. Co., Scanlan v. (Cal.)	271
Rader v. Barr (Or.)	1127	San Garde, Clearwater Short-Line R. Co. v. (Idaho)	137
Raleigh v. District Court of First Judicial District (Mont.)	991	Sanguinetti v. Gianelli (Cal.)	1106
Ramsey v. Burns (Mont.)	129	San Jose Land & Water Co. v. Allen (Cal.)	1083
Randall v. Kelsey (Idaho)	515	Sauer, Board of Com'rs of D County v. (Okl.)	367
Randolph v. Hudson (Okl.)	1103	Savage, State v. (Or.)	1128
Ranaberry v. North American Transportation & Trading Co. (Wash.)	154	Scanlan v. San Francisco & S. J. V. R. Co. (Cal.)	271
Ratliff, Pratt v. (Okl.)	523	Scheinkoenig, Chicago, R. I. & P. R. Co. v. (Kan. Sup.)	414
Ratliff, Walters v. (Okl.)	1070	Schell, Curtis v. (Cal.)	951
Rauch, Northwestern & P. Hypotheek Bank v. (Idaho)	516	School Dist. No. 1 of Cascade County, Jay v. (Mont.)	250
Rauer v. Fay (Cal.)	90	School Dist. No. 1 of Greeley County, Shaffer v. (Kan. App.)	759
Rauer v. Merani (Cal.)	76	School Dist. No. 7, Clallam County, Trumbull v. (Wash.)	714
Rea, Jarman v. (Cal.)	790	Schuster v. Gray (Kan. App.)	819
Ready v. McDonald (Cal.)	272	Schwind v. Shortridge (Cal.)	573
Reed v. Loney (Wash.)	41	Scott v. Brown (Kan. App.)	460
Reed v. Union Cent. Life Ins. Co. of Cincinnati (Utah)	21	Scott, American Bonding & Trust Co. of Baltimore, Md., v. (Kan. App.)	873
Rees v. Higgins (Kan. App.)	500	Scott, Madison Tp., Greenwood County, v. (Kan. App.)	967
Reeves v. Territory (Okl.)	828	Scott, Walker v. (Kan. App.)	1091
Reid, Murdoch & Co. v. Bird (Colo. App.)	353	Scott's Estate, In re (Cal.)	98
Rettinger, Western Contracting & Building Ass'n v. (Kan. App.)	313	Scudder, Harker v. (Colo. App.)	197
Reynold v. Newcomb (N. M.)	205	Seaton v. Fiske (Cal.)	660
Reynolds, Melde v. (Cal.)	932	Second Judicial District Court of Silver Bow County, State v. (Mont.)	309
Rhoades, Knight v. (Kan. App.)	869	Second Judicial Dist. Court of Silverbow County, State v. (Mont.)	882
Rhodd, Gribling v. (Kan. App.)	1133	Sedgley, Mulvane v. (Kan. App.)	971
Rice v. Rigley (Idaho)	290	See, Mallory v. (Cal.)	1123
Rich, Lippincott v. (Utah)	526	Sepulveda v. Sepulveda (Cal.)	272
Rich, Snow v. (Utah)	336	Serrel, Cannon v. (Colo. App.)	187
Richardson v. Penny (Okl.)	584	Seymour v. Armstrong (Kan. App.)	675
Richardson, Territory v. (Okl.)	1135	Seymour, State v. (Idaho)	1033
Richardson, Tulloss v. (Kan. App.)	1096	Shadduck v. Stotts (Kan. Sup.)	1131
Richter v. Eagle Life Ass'n (Mont.)	878	Shaffer v. School Dist. No. 1 of Greeley County (Kan. App.)	759
Ridenour-Baker Grocery Co. v. Perkins (Kan. App.)	459	Shaffer, Starrett v. (Kan. App.)	817
Rigley, Rice v. (Idaho)	290	Sharp, Parkhurst v. (Kan. App.)	531
Rio Grande W. R. Co., Silcock v. (Utah)	565	Shaw, San Diego Inv. Co. v. (Cal.)	1082
Rio Grande W. R. Co., White v. (Utah)	568	Sheehan, Kepley v. (Kan. App.)	333
Rlatine v. Blocker (Colo. App.)	486	Sheld's Estate, In re (Cal.)	920
Ritchey v. Cedar Mill Co. (Wash.)	160	Shepard v. Doty (Kan. App.)	870
Roach, People v. (Cal.)	574	Sheridan, Hagan v. (Kan. App.)	756
Roberts v. Yaw (Kan. Sup.)	409	Sherlock, Trent v. (Mont.)	650
Robinson v. Southern California R. Co. (Cal.)	947	Shively v. Eureka T. G. M. Co. (Cal.)	939
Robinson v. Thornton (Cal.)	946	Shortridge, Schwind v. (Cal.)	573
Robinson, Warren v. (Utah)	28	Sibert, Lemmon v. (Colo. App.)	202
Rock Creek Gold-Min. Co., Pierce v. (Or.)	348	Sibson v. Hamilton & Rourke Co. (Wash.)	162
Rocky Mountain News Printing Co., Board of Com'rs of Arapahoe County v. (Colo. App.)	494	Silcock v. Rio Grande W. R. Co. (Utah)	565
Roeder, City of New Whatcom v. (Wash.)	767	Silver King Min. Co., Lewis v. (Utah)	860
Romero v. Board of Education of City of Las Vegas (N. M.)	109	Simon v. Matson (Nev.)	478
Romero, Pueblo of Nambe v. (N. M.)	122	Sinclair, Baker v. (Wash.)	170
Rose v. Durham (Okl.)	1100	Skeen v. Marriott (Utah)	296
Rosenberg, Beltaire v. (Cal.)	916	Sla, Power v. (Mont.)	468
Roth, Soden v. (Kan. App.)	500	Smislaert v. Prudential Ins. Co. of America (Colo. Sup.)	598
Ruddell, Daly v. (Cal.)	1080	Smith v. Buckman (Wash.)	31
Ruiz v. Territory (N. M.)	126	Smith v. Ellis (Idaho)	695
Russell, Osborn v. (Kan. App.)	1134	Smith v. Fluker (Kan. Sup.)	1131
St. Louis & S. F. R. Co. v. Brown (Kan. App.)	457	Smith v. Northern Pac. R. Co. (Wash.)	255
St. Louis & S. F. R. Co. v. Burrows (Kan. Sup.)	439	Smith v. Parry Mfg. Co. (Kan. App.)	906
St. Vincent's Institute for the Insane v. Davis (Cal.)	476	Smith v. Peck (Cal.)	77
St. Vincent's Institution for the Insane v. Davis (Cal.)	477	Smith v. Stearns Rancho Co. (Cal.)	662
Salt Lake County, Civic Federation v. (Utah)	222	Smith v. Supreme Lodge of Order of Select Friends (Kan. Sup.)	416
		Smith v. Wallace (Kan. App.)	458
		Smith, Cunningham v. (Kan. App.)	458

	Page		Page
Smith, Longfellow v. (Kan. App.).....	875	Stearns Ranchos Co., Spooner v. (Cal.).....	1130
Smith, McGowan v. (Wash.).....	713	Stearns Ranchos Co., Weidenmueller v. (Cal.).....	374
Smith, McManus v. (Or.).....	844	Steele, Gans v. (Idaho).....	286
Smith, Miller v. (Idaho).....	824	Steelman, Jones v. (Wash.).....	764
Smith, Morrow v. (Okla.).....	366	Steffey, Hoffman v. (Kan. App.).....	822
Smith, Phelan v. (Wash.).....	31	Stenger, Hale v. (Wash.).....	156
Smith, Phenix Ins. Co. of Brooklyn, N. Y., v. (Kan. App.).....	501	Stevens v. Beasley (Kan. App.).....	762
Snell, Swenson v. (Utah).....	555	Stewart v. California Imp. Co. (Cal.).....	280
Snow v. Rich (Utah).....	336	Stewart v. Hollingsworth (Cal.).....	936
Soden v. Roth (Kan. App.).....	500	Stewart, Hays v. (Idaho).....	501
Soodeletti, Hand v. (Cal.).....	373	Stites v. McGee (Or.).....	1129
Southern California R. Co., Robinson v. (Cal.).....	947	Stone, Statton v. (Colo. App.).....	481
South Riverside Land & Water Co., Hohenshell v. (Cal.).....	371	Stotta, Shaddock v. (Kan. Sup.).....	1131
Spencer, Denver & R. G. R. Co. v. (Colo. Sup.).....	606	Stover v. Stover (Idaho).....	462
Spokane St. R. Co., Helber v. (Wash.).....	40	Streight v. Durham (Okla.).....	1090
Spooner v. Stearns Ranchos Co. (Cal.).....	1130	Strock, In re (Cal.).....	282
Spreckels v. Butler (Cal.).....	378	Stuart, Whitehurst v. (Cal.).....	963
Stacy v. Cook (Kan. Sup.).....	399	Superior Court of City and County of San Francisco, Mark v. (Cal.).....	436
Stadell, Aikins v. (Kan. App.).....	325	Superior Court of Spokane County, State v. (Wash.).....	158
Stanard, Lee v. (Colo. App.).....	234	Supreme Lodge of Order of Select Friends, Smith v. (Kan. Sup.).....	416
Standard Steam Laundry v. Dole (Utah).....	1103	Susewind v. Lever (Or.).....	644
Standley v. Hendrie & Bolthoff Mfg. Co. (Colo. Sup.).....	600	Swank v. Swank (Or.).....	846
Standley, Pocatello Water Co. v. (Idaho).....	518	Swenson v. Snell (Utah).....	555
Starr v. Kreuzberger (Cal.).....	787	Swift & Co. v. Creasey (Kan. App.).....	314
Starrett v. Shaffer (Kan. App.).....	817	Swift & Co. v. Hoblawetz (Kan. App.).....	960
Start, State v. (Kan. Sup.).....	394	Tallmadge v. Hooper (Or.).....	349
State v. Andrews (Kan. Sup.).....	808	Tallmadge v. Hooper (Or.).....	1127
State v. Asbell (Kan. Sup.).....	690	Taylor v. Canyon County (Idaho).....	521
State v. Bates (Utah).....	995	Taylor v. Colorado Iron Works (Colo. Sup.).....	233
State v. Blize (Or.).....	735	Taylor, State v. (Idaho).....	288
State v. Clancy (Mont.).....	987	Teague v. John Caplice Co. (Mont.).....	1134
State v. Coates (Wash.).....	726	Territory v. McGinnis (N. M.).....	208
State v. Corcoran (Idaho).....	1034	Territory v. Pratt (N. M.).....	104
State v. Crawford (Kan. App.).....	316	Territory v. Richardson (Okla.).....	1135
State v. Deves (Kan. App.).....	511	Territory, Eldott v. (N. M.).....	105
State v. Elliott (Kan. App.).....	981	Territory, Foust v. (Okla.).....	923
State v. Goff (Kan. App.).....	680	Territory, Garcia v. (N. M.).....	207
State v. Goff (Kan. Sup.).....	683	Territory, Reeves v. (Okla.).....	828
State v. Grinstead (Kan. App.).....	975	Territory, Ruiz v. (N. M.).....	126
State v. Grinstead (Kan. App.).....	976	Tessendorf v. Lasater (Kan. App.).....	328
State v. Grinstead (Kan. App.).....	980	Tessendorf v. Lasater (Kan. App.).....	677
State v. Hilberg (Utah).....	215	Thayer v. Martin (Kan. App.).....	511
State v. Hyde (Wash.).....	719	Thiesler, Keith v. (Kan. App.).....	758
State v. Inlay (Utah).....	557	Thompson, Fidelity & Casualty Co. v. (Cal.).....	94
State v. Jenkins (Wash.).....	141	Thornton, Robinson v. (Cal.).....	946
State v. June (Kan. Sup.).....	804	Thorpe v. Hoopes (Kan. App.).....	1134
State v. Kornstett (Kan. Sup.).....	805	Thum v. Pingree (Utah).....	18
State v. Kruger (Idaho).....	463	Thum v. Wolstenholme (Utah).....	537
State v. Lashell (Kan. App.).....	678	Tilley v. Montellus Piano Co. (Colo. App.).....	483
State v. Lindsay (Mont.).....	883	Times Printing Co., Lawrence v. (Wash.).....	166
State v. Lucey (Mont.).....	994	Toland v. Earl (Cal.).....	914
State v. McBee (Kan. App.).....	1093	Topeka Capital Co. v. March (Kan. App.).....	876
State v. Mahoney (Mont.).....	647	Townsend, Mullaly v. (Cal.).....	950
State v. Mason (Mont.).....	861	Toy v. Haskell (Cal.).....	89
State v. Mims (Or.).....	888	Traders' Nat. Bank v. Washington Water-Power Co. (Wash.).....	152
State v. Morgan (Utah).....	527	Trades Assembly, World Package, Express & Messenger Co. v. (Mont.).....	990
State v. Murphy (Idaho).....	462	Trent v. Sherlock (Mont.).....	650
State v. O'Donnell (Or.).....	892	Trimble v. Missouri, K. & T. R. Co. (Kan. App.).....	449
State v. Putze (Kan. App.).....	1134	Tripler v. Mt. Pleasant Commercial & Savings Bank (Utah).....	25
State v. Savage (Or.).....	1128	Trumbull v. School Dist. No. 7, Clallam County (Wash.).....	714
State v. Second Judicial District Court of Silver Bow County (Mont.).....	309	Tucker, State v. (Or.).....	894
State v. Second Judicial Dist. Court of Silverbow County (Mont.).....	882	Tulloch v. Richardson (Kan. App.).....	1096
State v. Seymour (Idaho).....	1033	Turner v. Locy (Or.).....	342
State v. Start (Kan. Sup.).....	394	Ullery v. Kokott (Colo. App.).....	189
State v. Superior Court of Spokane County (Wash.).....	158	Underwood v. David (Wyo.).....	1012
State v. Taylor (Idaho).....	288	Union Casualty & Surety Co. of St. Louis, Mo., v. Bailey (Kan. App.).....	452
State v. Tucker (Or.).....	894	Union Cent. Life Ins. Co. of Cincinnati, Reed v. (Utah).....	21
State v. White (Idaho).....	517	United States, Mulkins v. (Okla.).....	925
State v. Yee Wee (Idaho).....	588	Urquide v. Flanagan (Idaho).....	514
State v. Young (Wash.).....	725	Valles, Lamson v. (Colo. Sup.).....	231
State, Appel v. (Wyo.).....	1015	Vann, People v. (Cal.).....	776
State, Brantley v. (Wyo.).....	139	Van Wagenen v. Carpenter (Colo. Sup.).....	698
State, Clark v. (Kan. App.).....	814		
State, Dobbs v. (Kan. Sup.).....	408		
State Bank v. Hutchinson (Kan. Sup.).....	443		
State Sav. Bank v. Davis (Wash.).....	43		
Statton v. Stone (Colo. App.).....	481		
Stearns Rancho Co., Smith v. (Cal.).....	662		

	Page		Page
Ventura County Lumber Co., Beronio v. (Cal.)	958	Whitehurst v. Stuart (Cal.)	963
Veseley v. Engelkemier (Okla.)	924	Wiederrecht v. People (Colo. Sup.)	225
Vickers, Board of Com'rs of Cloud County v. (Kan. Sup.)	391	Willard, Douglass v. (Cal.)	572
Vincent v. Vineyard (Mont.)	131	Willet, Mansur & Tebbetts Implement Co. v. (Okla.)	1066
Vineyard, Dellinger v. (Mont.)	1134	Williams v. Gross (Cal.)	934
Vineyard, Vincent v. (Mont.)	131	Williams v. Long (Cal.)	1087
Wade v. Lewis and Clarke County (Mont.)	879	Williams v. Olden (Idaho)	517
Wade, Lombard v. (Or.)	856	Williams, Breeding v. (Or.)	858
Walker v. Scott (Kan. App.)	1091	Williams, Woolsey v. (Cal.)	670
Walker, L. W. Blinn Lumber Co. v. (Cal.)	664	William W. Kendall Boot & Shoe Co. v. Goldman (Kan. App.)	1134
Walker, People v. (Cal.)	800	Willis v. Booth (Or.)	1135
Wallace, Smith v. (Kan. App.)	458	Wills v. Porter (Cal.)	1109
Walker v. Leavenworth Light & Heating Co. (Kan. App.)	327	Wilson v. McCornack (Okla.)	1068
Walters v. Rathliff (Okla.)	1070	Wilson v. Wolf (Kan. App.)	311
Walters, Kaffer v. (Kan. App.)	323	Wilson v. Wood (Okla.)	1045
Walters, McManus v. (Kan. Sup.)	686	Winans v. Manning (Kan. Sup.)	393
Warneke, Nippert v. (Cal.)	96, 270	Wise v. Ballou (Cal.)	574
Warren v. Robison (Utah)	28	Wist, Gottstein v. (Wash.)	715
Warren, Adams v. (Colo. Sup.)	609	Witcher v. Gibson (Colo. App.)	192
Wasco County, Gardner v. (Or.)	834	Wolf, Wilson v. (Kan. App.)	311
Washington Nat. Bank v. Moyer (Wash.)	712	Wolfskill v. Los Angeles R. Co. (Cal.)	775
Washington Water-Power Co., Traders' Nat. Bank v. (Wash.)	152	Wolstenholme, Thum v. (Utah)	537
Wastl v. Montana Union R. Co. (Mont.)	9	Wood, Wilson v. (Okla.)	1045
Watkins Land-Mortgage Co. v. Mullen (Kan. Sup.)	385	Woodell, Farmers' & Traders' Nat. Bank v. (Or.)	837
Weidenmueller v. Stearns Ranchos Co. (Cal.)	374	Wood Live-Stock Co. v. Woodmansee (Idaho)	1029
Weir v. Iron Springs Co. (Colo. Sup.)	619	Woodmansee, Wood Live-Stock Co. v. (Idaho)	1029
Wells, Miles v. (Utah)	534	Woodruff, Oswego Tp. v. (Kan. App.)	449
Werner v. Werner (Kan. Sup.)	1131	Woollacott, Braun v. (Cal.)	801
West Point Irr. Co. v. Moroni & Mt. Pleasant Irr. Ditch Co. (Utah)	16	Woolsey v. Williams (Cal.)	670
Westerfield v. New York Life Ins. Co. (Cal.)	667	World Package, Express & Messenger Co. v. Trades Assembly (Mont.)	990
Western Contracting & Building Ass'n v. Rettiger (Kan. App.)	313	Wright v. Platte Val. Irr. Co. (Colo. Sup.)	603
Western Union Tel. Co. v. Getto-McClung Boot & Shoe Co. (Kan. App.)	504	Wright, Nodine v. (Or.)	734
Western Union Tel. Co. v. Morris (Kan. App.)	972	Wyandotte Gas Co., City of Kansas City v. (Kan. App.)	317
Wheeler v. Commercial Inv. Co. (Wash.)	715	Wyckoff, Mackey v. (Kan. App.)	1133
Wheeler v. Lack (Or.)	849	Wyoming Nat. Bank v. Brown (Wyo.)	465
Wheeler v. Mayher (Colo. App.)	623	Yahn, Hutchison v. (Kan. App.)	458
Wheeler, Bree v. (Cal.)	782	Yakish, Dunn v. (Okla.)	926
White v. Rio Grande W. R. Co. (Utah)	568	Yaw, Roberts v. (Kan. Sup.)	409
White, Linforth v. (Cal.)	910	Yee Wee, State v. (Idaho)	588
White, State v. (Idaho)	517	Young, Applegate v. (Kan. Sup.)	402
		Young, State v. (Wash.)	725
		Yount, Denning v. (Kan. Sup.)	803
		Zumwalt, Fisher v. (Cal.)	82

THE
PACIFIC REPORTER.
VOLUME 61.

MCGUIGAN v. HENNESSY.

(Supreme Court of Montana. May 22, 1900.)

MINES AND MINERALS—DEED—DESCRIPTION—CONSTRUCTION—QUESTION FOR JURY.

A deed of mineral land described the tract conveyed as a lot situated in a certain town, county, and state, "fronting 25 feet on" a certain road, "extending back east 125 feet, more or less, to the gulch, and lying about 25 or 30 feet south from the south side line" of a certain claim. *Held*, in a suit involving its construction, that the description was not so ambiguous as to authorize the submission of the case to the jury.

Appeal from district court, Silver Bow county; John Lindsay, Judge.

Action by William McGuigan against John B. Hennessy. From a judgment for defendant, plaintiff appeals. Affirmed.

John W. Cotter, for appellant. Thompson Campbell, for respondent.

PER CURIAM. Action to recover possession of a piece of ground described in the complaint by metes and bounds, and for damages, rents, and profits. Defendant denies that plaintiff is the owner of the ground in controversy, or any part thereof, and that without right or title he went upon any portion thereof, or ousted or ejected plaintiff therefrom, or that he has withheld possession thereof, to plaintiff's damage. Upon close of plaintiff's evidence, defendant's motion for a nonsuit was granted, and judgment ordered for defendant for costs. Plaintiff appeals.

The main question in this case involved a construction of a certain description in an original deed of conveyance from one Lloyd to one Thomas. The tract was described as "a parcel or lot of land situate, lying, and being in the town of Centerville, Silver Bow county, Montana territory, to wit: That certain lot fronting twenty-five feet on the main road from Butte City to Walkerville, extending back east one hundred and twenty feet, more or less, to the gulch, and lying about twenty-five or thirty feet south from the south side line of the Granger quartz lode claim." After considering the evidence of plaintiff, the court held that there was no such ambiguity in the description as author-

ized the submission of the case to the jury. We affirm the ruling as correct, deeming it unnecessary to recite the facts. Judgment and order affirmed. Affirmed.

CONRAD NAT. BANK v. GREAT NORTHERN RY. CO.

(Supreme Court of Montana. May 14, 1900.)

WORK AND LABOR—BOARD—PLEADING.

1. A plaintiff in assumpsit to recover an unpaid balance alleged that his assignor had "performed certain labor for and on behalf of defendant, and furnished to employes of defendant, at defendant's special instance and request," certain board and food. *Held*, that as defendant had not agreed to pay any specific sum, but simply to pay the amount of the account whenever ascertained, the complaint as to labor was insufficient in not stating that it was furnished at defendant's request, the clause in the complaint as to the board not being applicable to the clause as to the labor, and Code Civ. Proc. §§ 740, 778, providing that pleadings shall be liberally construed, not requiring the reading into pleading of an allegation which had been omitted therefrom.

2. An allegation of a complaint that plaintiff's assignor furnished to employes of defendant, at his special instance and request, certain board and lodging, was not sufficient to support a judgment therefor, as the furnishing to a third person on such request does not imply an undertaking by defendant to pay, and the complaint is insufficient, as not alleging such a promise.

Appeal from district court, Flathead county; D. F. Smith, Judge.

Assumpsit by Conrad National Bank of Kallispell against the Great Northern Railway Company to recover a balance on account of labor performed for defendant, and for board, food, and lodging, and goods, wares, and merchandise, furnished by plaintiff's assignor to employes of defendant at its special instance and request. Defendant's demurrer to the complaint was overruled, and judgment entered in favor of plaintiff, and defendant appeals. Reversed.

A. J. Shores, for appellant. Sanford & Grubb, for respondent.

PER CURIAM. This is an action by plaintiff, as assignee of M. C. Doran and

wife, to recover a balance on account of labor performed for defendant, and for board, food, and lodging, and goods, wares, and merchandise, furnished to employes of defendant at its special instance and request. Demurrers were interposed to the original and first amended complaints, and were sustained. To the second amended complaint the defendant again demurred generally. This was overruled, and, defendant declining to plead, judgment was entered against it under the prayer of the complaint for the balance alleged to be due, with interest at 10 per cent. per annum, amounting to \$2,804, with costs of suit. The appeal is from this judgment. The question presented for our consideration is whether the complaint states a cause of action.

The paragraph of the complaint to which the demurrer is directed is the following: "That between the 1st day of December, 1894, and the 1st day of November, 1895, M. C. Doran and Mrs. M. C. Doran performed certain labor for and on behalf of the defendant, and furnished to the employes of the defendant, at defendant's special instance and request, certain board, food, and lodging, and goods, wares, and merchandise, to the value of and in the amount of \$5,825.60, no part of which has ever been paid." The complaint then proceeds to allege, further, that on or about the 1st day of November, 1894, the said M. C. Doran and his wife, for a valuable consideration, executed and delivered to the KallsPELL Meat Company, a co-partnership, certain orders and assignments in writing, which conveyed and transferred to the said KallsPELL Meat Company all the moneys then due, or to become due, from the defendant to the said Doran and wife during the months of September, October, and November, 1894, on said accounts hereinbefore set out; that thereafter, and on or about the 1st day of November, 1894, the said company presented said orders and assignments to the defendant, and that defendant then and there duly accepted the same, and promised to pay the amounts due upon said accounts to the said company; that on or about the 30th day of November, 1894, there was due and became due from the defendant to the said company, by reason of said orders and assignments, the sum of \$5,825.60; that the defendant has wholly failed and refused, and still fails and refuses, to pay any part of said sum, except the sum of \$3,778.70, which the defendant paid to the said company on or about the 5th day of September, 1895; that thereafter, and on or about the 15th day of February, 1896, the said company, for a valuable consideration, sold and assigned to the plaintiff herein the said above-described orders and assignments, together with the amounts due thereon; and that the plaintiff is now the lawful owner thereof, and the balance due thereon, amounting to the sum of \$2,046.90, with interest thereon from the 1st

day of December, 1894, at the rate of ten per cent. per annum.

It is clear, from an examination of the complaint, that the allegations touching the giving of the orders and assignments by Doran and his wife to the KallsPELL Meat Company, in legal effect, mean nothing more than that by this arrangement the meat company became the assignee from Doran and his wife on or about November 1, 1894, of whatever amount had already become due upon the account, and what was still to become due during the month of November. No specific sum was named in these orders, a part of the thing assigned being still unearned, and therefore not in esse. The acceptance, as made by defendant under these circumstances, amounted to nothing more than a promise on its part to pay the amount of the accounts to the meat company, whatever it might be, whenever it should be ascertained. This amount could not be ascertained in any other way than by reference to the accounts at the end of the month of November. The arrangement was therefore not equivalent to an agreement on the part of the defendant to pay the meat company any specific sum upon a stated account or upon an express agreement in writing. The subsequent transaction between the meat company and the plaintiff, on February 15, 1896, was a transfer to the plaintiff of any balance due the company still unliquidated; for there is no allegation that there was ever any settlement with defendant after the delivery of the orders to the meat company by which the amount, if any, which became due at the end of November, was ascertained. The balance claimed by the plaintiff to be due after the payment on September 5, 1895, so far as any allegation to the contrary in this connection shows, may have been disputed by the defendant. Through the assignments, therefore, the nature of the obligation on the part of defendant was not changed, but retained its original status of an open, unliquidated account. This being true, the question raised by the demurrer is whether the complaint states a cause of action in assumpsit for work and labor performed, for board, food, and lodging, and for goods, wares, and merchandise furnished.

As a statement of a cause of action for labor performed, the complaint is clearly insufficient, in that it fails to allege that the labor was performed at defendant's request. It may have been the pleader's intention to apply the clause, "at defendant's special instance and request," to the clause containing the allegation of labor performed, as well as to the charge for board, food, lodging, etc.; but this intention is not manifested by the position which this clause occupies in the sentence. There is therefore not sufficient of substantive allegation to support the complaint in this respect. Chit. Pl. p. 359; Boone, Code Pl. § 193; Wilkins v. Stidger,

22 Cal. 282; Bassford v. Swift (Sup.) 39 N. Y. Supp. 337. Section 740 of the Code of Civil Procedure provides that pleadings must be given a liberal construction, with a view to substantial justice. It is also provided, in section 778, that the court must in every stage of the action disregard any error or defect in pleading which does not affect the substantial rights of the parties, and that no judgment shall be reversed or affected by reason of such error or defect. These provisions were construed in *Daniels v. Insurance Co.*, 2 Mont. 78, and it was there held that the effect of them is to abolish the rigorous rule of the common law requiring the pleading to be construed most unfavorably to the pleader. This case was approved in *U. S. v. Williams*, 6 Mont. 386, 12 Pac. 851. But the rule does not require such a liberal construction as will read into the pleading a substantive allegation which has been omitted therefrom. Substance is just as essential under the Code as at the common law. *Miller v. Van Tassel*, 24 Cal. 458; *Glide v. Dwyer*, 83 Cal. 477, 23 Pac. 706; *Clark v. Dillon*, 97 N. Y. 370. The court will not adhere to strict rules of grammar under any circumstances, and will in a measure disregard them, particularly so where no seasonable attack has been made upon the pleading. Mere matters of form or defective statement, not affecting the substance, will not be held fatal, if the pleading as a whole shows its general intent and purpose. *Bliss*, Code Pl. 314. Where, however, such an attack is made upon the complaint for want of substantial allegations, the court should indulge, as against the pleader, the presumption that he has stated his cause of action as strongly as he can, and construe it accordingly. *Becker v. Commissioners*, 11 Mont. 490, 28 Pac. 1116.

Nor are the allegations sufficient to support a judgment for food, board, and lodging, and goods, wares, and merchandise, furnished to defendant's employés at its request. It is not necessary to allege a promise to pay where the facts as alleged imply a promise, as where the board, food, lodging, etc., are furnished to defendant upon request; but where the furnishing or delivery is to a third person, upon defendant's request, then, nothing further appearing, no promise on the part of the defendant to pay is implied; for a furnishing or delivery to a third party, though upon defendant's request, does not, as a matter of law, imply an undertaking by defendant to pay. The fact of delivery upon defendant's request is consistent with the idea that credit was extended to the person receiving the goods. The relation of employer and employé does not carry with it any obligation upon the employer from which the law implies a promise to pay for the benefits enjoyed by the employé only. Either the express promise should be alleged, or the facts from which it may be implied, as that the credit was extended to the employer, and not to the em-

ployé (*Chit. Pl.* pp. 308, 356); or the allegation should have been made, generally, that the food, board, lodging, and merchandise were furnished to the employer at its request (*Porter v. McClure*, 15 Wend. 187). Let the judgment be reversed, and the cause be remanded, with directions to the district court to sustain the demurrer. Reversed and remanded.

(24 Mont. 184)

A. M. HOLTER HARDWARE CO. v. ONTARIO MIN. CO. et al.

Appeal of *NEWTON et al.*

(Supreme Court of Montana. May 14, 1900.)

MINING SUPPLIES—LIENS—RUNNING ACCOUNT—SEPARATE CONTRACTS—PLEADING—AMENDMENT—FILING—ATTACHMENT LIEN.

1. Code Civ. Proc. § 773, authorizing the amendment of any pleading of course, once, by filing the same as amended, and serving a copy on the adverse party, does not apply to amendments made by order of court; and where leave is given to amend an answer, and the amendment, rather than the answer as amended, is filed and served, the original answer is not superseded by the amendment, except as thereby changed.

2. Where an attachment issued by the court in one county was levied on real estate in another it was not essential to the establishment of a lien to file a transcript of the judgment in the other county, as provided by Code Civ. Proc. § 1200.

3. The fact that the sheriff's return to the writ of execution issued on the judgment was not filed within 60 days did not destroy the lien created by a levy of an attachment.

4. Where plaintiff sold mining supplies to defendant from time to time, and monthly bills were rendered therefor, and interest charged thereon, with the understanding that defendant was to be carried till he could make payment by shipping ore, such purchase did not constitute a continuing running account, but each was made under a separate contract, payment for which was due at the end of the month, from which time the 90 days required by Code Civ. Proc. § 2131, for filing of a statement of lien began to run.

5. A written agreement for the purchase of certain machinery at a certain price, and also all castings required, in addition, at a certain figure, had reference only to the castings required for the machinery mentioned, and no mechanic's lien based on such an agreement could be enforced for other purchases.

Appeal from district court, Deerlodge county; *Theo. Brantly*, Judge.

Action by the *A. M. Holter Hardware Company* against the *Ontario Mining Company* and others to enforce a mechanic's lien. From a judgment establishing a lien for part only of plaintiff's claim, and of the claims of certain defendants, plaintiff and defendants *J. P. Newton* and *Caird & Hawksworth* appeal. Affirmed.

Stranahan & Stranahan, *E. Scharnikow*, and *Walsh & Newman*, for appellants. *McConnell & McConnell*, for respondents.

PER CURIAM. Action to foreclose a material man's lien for merchandise sold and delivered to the defendant, the *Ontario Mining Company*, between November 2, 1896, and

July 20, 1896. The articles furnished by the plaintiff to the mining company were received by the latter, and used in and about its mines. On August 1, 1896, the plaintiff hardware company filed its lien to secure the payment of a balance due on the account of the said mining company amounting to \$4,430.79, and began suit on October 16, 1896. On July 29, 1893, the Merchants' National Bank, defendant and respondent herein, also brought suit against the Ontario Mining Company, defendant, for debts due by that company to the bank, and attached the property of the mining company. The Ontario Mining Company did not answer the hardware company's complaint, and its default was duly entered; but the defendant bank answered and contested the right of the plaintiff to a lien, and the right of certain other lienholders to liens upon the property,—the bank claiming an interest in the property charged, by virtue of its attachment, a judgment, execution, and sale. The case was tried to the court without a jury. Plaintiff obtained judgment against the mining company for the sum of \$4,430.79; but the court adjudged that plaintiff's lien could only be enforced against the property of the mining company to secure the payment of \$749.71, which was the value of such articles only as were sold by the plaintiff corporation to the mining company after May 1, and up to August 1, 1896. For goods sold and delivered prior to May 1, 1896, the court decided there was no lien. The plaintiff appeals from the order refusing a new trial, and from so much of the judgment as failed to allow it a lien for the whole debt.

Upon the trial it appeared that the amount of plaintiff's claim was correct, and that the merchandise included in the account of the sales was delivered to the defendant mining company. Nor was any objection interposed to the form of the plaintiff's lien. But the defendant bank objected to the introduction of any testimony to establish the lien, for the reason that the account, on its face, showed such an intermingling of lienable and non-lienable articles that the entire account failed to show any lien on its face, and that therefore plaintiff failed to state any cause of action. The court overruled this objection, and the following material evidence was adduced:

D. P. Patenaude testified that he was the manager of the plaintiff company; that his company had furnished the Ontario Mining Company supplies for about five years; that some of the officers of the mining company would bring an order for goods, and that he would O. K. it, have the goods forwarded according to shipment instructions, and charge the amount up to the account of the mining company; that the account was not straightened between the plaintiff and the defendant companies upon the furnishing of each order, and that at the time the materials were supplied his company considered the mining property ample security for the goods

sold; that the mining company made partial payments, and that no interest was charged against them, although, on the bills rendered, these words appeared in print: "All accounts are due on the first of the month following purchase. Interest will be charged after thirty days:" that the goods were sold on the faith of the lien that plaintiff had for them against the mine, and that they were not sold on the credit of the company; that the account between the two companies was open and continuous; that witness' idea was that a lien could be placed upon the property of the mining company, and plaintiff get its money by doing so; that there was no agreement between plaintiff company and the mining company, in furnishing the articles, that the amounts were to be due at the end of each month, and that the heading on its bills, referred to, is a printed form on all of the plaintiff's statements; that different terms were often made as the circumstances required; and that, as each shipment of goods was made, bills were sent, but payment was not required immediately upon shipment.

Norman B. Holter, vice president of the plaintiff company, testified that about 1893, when the Ontario Mining Company first opened its account, its officers wanted to make an arrangement for a line of credit that would meet their circumstances; that they wanted mining supplies to operate their mine near Elliston; that the arrangements were that inasmuch as they could not pay for what they received every month or so, according to the usual line of credit, they could buy the supplies and pay for them when they were in position to do so, after their plant was completed; that at the time these arrangements were made the mill was not in operation, but was being built; that it was understood that plaintiff "would simply carry them [the mining company] from month to month, and charge them interest on their account, on their balances"; that when the arrangements were completed the account was opened, and the mining company purchased from time to time; that the account continued until it amounted to several thousand dollars, when, in November, 1895, they paid up to a certain time, and still kept on buying; that the account was opened under the arrangements just stated, and continued under them; that it was an unpaid, open account; and that the plaintiff relied upon the mining property solely as security for its debt. On cross-examination this witness testified that there was no arrangement by which the mining company was to buy all of its supplies from the plaintiff company, but that it could buy where it pleased; that the goods ordered were to be paid for when the mining company realized on its shipments of ore; that the plaintiffs did not consider the bills due at the time,—not until the completion of the mill, when the company would be in shape to pay them; that the mill was completed in September, 1895; that, at the time the hard-

ware company made the original contract, the Ontario Mining Company had in contemplation the erection of the mill, or making an addition to it; that at the end of each month a statement from the ledger account was mailed to the mining company, and these statements contained interest accounts; that, according to the agreement, the bills so rendered were not due, but that they were due at the time of the completion of the work; that when the company commenced to ship ore it was to pay the plaintiff; that, if the mining company wanted to pay its account, it could, but that it was satisfactory to both sides to let the account continue as it was.

P. G. Schroeder, the bookkeeper for the plaintiff, testified that the business relations between the plaintiff and the defendant companies had existed since 1893; that there was an account during that time between the parties,—a current, open account; that there was a settlement between them during the existence of the account; that this settlement was in November, 1895, and that at that time the accounts were settled up to November 1, 1895; that between November 1, 1895, and the date of the payment, which was November 13, 1895, there were other charges made upon the account between the parties; that these charges were upon open account, as formerly; that the date of the last charge was July 20, 1896; and that the balance unpaid upon the account was \$4,430.79. On cross-examination, witness stated that the mining company could purchase elsewhere if it saw fit.

O. A. Southmayd, the secretary of the Ontario Mining Company, testified that the account between the plaintiff and the defendant mining company ran along indefinitely from the time the mining company started until it closed down its work, and that articles were ordered from time to time as his company needed them. This same witness was called for the defense, and testified that he did not know of any agreement between plaintiff and the mining company, except for the purchase of a considerable lot of machinery originally bought at the beginning of operations, and that, if there was any agreement at that time that his company was to have credit for any limited amount, he knew nothing of it; that the Ontario Mining Company had paid various sums of money at different times to the plaintiff, and on November 13, 1895, the sum of \$6,855.47 to pay balance due November 1, 1895; that he had no knowledge of any such agreement as was testified to by plaintiff's witnesses; that he understood that bills for materials were due at the end of the month; that the supplies were furnished under separate orders from time to time as they were needed. On cross-examination, witness said: He knew there was an account between the parties, but that he remembered no specific talk in relation to an account. That "it was construed that there was an arrangement between the two companies by

which they were to have a line of credit there, and they [the hardware company] would furnish things as we needed them. But I knew nothing definite. If I had not so understood it, I would hardly have ordered material without making some arrangement about a line of credit. As I understood it, as secretary of the company, there was an arrangement between the Ontario Company and the hardware company by which the Ontario Company was to have a line of credit for the materials they wanted for their use for the mine. We used it, anyhow." That the bills were not paid on the 1st of every month, and that no demand was made for payment every month.

Cornelius Hedges testified for the defendant that he was president of the mining company; that it had had a special arrangement with the plaintiff when the company made the principal purchase of machinery in its early days; that his company settled in full in November, 1895, upon the accounts due prior to that time; that the amount of credit obtained the first time was agreed upon; that that was a specific trade about certain machinery,—a special purchase; that there was no special agreement with the plaintiff company at that time, or at any subsequent time, looking to a general line of credit running up to the time the mine closed; that "when we got goods there, and did not pay for them at the time they were delivered, the agreement or understanding as to when they were payable was that we were to pay as soon as we could realize from the resources of the mine." On cross-examination, witness stated that when his company bought the bulk of the machinery, engine, and boiler, there was a special understanding between it and the plaintiff; that they had negotiations, and that it was a special arrangement, by which the mining company was to pay for the things it got as soon as it could get the money; that he presumed his company continued trading under that arrangement; that in 1895 there was a general settlement; that everything the company owed up to that time was paid to November 1st; that between November 1st and 13th the account continued as a running account, as far as he knew; and that the mining company continued purchasing on the same account, and under the same arrangement.

The specifications of error relied on are: (1) That the court erred in finding as a fact that the account was fully settled up to and including the 1st day of November, 1895, and during November was fully paid off and discharged. (2) Error is specified, also, in the finding that from and after November 2, 1895, up to and including July 20, 1896, the plaintiff at various times furnished materials to the said mining company, to be consumed in said mine, including many other articles for other purposes, to the amount of \$4,430.79, and that these articles were all furnished on credit on account, but in separate bills, and

due and payable at the end of each month, with interest for any payment delayed after each bill became due. (3.) It is said the court erred in finding that the account contains many articles not used in the mine or mill or concentrator, besides many the use of which the proof left doubtful, and upon which the court could make no findings as to their use. Counsel for the hardware company also state that the court erroneously made a conclusion of law to the effect that the account set out in the plaintiff's statement of lien was made upon a series of independent contracts, and that the monthly bills rendered at the end of each month for the purchases during the month constituted a separate and independent account and contract from the bills purchased during other months, and that the court erred in concluding that the separate bills of purchase did not constitute a continuous and running account, and that all the materials included in the statement of account for materials purchased and delivered prior to May 1, 1896, were not the subjects of a lien upon the property of the mining company. Error is likewise predicated upon the finding that certain articles were not lienable, and that the bank has a lien upon all the property involved in this action.

1. During the trial, and on April 7, 1897, leave was granted to amend the answer, and an amendment was filed on April 14th, but was never actually incorporated into an amended answer. The plaintiff argues that this amendment is not a pleading allowed by law or the rules of practice, and that it can be considered only as an amended answer which superseded the original. Such being the case, and the amendment failing to deny any of the allegations of the complaint, the plaintiff insists that it is entitled to a judgment upon the pleadings. This contention is without merit. Section 773 of the Code of Civil Procedure seems to apply to amendments which may be made as of right, and not those which are permissible only by virtue of an order of court. Under this section a pleading is amended by filing and serving the same as amended. Where, however, leave is granted to amend, the court may require either a copy of the amendment, or the pleading as amended, to be filed and served. Such is the provision declared by section 683 of the Code of Civil Procedure in respect of complaints, and we think the same rule is, by analogy, to be considered as applicable to answers. In the case at bar the court allowed the bank to amend its answer, without specifying which of the two courses mentioned should be followed. The defendant chose, as was its privilege, to follow one method, and not the other. We remark, in passing, that, while either method is proper, the better practice is to file the pleading as amended. The original answer, therefore, was not superseded by the amendment, except in so far as the former is changed by the latter. The complaint also is made that the defendant bank

had no lien upon the real property sold to it, and upon which the plaintiff is endeavoring to enforce its supposed lien for materials furnished. The action in which the bank recovered the judgment was commenced in the district court of Lewis and Clarke county. A writ of attachment was duly issued to the sheriff of Deerlodge county, the situs of the real property. The writ was executed by attaching such real estate. Thereafter the judgment in question was obtained in the district court of Lewis and Clarke county, but a transcript thereof was never filed in Deerlodge county, nor did the sheriff of that county levy upon or attach the property under the writ of execution issued upon the judgment. It is insisted by the plaintiff that the judgment was not a lien upon the property, because of the omission to file a transcript thereof in Deerlodge county (section 1200 of the Code of Civil Procedure), and that there was no lien under the execution and sale, because the writ of execution was not returned within 60 days after it was issued, and because the writ of execution was not levied upon the property (sections 1218 and 1224 of the Code of Civil Procedure). These contentions, also, are without merit. The levy of the writ of attachment created the lien. The property was thereby seized and held, and there was no necessity for filing a transcript of the judgment. The only effect of filing a transcript, it seems, would have been the merger of the lien by attachment into the lien by judgment. See *Porter v. Pico*, 55 Cal. 165; *Starp v. Baird*, 43 Cal. 577. An attachment having been levied within the life of the writ, a lien is created, which may be enforced by execution sale without further levy. The fact that the return of the sheriff was not filed within 60 days after the test of the writ cannot have the effect of destroying the lien created by the levy of attachment. *Brusie v. Gates*, 80 Cal. 468, 22 Pac. 284; *Blood v. Light*, 38 Cal. 652, 99 Am. Dec. 441. When the property has been attached under a writ of attachment, there is no occasion for levying thereon a writ of execution. The lien acquired by the attachment is sufficient. Suggestion was made on the argument that the validity of the title acquired by the purchaser at an execution sale is not impaired or affected by the failure of the sheriff to attach or levy upon the property sold. As to this question we express no opinion.

2. The original agreement for a line of credit was specially made with relation to the erection of a mill about to be constructed by the company in undertaking its mining operations, but ran along after the completion of the mill. Under the evidence, we think, however, that it was terminated by the payment on November 13, 1895, when all accounts previous to November 1st were satisfied. From the November settlement on, the credit seems to have been extended upon the supposed value of the property, and the

somewhat vague understanding originally had was lost sight of by all parties. Monthly accounts were rendered,—one on December 2d for \$592.51, for the month of November. Such monthly accounts were always thereafter rendered until July, during which month the mill was closed down. These accounts were acquiesced in. Doubtless, the hardware company believed it might enforce a lien, and at the same time considered itself perfectly secure by the supposed solvency of the mining corporation, and the value of any concentrates it might produce; but the indulgence of not enforcing collection every month was “a matter of grace” on the part of the hardware company, for the accounts were due and payable at the end of each month. Transactions such as were had between the plaintiff and the Ontario Mining Company are distinguishable from those wherein supplies are to be furnished for the construction of a building or other structure, where a reasonably, if not perfectly, definite amount of material can be counted upon to be furnished from time to time under one general contract. But purchases for a mining enterprise, made under no special agreement, cannot be considered as constituting a continuing running account. *Big Blackfoot Milling Co. v. Bluebird Min. Co.*, 19 Mont. 456, 48 Pac. 778. The law will regard each delivery made in such case as a separate and independent contract,—with due regard, however, to the principle that where the agreement is regarded as a current one for each month, and a statement is rendered monthly, the account will be deemed due each month, so that the time for bringing suit does not arise until the end of the month. *Boisot, Mech. Liens*, § 724. Within this principle are the plaintiff's monthly accounts. As this case is presented, the last item of materials furnished in each month attracted to it all the other items of that month, so that the 90 days within which the statement of lien was required to be filed began to run, as to the accounts for the month, from the day when the last material was delivered. In this sense, the transactions of the month may fairly be regarded as constituting one continuing contract.

Newton's Case.

Appellant T. P. Newton filed a cross complaint in foreclosure, in which he set forth a copy of a lien he had filed to secure payment for sums due for machinery and supplies furnished to and used by the Ontario company in its mining operations. The Merchants' National Bank, by answer, questioned the validity of the Newton lien, and, as against him, also set up its claim to the property by virtue of the purchase at execution sale. Newton relied upon a written contract dated October 31, 1896, which was as follows: “Helena, Montana, Oct. 31, 1895. We hereby agree to furnish the Ontario Mining Co., f. o. b. Elliston, all machinery, etc., contained in list

marked ‘Exhibit A,’ for the sum of six thousand two hundred and nine dollars (\$6,209), and will have the said material ready to ship by the first of November. We will also furnish all castings required, in addition, at the rate of \$3.15 per 100 pounds f. o. b. Butte. [Signed] Montana Iron Works, T. P. Newton. The Ontario Mining Co. of Montana, by Cornelius Hedges, President.” The court awarded Newton a judgment against the mining company for the sum of \$6,287.50 and interest, but found that of this amount he was only entitled to a lien for the sum of \$29.22, with interest, for the reason that the account set out in the statement of lien by Newton was made up of a series of independent contracts, and that no lien could be enforced for any of the merchandise included in the account which was purchased and delivered prior to June 2, 1896; there having been no materials furnished between April 22d and June 2d. Newton appeals from the judgment rendered in accordance with the findings of the court against him, and from an order denying his motion for a new trial. The question presented by Newton's appeal is whether all of the items set forth in the account attached to Newton's lien were furnished under one contract, or whether the sale and delivery of the various items were under separate and independent contracts.

In the statement of lien filed by Newton on August 1, 1896, there is this entry: “Feb. 12. Concentrator machinery, per contract, \$6,209.00.” Then follow items, under dates of February 13th and 15th, amounting to \$10. The next item is of March 12th, at which date one Longmaid became manager of the mine. Longmaid testified that when he went to the mine the concentrator furnished by Newton was being built, and was in running order on April 6th or 7th. The statement shows that in June, 1896, three pairs of eccentrics, with bolts therefor, charged at \$30.15, were delivered to the mining company; but Longmaid testified that these eccentrics had no connection with the concentrator Newton furnished, but were used in repairing an old concentrator which was added to. Newton charged interest for the \$6,209 item for the concentrator he sold in February, but did not include interest on the other items contained in his statement of lien. Hedges, the president of the company, gave the following testimony as to the clause of the contract concerning castings: “As to what we had in contemplation when the contract was drawn and when I put that into it, my recollection is that there was some part of the castings,—just the amount could not be determined,—and the price was stated to apply to all that we needed in connection with that bill of work. We had specifications. There were some things that we could not definitely determine what we did need. That is my understanding. And that was intended to cover them. I had no idea, in connection with the contract, of his furnishing castings necessary for all time that

we might run the mine at that price,—simply to complete the contract; to furnish what was necessary in connection with it." It is to be observed that the contract with Newton bears date October 31, 1895. The first items on the statement of lien are of November 18, 1895, and there are two other items before the item of February 12, 1896. All these articles went into the concentrator machinery, and are within the special contract. But the items of June, which are the only ones brought within the limit of 90 days, were for repairing old machinery, and wholly independent of the machinery included in the first part of the contract. The last clause of the Newton contract was apparently meant to cover all castings which the company might have to buy to complete the concentrator; such castings to be in addition to the machinery, including castings and supplies, covered by the first clause of the contract. The evidence adduced on the trial tended to support this construction as the one put upon the agreement by the parties themselves. Castings bought in June were charged for at the rate of \$4 per 100, instead of \$3.15. The explanation that this was a bookkeeper's error, not discovered by Newton until he was preparing to try the present case, was not accepted by the trial court, and we cannot disturb the finding that the account was made up of a series of independent transactions or accounts.

Calrd & Hawksworth's Case.

Calrd & Hawksworth also filed a cross complaint, praying for judgment against the mining company for \$422.75 and interest, for material sold and delivered to the mining company between March 1, 1896, and July 7, 1896. Judgment was entered for the full amount of their claim against the defendant company, together with interest, but the court decreed that they were entitled to enforce a lien to recover the sum of \$313.47 only. They also appeal from the judgment and an order denying their motion for a new trial.

These claimants filed their statement of lien upon August 1, 1896. The court held that for mining supplies sold and delivered to the Ontario Company prior to May 1st they were not entitled to a lien, inasmuch as the purchases made each month constituted separate and independent contracts. For the purposes of the enforcement of a material man's lien, we affirm this ruling, as in accord with the decision of our court in *Big Blackfoot Milling Co. v. Bluebird Min. Co.*, 19 Mont. 456, 48 Pac. 778.

The questions presented by these appeals are very close. They have received our repeated and most careful examination; but, the oftener we have consulted, the more we find ourselves drawn to the conclusion that the proper result, under the statutes, rests in the affirmance of the judgment, and the several parts thereof appealed from, and of the orders of the district court. It is therefore

ordered that the judgment (in all respects) and the several orders appealed from be affirmed. Affirmed.

BRANTLY, C. J., being disqualified, takes no part in this decision.

M. HOLTER HARDWARE CO. v. ONTARIO MINING CO. et al.

Appeal of CONTINENTAL OIL CO. et al.

(Supreme Court of Montana. May 14, 1900.)
MECHANICS' LIENS—MINING PLANT—OIL FOR MACHINERY.

Illuminating oil, mica grease, lubricating oil, and gasoline for fuel used in a mining plant did not enhance the value nor become part of the machinery, and hence were not lienable, within Code Civ. Proc. § 2130, providing that every person furnishing material for any machinery, fixture, or building shall have a lien therefor.

Appeal from district court, Deerlodge county; Theo. Brantly, Judge.

Action by the A. M. Holter Hardware Company against the Ontario Mining Company and others to enforce a mechanic's lien. From a judgment denying a lien to defendant Continental Oil Company, it appeals. Affirmed.

F. W. McIntire, for appellant. McConnell & McConnell, for respondents.

PER CURIAM. This action was brought to foreclose a material man's lien against the defendant Ontario Mining Company; the Continental Oil Company, the appellant, being one of the defendants. This defendant sought to enforce a lien against the real property of the Ontario Mining Company for the price of sundry materials furnished to it between the 1st day of January, 1896, and the 10th day of June, 1896; the claim of lien having been filed on the 31st day of July, 1896. The supposed rights of the Continental Oil Company were contested by the Merchants' National Bank and one Hershfield, claiming interests in the property of the mining company by virtue of attachments and executions against it. Upon trial the Continental Oil Company obtained a judgment against the mining company for the amount of its claim of \$267.67, with interest, but only \$22.68 of that amount, with interest from August 1, 1896, and attorney's fees, was decreed to be a lien upon the real estate of the debtor. The court found that each month's sales were separate and independent accounts, and that the appellant was not entitled to a lien for the value of any materials not furnished within 90 days next before the time when the statement of lien was filed, and that none of the articles are of a lienable nature, except the gasoline for fuel in the assay office in connection with the mill and concentrator. Some of the gasoline had been furnished more than 90 days before the statement of lien was

fled. The appeal is from the order denying a new trial, and from so much of the judgment as fails to allow a lien for the whole account.

We find it unnecessary to determine whether or not the account in suit is made up of a series of independent contracts, or whether or not the purchases during each month constitute separate and independent accounts. The articles furnished for which a lien is claimed consist of coal oil for illuminating purposes, mica grease and oil for lubricating purposes, and gasoline used for fuel. We are satisfied that no one of these is of a lienable nature. Each is consumed in use; neither adding to the value, nor becoming parcel, of the property upon which it is used. Section 2130 of the Code of Civil Procedure does not, by any fair construction, include the materials for which a lien is sought to be enforced in the case at bar. The statute creating the right of the material man to acquire a lien is the outgrowth of the principle that he who furnishes that which becomes a constituent part of real property, and is intended to enhance its value, should be given security for the price or worth thereof. The doctrine is well stated by Mr. Justice Brewer in *Central Trust Co. v. Texas & St. L. Ry. Co.* (C. C.) 23 Fed. 703: "The language of the statute contains the word 'fuel,' in addition to the words 'labor and material'; and it is claimed that the use of the word 'fuel' enlarges the meaning of the word 'material,' and makes it broad enough to cover all supplies furnished. But for that word 'fuel,' there would be no question. The idea which underlies these lien statutes is that because the labor and the material have gone into the building of the road or structure, and to that extent added to its value, therefore a lien for such labor and material should be given to him who does the one and furnishes the other. * * * While we may be compelled to follow the language of the statute, and give for the fuel furnished a lien, yet I think in the construction of these statutes we should start from the underlying thought of giving security to him who adds to the value of the road, and that we should never carry the statute beyond that, unless imperatively demanded by the language used." The Wisconsin statute provides that every person who furnishes any materials in or about the erection, construction, protection, or removal of any machinery which is or becomes a part of the freehold, shall have a lien for such materials. In *Oil Co. v. Lane*, 75 Wis. 636, 44 N. W. 644, 7 L. R. A. 191, the court said: "The statute seems to go on the principle that materials used and labor performed on machinery, which enhance its value and become a part of such machinery, should be entitled to a lien. This appears to be the object of the statute. It is clear that it is not everything used in operating machinery, and which tends to preserve it, that is em-

braced within the meaning of the statute. Many things may serve to preserve machinery and make it operate more efficiently and easily, which do not protect it in the sense of the statute." We affirm the doctrine announced in these cases, as based upon correct principle. The judgment and order appealed from are affirmed. Affirmed.

BRANTLY, C. J., being disqualified, takes no part in this decision.

(24 Mont. 159)

WASTL v. MONTANA UNION RY. CO.

(Supreme Court of Montana. May 14, 1900.)

SECOND APPEAL—FORMER DECISION—LAW OF CASE—STATUTE—REPEAL—EFFECT—RIGHTS ACCRUED—MASTER AND SERVANT—PERSONAL INJURIES—QUESTIONS FOR JURY—VERDICT—CONCLUSIVENESS—LIMITATION OF ACTIONS—REVIEW—RECORD—PRESUMPTIONS—INSTRUCTIONS.

1. On a second appeal the appellate court is bound by a former decision on points necessarily determined, but on matters not essential, or questions not considered, it is not bound.

2. Comp. St. 1887, § 437, giving to one employé injured by the negligence of a superior a right of action against the master, was repealed by Const. art. 15, § 11. Const. 1889, art. 20, § 9, provides that all causes of action, claims, and rights existing at the time of the admission of the state into the Union shall be enforced and protected under the laws of the state. *Held*, that rights which had accrued under section 437 prior to its repeal were preserved by the saving clause of the constitution to be enforced under the laws of the state.

3. The evidence in an action for personal injuries showed that plaintiff was employed at defendant's roundhouse as night helper, to do work required by his superior, the hostler in the yard. The hostler, desiring to move an engine to the roundhouse, directed plaintiff to turn the switch. Plaintiff had no torch (having been forbidden to use one), and it was so dark he could not tell, when he got off the engine to turn the switch, whether he was between the rails or not. While plaintiff was stooping to find the switch lever, without looking to see if the engine was coming, the hostler, without any signal, started the engine, to avoid a collision with an approaching train, and plaintiff was run down and injured. It was customary for the helper to signal the hostler by hallooing when the switch was turned, and plaintiff knew that it was defendant's custom to run engines about the yard at night without signals or lights. *Held*, it was for the jury to say whether defendant's hostler was negligent, and whether plaintiff was guilty of contributory negligence.

4. A verdict on conflicting evidence will not be disturbed on appeal where there is sufficient evidence to sustain it.

5. An alleged error in admitting evidence in support of a cause of action to which the defense of the limitations has been properly interposed cannot be reviewed in the absence of a request for instructions directing the jury to disregard it.

6. Code Civ. Proc. § 1080, subds. 7, 8, provide that all instructions given must be filed together with those refused, and that the instructions given, and the modifications thereof, and the refusal to give instructions shall be deemed excepted to, and no bill of exceptions is required. Sections 1151, 1176, and 1196 provide that instructions are deemed to have been excepted to and no bill of exceptions is required, and that the judgment roll, containing among other papers "all orders, matters, and proceedings deemed to have been excepted to without a bill of ex-

ceptions," constitutes the record on appeal. *Held*, that instructions were properly in the record for review when made a part of the judgment roll, and that it was unnecessary to include them in the bill of exceptions.

7. Under Code Civ. Proc. § 3266, subd. 15, declaring that the prima facie presumption is "that official duty has been regularly performed," it will be presumed, in the absence of a showing to the contrary, that instructions found in the proper place in a record on appeal, with proper indorsements thereon, were put there by the trial court and its officers.

8. Instructions given or refused are properly in the record on appeal when identified by the trial judge, and made a part of the judgment roll, though they are not signed by the party asking them, as required by Code Civ. Proc. § 1080.

9. An instruction in an action by an employé for personal injuries that, although the plaintiff was negligent, he is not precluded from a recovery unless his negligence was "the" proximate cause of the injury, is erroneous, since the jury can infer from the use of the definitive "the" that the plaintiff, though guilty of negligence which could be called "a" proximate cause of the injury, should not be barred unless his negligence was the sole cause of the injury.

Hunt, J., dissenting.

Appeal from district court, Silverbow county; William Clancy, Judge.

Action by Peter Wastl against the Montana Union Railway Company. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Reversed.

This is an action for damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. A judgment for the plaintiff was reversed on a former appeal, and the cause was remanded for a new trial. 17 Mont. 213, 42 Pac. 772. Before the second trial in the district court the complaint was amended so as to make more specific the allegations of negligence on the part of defendant. It is alleged by plaintiff that on April 15, 1889, the defendant, a corporation organized under the laws of Montana, was engaged in operating its railroad in Silverbow county, using in connection therewith, at the city of Butte, its depot, tracks, switches, switch yard, engines, and other necessary appliances; that the plaintiff was in its employ as a laborer, his ordinary duties requiring him to wipe and coal engines, and to perform such other tasks as might be directed by the boss in the roundhouse or the hostler in the yard; that it was also plaintiff's duty, in the absence of the regular helper, and when ordered by the hostler, to aid the hostler in the movement of engines about the yard by opening and closing the necessary switches; that plaintiff had no experience whatever in turning switches,—a fact well known to defendant,—and that defendant had wholly failed to instruct him how to perform this task by the promulgation of suitable rules, or by other means, so that he might avoid the danger incident thereto; that about 9 o'clock p. m. on April 15, 1889, the regular helper being absent, the hostler, as the superior of plaintiff, directed the plaintiff to get upon an engine which was standing on a side track in the yard, and assist in taking the engine to

the roundhouse by getting off and turning the switches whenever the engine stopped; that the night was dark; that the yard was not lighted; that the plaintiff was not permitted to take a light; that the engine went west to a point near the first switch, where it stopped; that thereupon the plaintiff, getting off, went eastward, walking between the rails, to turn the switch, and, giving his attention entirely to his task, was stooping down in the darkness, looking for the switch lever; that while he was in this position the hostler, without giving any signal with the bell or whistle, or by other means, reversed the engine, and ran it back towards the east upon and over the plaintiff, inflicting upon him serious and permanent injuries, with the result that he has since that time been unable to perform manual labor and to earn a living for himself and family; and that the said injuries were wholly without his fault. The answer denies all the material allegations of the complaint, alleges that the injuries of plaintiff were due to his own negligence, and sets up a special affirmative defense that, in so far as the plaintiff seeks to recover of defendant upon the ground that defendant had failed to instruct him how to turn switches, and to promulgate suitable rules to guide him in the performance of this duty, the plaintiff's cause of action is barred by the provisions of section 47 of the Code of Civil Procedure of the Compiled Statutes. The jury found for the plaintiff, assessing his damages at \$10,000, and judgment was entered for that amount. From this judgment, and an order denying a new trial, defendant prosecutes this appeal.

John F. Forbis, G. B. Winston, and Wm. Wallace, Jr., for appellant. John A. Shelton, T. J. Walsh, and J. M. Hinkle, for respondent.

BRANTLY, C. J. (after stating the facts). The appellant asks for a reversal of the judgment and order upon the following grounds: That the trial court erred in refusing to direct a nonsuit, that the evidence is insufficient to justify the verdict, that the trial court admitted improper evidence, that it erred in submitting certain instructions to the jury and in refusing to submit others requested, and that the verdict is excessive.

1. This suit was brought under section 697, div. 5, Comp. St. 1887. This section was construed and applied in *Criswell v. Railway Co.*, 17 Mont. 189, 42 Pac. 767. The judgment in that case was afterwards reversed on rehearing upon a constitutional question which was not urged on the first hearing (18 Mont. 167, 44 Pac. 525, 33 L. R. A. 551), but the opinion of the court there expressed as to the proper interpretation of this section was in no wise changed or modified. As already noted in the foregoing statement, a judgment for the plaintiff in this cause was reversed upon a former appeal, and a new trial granted. The contention is now made by counsel

for respondent that all the questions presented upon this appeal, except the one raised by the assignment last mentioned and some arising upon the correctness of particular instructions, presently to be noted, were involved in the former appeal, and, therefore, that the conclusions reached by the court at that time are the law of the case, and binding upon us on this appeal. Counsel even go so far as to insist that this principle extends to all matters that the court should, or might have, properly considered and determined on the former appeal, whether an opinion was expressed thereon or not. As we understand it, however, this court has never gone further in the application of the rule than to hold that it is bound by a former decision upon all points necessary to a determination of the cause as it was then presented. On matters not essential, or questions incidental or not considered, the court is not conclusively bound upon the second appeal. In *Palmer v. Murray*, 8 Mont. 174, 19 Pac. 553, referring to a former appeal in the same case (6 Mont. 125, 9 Pac. 896), the territorial supreme court said: "That decision has now become the law of the case in all of its stages, and cannot be departed from, so far as the questions of law or fact are concerned which were therein presented for review or decision." The rule has been repeatedly invoked and applied in this jurisdiction, both before and since the decision in the case cited. *Oreighton v. Hershfield*, 2 Mont. 170; *Daniels v. Insurance Co.*, Id. 500; *Kelley v. Cable Co.*, 8 Mont. 440, 20 Pac. 669; *Davenport v. Kleinschmidt*, 8 Mont. 467, 20 Pac. 823; *Priest v. Elde*, 19 Mont. 53, 47 Pac. 206, 958; *Madrox v. Teague*, 18 Mont. 512, 46 Pac. 535; *Murray v. Polglase*, 23 Mont. 401, 59 Pac. 439. But, though the rule may be invoked even in support of an erroneous ruling upon the former appeal (*Davenport v. Kleinschmidt*, supra), its application will be strictly limited to the points necessary to the determination of the cause. It cannot be successfully invoked to estop the appellate court in a case where a different state of facts is shown, or questions of law are presented a decision of which was not necessary or germane to the former opinion. *Priest v. Elde*, supra; *Klauber v. Car Co.*, 98 Cal. 105, 32 Pac. 876; *Barney v. Railroad Co.*, 117 U. S. 228, 6 Sup. Ct. 654, 29 L. Ed. 858. So that, while we recognize the rule as well established in this jurisdiction, we are not disposed to extend it beyond the exigencies which demand its application.

Looking into the record as presented upon the former appeal, and to what was said by this court in that decision, we find that a majority of the justices agreed to a reversal of the case upon two paragraphs of the charge of the trial court, designated as instructions 7 and 15. Mr. Justice De Witt was disqualified, and took no part in the decision. The chief justice wrote the opinion, but Mr. Justice Hunt concurred therein specially, and

upon the sole ground that the charge was erroneous in the particulars mentioned. From an examination of these parts of the charge it appears that the trial court misstated the rule of law by which the jury should be guided in determining the preponderance of the evidence, and invaded the province of the jury by calling attention to certain of defendant's witnesses by name, and, to this extent, improperly commenting on the weight of the evidence. The sufficiency of the evidence to withstand a motion for nonsuit or to sustain the verdict cannot be held to have been within the purview of the concurring opinion, and was, therefore, a matter upon which no opinion was expressed. This fact, however, is to be noted: The case of *Criswell v. Railway Co.*, supra, was under advisement by the court during the time this case was considered. As stated already, it involved the construction and application of section 697, div. 5, of the Compiled Statutes of 1887,—the fundamental question involved in this case, and presented by the record in the former appeal. The two opinions were handed down the same day. As the decision in the former was by all the justices, and as the two cases may be looked upon as one, in so far as this section of the statute was involved, a construction of the statute being necessary to this case also, the decision in the former case on this point may fairly be treated as the law of this case. In fact, the construction given to the statute in the *Criswell Case* was referred to and adopted as applicable to the present case, the court deeming it unnecessary to repeat the discussion and decision in the *Criswell Case*. Therefore, though it subsequently appeared that a construction of the statute as applied to the facts in the *Criswell Case* was entirely unnecessary, yet the two cases were so connected that the law as declared in that case became the law in this one, and we feel bound to recognize and apply it as such. And we are the more willing to follow the construction given to the statute in that case because we regard it as entirely just. The constitutional question upon which the *Criswell Case* was reversed has no application to this case, as that case arose after the constitution was adopted, while the present one arose prior to that time. Counsel for appellant contends now that, as the constitution abrogated the statute it necessarily resulted that the plaintiff's right of action under it was thus entirely destroyed. Respondent insists that this question was also disposed of on the former appeal, and that a consideration of it at this time is thus foreclosed. This position is not tenable, however, for the question was not then brought to the attention of the court, nor was it considered. In short, the only point in the case which is not open for consideration on this appeal is the construction of the section of the statute above referred to. All the other questions properly presented upon this record and

urged in his brief, counsel for appellant is entitled to have determined. We have given respondent's contention as to the law of the case more attention than it, perhaps, deserves; but, owing to the peculiar situation of the case because of its association with the *Criswell Case*, we have deemed it proper to give it more than a passing notice.

2. At the close of plaintiff's proof the defendant moved for a nonsuit on the several grounds that plaintiff had failed to show negligence on the part of defendant, that the proof showed affirmatively that the injury to plaintiff was the result of unavoidable accident, and the plaintiff contributed thereto by his own negligence at the time of the accident, and that the accident was caused by the negligence of plaintiff's fellow servant. The evidence tended to show the following: Plaintiff had been in the employ of the defendant in the yard in the city of Butte about seven months. His business was to wipe and coal engines, give them water and sand, clean out the ashes, and to do such other work as was directed by the boss in the roundhouse and the hostler in the yard. The duty of turning switches also fell to him in the absence of the regular helper. The duties of the hostler were to receive engines as they came into the yard, to see that they were properly cleaned, supplied with coal and sand, and put away, and to deliver them again to the proper engineer. He had authority to discharge, but not to employ, laborers. On the evening of April 15, 1889, the regular helper was absent. A switch engine which had been coaled by plaintiff and others was standing on a side track at the coal bins on the north side of the yard. The hostler desired to move it to the roundhouse, which was on the south side. To do this it was necessary to run to the west in order to shift it to the track running to the roundhouse, and then to run east on that track. The hostler directed the plaintiff to go with him, and turn the switches. It was customary for those performing this duty for the hostler to ride upon the footboard of the engine. When it stopped, they would get off, and, after turning the switch, signal the engineer by hallooing. While in the yard, the engines did not usually carry a headlight. This was the case only when an engine was brought in after dark. It was not customary to use the bell or whistle for a signal. On the evening in question the engine had no headlight. The plaintiff rode on the east end of the engine. The engine backed west, and when it stopped he got down, and went eastward to look for the switch. It was dark, and there was so much smoke from the engine that plaintiff could not tell whether he was between the rails. He stooped in the darkness to look for the switch. He had no light. The boss of the roundhouse had forbidden him to take his torch. While he was in this stooping position, the hostler, without warning, shifted the engine towards the east, in order to get it out of the way of a

freight train which was approaching on the main track from the west. This was done in obedience to a signal received from towards the west. If the engine had remained standing where it was, there would have been a collision with the approaching train. Plaintiff did not look back to see if the engine was coming. He was caught by the engine, and thrown over, suffering the loss of a toe and two fingers besides other injuries upon the head, resulting in a permanent tremor in his right hand, and frequent headaches and general weakness. The plaintiff, until about 15 days before the accident, had worked in the daytime. For these 15 days he had been doing night work. He had never turned a switch before. No one had given him any instructions about how to do this, but he had seen others do it. The switch levers were outside the rails. The plaintiff could not speak or understand English very well. He was, at the time of the accident, about 48 years old. There were no rules regulating the running of engines in the yard. The laborers about the yard and roundhouse were subject to the direction of the hostler after he came on duty at night.

The fundamental question raised by this motion is the effect, if any, wrought upon plaintiff's right of action by the repeal of section 697, *supra*, by section 11 of article 15 of the constitution, as was held in *Criswell v. Railway Co.*, 18 Mont. 167, 44 Pac. 525, 33 L. R. A. 554; for, as stated before, plaintiff is endeavoring to establish in this case a right founded upon the statute, and this right does not exist unless it survived the repeal of the statute. The effect of the statute, so far as domestic railroad corporations were concerned, was to abrogate the common-law rule governing the liability of a master for an injury to his employé by the negligence of a fellow employé engaged in a common employment for a common purpose. It established in the territory the superior servant doctrine, and gave to one employé injured by the negligence of a superior a right of action therefor against the master when the injured employé was himself without fault or negligence. *Criswell v. Railway Co.*, *supra*. This right did not exist at the common law, and, under the facts in this case and the rule as recognized and repeatedly reaffirmed in this state since the adoption of the constitution, the plaintiff could not recover; for it is clear that under this rule plaintiff and the hostler were fellow servants engaged in a common employment for a common purpose, and that the injury complained of, if not caused by plaintiff's own act, was due to the negligence of the hostler. *Goodwell v. Railway Co.*, 18 Mont. 293, 45 Pac. 210; *Hastings v. Railway Co.*, 18 Mont. 493, 46 Pac. 264; *Mulligan v. Railway Co.*, 19 Mont. 135, 47 Pac. 795. We think, however, that a complete answer is found to the question raised and the contention of the appellant by the provision contained in section 9 of the schedule of the constitution. This provision is: "All writs, pro-

cesses, prosecutions, actions, causes of action, defenses, claims and rights of individuals, associations and bodies corporate existing at the time the state shall be admitted into the Union, shall continue and be respectively executed, proceeded with, determined, enforced and protected under the laws of the state." Here is an express provision that all causes of action, defenses, claims, and rights, without exception, of all classes of individuals, shall continue and be enforced and protected under the laws of the state. No distinction is made between statutory rights and those existing at common law, nor between those arising out of torts and those founded upon contract. The section seems to have been inserted in the schedule—which is, so to speak, a general saving clause to the constitution—*ex industria*, to meet just such cases as the present, and to preserve all rights already accrued, and either in action or capable of being enforced by the ordinary remedies provided for this purpose. The framers of that instrument evidently intended that the territorial government should be succeeded by that of the state with the least possible friction and disturbance. While realizing that many of the statutes of the territory were not suitable to the changed conditions under the constitution, and would be abrogated thereby (Const. Sched. § 1), they intended also that the rights of the individual citizen should be preserved and enforced just as effectively as if the constitution had not been adopted. There is nothing in the section showing any intention to make any exception. The language is general, and includes all rights and claims, whatever be their character. Therefore the contention of counsel that the repeal of the statute destroyed also the right already accrued thereunder cannot be sustained. The constitution operated upon the statute so as to prevent other rights from accruing thereunder; but under its saving clause, as expressed in the section of the schedule quoted, the right already accrued was preserved to be enforced "under the laws of the state," whatever they might be; for, after the right became fixed, its enforcement no longer depended upon the statute, but was to be governed by the general provisions of the Code suitable to the enforcement of all rights, without regard to their origin. This being our conclusion, it is not necessary to discuss what would have been the effect upon plaintiff's right in the absence of this section of the schedule. An inquiry upon this subject would necessarily lead to an examination of the question whether the right asserted by the plaintiff under the statute is "property" within the meaning of the fourteenth amendment of the constitution of the United States, and whether the section of our constitution (section 11, art. 15), which repealed the statute, is within the malediction of the first section of that amendment. We are content to omit this inquiry.

Upon the other points made by the motion, we think the motion was properly denied.

Under the law of this case (*Criswell v. Railway Co.*, supra) it is clear that there is a sufficient showing as to the negligence of the hostler to go to the jury. He was bound to exercise the same degree of care towards the plaintiff as towards a passenger, and it cannot be doubted that, if the plaintiff had been a passenger, the hostler would have been bound to give some sort of signal before starting the engine. The plaintiff had a right to expect the engine to remain where he left it until he should give a signal for the start in the usual way by hallooing. Nor does the evidence show that a collision was so imminent that the hostler could not have given a signal. His act in starting the engine as he did was a departure from the ordinary course, and he should have taken extraordinary care. And though it may well be said that the plaintiff, knowing that the defendant was accustomed to run its engines about the yard at night without signals and lights, assumed all the risks incident to the ordinary conditions, it cannot be claimed that this assumption on his part contemplated also the dangers arising from conditions which could not reasonably have been foreseen by him. Nor do we think it is clear from all the circumstances of the case that the plaintiff was guilty of such negligence in getting between the rails that he is precluded from a recovery. It was dark, and the vision was obscured by the smoke emitted by the engine. He states that he could not tell whether he was without or within the rails. Besides, as we have stated, he justly had a right to suppose that the engine would not move until he had signaled the hostler. We think it was for the jury to say whether, under all the circumstances, the hostler used that degree of care called for by the circumstances, and whether the plaintiff was sufficiently circum-spect. *Prosser v. Railway Co.*, 17 Mont. 372, 43 Pac. 81, 30 L. R. A. 814; *Pyle v. Clark*, 25 C. C. A. 190, 79 Fed. 747. This case is clearly distinguishable from *Aerkfertz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, 38 L. Ed. 758, in which the injury complained of was due to a clear disregard on the part of the plaintiff of the most ordinary precautions under usual conditions.

3. What has just been said touching the sufficiency of the evidence to go to the jury renders it unnecessary to remark upon the assignment that the evidence is not sufficient to sustain the verdict. Viewed in the light most favorable to the defendant, it presents a case proper to be submitted to the jury upon conflicting evidence, and the finding of the jury thereon should not be disturbed.

4. The next contention made by the appellant is that the allegations in the third amended complaint upon which the last trial was had, setting up a failure on the part of the defendant to promulgate suitable rules to guide the plaintiff in the discharge of his duties, and to instruct him therein, as culpable negligence, constitute separate and distinct

grounds of recovery; and that plaintiff's right of recovery as to them is barred by the provisions of section 47 of the Code of Civil Procedure (Comp. St. 1887). This contention is based upon the fact that these matters are alleged for the first time in the last amended complaint, long after the limitation of the statute had run. But, whatever may be its merits, appellant is not in position to have this question considered here. In this state the defense of the statute of limitations can be made available only by answer or reply. Code Civ. Proc. § 568; Laws 1890, p. 142. The defense was interposed in the proper way in this case, but the only attempt to present the question thus raised was by an objection to the evidence tending to show that no rules had been promulgated by the defendant regulating the running of engines and trains in the yard, the ground of the objection being that the action, so far as based upon the negligence of the defendant, "is barred by limitation, and not proper matter to introduce in evidence at this time." This objection, not being made upon any lawful ground, was properly overruled. The proper mode to present the question was to request an instruction to the jury directing them to disregard the evidence on this point. No such request was made. In the absence of it, the defendant cannot complain of the trial court for its failure to submit the question to the jury. Indeed, upon the record presented here, we are justified in the conclusion that this defense was abandoned, and hence that no reference was made to it in the instructions.

5. Another contention made by the appellant is that the court misdirected the jury to its prejudice, and failed to give correct instructions requested. A question of practice is presented here by objection to the consideration of the instructions, either given or refused, on the ground that they are not properly in the record, in that they are not included in a bill of exceptions, and are not properly identified. We find them in the record as a part of the judgment roll, and in this condition: Those requested by the plaintiff are together, following each other consecutively, properly numbered, under the general heading "Instructions on the Part of Plaintiff." Each one is marked "Given." At the end of the last one appear the words: "Indorsed: Filed Apr. 8, 1897. Clinton O. Clark, Clerk, by T. E. Booth, Deputy Clerk." April 8, 1897, was the date of the trial. In the same way follow those requested by the defendant under the heading "Instructions on the Part of Defendant." They are marked and indorsed just as are those requested by the plaintiff, except that in two instances additions were made at the end, which are noted. Then follow "Refused Instructions Offered by Defendant." These are marked as "Refused," and indorsed "Filed," as are the others. Subdivision 7 of section 1080 of the Code of Civil Procedure provides that "the

court shall either give each instruction as requested, or positively refuse to do so, or give the instruction with a modification, and shall mark or indorse upon each instruction so offered in such manner so that it shall distinctly appear what instructions were given in whole or in part, and, in like manner, those refused. All instructions given by the court must be filed, together with those refused, as a part of the record." In the following subdivision (subdivision 8) it is further provided that the charge of the court, the instructions given, and the modifications thereof, and the refusal to give instructions shall be deemed excepted to, and no bill of exceptions is required. Further, section 1151, Id., provides that the instructions and charge of the court are deemed to have been excepted to, and no bill of exceptions is required. Section 1193, Id., directs what papers the judgment roll shall contain, and, among others, are enumerated "all orders, matters, and proceedings deemed excepted to without bill of exceptions." The judgment roll, with other papers named, constitutes the record on appeal. Id. § 1176. These provisions of the statutes set at rest any question as to the proper method to pursue to bring the instructions before this court for review. Indeed, after they pass into the hands of the trial court, the duty of preserving them and making them a part of the record devolves upon the court and its officers, and nothing further is required by the parties. The parties may, if they choose, include them in a bill of exceptions, and present them in this way, but this course is entirely unnecessary, and involves useless labor. The cases cited by counsel in support of his claim that the instructions must be contained in a bill of exceptions formally settled are founded upon different statutes from ours, and are not in point.

Neither do we think there is any force in the argument that the instructions are not properly identified as those actually given as requested, or as modified, or as actually requested and refused. We find them in the record, with certain indorsements and notations upon them. They are in the place where they should be found. These indorsements and notations upon them indicate that they are what they purport to be. There is nothing before us to show the contrary. The statute declares that the prima facie presumption is "that official duty has been regularly performed." Code Civ. Proc. § 3263, subd. 15. Indulging this presumption, we must conclude that the instructions in the record were put there by the trial court and its officers. But counsel insists that they are not signed by the attorneys who requested them, in obedience to the requirement of the first part of section 1080, supra. We take it that this requirement is made for the benefit of the judge of the trial court to aid him in the discharge of his duties. He could not be put in error for refusing to give instruc-

tions requested unless the party requesting them should do so in conformity with the statute; but, if he chooses not to require a strict compliance, and proceeds to identify the instructions given and refused, as well as the modifications made of any of those given, as is required of him by section 1080, supra, and to make them a part of the judgment roll, as in this case, his duties have been fully discharged, and the record is properly made.

The conclusion already reached that the statutory and not the common-law rule of liability applies to this case, and that the evidence warranted a submission of it to the jury upon the question of the hostler's negligence and the contributory negligence of the plaintiff, disposes of all the questions raised upon the instructions save one. This arises upon instruction 3 given at plaintiff's request, which reads as follows: "You are instructed that if, from all the evidence, you believe that plaintiff was working under the orders and directions of the hostler, and that it was his duty to obey such orders, and that at said time the defendant, by its hostler, might have avoided said injury by the use of proper signals or warning, or by having a headlight on its engine, and if, from the evidence, you further believe that at the said time defendant neglected to have said headlight, or give such warning, then you have the right to determine whether or not said neglect caused the accident; and if you believe from the evidence that it did, and that the plaintiff was without negligence, or, if negligent, that his negligence was not the proximate cause of the injury, then you should return a verdict for the plaintiff." Appellant complains that this instruction does not state correctly the law of contributory negligence, and that the vice of it consists in its telling the jury that, though plaintiff might be barred of his recovery by his own negligence, yet such negligence, to be a bar, must be the sole proximate cause of the injury for which he was seeking compensation. Mr. Beach defines contributory negligence as follows: "Contributory negligence, in its legal significance, is such an act or omission on the part of a plaintiff amounting to a want of ordinary care, as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." Beach, Contrib. Neg. § 7. Mr. Thompson defines the phrase thus: "In order to constitute such negligence as will bar a recovery of damages, these two elements must in every case concur: (1) A want of ordinary care on the part of the plaintiff, or, where the action is for damages resulting in death, a want of ordinary care on the part of the person killed; (2) a proximate connection between this want of ordinary care and the injury complained of." Thomp. Neg. § 3, p. 1148. The principle embodied in these definitions is that, in order that there may

be any contributory negligence on plaintiff's part, there must be negligence also on the part of the defendant having a direct and proximate causal relation to the injury. Negligence proximately causing the injury is necessary to render the defendant liable. Negligence on plaintiff's part, which is a proximate cause, is necessary to bar a recovery on the ground of contributory negligence. If defendant's negligence is the sole proximate cause, there is no contributory negligence. If the plaintiff's negligence is the sole proximate cause, then no negligence is attributable to the defendant. Obviously, therefore, the negligent acts of plaintiff and defendant must concur and operate together, each contributing proximately to cause the injury complained of. If this condition does not exist, then there is no question of contributory negligence. 7 Am. & Eng. Enc. Law (2d Ed.) 373, 374; Payne v. Railroad Co. (Mo. Sup.) 31 S. W. 836; Thomp. Neg. pp. 1148-1153.

Applying these principles to test the instruction complained of, we must conclude that appellant's position is correct. The jury are told that, though the plaintiff was negligent, he was not precluded from a recovery unless his negligence was the proximate cause of the injury. The use of the article "the" with its specifying and particularizing force, as opposed to the indefinite article "a," which should have been used, excludes the idea of any other concurring cause. The article "the," in the sense in which it is here employed, designates one particular from a class or number, disassociating it from others of the same class. Attention is thus called to the particular object singled out of the class, and thus individualized. The indefinite "a," used in place of it, would have meant "one" or "one of" the class, or, in this instance, one of the two contributing causes. From the particular phrase in which the definitive "the" is used, the jury could, and perhaps did, infer that the plaintiff, though guilty of negligence which could be called an approximate cause of the injury, should nevertheless be held not barred, unless the proof showed that his negligence was the sole causal agency in producing the injury. The rule thus stated for the guidance of the jury omits one of the essential elements in the definition of contributory negligence. It appearing from the proof that it was proper to submit the question to the jury, the defendant was entitled to have it submitted under a correct statement of the law. The error complained of in this instruction might possibly have been disregarded as an inadvertence, and without prejudice, had the law on this point been generally correctly stated elsewhere through the instructions; but such was not the case. Wherever this principle was referred to in the instructions, the same error was committed. We cannot say that the appellant was not prejudiced by it. Par-

rin v. Railway Co., 22 Mont. 290, 56 Pac. 315. It is regrettable that this case must be reversed upon a ground apparently so technical. Our only course, however, is to declare the law as we find it, without regard to any hardship that may result in this particular instance. Let the judgment and order be reversed, and the cause be remanded for a new trial. Reversed and remanded.

PIGOTT, J., concurs.

HUNT, J. I dissent; not, however, without appreciation of the difficulty of the point on which reversal is ordered, and I agree that there is carelessness in the use of words employed in the instruction deemed prejudicial. I think, though, that the definite article "the," as used in the instruction held bad, particularized the subject of proximate cause which was being spoken of by the court, without going to the extent of limiting the jury to the consideration of one, and only one, proximate cause within the several proximate causes embraced in the general subject so particularized; that is to say, while I believe the jury were directed to the subject of proximate causes by the instruction, still there was no one special limitation within the bounds of that subject by which they were exclusively concluded. This opinion is strengthened by the statement that elsewhere in the charge a correct definition of proximate cause was given. I believe, therefore, that the inference of a "sole causal agency," spoken of by the Chief Justice as perhaps having been drawn by the jury, could not reasonably have been drawn, and that it involves too technical a construction of the language embraced in the instruction. I do not approve the language of the instruction, yet I cannot think its fault was calculated to mislead or did mislead. I think the judgment should be affirmed.

(21 Utah 229)

WEST POINT IRR. CO. v. MORONI & MT. PLEASANT IRR. DITCH CO. et al.

(Supreme Court of Utah. March 29, 1900.)

OBSTRUCTION AND DIVERSION OF WATER—ACTION FOR INJUNCTION—NECESSARY PARTIES—FACTS NECESSARY TO MAINTAIN WATER RIGHTS—UPPER AND LOWER APPROPRIATORS—CONFLICTING TESTIMONY.

1. In an action brought solely to restrain defendants from obstructing the flow of certain waters, where it appears that during the period complained of other persons, not parties to the action, diverted water from the same stream to such an extent that it cannot be sufficiently shown that, but for the acts of the parties not sued, no injury would have resulted to the plaintiff, an injunction will not be granted.

2. In order to successfully maintain an injunction proceeding, it must appear that the acts of those sued caused the injury, and that, if such acts are continued, damages will follow.

3. Before an appropriator of water can be enjoined for diversion by an appropriator further down the stream, it must satisfactorily appear that, had the water been allowed to pass down

the stream, it would have reached plaintiff's ditch.

4. In an equitable action, although the testimony may have been conflicting, if there is testimony to support the findings it must be held sufficient on appeal.

(Syllabus by the Court.)

Appeal from district court, Seventh district; Ogden Hiles, Judge.

Action by the West Point Irrigation Company against the Moroni & Mt. Pleasant Irrigation Ditch Company and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The plaintiff, in its complaint, claims, among other things, that it is the owner of one-half of all the water of Sanpitch river, Sanpete county, flowing between what is known as the "Rock Dam," near Moroni city, and the head of plaintiff's ditch, which is about five miles below, from the 15th day of November of each year to the 1st day of July of the succeeding year, and all of said water flowing therein during the remainder of the season; that during the years 1893, 1894, and 1895, defendants, by means of dams and ditches in said river above the rock dam, diverted large portions of said water from the river, and prevented the same from flowing down to plaintiff's ditch and dams, to plaintiff's damage, and prays for an injunction. The defendants deny the allegations in the complaint, and claim the ownership of the water, and plead the statute of limitations. So far as material, the trial court found, in substance: (3) That in the year 1861 rock dam was completed in the bed of the river, and has since been maintained as a tight dam during the irrigation season, with the intention to divert at that point the waters of the river, and during the dry season all the water at said dam; and the ditches connected therewith have been diverted and taken out. (4) That the water appropriated by the plaintiff was of the overflow and surplus water coming into the river below the rock dam. (5) That in 1860, settlers at Moroni appropriated all the water of the river during the dry season for irrigating their lands, and thereafter continued to use the same by common consent and under agreed rules for many years, until the organization of the defendant corporations, for the benefit of said citizens and appropriators, and distributed the water above said S. E. Field and Canal dam; and said corporations succeeded to all the rights of said citizens, and ever since have controlled and distributed said water by the consent and authority of said original settlers and appropriators. (6) That defendant corporations have no interest in the rock dam or the ditches connected with said dam, but other persons have owned and controlled the same. (7) That each year since the organization of the plaintiff corporation other persons, not parties to this suit, during the dry and irrigating season, have diverted the waters of said river flowing through and seeping in below the said rock dam and above the plaintiff's dam; that the

dry season ordinarily commences each year about the 15th, or middle, of June. (8) That each year since the organization of the plaintiff corporation other persons, not parties to this suit, have diverted the waters of said river during the dry season from above the said rock dam. (9) That, owing to the configuration of the country, and the character of the soil in the vicinity, a large proportion of the entire quantity of the water appropriated and diverted from the river by the defendant corporations, and other parties, not parties to this suit, each season, finds its way back into the river bed at or near the said rock dam by seepage; that said seepage water has not been restrained or diverted by either of the defendants. (10) That the defendant the Moroni & Mt. Pleasant Company did, in the year 189-, by means of an enlarged and practically a new ditch, divert large quantities of the waters of said river at a point on the N. E. $\frac{1}{4}$ of section 15, township 14 S., range 4 E., near the east section line thereof, and controlled and distributed the same for the purpose of irrigating a large area of new lands; that there were several dams and ditches below this said point of diversion and above said rock dam, older in time than West Point, the plaintiff's ditch and dam, and a large proportion of the water theretofore used in said older ditches, upon the completion of the Moroni & Mt. Pleasant Company's ditch, were transferred to and diverted on the other lands by means of said new ditches, since 1894; that during the time of the use by the Moroni & Mt. Pleasant Company of the said new dam and ditch each year since its completion, during the dry season, the several dams and ditches below the point of diversion and above the rock dam were diverting the waters of the river to the extent of their capacities. (11) That the quantity of water flowing each season in the said river has been increased from year to year to the present time by means of the appropriation of water from other sources, and a large increased area of irrigation above the dam and ditches of the defendant companies at, near, and adjacent to the town of Fairview, which said increased flow is used by all the persons appropriating water from the stream above the plaintiff's dams and ditches; but I am unable to determine from the evidence what proportion thereof is or has been appropriated by either of the defendant companies. (12) That all of the waters of said river flowing therein above the rock dam are, during each irrigating season, appropriated and used by the defendant corporations and a number of other persons, not parties to this suit, some prior in time and right and others subsequent in time and right to the plaintiff corporation; that neither of the defendant corporations have during the years 1893, 1894, or 1895, acting in concert or otherwise, diverted from the said Sanpitch river any of the waters thereof, to which the plaintiff was entitled, or to its damage or in-

jury; that plaintiff's stockholders have lost no crops and have suffered no injury by reason of the use of the waters of said river by the defendant corporations. Upon such findings, so made, a decree was entered in favor of the defendants. The plaintiff pleads and alleges the insufficiency of the evidence to justify the findings.

W. K. Reid and Rawlins, Thurman, Hurd & Wedgwood, for appellant. Richards & Varian, for respondents.

After stating the facts, MINER, J., delivered the opinion of the court.

The relief prayed in the complaint was for an injunction to prevent the defendants from obstructing the flow of water of Sanpitch river to plaintiff's dam and ditches. It was not an action to quiet title. Plaintiff claimed the water flowing south of the rock dam to his ditch. The S. E. Field and Canal dam is about two miles up the river, and east of the rock dam. Defendants' main ditch is taken out just above the latter dam, and runs in a westerly course down the river, and waters a large quantity of land. Between these two dams are five ditches owned by other persons, not parties to this action, which carried water from the river during the period mentioned in the complaint. It also appears that the defendants maintain an enlarged ditch intersecting the river below the S. E. Field and Canal dam, through which water is taken, and some of the water which formerly ran through their other ditches was transferred into this enlarged ditch, and is used by the defendants. It does not appear that the plaintiff made any motion to amend his complaint as to parties either at the close of his case or that of the defendants. The case was submitted to the court upon the pleadings and the testimony, and the injunction was thereafter denied. The testimony tends to show that the people of Moroni appropriated all the waters of the river flowing down to the S. E. Field and Canal dam in 1860, and that the respondents have succeeded to such appropriation for the use and benefit of the people; that the appellant's predecessors appropriated only the overflow and seepage waters which came into the river bed below the rock dam; that the first appropriation and use of these waters was insignificant, and for a limited number of acres, but that in 1874 and 1877 the more extended use of the present time was first made; that the natural volume of the stream has not become larger, but that the enlarged use of the waters during the early or high-water season has resulted in storing the water for a time in the soil, and, as a consequence, by seepage back into the river bed, resulted in an increased flow during the dry or low-water season, and that this is also true of the river below the rock dam; that this seepage water has not been restrained or diverted by respondents, and that all the waters flowing in the river

above the rock dam are used and appropriated by respondents, and by others, not parties, whose rights are both prior and subsequent in time to appellant's; that below the dam others, not parties, are using the waters. It also appears that rock dam was not controlled by the respondents, but by other people, not parties to the action. In the years 1893, 1894, and 1895, during which period plaintiff claims an interference with his water, several persons, other than the respondents, diverted water from above the rock dam through ditches over which the respondents had no control. Some of these ditches diverted water appropriated by the owners before and some after appellant's appropriation of water by seepage and overflow below the rock dam. These appropriators of water between the S. E. Field and Canal dams claimed under an increased supply through seepage and percolation, and the dams have been kept as tight as circumstances would permit during the ordinary low-water season, thereby discharging water at each dam.

It does not appear that any one of the defendants or other persons not parties here deprived the plaintiff of the water to which he is entitled. It is true that in ordinary cases any one of many joint tortfeasors may be made liable for the whole damage proved. If the above rule is applicable in an equity case like this, any one who has diverted some water might be held liable in damages to one who owned the whole of the water. But the appellant does not own all of the water. What he does own mostly arises from seepage, percolation, and surplus water below the rock dam. The wrongful taking of the water is charged against the defendants, but other parties, not made defendants, also took water. It does not sufficiently appear how much was taken by each. The water claimed may be that which, after being used above, continued to seep or percolate back into the bed of the river, either above or below the rock dam. Such water may belong to those who appropriated water in the stream above the rock dam prior to the appropriation of the appellant. In such a case as this, when several parties are sued in an equity proceeding, and it appears that other persons than the defendants, who have not been made parties to the action, have, during the same period, diverted water from the same stream to such an extent that it cannot be sufficiently shown that, but for the acts of the parties not sued, no injury would have resulted to the plaintiff, an injunction will not be granted in an action brought solely for that purpose. In such cases it must appear that the acts of those sued caused the injury, and that, if such acts are continued, damages will follow. In *Hillman v. Newington*, 57 Cal. 56, it was held: "It is not at all improbable that no one of the defendants deprives the plaintiff of the amount to which he is entitled. If not, upon what ground could he maintain an action against any one of them? If he were

entitled to all the water of the creek, then every person who diverted any of it would be liable to him in an action. But he is only entitled to a certain specific amount of it, and, if it is only by the joint action of the defendants that he is deprived of that amount, it seems to us that the wrong is committed by them jointly, because no one of them alone is guilty of any wrong. Each of them diverts some of the water; and the aggregate reduces the volume below the amount to which the plaintiff is entitled, although the amount diverted by any one would not. It is quite evident, therefore, that without unity or concert of action no wrong could be committed; and we think that in such a case, all who act must be held to act jointly." A court of equity could not be expected to enjoin an appropriator of water furthest up the stream without satisfactory proof that the water so claimed to be diverted would have, had it been allowed to pass down the stream, reached plaintiff's ditch. While one or all who take water might be sued, the parties who are sued should not be enjoined until it appears that their acts caused the injury complained of. Notwithstanding the able argument and brief of counsel for the appellant, we are compelled to hold that, although the testimony was conflicting, there was sufficient to sustain the findings of the court. *Kloppenstine v. Hays*, 57 Pac. 712, 20 Utah, —. We have examined the other questions presented in the record, but find no reversible error in the rulings complained of. The judgment of the district court is affirmed, with costs, but without prejudice on the part of appellant to commence and prosecute another action.

BARTCH, C. J., and BASKIN, J., concur.

(21 Utah 348)

THUM v. PINGREE et al.

(Supreme Court of Utah. April 11, 1900.)

RECEIVER IN STATE COURT—JURISDICTION
OVER PROPERTY—COUNTY WARRANTS
—SITUS—ATTACHMENT.

1. Where a receiver has been appointed by a state court, or property has been transferred by operation of law, such receiver has no extraterritorial jurisdiction over property, except that which is found within the territorial limits of the state wherein he was appointed, and such transfers have no force upon property outside of the state where they are made.

2. Where Idaho county warrants, the property of an Idaho banking concern, are pledged in New York City prior to the appointment of a receiver for the bank in Idaho, they are liable to seizure, in an attachment proceeding, under section 648 of the New York Code of Procedure, in an action brought by a creditor of the Idaho concern, subject only to the lien of the pledge; for, being property in which defendant bank had an interest, and being held in possession of the bank in New York City, the warrants had a situs in New York, were subject to the same rules as other personal property of like character, and were liable to seizure and sale under a writ of attachment.

3. While an attachment proceeding without personal service forms no basis for a personal

judgment in the state of New York, and can affect only property found within the jurisdiction, Idaho county warrants, made payable to bearer, and capable of transfer without indorsement, found within the state of New York, are there subject to attachment. The res being within the state, the court had jurisdiction of it. (Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by C. E. Thum, receiver of C. Bunting & Co., Bankers, against James Pingree and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The record in this case shows: That C. Bunting & Co., Bankers, a Utah corporation, was doing a general banking business at Blackfoot, Idaho, on the 15th day of February, 1897. That about the 1st day of December, 1896, said Bunting & Co. borrowed of the Chase National Bank of New York City \$10,000 upon its promissory note, and pledged as security therefor with said bank \$7,238.09 of county warrants issued by Bingham county, Idaho, and warrants of the par value of \$5,867.48 issued by Fremont county, Idaho. These warrants were payable to bearer at the county seat of the respective counties at maturity. Bunting & Co. being in failing circumstances, the First National Bank of Pocatello, Idaho, brought an action in Idaho against said company, setting up the facts, and asked that a receiver be appointed to take charge of the assets of the company. Thereupon C. E. Thum, the plaintiff here, was appointed general receiver of C. Bunting & Co., Bankers, on or about the 15th day of February, 1897. At the time of the failure, Bunting & Co. was owing to the First National Bank of Ogden, on an overdraft, the sum of \$4,608.11, which indebtedness was on the 24th day of February, 1897, assigned to the American Exchange National Bank of New York City. On February 25, 1897, said last-named bank brought suit in the supreme court of New York against C. Bunting & Co., Bankers, upon said indebtedness on said overdraft, and on the same day caused a writ of attachment to issue in said action under the laws of the state of New York, and said attachment was levied on the warrants so held in possession of the Chase National Bank. On July 2, 1897, judgment was rendered in said court in favor of the American Exchange National Bank for the sum of \$4,860.23, and thereafter execution was issued on said attachment and levied upon said warrants, which were sold on said execution to the American Exchange National Bank of New York. The latter bank then paid the amount still due the Chase National Bank, for which said warrants were held as security, and took into its possession the warrants in question, and thereafter assigned the same to the First National Bank of Ogden, which at the time of the commencement of this action held in its possession all said warrants, except about \$1,800 thereof, which had been called in and paid to

it, as the warrants became due, under a stipulation between the parties. On February 21, 1898, C. E. Thum was appointed receiver of said corporation of C. Bunting & Co., Bankers, in Utah, but no receiver for said company was ever appointed in New York or in the state of Utah until long after said attachment and sale of the warrants referred to. On the 11th day of April, 1898, appellant, as receiver, tendered the First National Bank of Ogden \$4,850 in gold coin in payment of the sum due on said notes and interest, and demanded the warrants so held. The tender was refused. At the time the attachment proceeding was brought in New York City there was substituted service of summons by publication in said city, and by order of the court personal service was had upon the officers of C. Bunting & Co., Bankers, at Blackfoot, Idaho, but no service was had upon either Bingham or Fremont county, which counties issued the warrants payable to bearer. Thereupon appellant brought this action for the purpose of obtaining possession of the warrants.

Brown & Henderson, for appellant. Evans & Horn, for respondents.

After stating the facts, MINER, J., delivered the opinion of the court.

The record shows that a receiver was appointed for C. Bunting & Co., Bankers, in the state of Idaho, but not in the city of New York, and that such appointment in Utah was not made until long after the warrants had been attached in New York City. Under the authorities, it is clear to our minds that where a receiver has been appointed, or property has been transferred by operation of law, such receiver has no extraterritorial jurisdiction over property, except that which is found within the territorial limits of the state wherein he was appointed, and such transfers have no force upon property outside of such state where they are made, and it will be administered for the benefit of creditors and others interested therein by courts of that state where it is found. *Osgood v. Maguire*, 61 N. Y. 524; *Bank v. Lacombe*, 84 N. Y. 367; *Wood v. Parsons*, 27 Mich. 159; *Blake v. Williams*, 6 Pick. 286; *Paine v. Lester*, 44 Conn. 196; *Pierce v. O'Brien*, 129 Mass. 314. The principal question for determination then is, were the county warrants issued by, and showing indebtedness of, Bingham and Fremont counties, Idaho, owned by C. Bunting & Co., Bankers, a corporation, and by it transferred to and actually held by the Chase National Bank of New York City as a pledge to secure the payment of the note of C. Bunting & Co., liable to attachment in the courts of New York by the creditors of C. Bunting & Co., who also resided in New York, without personal service of summons on the counties issuing the warrants, and obligated to pay the same? Section 648 of the New York Code of Procedure reads as

follows: "The attachment may also be levied upon a cause of action arising upon contract; including a bond, promissory note or other instrument for the payment of money only, negotiable or otherwise, whether past due, or yet to become due, executed by a foreign or domestic government, state, county, public officer, association, municipal or other corporation, or by a private person either within or without the state, which belongs to the defendant and is found within the county. The levy of the attachment thereupon is deemed a levy upon and the seizure and attachment of the debt represented thereby." The subject of the attachment was the right of C. Bunting & Co. to compel the Chase National Bank to account to it for the pledged warrants, and to receive that which remained of the proceeds of the warrants after the debt was paid for which the pledge was made. This right is a demand, a chose in action, a debt, and the warrants are evidences of such debt and right to the payment of the money thereon. It is clear that under this statute the warrants in question were included, not only as property, but as a debt, and liable to seizure under attachment proceedings in New York City. They were promises of Bingham and Fremont counties, Idaho, to pay the bearer the sum specified in each warrant at a specified time. The defendant C. Bunting & Co. owned the warrants subject to the lien of the pledgee. Such warrants were in the possession of the garnishee, the Chase National Bank, in New York City, who also had an interest therein so long as the debt for which the warrants were pledged subsisted. While the title may have remained conditionally in C. Bunting & Co., yet the pledgee, the Chase National Bank, had a lien or special property interest therein, with the right of possession thereof against all others until the debt was paid. Under such a pledge the title to the warrants passed, to the extent that the pledgee had a right to collect the amount when due, and apply the proceeds upon his note. To this extent only the warrants were the property of the pledgee. By the attachment and sale all the right, title, and interest of C. Bunting & Co. in the debt evidenced by the warrants, after the note for which they were pledged was paid, were transferred to the American Exchange National Bank. The attachment operated to secure to the bank a lien on the pledged property, subject to the claim of the pledgee, which was thereafter paid by the bank. Being property in which C. Bunting & Co. had an interest, and being in the possession of the bank, in New York City, subject to the lien described, the warrants had a situs in New York, and were subject to the same rules as other personal property of like character, and were liable to seizure and sale under the writ issued in this case.

The contention that summons was not personally served on C. Bunting & Co. and the

counties named, and that therefore the court obtained no jurisdiction, is untenable. The publication of the summons was had in accordance with the statute of New York, and the property in question was attached and sold. The judgment of the supreme court of New York, recovered upon attachment proceedings, in which the county municipalities issuing the warrants were nonresidents, and were not personally served with process, and did not appear, but where the attaching creditor was a resident of New York, is effectual to bind the property of the debtor found within the jurisdiction of the court. It is true that this may form no basis for a personal judgment, and does not affect the property not attached, and not found within the jurisdiction of the court where the proceedings were had, but it is as effectual against the property of the debtor attached as if personal service of summons had been made within the jurisdiction. This is the general rule where states like those of New York authorize attachment for debts and choses in action. The attachment process was invented and enacted in most of the states for the purpose of reaching property found in jurisdictions where the owner could not be served. The warrants are made payable to bearer, and pass from hand to hand, like a bank note, without indorsement, as shown by their circulation over the country, and are, before due, as liable to be found in one state as another. Their situs was no more that of the residence of the counties issuing them, than would be that of any other species of commercial paper or of bonded securities. The maker is no more liable to be annoyed by a double payment in one case than the other. The county municipalities were in no way concerned in their ownership, or where they were held. Under the statutes of New York, neither the municipalities nor C. Bunting & Co. were required to be personally served with process. It was sufficient, under these statutes, that the warrants, or debt represented by them,—the res,—were within the jurisdiction of the court of that state, and that the creditor also resided there. In some jurisdictions having no statute upon the subject, or where no property was found within the jurisdiction of the court, a different rule has been established. In this case it is clear that if property had not been found in New York, upon which to make the attachment, the court would have had no jurisdiction. The provision of the New York statute is sufficiently broad and comprehensive to include the warrants in question and the debt evidenced thereby. The case of *Warner v. Bank*, 115 N. Y. 251, 22 N. E. 172, was where a New York bank, having a claim against a Pennsylvania bank, brought an action in New York, attaching notes and other like securities, held in excess of the debt owed, in possession of the American National Bank, in New York City, and left with it to secure a loan made by the Pennsylvania bank. The

Pennsylvania bank had failed, and it was claimed by the assignee of said bank that the attachment of the notes and securities was ineffectual to pass title to the pledged property. Upon this subject the court said: "The American Exchange Bank, as pledgee, was entitled to the possession of the pledged property so long as the debt subsisted, for the payment of which it was pledged. The title to property may remain in the pledgor, but the pledgee has a lien or special property in the pledge which entitles him to its possession against the world. Under a pledge of such property as commercial paper, the title so far passes as to clothe the pledgee with power to collect it as it falls due, and the money thus collected stands in the place of the paper. *Farwell v. Bank*, 90 N. Y. 483.

* * * In this case, what was the subject of the attachment was the right of the Penn Bank to compel its pledgee to account to it as to the pledged paper, and to receive the surplus of the proceeds of collection, after satisfying the pledgee's claim for advances. That right is a chose in action, and, in the nature of things, is intangible. It is the subject of attachment, as a demand against the person, within the spirit of the language of the Code. While the debt remains undischarged the pledge belongs to the pledgee, and while held by him the pledgor's title is subject to the pledgee's lien and right of possession; but the pledgor's residuary interest in the pledge constitutes a claim or demand upon the pledgee, which is property, and hence may become the subject of attachment. But such property, being intangible, is naturally incapable of manual delivery. * * * We think the attachment in question here operated to secure to the Fourth National Bank a lien upon the pledged property, to the extent of the interest of the Penn Bank, and that interest was the right to the pledged property, or so much of it, or of its proceeds from any collection, as remained after the satisfaction of the pledgee's claim for advances. This right, being a demand or chose in action, was personal property, incapable of delivery; but through the levy of the sheriff the plaintiff acquired such a lien upon whatever might become due to the Penn Bank from its pledgee, the American Exchange Bank, as to entitle it now to the surplus in the pledgee's hands." *Ward v. Boyce*, 152 N. Y. 191, 46 N. E. 180, 36 L. R. A. 549; *Storm v. Cotzhausen*, 38 Wis. 139; *Wap. Deb. & C.* §§ 15, 25, 50, 54, 56, 83, 97, 244; *Ward v. Boyce*, 80 Hun. 494, 30 N. Y. Supp. 491; *Osgood v. Maguire*, 61 N. Y. 524; *Wood v. Parsons*, 27 Mich. 159; *Bank v. Lacombe*, 84 N. Y. 367; *Mower v. Stickney*, 5 Minn. 397 (Gil. 321); 1 Greenl. Ev. § 541; *Bailey, Jur.* §§ 212, 220; *Story, Conf. Laws* (8th Ed.) § 592.

Under the stipulation of the attorneys, the money collected on the warrants should be considered and held the same as the warrants.

We do not deem it necessary to discuss the findings of the court below. The judgment is correct. We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

BARTCH, C. J., and BASKIN, J., concur.

(21 Utah 395)

REED v. UNION CENT. LIFE INS. CO. OF CINCINNATI.

(Supreme Court of Utah. April 9, 1900.)

INSURANCE POLICY—AGENT'S COMMISSION—PURCHASE OF POLICY BY COMPANY—ISSUANCE OF POLICY—PREMIUM PAID—COMPANY'S LIABILITY FOR COMMISSION—ESTOPPEL—ACT OF PARTY—PRINCIPAL AND AGENT—JOINT INTEREST—ACT OF PRINCIPAL—WAIVER—WHAT CONSTITUTES—ACTION ON CONTRACT—DEFENSE IN MITIGATION—HOW PLEADED.

1. An insurance company, under contract to pay plaintiff, as its agent, certain commissions on premiums paid and received by it, on insurance written by him, after the issuance of a policy, and accepting a portion of the first annual premium, and having in its possession non-due paper for the balance of such premium, may not, for a consideration and by the surrender of such notes, purchase the surrender of such policy so as to defeat plaintiff's right to commission, without proof of fraud in procuring the issuance of the policy or an express waiver by plaintiff.

2. Defendant, having accepted the application for insurance obtained by plaintiff, and having issued a policy thereon, and taken notes for the premium, was bound to collect such notes when due, and pay plaintiff therefrom the amount of his commission; and this obligation could not be avoided by a claim that the risk was undesirable, or that the assured had been previously refused by another company.

3. The defendant company having placed beyond its power the right to collect certain premium notes in which plaintiff had an interest, as for his commission, is now estopped from denying liability for commission earned upon the ground that the maker of the notes was insolvent and the notes uncollectible.

4. A principal who agrees that his agent shall receive a percentage of money or commissions to be paid upon a contract secured through such agent, for the benefit of both, cannot dispose of his own right to receive the fund, and thus deprive the agent of the reward for his services.

5. A waiver is an intentional relinquishment of a known right, and there must be both knowledge of the right and an intention to relinquish it.

6. In an action on a contract, a defense in mitigation of damages cannot be shown under a simple denial; it must be specially pleaded.

Bartch, C. J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county: A. N. Cherry, Judge.

Action by W. J. Reed against the Union Central Life Insurance Company of Cincinnati. Judgment for plaintiff, defendant appeals. Affirmed.

On December 31, 1896, plaintiff became agent of the defendant corporation under a written contract, which provides, among other things: "That the said party of the first part (a corporation) does hereby appoint the said party of the second part agent of the said party of the first part, for the

purpose of canvassing for applications for insurance on the lives of persons who shall be satisfactory to the said company, and for the purpose of collecting and paying over premiums on such insurance, when effected; * * * and that he will be governed in the business of his agency by the rules and instructions of said company, and such instructions as he may receive from said company from time to time. * * * That the compensation for said services is to be a commission upon the premiums which shall be paid in cash to, and received by, the said company on all policies of insurance effected with the said company by or through the procurement of the said agent, which commission shall be as follows: * * *." The contract provided for a commission to the agent on policies like that of Mr. Beck of 50 per cent. on the first year's premium, and 5 per cent. on the premiums for subsequent years during the continuance of the contract, which was for five years. It also provides that the plaintiff should not make, alter, or discharge any contract, or waive forfeitures, and also provides for the collection of notes. Under this contract, plaintiff, on August 2, 1897, procured and submitted to the defendant corporation an application from John Beck for insurance upon his life in the sum of \$100,000. After receiving the application, and before its acceptance, the defendant company had knowledge that Beck had been declined as a risk by another life insurance company, and required several examinations by its local physicians of his urine for traces of kidney disease, and also investigated his financial condition. Defendant company thereafter accepted the risk, and issued and delivered to Beck its policy for \$100,000 on his life, and also gave Beck its receipt for \$5,702, that being the entire amount of the premium for the year. The first year's premium was paid by three promissory notes given by John Beck, as follows: \$2,000 due September 19, 1897; \$2,000 due November 19, 1897; \$1,702 due January 19, 1898. The \$2,000 note, due September 19, 1897, was paid at maturity, and plaintiff received \$1,000 commission thereof, and forwarded the balance to the company. About November 4, 1897, one Charles St. Morris, an agent of a rival insurance company, wrote and telegraphed the defendant company concerning Beck's poor financial condition, and endeavored to secure a cancellation of the policy on his life, on the ground of fraud in the application; and the defendant, after several communications had passed between them, thereafter requested him to consult the plaintiff in regard to the cancellation of the policy. He did so, and plaintiff, apparently annoyed at outside interference, declined to act without direct instructions of the company. Plaintiff wrote to defendant on November 8, 1897, that he was of the opinion that they had made a mistake in listening to the asser-

tions of rival agents, and unless they had information outside of St. Morris, or if there were facts that he knew nothing about, or if there was any good reason for canceling the policy, he would make every effort in that direction; that St. Morris had made threats to cancel all of Beck's insurance unless he was paid a premium on the Sun Life Insurance policy; and that St. Morris was using improper means to gain an advantage over him for the benefit of himself or his company. He also complained that St. Morris was appointed over his head to cancel the policy, and that it appeared to him that the defendant company was working against his interests. Plaintiff also requested that a special agent be sent to investigate the Beck insurance. Upon such request the defendant company sent its agent Mr. Waters to investigate the matter, and see whether the risk was desirable, with authority in said agent to negotiate for the surrender of the policy, if upon investigation he thought best to do so. Upon his arrival plaintiff advised Waters that he did not believe the risk was undesirable, but if, upon full investigation, he found any fraud connected with the policy, which he knew nothing of, he would be willing to cancel the policy, and would assist in its cancellation. Thereafter, on November 11th, Waters, accompanied by the plaintiff, called upon Mr. Beck, and Waters stated to him, in plaintiff's presence, that he was advised that Beck was suffering from Bright's disease, and that inasmuch as his risk had been declined by another insurance company on account of kidney trouble, and the fact was suppressed in the application, his company desired another examination. The reply was, in substance, that if examinations had to be made every month he would drop the whole thing; that he did not want the insurance in the first place. On November 12th, Waters and plaintiff called upon Beck, and Waters then and there negotiated with Beck to pay Beck \$500, and surrender to him the unpaid premium notes, in consideration that Beck should surrender to the company the policy for the \$100,000 insurance on his life. This was agreed to by the company's agent and Beck, and Beck receipted the policy in full, and it was canceled in consideration of such payment and surrender of the notes. The plaintiff took no active part in these negotiations, but offered no objection to the surrender of the policy and notes. He testified that he did not know that he had any right to his commission on the unpaid notes until he consulted an attorney prior to the bringing of this action, and that the question of commission in such cases had never arisen before, and that he never waived his right to such commission, and that nothing was said to him about it; that he felt that he was entitled to the commission, but said nothing about it, because Waters told him as he went away that it was hard on him, and that he

would take the matter up with the company, and see what he could get them to do. After this the company wrote that they would not charge the plaintiff the \$100 previously advanced to him, and would give him \$100 extra, and 10 per cent. additional commission on all business. Thereafter he charged 60 per cent. commission instead of 50 per cent., and so reported to the company. Mr. Waters testified, among other things, that he obtained the surrender of the Beck policy because he was convinced, upon investigation, that the risk was undesirable; that Beck was in financial difficulties, which involved a moral hazard, which the company did not care to assume. The defendant company wrote to plaintiff telling him that they did not attach any blame to him or the medical examiners in the Beck matter, and that they had done their full duty; that they understood agents of other companies considered Beck a good risk, and that competent physicians had passed upon him as such. On September 13, 1898, plaintiff resigned as agent of the defendant company, demanded his commissions on the Beck notes, and brought this action to recover the balance claimed of \$1,651. The jury, under instructions of the court, found in favor of the plaintiff, and the defendant appeals, assigning error in the admission of testimony, and in the charge to the jury and rulings of the court.

Bennett, Harkness, Howat, Sutherland & Van Cott, for appellant. Dey & Street, for respondent.

After stating the facts, MINER, J., delivered the opinion of the court.

The first question for consideration is whether or not, after the plaintiff had obtained the application for insurance from Mr. Beck, and the defendant had accepted said application, and issued the policy to Beck, receiving his notes in payment of the first year's premium, and receiving payment of one note, the defendant, before the maturity of any of the remaining notes, could, by contract with Beck, purchase the surrender of the policy for a consideration of \$500 cash, and the surrender of the two unmatured notes, without proof of fraud, or without an express waiver by the plaintiff, and thus deprive plaintiff of the commissions on the remainder of the premiums, under the contract providing that commissions should be paid upon the premiums which should be paid in cash and received by the defendant. The facts show that plaintiff had performed his part of the contract, and obtained an application for insurance that was satisfactory to the defendant; that, after full examination, defendant accepted Beck's application, and delivered a policy to him, and gave its receipt in full payment of the first year's premium. Having accepted the Beck notes, a legal obligation, as between the defendant and the plaintiff, rested upon the defendant to collect the notes when they became

due, and out of the proceeds thereof pay the agreed commission. This obligation cannot be avoided, under the contract, by the claim that the company afterwards learned that the risk was undesirable, or that it understood that Beck had been refused insurance in another company. It might forfeit the policy for fraud in procuring it, for misstatements in the application, or for nonpayment of the notes, but this course was not attempted. On the contrary, the company recognized the binding force and legality of the policy by paying \$500 in cash, and surrendering the notes not yet due, in order to purchase Beck's rights therein, and relieve itself from liability. The company could not thus relieve itself from such liability to the plaintiff for the commission earned by voluntarily placing beyond its power the right to collect the cash on the unmatured notes, because it had purchased the policy, and in part consideration thereof had surrendered the notes out of which the commissions should have been paid. The notes were not due. Having sold them to Beck, it is estopped from denying liability on the contract simply because it refused to collect the cash on the notes, as it should have done, or should have attempted to do, unless excused from that duty by the plaintiff. By receiving back the policy, the defendant may have received a full equivalent for the notes. The contract does not provide that the defendant, after having accepted the risk, shall have the right to buy a surrender of the policy, and thereby relieve itself from its duty to collect the notes in payment of the premiums. A principal who agrees that his agent shall receive a percentage of money or commissions to be paid upon a contract secured through such agent for the benefit of both cannot dispose of his own right to receive the fund, and thus deprive the agent of the reward for his services. Otherwise, the principal might receive a full equivalent for the original fruits of the agent's labor, and yet not pay him a dollar. The principal cannot do this without the agent's express consent, and in this case the evidence does not show that consent was given. The plaintiff was simply present when the agreement to purchase the surrender of the policy and notes was made for the consideration specified. The agent had no power to oppose the purchase or surrender, nor was his assent thereto required. Under the contract, he was required to perform such other services as the company desired him to perform. So far as appears, he may have gone with Waters as required by the contract. He was willing the company should do as it pleased, although he had previously discouraged it from taking up the policy, and there was nothing in his subsequent acts to justify a release of his rights, of the nature of which, under the contract and the terms of the policy, he was ignorant. *Hix v. Light Co.* (Sup.) 41 N. Y. Supp. 680; *Bish. Cont.* § 690; *Wolf v. Marsh*, 54 Cal. 228.

It is also insisted that the plaintiff waived his right to the commission, and therefore is not entitled to recover; that he is estopped by his conduct to insist upon his legal rights; and that the court erred in giving its instructions on these subjects to the jury. By the contract it is provided that the plaintiff shall not make, alter, or discharge any contract, or waive forfeitures. Under the contract, Beck and the company could deal with the policy as they pleased, without the consent of the plaintiff. The plaintiff, under the contract, had no right to interfere in such dealings, and had no power to prevent the company from giving or bargaining away the results of his labor, but in doing so the company acted at its peril. Had the plaintiff objected to the purchase of the policy, it would not have availed him. Plaintiff states that he stated to defendant's agent Waters that he objected to the policy unless fraud was shown. In this he is disputed by the company's agent. The jury found the facts against the company.

On the question of waiver, the court instructed the jury that if the plaintiff waived his right under the contract he could not recover, and that such waiver was an affirmative defense, and the burden of showing it was on the defendant. The court further instructed the jury as follows: "You are further instructed that waiver is the intentional relinquishment of a known right. In general, no man can be bound by a waiver of his rights, unless it is made with full knowledge of the rights which he intended to waive. So, in this case, if you believe, from the evidence, that the plaintiff was ignorant of the fact that under his contract he was entitled to commissions on the balance of the first year's premiums, provided the defendant purchased the surrender of the Beck policy, then he cannot be found to have waived or relinquished his right to the commission. The fact that the plaintiff deemed the commission lost to him because of the act of the company in purchasing the surrender of the Beck policy does not constitute a waiver or relinquishment of his right to the commission, unless you find that at the time or times he so expressed himself to the defendant or its agents he knew he had a right to insist upon payment of the commission, even though the company, for reasons of its own, bought the surrender of the Beck policy, and with such knowledge plaintiff then intentionally relinquished the right to the commission. You are instructed that the defendant had no right to wantonly or arbitrarily purchase the surrender of said policy, and to surrender to said Beck his notes; but if the defendant company, after the issuance of the said policy to said Beck, believed it to be to its best interests to purchase from Beck the surrender of said policy, by surrendering to said Beck said notes, then the defendant had the right to purchase the surrender of the said policy

by the payment of \$500, and returning to said Beck his notes; and if you believe, from a preponderance of the evidence, the plaintiff was fully informed and cognizant of all the facts and circumstances attending the transaction between defendant and Beck, and that he, by his acts, declarations, or conduct, intentionally waived to the defendant his rights to receive commissions on the amount of said notes surrendered, and also that the plaintiff had full knowledge of his rights in this respect, then the plaintiff cannot recover, and your verdict should be for the defendant." The question of the plaintiff's knowledge or ignorance in the matter is involved. If the plaintiff was ignorant of the fact that he was entitled to his commission at the time and after the defendant purchased the surrender of the policy, and did not intentionally waive his right therein after full knowledge, he was entitled to recover. This is so because a waiver is an intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it. The waiver, if any, was a question of intent on the part of the plaintiff. Knowledge of the rights he had, and an intention to waive such right, should be made plainly to appear before a court or jury would, in such a case as this, be justified in declaring it.

It is said that the plaintiff was bound to know the law, and that he must have known the facts. So far as the written contract alone was concerned, if not ambiguous or contradictory, this may be true. But when we consider the long course of dealing between the company and Beck, the company and St. Morris, and the company and Waters, concerning which plaintiff was largely uninformed; the company's dealings with plaintiff in reference to the Beck policy; and the ambiguous character of the contract,—it cannot be said that the plaintiff had full knowledge of all the facts, or of his rights, that would follow such a complicated state of facts. Indeed, the distinguished counsel representing the respective parties to the action, after a careful and critical review of the law and the evidence, do not agree as to what the facts are, what rights the contract bestows, or what the rights of the plaintiff are under the contract and evidence as it is presented to the court. In *Bennecke v. Insurance Co.*, 105 U. S. 355, 26 L. Ed. 290, it is said: "A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. A fortiori is this the rule when there is no agreement, either verbal or in writing, to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party." *Garesche v. Investment Co.* (Mo. Sup.) 48 S. W. 657; *Montague's Adm'r v. Massey*, 76 Va. 314;

Shaw v. Spencer, 100 Mass. 382; **Hoxie v. Insurance Co.**, 32 Conn. 40.

The further facts are that it does not appear from the answer or from the testimony that the defendant was misled by the conduct of the plaintiff, or that it would have acted differently had the plaintiff asserted his legal right to the commission at the time of the purchase of the policy. It appears that St. Morris and the company were negotiating with reference to the cancellation of the policy for fraud in the application. Waters, under instructions of the company, canceled the policy because it was undesirable. Plaintiff did not know what his rights were, but did not want the policy canceled unless for fraud. The defendant afterwards informed the plaintiff that no blame whatever was attributable to him, or to the examining physicians, in procuring the application, and that other companies considered the risk a good one. All the facts connected with the assumed waiver or estoppel, plaintiff's right to the commission under the contract, and the purchase of the policy by defendant, were sufficiently and properly submitted to the jury by the instructions quoted and others given by the court.

Under the circumstances of this case, we find no reversible error arising from the instructions of the court to the jury, nor do we find that the court erred in refusing to give the instructions requested by the defendant.

In its defense the defendant offered, in mitigation of damages, to show that Beck was insolvent at the time the notes were surrendered. The testimony was objected to on the ground that it was immaterial, irrelevant, and incompetent, and on the ground that it was estopped, by the voluntary sale of the notes before they became due, of interposing that defense. This testimony was rejected. We are of the opinion that there was no error committed in the ruling of the court. The defendant could have canceled the policy for fraud, if shown.

The policy would lapse and become invalid by its terms if the notes were not paid at maturity. But the defendant did not see fit to take this course. After it had accepted the notes in payment of a year's premium, and after one of the notes had been paid, and before the balance of the notes became due, it voluntarily made a bargain with Beck to buy from him the policy in consideration of \$500 and the surrender of the remaining notes, without obtaining the plaintiff's assent thereto. By selling the notes and buying the policy the defendant allowed Beck credit for the value of the notes.

The defendant voluntarily placed itself in a position whereby it had no power to collect the notes, as it was in duty bound to do or endeavor to do, and therefore it cannot now be heard to say that the maker was insolvent when the notes were surren-

dered. **Hix v. Light Co.** (Sup.) 41 N. Y. Supp. 680; **Wolf v. Marsh**, 54 Cal. 228.

In addition to this, the defense of Beck's insolvency, sought to be interposed on the trial, was new matter offered in mitigation of damages, and was not pleaded, or in any manner suggested, in the answer. The action was on a contract to recover plaintiff's commissions from defendant, not from the maker of the notes, and, if such a defense was admissible at all in such a case as this, it should have been set up in the answer. Section 2908, Rev. St., requires a statement of any new matter constituting a defense or counterclaim to be set up in the answer. **McKyring v. Bull**, 16 N. Y. 297; **Morrell v. Insurance Co.**, 33 N. Y. 443; **Pom. Code Rem.** §§ 693-695; **Foland v. Johnson**, 16 Abb. Prac. 235; **Gillson v. Price**, 18 Nev. 118, 1 Pac. 459; **Babb v. Mackey**, 10 Wis. 371; 5 Enc. Pl. & Prac. 774; 1 **Suth. Dam.** §§ 165, 166; **Fenstermaker v. Publishing Co.**, 12 Utah, 439, 43 Pac. 112, 35 L. R. A. 611; 1 **Enc. Pl. & Prac.** 830; **Piercy v. Sabin**, 10 Cal. 22, 70 Am. Dec. 692; **Willover v. Hill**, 72 N. Y. 36. Upon the whole record we find that the instructions given fully and fairly covered the issues in the case. The nonsuit was properly denied, and no reversible error appears in the record. The judgment of the district court is affirmed, with costs.

BASKIN, J., concurs. **BARTCH, C. J.**, dissents.

(21 Utah 313)

=====

TRIPLER v. MT. PLEASANT COMMERCIAL & SAVINGS BANK.

(Supreme Court of Utah. April 9, 1900.)

BANKS—ACTION TO RECOVER DEPOSIT—REAL PARTY IN INTEREST—EVIDENCE.

In an action to recover a certain sum, alleged to have been deposited in defendant's bank for the use and benefit of plaintiff, it appeared that plaintiff, from Colorado, sent a check on a bank in that state to defendant "for deposit to the credit" of one T.; that the check was entered by defendant for collection, and T. was so notified; that the check was never paid; that a draft on New York, by the bank on which the check was drawn, to cover the amount, was protested; that plaintiff and T. were notified of the protest; that plaintiff afterwards sent defendant four other checks, covering an amount equal to the first check, and requested a return of the protested draft for use in proving his claim against the insolvent Colorado bank; that plaintiff was not using his own money, but the money of C., and was acting as the agent of C., although he had an interest in the profits of the business conducted, as well as a salary from C. *Held*, that the proof does not show a cause of action in favor of plaintiff against defendant; and *held*, further, that plaintiff was not the real party in interest.

(Syllabus by the Court.)

Appeal from district court, Seventh district; **W. M. McCarty, Judge.**

Action by **J. W. Tripler**, agent, against the **Mt. Pleasant Commercial & Savings Bank**. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action in which the plaintiff seeks to recover from the defendant the sum of \$2,000, with interest, alleged to have been deposited by the plaintiff on September 18, 1897, for his own use and benefit, in the defendant's bank, in the name of Hans Tuft, to be checked out by the said Tuft in the purchase of cattle for the plaintiff, and that said sum was received by said defendant and placed to the credit of said Tuft in said bank; that thereafter said defendant refused to allow either the said plaintiff or the said Tuft to check out said money, or to pay over to the plaintiff or to the said Tuft said money, or any part thereof, although frequently requested so to do; and that said defendant still holds and retains said sum, and every part thereof. The answer admits the said agency of said Tuft, that the defendant is a corporation, and that the Bank of Montrose was a banking institution doing a banking business at Montrose, in the state of Colorado, but denies all the other allegations of the complaint, and sets up as a defense certain facts which it is not necessary to mention. The evidence adduced by the plaintiff, in substance, is as follows: The plaintiff testified that on the 31st day of August, 1897, he, as agent, entered into an agreement with Hans Tuft whereby the said Tuft was to purchase cattle at a certain price per head for plaintiff, at a commission of \$1 per head (the plaintiff to furnish the money for the purchase of the cattle); that in pursuance of said agreement the plaintiff drew and sent to the defendant bank a check, of which the following is a copy: "Montrose, Colo. Sept. 15, 1897. Bank of Montrose: Pay to the order of myself \$2,000 (two thousand dollars), with exchange. [Signed] J. W. Tripler, Ag't." Upon the back of this check the following indorsements were made: "For deposit in the Mount Pleasant Commercial and Savings Bank, Mount Pleasant, Utah, to the credit of Hans Tuft, Monroe, Utah. J. W. Tripler, Ag't." And: "Pay to the order of C. M. McClure, cashier, for collection, for account of Mt. Pleasant Com'l & Savings Bank, Mt. Pleasant, Utah. O. F. Wall, Cashier." On cross-examination the plaintiff testified that he signed the check as agent. To the question, "Is that your own money, or somebody else's?" he answered, "Somebody else's." He further testified: "I have an interest in it. That one Chapman is interested with me. My agreement with him is, he is to furnish money, and I act as his agent, and I get a salary and a share of the profits. If there is a loss, it detracts from the profits, so I am interested in it. I get forty per cent. of the profits." "I am conducting cattle business as agent. I receive money from Mr. Chapman to invest in cattle, and I get a salary and per cent. of the profits. I buy and sell whenever I deem advisable. Have full charge of the business. Mr. Chapman supplies me with money for it. I keep books, and account to him for the money I receive. Have

to show up in either cattle or expenditures." O. F. Wall, a witness in behalf of plaintiff, called and sworn, testified: "I am cashier of defendant's bank, and was such cashier in September, 1897. I remember about this \$2,000 transaction with Mr. Tripler. That money was not checked out of the bank by Hans Tuft. I never paid Mr. Tuft that \$2,000, nor gave Mr. Tripler, or any one else for him, the money. I never paid Mr. Tripler back the money. I never received any money on that check. I sent check to Bank of Montrose immediately upon receipt of it. We received a draft for the check. Sent the draft to the Utah Commercial." It appears from the evidence that the draft of the Bank of Montrose was drawn on the Hanover Bank of New York, and was protested. O. F. Wall further testified as follows: "Mr. Tripler's instructions were, when they sent the check, to place the amount to the credit of Hans Tuft. We did not do that. We entered it for collection. This was not entered upon the books to the credit of Mr. Tuft, except for collection, and, if paid, it would be placed to his credit, but it wasn't placed to his credit. On receiving the check we entered it for collection. Mr. Tripler was not a patron of our bank. We had no acquaintance with him. We notified Mr. Tuft we had received it and entered it for collection. We sent the draft for credit. We received word the draft had been protested before we received the latter dated September 30th. We sent Mr. Tuft a telegram that the draft had been protested for nonpayment, and we charged the amount of it up to him immediately upon the receipt of the telegram. A check for \$1,000 or more would not be received by our correspondent in Utah as a cash item. For that reason we entered it for collection. We received letter from Mr. Tripler, dated October 15th, demanding draft, and sent draft to him (this New York draft), and the bank has not had it since. When we received the draft we entered that for the credit of Mr. Tuft. Mr. Tuft was permitted to check that out,—that \$2,000. When we received word that the draft had been protested, we charged \$2,000 up to Mr. Tuft on his account that we had given him credit for. That charge was made when we got word that the draft was protested in New York, after we heard that the draft was protested,—the next day after, I should think." On the same day (September 30, 1897) on which the said Hans Tuft was notified that said draft had gone to protest, said Tuft sent a telegram to the plaintiff notifying him of the fact, and the plaintiff immediately sent to the defendant the following letter: "I just received a message from Mr. Hans Tuft that the draft sent you by the Bank of Montrose had been protested. I inclose four checks, amounting to \$2,000, which will make it good. Please acknowledge receipt, and notify Mr. Tuft. Respectfully, J. W. Tripler." And on the 15th day of October, 1897, he also sent to the defend-

ant the following letter: "Your favor, dated the 11th inst., acknowledging the receipt of the four checks for \$500 each, which I sent you on the 30th ult., to be deposited to the credit of Hans Tuft in lieu of the N. Y. draft sent you by the bank of Montrose, which was protested, at hand. As you have, no doubt, collected these checks by now, I write to ask you to send me the protested draft, in order that I may use it in proving my claim against the Bank of Montrose. Respectfully, J. W. Tripler, Ag't." In obedience to this request, the draft was sent to the plaintiff. At the time and before this request was made it appears from the plaintiff's testimony that he was aware of the circumstances relating to the draft, and that his object in sending the four checks was to make good to the defendant the amount of the draft. These four checks were in the following form: "Philadelphia, Sept. 18, 1897. The Corn Exchange National Bank: Pay to the order of J. W. Tripler, Ag't, five hundred dollars (\$500). Richard H. Chapman." On the back of each of these checks is the following: "For deposit in the Mount Pleasant Commercial & Savings Bank of Mount Pleasant, Utah, to the credit of Hans Tuft, of Monroe, Utah. J. W. Tripler, Ag't." When these checks were paid, the amount of the same was credited, as above directed, to Hans Tuft. After receiving the draft, as testified to by plaintiff, he caused a suit to be instituted against the Montrose Bank and its stockholders to recover the amount of said draft. What the result of that suit was, or whether it has as yet been terminated, does not appear. Shortly after said draft was drawn, the Bank of Montrose suspended business on account of insolvency. At the close of plaintiff's testimony, on motion of the defendant the trial court granted a nonsuit, on the ground that the evidence adduced failed to show any cause of action against the defendant, in favor of the plaintiff.

S. S. Sherman, Reid & Cherry, and L. R. Rhodes, for appellant. D. D. Houtz and Ferdinand Ericksen, for respondent.

BASKIN, J. (after stating the facts). The check on the Bank of Montrose was not discounted by the defendant. At the time the check was forwarded to the defendant, it was not acquainted with the plaintiff, and had had no transactions with him. We think it is clear from the plaintiff's own statements that he did not expect that the amount of the check, upon its reception, and before its collection, should be credited to Hans Tuft. This is evident from his letter of September 30th, in which he inclosed the four checks, of \$500 each, and from his letter of October 15th, in which he stated, "As you have, no doubt, collected these checks [the four checks before referred to] by now, I write to ask you to send me the protested draft, in order that I may use it in

proving my claim against the Bank of Montrose." The four checks were drawn in his favor, as agent, by Richard H. Chapman, and his indorsement was the same on these checks as on the check of \$2,000 on the Bank of Montrose, to wit: "For deposit in the Mount Pleasant Commercial & Savings Bank of Mount Pleasant, Utah, to the credit of Hans Tuft, Monroe, Utah. In other words, it is clear that the check for \$2,000, like the four checks, was sent to the defendant for the purpose of having the same collected through the defendant bank, and thereby to create a fund in said bank to the credit of Hans Tuft, to be drawn out by him in the execution of his agency. Upon the reception of said check the relation of creditor and debtor between the plaintiff and defendant did not arise, and has never since existed. If the amount of said check had been collected by the defendant, Hans Tuft would have become the creditor of the bank; and, as his agency was coupled with an interest in the fund, no one except himself would have had any authority to check against the same. It also appears from the evidence that the plaintiff had no direct interest in the fund, but that he acted in the matter as the agent of Chapman. He drew the check for \$2,000, as agent, not against any funds of his own in the Bank of Montrose, but against the funds of Chapman. The only interest which the plaintiff had in the premises was his salary, and a right to a share in the profits of the business which he was conducting as the agent of Chapman. In no view of the case could the loss occasioned by the failure to pay the draft of the Bank of Montrose fall upon the plaintiff. The draft was not made good by plaintiff, but by the four checks of Chapman. No part of the funds involved in the premises belonged to him. In his evidence he stated: "I am conducting cattle business as agent. I receive money from Mr. Chapman to invest in cattle, and I get a salary and a per cent. of the profits. I buy and sell whenever I deem advisable. Have full charge of the business. Mr. Chapman supplies me with money for it. I keep books, and account to him for the money I receive. Have to show up in either cattle or expenditures." That the defendant also understood that the check was merely sent to it for the purpose before stated is shown by the testimony of O. F. Wall, cashier of defendant's bank. He testified that: "On receiving the check, we entered it for collection. Mr. Tripler was not a patron of our bank. We had no acquaintance with him. We notified Mr. Tuft that we had received it and entered it for collection." No objection was made to this by Tuft or the plaintiff, for such, we think, was the intention of all the parties.

Appellant's counsel complain of the method pursued by defendant in the premises. As the defendant assumed the duty of collecting said check, if it failed in the proper

performance of that duty it would be responsible to the party injured by reason of such failure, but not in the form of action resorted to in this case. This is an action to recover a deposit of \$2,000, with interest, alleged to have been deposited in defendant's bank for the use and benefit of plaintiff. The evidence shows that no such deposit was ever made, and that the plaintiff is not the real party interested in the alleged deposit. A recovery by plaintiff would not bar an action by Chapman, the real party in interest. It is evident that the plaintiff, at the time the draft was made good, and the letters of September 30th and October 15th were written, did not consider the defendant in any way liable, but the idea of holding it was an afterthought. It is ordered that the judgment of the court below be affirmed, with costs.

BARTCH, C. J., and MINER, J., concur.

(21 Utah 429)

WARREN et al. v. ROBISON et al.

(Supreme Court of Utah. April 27, 1900.)

APPEAL—REMITTITUR—MANDATE—REMITTITUR NOT IN BILL OF EXCEPTIONS—JUDICIAL NOTICE OF RECORDS OF APPELLATE COURT—NONSUIT IN EQUITY—REVERSAL—TRIAL DE NOVO—JUDGMENT ON MANDATE—SECOND APPEAL—CONSTRUCTIVE FRAUD—DISCHARGE IN BANKRUPTCY—SURVIVAL OF ACTION.

1. From the fact that a trial court set aside its former judgment, and proceeded to again try a cause, in which a new trial has been ordered by the supreme court, it is manifest that the trial court considered the remittitur of the supreme court.

2. In order that an appellate court may determine whether or not a lower court proceeded in accordance with the mandate of the appellate court on a former appeal, it is not necessary that the remittitur should be contained in the bill of exceptions; the appellate court will take notice of its own records and files.

3. Where a judgment of nonsuit, entered by a court of equity, is ordered set aside by the appellate court, and the cause is remanded, with directions to the court below to proceed in accordance with the opinion, and neither the opinion nor the mandate requires a trial de novo to be granted, the effect is to place the case in the same position in the court below as it was in at the time when the progress of the trial was interrupted by the motion for the nonsuit, and the court may resume the trial, and proceed therewith in the same manner as it would have done if no judgment of nonsuit had been entered.

4. Where an appeal is taken from a judgment of an inferior court entered under a mandate of the appellate court, the latter tribunal will construe its own mandate in connection with its opinion, to determine whether the inferior court proceeded in accordance therewith.

5. Where an action is against a defendant for misappropriation or misuse of a trust fund and breach of duty, occasioned through neglect while he was acting in a fiduciary capacity, the allegations, if established, show at least constructive fraud, and the case falls within the exception contained in section 17 of the bankruptcy act (30 Stat. 550), and a discharge in bankruptcy will not release the defendant in such an action. Such an action

also survives, under section 3916, Rev. St. 1898, against the executors of a party defendant at a former trial, who has since died.

(Syllabus by the Court.)

Appeal from district court, Weber county; W. M. McCarty, Judge.

Action by Eliza Warren and others against Theodore Robison and others. Judgment for defendants, and plaintiffs appeal. Reversed.

M. D. Lessenger, A. J. Weber, and A. E. Farr, for appellants. L. R. Rogers, T. D. Johnson, R. H. Whipple, and Richards & Allison, for respondents.

BARTCH, C. J. This action was originally brought by the plaintiffs, as stockholders of defendant Citizens' Bank, in behalf of themselves and all other stockholders, creditors, and others similarly situated against the defendants for an accounting, and for damages alleged to have been occasioned by reason of negligence in the management of the bank by its directors and officers. At the trial, after the plaintiffs rested, the court, on motion of defendants, granted a nonsuit. Thereupon the plaintiffs appealed. This court, on appeal, affirmed the judgment of nonsuit as to all of the defendants except Brough, Spencer, Murphy, Kuhn, Wells, Schramm, and Corey, and as to them held that a prima facie case had been made out, and ordered the lower court to proceed in accordance with the opinion of the appellate court. After the remittitur was sent down, defendant Corey filed an amended answer, alleging, in substance, that the cause of action stated against him in the complaint was merged in a judgment rendered November, 1894, and that he had been discharged from the debts set forth in plaintiffs' complaint in bankruptcy proceedings. To this plea the plaintiffs filed a demurrer, which was overruled. They then filed a reply to the answer, and also filed a supplemental complaint alleging the death of defendant S. S. Schramm, who had died since the former trial, and the presentation of their claim to his executors, and the rejection thereof by them. Thereafter the case was again called for trial, but before proceeding the court, on motion of counsel for defendants, dismissed the action as to the executors of the estate of S. S. Schramm, upon the ground that the cause of action stated in the complaint did not survive against such executors. The trial was then proceeded with against the other defendants, who had been held prima facie liable by the appellate court, and counsel for the plaintiffs submitted the records of the former trial, as follows: "May it please the court, all of the records in this case are before the court. We submit them as the records of this court, being all of the evidence extended by the stenographer from his notes in the original hearing, upon which the supreme court has decided that the plaintiffs have made a prima facie case." With this the plaintiffs rested their case, and thereupon counsel for the defend-

ants moved for a judgment of nonsuit, on the ground that the plaintiffs had offered no evidence to sustain the allegations of the complaint. The court held that the cause must be tried *de novo*, and upon counsel for plaintiffs declining to place their witnesses upon the stand, and again offer their testimony by examination as upon the original trial, sustained the motion for a nonsuit, and dismissed the action. The plaintiffs then prosecuted this appeal.

The main question presented is whether the court erred in construing the opinion and remittitur of the supreme court as requiring a new trial, and consequently as requiring the plaintiffs to again introduce all their evidence in the same manner as at the first trial of the cause. The appellants insist that the mandate of this court did not require a reproduction of all their evidence verbally, as on the former trial; that the evidence formerly introduced had been held to have made out a *prima facie* case as to the defendants now being proceeded against; and that all the original evidence introduced upon the former trial, and upon which the supreme court had passed, being in the records submitted by them to the court, the same judge sitting to again hear the case, and they having rested their case upon that evidence, the court, under a proper construction of the remittitur, should have required the defendants to proceed with their defense the same as though no nonsuit had been granted. The respondents maintain that the court properly insisted upon a trial *de novo*, and that the question concerning the proper construction of the remittitur from this court cannot be considered on this appeal, for the reason, as they claim, that the remittitur was not presented to the court below, and is not incorporated into the bill of exceptions settled in this case. As to whether or not the remittitur was formally presented to the court below, we have no means of ascertaining, nor do we regard such presentation, or lack of it, material to this decision. From the fact that the court set aside its former judgment, and proceeded to again try the cause, it is manifest that it considered the remittitur, however it may have come before it.

Nor are we prevented from ascertaining and determining whether the court below proceeded in accordance with our mandate, because the remittitur is not contained in the bill of exceptions. The remittitur consists of a copy of the judgment entered in the records of this court, and, where there is a reversal, also a copy of the opinion filed by us. The original in each case, therefore, remains in our own court, and it would, indeed, be an anomalous state of affairs if, under the circumstances of this case, we could not take notice of our own records and files. But, if there were any question about this, the motion to amend the transcript, by adding thereto the remittitur, made and submitted under rule 5 of this court, would, in justice, have to prevail, and

that would cure the alleged defect. Therefore, to determine the question whether the court below properly interpreted the opinion and judgment of this court, we feel entirely free to resort to that opinion, a copy of which was attached to, and formed a part of, the remittitur, to ascertain the nature of the decision and what it required. That portion of it which is material here reads as follows: "We do not herein assume to determine the ultimate rights of the plaintiffs. Whether or not they will finally be able to recover for any of the transactions complained of will perhaps depend largely upon the question whether or not they themselves have been guilty of such acts and conduct, respecting these transactions and the management of the bank, as will prevent a recovery by them. We simply hold that the plaintiffs have established a *prima facie* case against the defendants Brough, Spencer, Murphy Kuhn, Wells, Schramm, and Corey, and as to them the judgment of the court must be set aside, costs to abide the result of the action. As to defendants Robison, Maguire, Beeman, Perkins, and Armstrong, the judgment of nonsuit is affirmed, with costs against the plaintiffs. The case must, therefore, be remanded to the court below, with directions to proceed in accordance herewith. It is so ordered." Such, after reference to the rules of law which must govern the case, and a review and discussion of the evidence, is the concluding paragraph. This contains a clear and express holding that the evidence of the plaintiffs "established a *prima facie* case against the defendants Brough, Spencer, Murphy, Wells, Schramm, Kuhn, Wells, and Corey," and the order is that as to those defendants the judgment of nonsuit must be set aside, and the cause remanded to the court below, with directions to proceed in accordance with the opinion.

It will be noticed that the case was not "reversed and remanded," but simply "remanded," with directions to "proceed"; that is, sent back to the court below to proceed, the same as if no judgment of nonsuit had been entered, according to the rules of law announced in the opinion as governing the case. In other words, after the judgment of nonsuit was set aside, the case stood as it did before that judgment had been entered, except that the defendants as to whom the judgment was affirmed were no longer parties interested. There is nothing in the opinion nor in the judgment entered in the records of this court, nor in the remittitur, which required a trial *de novo*. Nor does the record on appeal show any good reason for the ordering of such a trial by the lower court. The case was tried before a court sitting as a court of equity without a jury. The same judge who presided at the former trial, and heard the evidence and observed the witnesses, was again presiding. That same evidence was before him in record form, although, it must be confessed, very

inartistically submitted, as appears from the abstract herein. The court of last resort had reviewed and discussed the evidence, and held it sufficient to establish a prima facie case as to the defendants who were still interested parties to the suit. There was no change of material issues, and it appears the plaintiffs had no other or different evidence to offer, and were willing to rest their case on that introduced at the previous trial. Nor is there anything to show that the defendants would have been injured or their rights jeopardized if the court, upon the plaintiffs having submitted their evidence in record form and rested, had proceeded with the trial from the point where it was interrupted by the motion for nonsuit. On the contrary, it is manifest that the testimony of the plaintiffs, being very voluminous, could not have been introduced, by the re-examination of witnesses, without great expense to the litigants. Under these circumstances, and without an express direction in the mandate to do so, the ordering a trial de novo, and the requiring of the evidence, which had already been held sufficient to establish a prima facie case, to be again introduced by examination of the witnesses, was unnecessary and unauthorized. Where a judgment of nonsuit, entered by a court of equity, is ordered to be set aside by the appellate court, and the cause is remanded, with directions to the court below to proceed in accordance with the opinion, and neither the opinion nor the mandate requires a trial de novo to be granted, the effect is to place the case in the same position in the court below as it was in at the time when the progress of the trial was interrupted by the motion for the nonsuit, and the court may resume the trial, and proceed therewith in the same manner as it would have done if no judgment of nonsuit had been entered. In *Hawkins v. Railway Co.*, 39 C. C. A. 538, 99 Fed. 322, as appears from the syllabus, it was held: "When a decree is reversed, and the mandate does not direct the entry of any particular decree, but only that further proceeding be had not inconsistent with the opinion of the appellate court, the effect is to put the case in the same position in the court below as it no decree had ever been entered, and the court has the same authority to permit amendments of the pleadings to enlarge the issues, and admit further proofs, as it had before the entry of the decree." *Nelson v. Hubbard*, 13 Ark. 253; *Woolman v. Garringer*, 3 Mont. 405; *Commissioners v. Carey*, 1 Ohio St. 463; *West v. Brashear*, 14 Pet. 51, 10 L. Ed. 350; *Supervisors v. Kennicott*, 94 U. S. 498, 24 L. Ed. 260; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 16 Sup. Ct. 291, 40 L. Ed. 414; *Ex parte Sibbald*, 12 Pet. 488, 9 L. Ed. 1167. And, where an appeal is taken from a judgment of an inferior court entered under a mandate of the appellate court, the latter tribunal will construe its own mandate in connection with its opinion,

to determine whether the inferior court proceeded in accordance therewith. *Gaines v. Rugg*, 148 U. S. 228, 13 Sup. Ct. 611, 37 L. Ed. 432; *In re Sanford Fork & Tool Co.*, supra. We are of the opinion that the court erred in ordering a trial de novo, under the circumstances of this case.

We are also of the opinion that the demurrer to the amended answer of *W. W. Corey* was improperly overruled. This suit was brought against him for the misappropriation or misuse of a trust fund and breach of duty, occasioned through neglect while he was acting in a fiduciary capacity. The facts set up in the complaint, if established by competent proof, show a condition of, at least, constructive fraud. A breach of duty by a person acting in a fiduciary capacity is "constructive fraud." *Story, Eq. Jur.* §§ 258, 259, 307, 308, 311; *Cooley, Torts*, p. 607; *Baker v. Humphrey*, 101 U. S. 494, 502, 25 L. Ed. 1065.

This case, as to *Corey*, therefore, falls within the exception contained in section 17 of the bankruptcy act (30 Stat. 550), which, so far as material here, reads: "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity." *Corey* having been charged, in the complaint, with a breach of duty by a negligent management of the affairs of the bank, of which he was a director and officer, and a consequent loss to the institution, his discharge in bankruptcy constituted no bar to this action, which had been previously brought against him, and therefore the demurrer ought to have been sustained. Likewise, although a judgment had previously been entered against him for a debt which he owed the bank, he was still liable for any breach of duty or negligent management of the affairs of the bank of which he may have been guilty, while a director or officer of the institution, if such breach of duty resulted in injury to his trust. So, we are of the opinion that this action survived against the executors of *S. S. Schramm*, he having been a defendant at the former trial, but having since died. He and others were directors of the bank, and acted in a fiduciary capacity. The complaint charges that, while so acting, the deceased was negligent and inattentive to duty, and that, in consequence thereof, loss resulted to the bank; that is, funds and property of the institution, through his carelessness and inattention to his duties, were permitted to be wasted and lost. In such case the action survives, and may be maintained against the executors, under section 3916, Rev. St. 1898. It has been held likewise in California under a statute like ours. *Fox v. Mining Co.*, 106 Cal. 478, 41 Pac. 328; *Coleman v. Woodworth*, 28 Cal. 567. The judgment must be reversed, with costs, and the cause remanded, with directions to the court

below to proceed in accordance with this and our former opinion herein. It is so ordered.

BASKIN, J., and HIGGINS, District Judge, concur.

SMITH et al. v. BUCKMAN et al.

(Supreme Court of Washington. March 30, 1900.)

APPEAL—CONFLICT OF EVIDENCE—DISTURBING VERDICT—IMPROPER TESTIMONY—STRIKING OUT CURED ERROR.

1. Where there is a substantial conflict in the testimony, the appellate court will not disturb the verdict.

2. Where that part of the evidence to which exceptions might be allowed was stricken out on defendant's motion, and the jury instructed to disregard it, the error was cured.

Appeal from superior court, Clarke county; H. S. Elliott, Judge.

Action by Elizabeth Smith and another against T. Buckman and another. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Coovert & Stapleton and James P. Stapleton, for appellants. W. W. McCredie, for respondents.

PER CURIAM. This is an action in ejectment brought by the respondents, who were plaintiffs below, against the appellants, to recover a parcel of land, containing about six acres, which the respondents allege is a part of the donation land claim of John Dodd and H. E. Dodd, of which they are the owners by reason of certain mesne conveyances from the original donors to themselves. Answering the complaint, the appellants denied ownership in the respondents, and pleaded affirmatively matter constituting an estoppel, and adverse possession during the period of statute of limitations. The verdict of the jury was in favor of the respondents.

The principal contention is over the question whether the evidence is sufficient to justify the verdict. We have carefully examined the record, and find that there was a substantial conflict in the testimony on all of the issues made. In such cases this court will not disturb the verdict of the jury. *Pronger v. Bank*, 20 Wash. 618, 56 Pac. 391.

Exceptions were taken to the admission of certain evidence, and to the refusal of the court to give certain requested instructions to the jury. That part of the evidence to which exception might properly lie was stricken out by the court on motion of the appellants, and the jury were instructed to disregard it. If it was error originally to admit the testimony, the error was cured by the action of the court in striking it out. The charge of the court was full and clear, and covered the entire law of the case. Such of the requested instructions as were

proper were given, substantially, and the charge as a whole was as favorable to the appellants as the law of the case warranted. The judgment is affirmed.

PHELAN v. SMITH, Treasurer.

(Supreme Court of Washington. April 24, 1900.)

INJUNCTION—SALE OF PERSONAL PROPERTY FOR TAXES—LEGAL REMEDY INADEQUATE—TAXATION—WHEN LIEN ATTACHES.

1. An action for injunction will lie to restrain a county treasurer from removing and selling for delinquent taxes counters and shelving which have been purchased by plaintiff from the tax delinquent for value, without notice of any lien for taxes thereon, and affixed to plaintiff's building, and which it is alleged cannot be removed without destroying plaintiff's business and causing him great and irreparable damage, which cannot be compensated or estimated in money.

2. Under 1 Ballinger's Ann. Codes & St. § 1740, providing that taxes assessed upon personal property shall be a lien upon all of the real and personal property of the person assessed, from and after the first Monday of February next succeeding the date of the levy of such taxes, personal property which has been transferred by the owner prior to the first Monday in February next succeeding the levy is not subject to the lien of such taxes.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by M. J. Phelan, doing business as the Spokane Tea & Coffee Company, against A. L. Smith, treasurer of the county of Spokane, Wash., to enjoin the sale of certain personal property for taxes. From a judgment for plaintiff, defendant appeals. Affirmed.

James Z. Moore, Miles Poindexter, and Horace Kimball, for appellant. Danson & Hunke, for respondent.

DUNBAR, J. This is an equitable action to enjoin the treasurer of Spokane county from selling certain personal property in the hands of the respondent for the satisfaction of personal property taxes levied thereon while the property was in the hands of a former owner. The complaint alleges: "First. That, at all times in this complaint mentioned, M. J. Phelan was, and now is, doing a general tea, coffee, and spice business at Spokane, Washington, under the firm name and style of Spokane Tea & Coffee Company. Second. That during the year 1898, and until the sale of said property as hereinafter alleged, one Harry C. Adams was the owner of a stock of groceries, counters, shelving, and fixtures, which said property was situate in Spokane county, state of Washington, and then in possession of said Adams. Third. That, to wit, prior to the 2d day of June, 1898, the assessor of said county assessed said property as the property of said Adams for said year. Fourth. That on the 2d day of June, 1898, said Harry C. Adams was indebted to the Boothe-Powell Company, of Spokane county, Washington, a corporation organized

under the laws of said state, in the sum of \$1,912.66, and on said day said Boothe-Powell Company commenced an action against said Harry C. Adams in this court (No. 12,961) for the purpose of recovering judgment against said Adams for said sum, and caused an attachment to issue in said cause against said Adams, and to be levied upon the property hereinbefore described. Fifth. That thereafter, to wit, on June 27, 1898, said Boothe-Powell Company obtained a judgment in said court against said defendant for the sum of \$1,921.86, together with \$—— costs and disbursements, which said judgment was duly given, rendered, and made after due personal service had been made upon said defendant, and said attachment was by said court duly sustained upon the ground that said defendant has assigned, secreted, and disposed of his property with the intent to hinder, delay, and defraud his creditors, and that said defendant was about to assign, secrete, and dispose of his property to hinder, delay, and defraud his creditors, and that he was guilty of fraud in contracting the debt and incurring the obligation for which said action was brought; and said court upon said grounds sustained said judgment, and ordered and directed said property to be sold by the sheriff of said county under said attachment for the purpose of satisfying said claim and judgment against said defendant. Sixth. That in pursuance of said order and judgment of said court, and after due notice had been given as by law provided, said sheriff of said county, to wit, on the —— day of June, 1898, sold all of said property under said attachment, and the money derived therefrom was applied to the satisfaction of said judgment in pursuance of said order of court. Seventh. That thereafter plaintiff herein purchased a portion of said counters, shelving, and fixtures, paying therefor a reasonable and fair value thereof, without notice of any claim of any tax lien thereon, and ever since has been the absolute owner and in possession thereof. Eighth. That, to wit, on the 19th day of June, 1899, said defendant, as said treasurer, seized all of said counters, shelving, and fixtures which were then in possession of said plaintiff as aforesaid, on account of delinquent personal taxes now claimed to be due said county from said Harry C. Adams for the year 1898, which were assessed as aforesaid by said county assessor to satisfy the sum of \$63.74, \$2.40 interest, and \$2.15 costs, amounting to the total sum of \$68.29, and which is by said treasurer claimed to be due from said Adams for personal taxes as aforesaid; and said treasurer has advertised said property for sale on the 1st day of July, 1899, at 2 o'clock p. m. of said day, and is proceeding and is about to sell said property as aforesaid, and, unless prevented from so doing by this court, will wrongfully and without right sell the same as aforesaid. Ninth. That the value of the property so seized by said treasurer is the sum of \$300; that said property is

now in the store of plaintiff, affixed to said building, and used in carrying on plaintiff's said business, and that to take the same or any part thereof, or to remove the same or any part thereof, or to sell the same or any part thereof, will have the effect to ruin and destroy the business of this plaintiff, and deprive him of said property, and thereby cause this plaintiff great and irreparable damage, which cannot be compensated or estimated in money. Tenth. That this plaintiff is without remedy at law, and has no remedy except in a court of equity, and that unless said defendant be by this court restrained from taking possession, selling, or in any way meddling with said property, this plaintiff will be without remedy, and wrongfully deprived of his said property, and will suffer great and irreparable damage as aforesaid."

Passing some minor technical objections to the form of the complaint, which we think are not meritorious, the appellant's first contention is that the complaint does not state facts sufficient to constitute a cause of action, for the reason that equity will not interfere in such case by injunction, but will leave the party to his rights, if he have any, under the law. Without going into an analysis of the cases on this proposition, we think, under modern authority, the facts stated in the complaint bring it within equitable jurisdiction. Incompleteness and inadequacy of the legal remedy are what determine the right to the equitable remedy of injunction, and we do not think, conceding the allegation of the complaint to be true, that respondent could obtain complete and adequate relief by law. Nor would any good purpose be subserved by allowing this property to be wrested from the possession of the respondent, and relegating him to an action for damages, or by compelling him to pay the taxes as a basis of a suit for damages. This court has passed upon that question in *Andrews v. King Co.*, 1 Wash. St. 46, 23 Pac. 409, and *Benn v. Chelalis Co.*, 11 Wash. 134, 39 Pac. 365. It is true that those cases embraced real-estate taxation, but the principle is exactly the same, and the interference with the powers of the government in the collection of its revenue is the same. This point was also raised by the county in its brief in *Mills v. Thurston Co.*, 16 Wash. 378, 47 Pac. 759; and, while not noticed in the opinion, this court tacitly acknowledged the jurisdiction, by deciding the case upon the merits.

The important proposition in this case, however, and the one it is desirable should be settled, is involved in appellant's second main contention,—that the plaintiff is not entitled to relief in any manner whatever, for the reason that the taxes sought to be enforced are a lien upon the property levied upon. We cannot agree with the construction placed upon the statute by the appellant, nor do we think that the opinion in the case of *Mills v. Thurston Co.*, *supra*, aids it. In that case we simply held that the property

would be held for the taxes if transferred after the lien attached, which was provided by statute; and the language of the court to the effect that the revenue statutes "should receive a fair construction to effect the end for which they were intended" was used with reference to sustaining the validity of the lien, and of enforcing it. But no lien other than that provided by statute was under consideration or contemplation. It will not be disputed, we think, that tax levies are purely statutory; and it is for the legislature to determine the time when the lien shall attach, and to settle all questions of public policy of that kind. The general rule is that taxes are not a lien unless expressly made so, and when liens are expressly created they are not to be enlarged by construction. *Cooley, Tax'n* (2d Ed.) 444, and cases cited. The pertinent question then is, when does the statute impress the lien for taxes upon personal property? Section 1740, 1 Ballinger's Ann. Codes & St., provides that the taxes assessed upon personal property shall be a lien upon all of the real and personal property of the person assessed, and also upon the property so assessed, if the possession thereof shall have been transferred, from and after the first Monday of February next succeeding the date of the levy of such taxes. This statute seems so plain that it is difficult to construe it. Under the rule announced above, excepting for this statute there would be no lien upon the property; there would be nothing but a personal obligation of the original owner after the property had passed from his possession. Both as a matter of public policy, and to aid in collecting the revenues, the legislature by the enactment above has provided that the taxes shall be a lien upon all of the real and personal property of the person assessed, from the time the taxes are assessed, if the property remains the property of the person assessed, but not so when it is transferred to another person before the first Monday of February next succeeding the levy. Another rule is announced to govern that case, and the lien is made to attach only upon the condition precedent of the transfer having been made subsequent to the time mentioned. Any other construction would render absolutely meaningless the latter and conditional part of the section. It may be that the state and city will occasionally fail to collect taxes, under this construction of the law, but this cannot be avoided. The legislature doubtless concluded that it would be better that this should be so, than that the citizens of the state should be subjected to the perils of a confiscation for taxes of every article that they might purchase between the time the taxes were levied and the time they became due, during which time the payment of taxes is not possible. And it fixed the attachment of the lien at the time the taxes became due, and after that time the purchaser can protect himself by ascertaining whether or not the taxes on the property he is purchasing have

been paid. We think the court placed the proper construction upon the statute, and the judgment is affirmed.

GORDON, C. J., and FULLERTON and REAVIS, JJ., concur.

KARASEK v. PEIER.

(Supreme Court of Washington. May 4, 1900.)

CURATIVE ACTS—INJUNCTION—FENCES MALICIOUSLY ERECTED—CONSTITUTIONAL LAW.

1. Defects in Ballinger's Ann. Codes & St. § 5433 (2 Hill's Ann. St. & Codes, § 268), providing that injunctions shall be issued to restrain the malicious erection of structures on land embodied in Act 1883, to correct errors and supply omissions in the Code in contravention of the organic law of the territory (Rev. St. U. S. § 1924), declaring that every law shall embrace but one object, to be expressed in the title, are cured by 23 Stat. 122, c. 226, validating and curing defects in such act.

2. Under Ballinger's Ann. Codes & St. § 5433 (2 Hill's Ann. St. & Codes, § 268), providing that an injunction may be granted to restrain the malicious erection on land of any structure intended to spite or annoy the adjoining proprietor, and that, where the structure has been erected, a mandatory injunction will lie to compel its abatement and removal, a fence erected maliciously, with intent to spite or annoy the adjoining proprietor, is a "structure," within the meaning of the statute.

3. Ballinger's Ann. Codes & St. § 5433 (2 Hill's Ann. St. & Codes, § 268), providing that an injunction may be granted to restrain the malicious erection on land of any structure intended to spite or annoy the adjoining proprietor, and that where the structure has been completed a mandatory injunction will lie to compel its abatement and removal, is not unconstitutional because it enjoins an act not prohibited by law.

4. Ballinger's Ann. Codes & St. § 5433 (2 Hill's Ann. St. & Codes, § 268), is not unconstitutional, as intending to prevent the erection by a landowner of such structures as really enhance the value, usefulness, or enjoyment of land, when the motive in doing so is malevolent.

5. Plaintiff refused, on request of defendant, to join in the erection of a division fence. The roof of plaintiff's house projected over the boundary line, allowing water to be discharged on defendant's lot, damaging his lawn and flowers. Plaintiff refused, on request, to alter the roof. Defendant then erected a board fence nine feet high, shutting out plaintiff's light entirely from three windows. In an action for an injunction, defendant testified that he built the fence to keep out children and chicken, and as a support for his flowers, and admitted that a fence five feet high would have served as well, and that he would not have built the fence so high, had plaintiff helped him build the division fence, and put an eaves trough on the roof of her house. *Held*, that malevolence was the dominating motive in its erection, and that, on plaintiff's altering her roof so that the water would not be discharged on defendant's lot, an injunction would lie, under Ballinger's Ann. Codes & St. § 5433 (2 Hill's Ann. St. & Codes, § 268).

Appeal from superior court, Pierce county; J. A. Williamson, Judge.

Action by Anna Karasek against Anton Peier for an injunction to restrain the erection of a fence, or, if the fence should have been completed before the final hearing, that a mandatory injunction might issue to compel its removal. From a judgment in favor of plaintiff, defendant appeals. *Affirmed*.

John M. Boyle and J. P. Cass, for appellant.
W. H. Harris and Ernest Hoppe, for respondent.

ANDERS, J. The respondent and the appellant are owners of adjoining lots fronting on G street, in the city of Tacoma. There is situated on the respondent's premises a dwelling house, which is some distance back from the street, but so near the side of her land next to that of the appellant that the roof projects over the boundary line thereof, causing the rain water falling thereon to be discharged on the appellant's lot. The appellant's dwelling house is located about 25 feet from the respondent's lot, and the intervening portion of his land is used for a flower garden and lawn. The surface of the lots of both of the parties contiguous to the street is about 4 feet below the grade of the sidewalk, and gradually descends to the alley in the rear. The respondent's house, it appears, was erected several years before the appellant owned or occupied his premises, and has usually been occupied by tenants; the respondent herself residing in another house located on her land. Before and at the time the appellant purchased his lots there was a fence about 5 feet high along the boundary line of the respondent's lot, but on the land of the appellant, extending from the front of her house to the sidewalk; but at that time the back part of the lots of both parties seems not to have been inclosed, and the people residing in the neighborhood were in the habit of passing over that portion of appellant's premises in going to and returning from the business portion of the city. The appellant, having concluded to inclose his premises with a more substantial fence, requested the respondent to join him in erecting such a fence on the line dividing their respective lots. This the respondent declined to do; claiming that she had no need of another fence, and that she could not afford to build one. Appellant at the same time also requested the respondent to so alter the roof of her house that water would not fall therefrom upon his land and damage his lawn and flowers, which she also refused to do. These refusals greatly provoked and irritated the appellant, and, according to the testimony of the respondent, he became very angry and said to her: "You will do nothing. Never mind. I will fix you." Thereafter the appellant commenced to construct a high board fence upon his own land, along and close to the boundary line between his lot and that of the respondent. The respondent thereupon instituted this action for the purpose of restraining the appellant from further proceeding with the erection of the fence, averring in her complaint, among other things not necessary to be mentioned, that the fence was maliciously commenced for the purpose of annoying and spiting the plaintiff by shutting off the light from the three windows on the north side of her dwelling house, and for no other purpose; that, if the defend-

ant is allowed to erect and maintain said fence, her house will be darkened thereby in such a manner as to shut out and obscure the light almost entirely from the said three windows, and her house greatly damaged on account thereof; and that the tenant now occupying said house is threatening to, and will, vacate the same if the plaintiff is permitted to erect and maintain said fence. She prayed that, in case the fence should have been completed before the final hearing and disposition of the cause, a mandatory injunction might issue, compelling its removal. The defendant, after denying the material allegations of the complaint, alleged affirmatively in his answer that he was constructing the fence on his own land, as an improvement thereon, and for the proper use and enjoyment of the same, and denied that it was being constructed wantonly or maliciously, with the intent to injure or annoy the plaintiff. Before the cause came on for trial the fence had been completed. It was 8 feet high at the street, and something more than 9 feet high opposite respondent's windows, owing to the fact that the soil had been "dug out" considerably in that locality. It was constructed of inch boards nailed to stringers attached to posts set in the ground, and unplanned on the side next to respondent's house, and extended up to the top of the lower sash of respondent's windows.

At the trial the court found, among other facts, that the plaintiff used the house in question for the purpose of renting to tenants; that at the time of erecting said fence said dwelling house was occupied by a tenant, who afterwards vacated it on account of the darkening of the windows by said fence; that said fence, owing to the unusual height and character of the same, was and is a nuisance to the plaintiff and her tenants; that said fence was not erected by said defendant for any useful or ornamental purpose, but for the sole purpose of spiting and annoying plaintiff; that a fence 5 feet high would have answered for any lawful, useful, or ornamental purpose, or for the protection of defendant's said premises; and that, if said fence is allowed to remain at the height it now is, plaintiff will suffer great injury and damage on account thereof. After filing its findings of fact and conclusions of law, the court adjudged and decreed that "upon the plaintiff's constructing a sufficient gutter or eaves trough under the eaves of the roof of her said dwelling described in the pleadings and findings of fact on file herein, to prevent the water from running off of her roof onto the defendant's premises, she have a peremptory injunction ordering and compelling the defendant to remove or cause to be removed the said fence described in the pleadings on file herein, or cause the same to be cut down to a height not exceeding five feet all the way from G street to a point at the rear end or northeast corner of said dwelling; that, if said defendant shall neglect or refuse to so remove or

cut down said fence as herein directed for a period of thirty days after the plaintiff shall have constructed the eaves trough herein specified, the sheriff of Pierce county be, and is hereby, directed to cut down or remove the same at the cost and expense of the said defendant."

This action is based upon section 5433, Ballinger's Ann. Codes & St. (2 Hill's Ann. St. & Codes, § 268), which reads as follows: "An injunction may be granted to restrain the malicious erection, by any owner or lessee of land, of any structure intended to spite, injure or annoy an adjoining proprietor; and where any owner or lessee of land has maliciously erected such a structure with such intent, a mandatory injunction will lie to compel its abatement and removal." This section of the statute was enacted in the year 1883, and embodied in an act entitled "An act to correct errors and supply omissions in the Code of Washington" (Laws 1883, p. 44), and it is contended on the part of the appellant that the section is void for the reason that it is in contravention of the organic act of the territory of Washington (Rev. St. U. S. § 1924), which declares that every law shall embrace but one object, and that shall be expressed in the title; and the case of *Harland v. Territory*, 3 Wash. T. 131, 13 Pac. 453, is cited in support of this contention. It is, no doubt, true that under the decision in the *Harland* Case the title of the act in question was insufficient; but under the rule announced by this court in the subsequent case of *Marston v. Humes*, 3 Wash. St. 267, 28 Pac. 520, and which has since been followed, it would seem that the title is not open to the objection here urged against it. But whether this statute was originally valid or invalid under the organic act is now quite immaterial, for the act of which it is a part was expressly ratified and confirmed, as a whole, by an act passed by congress in July, 1884. See 23 Stat. 122, c. 226.

The appellant also contends that, even if the statute is not invalid upon the ground of insufficiency of title, still it does not cover this case, for the reason that a fence is not a structure, within the meaning of the act. Webster defines a structure to be "that which is built; a building; especially a building of some size or magnificence; an edifice." *Webst. Int. Dict.* And hence it is argued that the term "structure," as used in the statute, must mean an offensive building of some kind, apparently serving no purpose but to spite and annoy an adjoining owner. In support of the position that a fence is not a structure, in contemplation of this statute, the appellant cites the case of *Rutherford v. Railroad Co.*, 35 Ohio St. 559; and it is true that in that case the supreme court of Ohio held that a railroad was not a structure, within the meaning of a statute providing for mechanics' liens on "any house, mill, manufactory or other building, fixtures, bridge or other structure." But that conclusion was

arrived at by the application of the well-known rule of statutory construction, that, where general words follow an enumeration of specific persons or things, they are limited to the same class of persons or things as those specifically mentioned. But here the word "structure" stands alone, and is not confined to any class of erections, and therefore the above-mentioned case is not an authority in favor of appellant's contention. Of course, it is true that a house is a structure, but it is also true that there are many other things which may properly be designated as structures,—such, for instance, as a telegraph line, a wharf, or a bridge. "In the broadest sense, a structure is any production or piece of work artificially built up or composed of parts joined together in some definite manner; any construction." *Cent. Dict.* And we have no doubt that a fence is a structure, within the meaning of this statute.

It is further contended that this section is unconstitutional because it empowers the courts to restrain by injunction the commission of an act not prohibited by any law of the state or of the United States. This position is clearly not tenable. Although the legislature has not in express words declared it illegal for an owner or lessee of land maliciously to erect any structure intended to spite, injure, or annoy an adjoining owner, it has in legal effect done so, by providing a remedy in favor of a party thus injured. To say that the commission of a certain act may be enjoined is to declare, substantially, that such act is illegal. If, therefore, this section is unconstitutional, it is not so because it authorizes the enjoining of an act not prohibited by law, but because it is inimical to some provision of the constitution, or, in other words, because the legislature exceeded its constitutional power in its enactment. "The reasonable enjoyment of one's real estate," says Mr. Tiedeman, "is certainly a vested right, which cannot be interfered with or limited arbitrarily. The constitutional guaranty of protection for all private property extends equally to the enjoyment and the possession of lands. An arbitrary interference by the government, or by its authority, with the reasonable enjoyment of private lands, is a taking of private property without due process of law, which is inhibited by the constitutions. But it is not every use which comes within this constitutional protection. One has a vested right to only a reasonable use of one's lands. It is not difficult to find the rule which determines the limitations upon the lawful ways or manner of using lands. It is the rule which furnishes the solution of every problem in the law of police power, and which is comprehended in the legal maxim, 'Sic utere tuo ut alienum non lœdas,'" *Tied. Lim. p. 423.* According to this maxim, every one must so use his own property as not to injure the rights of others. Subject to this qualification, every person has the right to exercise complete control over his own land,

to the exclusion of all others, and this right has been recognized from the earliest times by the courts. 1 Wood, Nuis. (3d. Ed.) 127. Upon the common-law maxim above quoted rests, as we have seen, what is termed the "police power of the state," which, in its broadest acceptation, means the general power of the state to preserve and promote the public welfare, even at the expense of private rights. 18 Am. & Eng. Enc. Law, 740, 741. It has often been said that it is difficult, if not impossible, to give an exact and satisfactory definition of "police power"; but it is said by an eminent text writer that this power, "like that of taxation, pervades every department of business, and reaches to every interest and every subject of profit or enjoyment." Cooley, Const. Lim. (5th Ed.) p. 706. In the exercise of police power the legislature may, to a reasonable extent, and with due regard to the public welfare, prohibit or regulate the use of private property; but any provision or regulation of the use and enjoyment of land by the owner which is not limited to the prevention of nuisances is opposed to constitutional principles, and the power of the legislature to prohibit nuisances is confined to the prohibition or regulation of such acts as violate or materially interfere with the rights of others. Tied. Lim. p. 426. See, also, 2 Wood, Nuis. (3d Ed.) p. 1098.

The respondent, as we have stated, bases her claim to an injunction upon the allegation in her complaint that the light has been cut off from her windows, and her house made less rentable, and consequently damaged, by the erection of the fence by the appellant. But neither or both of these effects upon her property constitutes a cause of action in her favor unless they are the result of an unreasonable, and therefore unlawful, use by the appellant of his own premises. 1 Wood, Nuis. (3d Ed.) pp. 2, 3. At common law a man has a right to build a fence or other structure on his own land as high as he pleases, although he thereby completely obstructs his neighbors' light and air, and the motive by which he is actuated is immaterial. Rideout v. Knox, 148 Mass. 368, 19 N. E. 390, 2 L. R. A. 81; Mahan v. Brown, 13 Wend. 261; Letts v. Kessler, 54 Ohio St. 73, 42 N. E. 765, 40 L. R. A. 177; Frazier v. Brown, 12 Ohio St. 294; Falloon v. Schilling, 29 Kan. 292; Chatfield v. Wilson, 28 Vt. 49; Lord v. Langdon (Me.) 39 Atl. 552; Phelps v. Nowlen, 12 N. Y. 39; 2 Washb. Real Prop. (5th Ed.) p. 362. The only exception to this rule of law is found in cases where one has acquired, by long user, a right, in the nature of an easement, to have light pass to his windows across the land of his neighbor. But in the United States the courts have, with very few exceptions, repudiated the doctrine of ancient lights, as recognized in England, as "unsound in principle, and unsuited to the habits and rapid growth of the country." 1 Wood, Nuis. 196; 6 Am. & Eng. Enc. Law, 152; Tied. Real Prop. (Enlarged Ed.)

§ 613; Cooley, Torts (2d Ed.) pp. 832, 833; Parker v. Foote, 19 Wend. 309; Pierre v. Fernald, 28 Me. 436; Guest v. Reynolds, 68 Ill. 478; Lapere v. Luckey, 23 Kan. 534. An easement of light and air can be acquired in this country only by grant, either expressed or implied, and no such grant is claimed by the respondent in this case. Whatever right, therefore, she may have to an injunction, is derived solely from the statute, and not from the common law; and, in order to ascertain such right, it is necessary to determine the meaning and validity of the statute. The language employed by the legislature is sufficiently comprehensive to authorize an injunction against the erection by a landowner of a dwelling house or a business block on his own land, providing his motive in so doing is malevolent. If it was the intention of the legislature to prohibit the erection of such structures, we are clearly of the opinion that the statute is, to that extent, at least, unconstitutional; for the reason that to prohibit such a use of real estate would, in effect, deprive the owner of his property without due process of law and compensation. But, inasmuch as it must have been well known to the legislature that useful and valuable structures, such as houses, are rarely or never erected merely to annoy or injure an adjoining owner, we feel justified in holding that it was not the intention to prohibit the erection of such structures as really enhance the value, usefulness, or enjoyment of land, but such only as are primarily or solely intended to injure or annoy an adjoining owner, and which serve no really useful and reasonable purpose. It is well settled that it is the duty of the courts to so construe a statute, if practicable, as to give it force and validity, rather than to render it inoperative or void. Cooley, Const. Lim. (5th Ed.) pp. 220, 222. And we think the construction we have placed upon this section is not inconsistent with its language, and is such as brings it within the power of the legislature, and, as thus construed, the statute is constitutional.

The constitutionality of a statute of Massachusetts providing that "any fence or other structure in the nature of a fence unnecessarily exceeding six feet in height, maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance" (St. 1887, c. 34S, § 1) was called in question in Rideout v. Knox, supra; and the act was held constitutional, for the reason, as stated by the court, that it simply restrained a noxious use of the owner's premises, and, although the use was not directly injurious to the public at large, there was a public interest to restrain this kind of aggressive annoyance of one neighbor by another, and to mark a definite limit beyond which it is not lawful to go. In that case it was also held that, in order to maintain an action under the statute, it must be shown that the fence was

erected or maintained from an actually malevolent motive, as distinguished from mere technical malice, and that it is not enough to satisfy the words of the statute that malevolence was one of the motives, but that malevolence must be the dominant motive, —a motive without which the fence would not have been built or maintained. In *Lord v. Langdon*, *supra*, which was a case involving the construction of a statute substantially like that of Massachusetts, the supreme court of Maine approved and applied the doctrine announced in *Rideout v. Knox*, and accordingly held that the gist of the action consists in the fact that the structure is maliciously kept and maintained, and that, to entitle the plaintiff to recover, it must be shown that malevolence was the dominant motive, and without which the fence would not have been built or maintained. The Massachusetts statute was again held constitutional in the case of *Smith v. Morse*, 148 Mass. 407, 19 N. E. 893; but the court there decided that, notwithstanding the use of the word "nuisance," the statute did not create an easement in favor of the plaintiff's land, but only made it unlawful to do maliciously what the defendant still had a right to do from other motives. And the same thing may properly be said as to the scope and intention of our statute. In Connecticut there is a statute providing that "An injunction may be granted against the malicious erection by an owner or lessee of land of any structure upon it, intended to annoy or injure any proprietor of adjacent land in respect to his use or disposition of the same." Revision 1875, p. 477, § 4. This statute, it will be observed, is in substance similar to the first provision of our statute, and it has been construed by the supreme court of that state in at least two cases. In *Harblison v. White*, 48 Conn. 106, the petitioner sought the abatement of a structure erected of rough boards at a distance of little more than 3 feet from his block of houses, and which was 18 feet high, and of a nature to exclude the light and air, to a great extent, from the basement, lower story, and one-half of the second story of the block, on the ground that it was erected maliciously and with intent to injure and annoy the petitioner, as an adjoining proprietor of land; and, it appearing to the court that it was in fact maliciously erected and was injurious to the petitioner, a mandatory injunction was sustained against its continuance, notwithstanding the fact that it served to screen the defendant's premises from observation. Upon the question of motive the court said: "The finding is that malice prompted the erection of the structure in question. That it protected from observation must be regarded as an incident. The statute concerns itself wholly with the motive. Therefore it inquires for that. That found to be malicious, the statute disregards the incident, and puts an immediate end to the wrong by injunction." In that case, how-

ever, nothing was said, except in a very general way, as to the quality or quantum of malice necessary to be shown in order to maintain an action under the statute; but in the subsequent and well-considered case of *Gallagher v. Dodge*, 48 Conn. 387, the court held that "the malicious intent must be so predominating as a motive as to give character to the structure," and that "it must be so manifest and positive that the real usefulness of the structure will be as manifestly subordinate and incidental." As to the proof of motive, the court was of the opinion that the question whether the structure was maliciously erected is to be determined by its character, location, and use, rather than by an inquiry into the actual state of mind of the person erecting it. Upon this point the learned court observed: "* * * We think no rule can be laid down that is on the whole more easy of application, and more likely to be correct in its application, than that the structure intended by the statute must be one which, from its character or location or use, must strike an ordinary beholder as manifestly erected with the leading purpose to annoy the adjoining owner or occupant in his use of his premises." Although we concede that this rule will generally be more correct in its application than any other general rule that could be laid down, it is apparent that it cannot be relied on in all cases, to the exclusion of other legitimate evidence. The fence in question in this case is much higher than boundary fences usually are in cities, but it would be very difficult for us to say that an ordinary observer would, from its appearance or character or location, conclude that it was manifestly erected, for the leading purpose, to spite and annoy the respondent; and yet we are clearly of the opinion, from all the evidence in the record, including the character and location of the fence, that malevolence was the dominating motive in its erection. It is true that the appellant, as a witness in his own behalf at the trial, testified that he built the fence to keep out children and chickens, and to support his vines and roses, and not for the purpose of annoying or spiting the respondent. But he virtually admitted on cross-examination that a fence as high as the former one—5 feet—would have served as well for such purposes, and that he would not have built the fence as high as he did, if the respondent had helped him build a division fence, "as she should," and put an eaves trough or gutter on the roof of her house. The judgment and decree are affirmed.

DUNBAR, J., concurs.

REAVIS, J. I concur in the conclusion viewing the statute as meaning to confine the power to interfere where the motive is malevolent in the construction of the structure; and I think that malevolence must clearly appear as the dominating impulse, to make a case within the statute.

DENNY v. COLE et al.

(Supreme Court of Washington. April 18, 1900.)

PARTNERSHIP—PLEDGE—ACTIONS AGAINST PARTNER—RECEIVER NOT PARTY.

Ballinger's Ann. Codes & St. § 5455, defines a receiver as one appointed by the court or judicial officer to take charge of property during the pending of a civil action or proceeding, to manage or dispose of it as the court or officer may direct, and having power to bring and defend actions connected with the trust. *Held*, that where a partnership had pledged stock as security, and the pledgee brought an action against the partners to foreclose the lien, and a receiver of the partnership appointed on dissolution thereof was not made a party to the action, the decree foreclosing the lien was nugatory, since, under section 5455, a receiver could not be regarded as a mere custodian of the property, but has such a special interest therein as necessitated his being a party to the action.

Appeal from superior court, King county; Frank T. Reid, Judge.

Action by Charles L. Denny against Flavius S. Cole and another. From a judgment in favor of plaintiff, defendant Cole appeals. Reversed.

Preston, Carr & Gilman and Piles, Donworth & Howe, for appellants. E. F. Blaine, for respondents.

FULLERTON, J. The appellant, Flavius S. Cole, and the respondent, Ernest W. Price, were formerly partners, doing business under the firm name of Cole & Price. As such partners they were the owners of certain shares of the capital stock of the Lumberman's Logging Company, a corporation. They became indebted to the Farmers' & Citizens' Bank of Dewitt, Iowa, and the First National Bank of Dewitt, Iowa, upon various obligations, aggregating, with interest, at the time of the commencement of the present action, the sum of \$39,659.63. As security for this indebtedness, the firm of Cole & Price pledged with the above-named banks the shares of stock held by them in the Lumberman's Logging Company. After the pledge had been made, Cole brought an action against Price for a dissolution of the partnership and for an accounting, praying in his complaint for the appointment of a receiver to take possession of the property and assets of the partnership pending the litigation. The court, after notice and hearing, found that the partnership, and each of the members thereof, were insolvent, and appointed a receiver "to immediately take possession of all the property and assets of said firm, real and personal, * * * to manage and control said property during the pendency of said suit, and to collect debts due said partnership, and for that purpose, or for the purpose of recovering and reducing to the possession of said firm any of said property, to bring actions in his own name or in the name of said firm, and to defend any and all actions, and to inter-

vene, in his own name or in the name of said firm, in any and all actions in which the rights or interests of said firm or its creditors might be involved, with full power by law vested in such receivers, with such other powers and such other duties as the court might from time to time order." The receiver duly qualified, and was acting as such at the time of the commencement of the present action, but never reduced, or attempted to reduce, to possession the property pledged to the banks. The respondent, Charles L. Denny, is the assignee of the indebtedness of Cole & Price to the aforesaid banks, and brought this action for the purpose of obtaining a personal judgment against Cole & Price, and to foreclose the pledgee's lien upon the stock. At the time the action was commenced, he obtained an order from the court authorizing the action to be brought against the receiver, and made the receiver a party defendant along with Cole & Price; but shortly thereafter, upon application of the receiver, the order was vacated, and the receiver dismissed from the proceedings. Default was entered against the respondent, Price. The appellant, Cole, answered the complaint, making certain denials, and pleading as an affirmative defense the appointment of the receiver, and the proceedings by which he was dismissed from the action, praying that the action be dismissed because there was a defect of parties defendant. Judgment for the amount due and of foreclosure of the lien was entered in favor of Denny, and Cole appeals. The question presented is, did the receiver have such an interest in the pledged stock as to make him a necessary party defendant in an action to foreclose the pledgee's lien?

It seems to have been the view of the court below, and the respondent urges in this court, that no title to partnership property passes to a receiver of such property appointed in a suit brought for a dissolution of the partnership, and that, for this reason, a receiver of partnership property is not a necessary party to a suit brought to foreclose a lien thereon. On the question of the receiver's title the authorities are not uniform, but there is respectable authority holding that he takes, by virtue of his appointment, both the legal and equitable title. In High, Rec. (3d Ed.) § 539, the rule is laid down as follows: "A receiver of the effects of a partnership, appointed in an action for the settlement of the firm business, is regarded as vested with the whole equitable title to the partnership property, without any assignment for that purpose, and in an action to obtain possession of the property he represents the interests therein of all parties to the suit in which he was appointed. And it is held that, to enable him to properly discharge his trust, he may, suo motu, and without special leave of the court, bring an action to possess himself of

the property to which he is officially entitled, incurring no risk thereby except as to costs, and, least of all, have the persons against whom he brings such action the right to object that he brings suit without leave of court. The appointment of a receiver upon the insolvency of the firm operates, in effect, as an assignment of the firm assets, with all securities incident thereto, for the benefit of firm creditors. But, since a receiver's authority is conferred by law, and not like that of a voluntary assignee of the parties, a receiver of a partnership succeeds, not only to the legal title of the partners as joint tenants, but also to the equitable rights and remedies of the firm and of its beneficiaries." So, in *Beach on Receivers* ([Alderson's Ed.] § 585), it is said: "Upon the appointment of a receiver the entire legal and equitable title to the tangible property of the firm, as well as to its rights and remedies, vest in him; and real property held by the members of a firm as tenants in common, but used for partnership purposes, and built on with partnership funds, will be treated as partnership property, and will pass to the receiver." The rule is also supported by the following cases: *Ryan v. Kingsbery*, 88 Ga. 361, 14 S. E. 596; *Tillinghast v. Champlin*, 4 R. I. 173; *Pearce v. Gamble*, 72 Ala. 341; *Winslow v. Wallace*, 116 Ind. 317, 17 S. E. 923; *Wallace v. Yeager*, 4 Phila. 251. And in *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138, we held that a receiver of the property of an insolvent corporation was a quasi assignee of the property, and vested with sufficient title to maintain an action in his own name in relation thereto. By the Code (section 5455, Ballinger's Ann. Codes & St.) a receiver is defined as "a person appointed by a court or judicial officer to take charge of property during the pending of a civil action or proceeding, * * * to manage and dispose of it as the court or officer may direct," and has power "to bring and defend actions" affecting property connected with his trust (section 5456). But if it be held that a receiver of partnership property does not have title thereto in the sense that the partnership had title prior to his appointment, it is an inaccurate statement of his relation to the property to say that he is merely its custodian. As was said by the supreme court of Minnesota in *Henning v. Raymond*, 35 Minn. 303, 29 N. W. 132: "When a court has taken property into its own charge and custody for the purpose of administration and disposition in accordance with the rights of the parties to the litigation, it is in custodia legis. The title of the property for the time being, and for the purpose of such administration, may, in a sense, be said to be in the court. The proceeding by receivership is quasi in rem, so far as it involves a sequestration of assets. The receiver is appointed for the benefit of all concerned. He is the representative of

the court and of all the parties interested in the litigation wherein he was appointed. He is the right arm of the court in exercising the jurisdiction invoked in such case of administering the property." And in that case it was held that the receiver had such a special interest in the property as to make him the real party in interest within the meaning of a statute which provided that every action should be prosecuted in the name of the real party in interest. In the case of *Kirkpatrick v. McElroy*, 41 N. J. Eq. 539, 7 Atl. 647, it was held that on the appointment of a receiver for the settlement of a partnership the surviving partner was superseded in the possession and control of the partnership effects and in the authority to settle up the partnership affairs, that this right was vested exclusively in the receiver, and that he was a necessary party to any suit affecting the property of the partnership; citing *Kirkpatrick v. Corning*, 38 N. J. Eq. 234. While, as we have shown, our statute provides that a receiver has power to dispose of property held by him as receiver on the order of the court or officer appointing him, it is generally held, in the absence of a statute, that the court may order a sale of the property in the hands of the receiver whenever it deems a sale necessary or advisable in order to protect the rights and interests of all parties, and that a purchaser at such sale will take the legal title to the property purchased. It would seem to be hard to reconcile these principles with the doctrine that a receiver is only the custodian of the property involved in the receivership, and we think it must be held that he has such a special property therein as to make him the representative of the rights of the partners in all actions or proceedings affecting the property, and as such entitled to notice in all cases where the partners would have been entitled to notice had there been no receiver. In the case at bar, notwithstanding the pledge of the stock in question by Cole & Price as security for their indebtedness, they still retained an interest therein, namely, their right to pay the debt, and redeem the stock from the lien of the pledge. They could not have been barred of this right by a decree of foreclosure in which they were not made parties and served with process. The receiver, having succeeded to their rights in this respect, was also a necessary party to the foreclosure proceedings, and the failure to make him a party rendered the decree of foreclosure nugatory. Ballinger's Ann. Codes & St. § 4833; *Bacon v. O'Keefe*, 13 Wash. 655, 43 Pac. 886. The judgment of foreclosure is reversed, and the cause remanded, without prejudice to the right of the respondent, Denny, to renew his application for leave to sue the receiver.

GORDON, C. J., and DUNBAR and REAVIS, JJ., concur.

HELBER v. SPOKANE ST. RY. CO.

(Supreme Court of Washington. April 4, 1900.)

STREET RAILWAYS—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE—DUTY TO STOP—PRESUMPTION.

1. Plaintiff was injured by a collision with a street car. He was driving rapidly, and when he reached the crossing he slowed the team down, and drove across the track in a walk. His attention was fixed on a watering place across the street. Had he maintained the rapid speed, he could have crossed the track safely. The wagon was covered, and plaintiff could not see without putting out his head, which he did not do until he heard some one yelling, just before the collision. Defendant's car was approaching at a rate of 12 to 14 miles per hour. Had plaintiff looked, he could have seen the approaching car, and would have had time to stop his team. He was acquainted with the road, and knew that a car was due about that time. Held, plaintiff was guilty of contributory negligence as matter of law, which negligence was the proximate cause of injury.

2. Where plaintiff approaches a street-car crossing towards which a car is approaching, the duty is on the party to stop and avoid a collision who can most easily and readily adjust himself to the exigencies of the case; and, where plaintiff can do so more readily, the motorman has a right to presume that such duty will be performed.

Appeal from superior court, Spokane county; A. L. Miller, Judge.

Action by John Helber against the Spokane Street-Railway Company for injuries received in a collision at a street crossing. From a judgment in favor of defendant, entered on a motion for judgment at close of plaintiff's testimony, plaintiff appeals. Affirmed.

Hand, Taylor & Graves, for appellant. Stephens & Bunn, for respondent.

DUNBAR, J. This is an action brought by the appellant against the respondent, the Spokane Street-Railway Company, to secure damages for injuries alleged to have been sustained by reason of a collision between his wagon, in which he was sitting and driving his team, and a street car owned and operated by respondent in the city of Spokane. The complaint is the ordinary complaint in such cases. The answer tenders the issue of contributory negligence. At the close of plaintiff's testimony the defendant challenged the sufficiency of plaintiff's evidence, and asked for judgment. The motion was sustained. The case was taken from the jury, and judgment for costs against the plaintiff was given by the court. From such judgment this appeal is prosecuted.

The only questions presented for our consideration are: Did the testimony of the plaintiff, conceding it to be true, show that, as a matter of law, the plaintiff was guilty of contributory negligence? And, if so, was such negligence the proximate cause of his injury? A careful consideration of the whole testimony convinces us that both questions must be answered in the affirmative. Sprague street, in the city of Spokane, runs east and west. Pine street runs north and south, reaching the south line of Sprague street, and

terminating there. It was on Sprague street, about 23 feet north of the termination of Pine street, that the accident occurred. The plaintiff was a milkman, driving a milk wagon, and was coming down Pine street from the south, and attempting to cross Sprague street to reach a point where there was a water trough and water tank. He testified that when about 40 feet from the south line of Sprague street he looked east for a car, and did not see any coming; that he could have seen a car for the distance of a block from where he looked, but that, not seeing one, he thought that he would have plenty of time to make the crossing, and did not look any more; that at the time he was driving in a fast trot, at the rate of about 8 miles an hour, but just before reaching the street he brought his horses down to a slow walk, at the rate of about a mile and a half per hour; that he was in a covered milk wagon, and could not see without putting his head out, and that he did not put his head out again until he heard some one yelling, a second before the collision. The testimony shows that the car was approaching at the rate of from 12 to 14 miles per hour. This was about 7 o'clock in the morning, and the plaintiff testified that he was acquainted with the road, and knew that a car was due about that time. He testified on cross-examination that his wagon was moving very slowly when it was struck; that the horses were in a slow walk, and that his attention was fixed on the watering place across the street; that, if he had looked when he got to Sprague street, there was nothing to prevent him from seeing the car coming, and that he had plenty of time, if he had looked after he reached Sprague street, and had seen the car coming, to have stopped his team without driving on the track; and that he drove on the track utterly regardless of whether a car was coming or not. This is the substance of the pertinent testimony, and it is contended by the appellant that it was as much the duty of the defendant to see the plaintiff and protect him from a collision as it was the duty of the plaintiff to see the car and avoid a collision. But conceding, for the purposes of this case, that the duties were equal, the testimony shows that the plaintiff was approaching at a rapid rate of speed, and the motorman would have been justified in concluding that such rate of speed would be maintained at least until the crossing was accomplished, and that, if it was so maintained, the wagon would be clear of the track before the car would reach the crossing, as would no doubt have been the case, as it eventuated that, even with the retarded movement, the wagon was nearly out of the way when the car reached the crossing. But the undisputed testimony shows that when the plaintiff reached the crossing he slowed the team down, and drove across the street and the track in a slow walk. In fact, one of his witnesses testified that the horses were stand-

ing still when the car struck the wagon. In any event, it is evident that he was dallying on the track with his attention absorbed by the condition of things he described around the watering place. So it can readily be seen that such an abrupt change in the speed of the team might, and probably did, mislead the motorman, and that by the time he had noted the changed conditions it was too late to stop the car in time to avert the accident, although the testimony shows that he was attempting to do so. While it is true, as this and many other courts have frequently said, that street cars have not an absolute right of way through the streets, and that pedestrians and others have an equal right to travel on or across any street, yet this latter right must be exercised reasonably, and is qualified by the fact that cars run on fixed tracks, and, in the nature of things, cannot accommodate themselves as readily to emergencies, and cannot even stop with the same promptness or facility, as can pedestrians or drivers of free vehicles, who can instantly stop, or turn to right or left, and avoid a collision with an advancing car. The universal knowledge of this fact has established a custom which ought in justice to have the force of law, making it the duty of the party who can most easily and readily adjust himself to the exigencies of the case to do so, and to stop or turn to avoid a collision; and the motorman has the right to presume that such duty will be performed. Of course, if he discovers, or ought, as a prudent person, to discover, that it will not be performed, his duty is to stop in any event; otherwise, he will subject himself and his company to the charge of willful negligence. But there is nothing in this case tending to show willful negligence on the part of the company, nor is there any allegation of that character in the complaint. Much testimony was introduced in relation to the time it would take to stop a car running at the rate of speed proven in this case, but, in view of what we have said before, we do not think the testimony material.

Many quotations from the opinions of this and other courts in relation to the duties of street cars are presented in appellant's brief, and it is claimed that, if the logic of such opinions be followed, it must result in the reversal of the judgment in this case. But announcements by courts of the character quoted are valuable only when construed in connection with and in reference to the circumstances surrounding the particular cases under consideration by the courts making them, and we do not believe that any court has sustained, or ought to sustain, a judgment based on such testimony as is presented in this record; for, while extraordinary mental alertness is not commanded by the law, common prudence is, and it seems to us that a degree of prudence less than common would have restrained a man from driving onto a track under the circumstances testified to by

the plaintiff. In our opinion, the learned judge who tried the case rightly determined that the negligent act of the plaintiff was the approximate cause of the injury. The consideration of the cause was properly taken from the jury. Judgment affirmed.

GORDON, C. J., and FULLERTON and REAVIS, JJ., concur. ANDERS, J., not sitting.

REED v. LONEY et al.

(Supreme Court of Washington. May 7, 1900.)

FRAUDULENT CONVEYANCES—PLEADINGS—INSOLVENCY—WITNESSES—IMPEACHMENT—BILLS AND NOTES—PRESUMPTIONS—GRANTEE'S NOTICE.

1. A complaint in an action to set aside deeds fraudulent as to creditors, which alleges that execution was returned unsatisfied, that the property transferred constitutes all the debtor's property, and that, unless it can be reached, plaintiff's judgment must remain wholly unpaid, sufficiently shows the debtor's insolvency.

2. Testimony in supplementary proceedings, put in evidence by a creditor in an action to set aside deeds fraudulent as to creditors, is not binding on him when introduced for the sole purpose of impeaching the debtor's verified answer in such action, by showing that he had testified contrary to its allegations.

3. Where a note is executed by a husband and his sons, the presumption is that it evidences a community debt.

4. Where an insolvent debtor conveyed all his property to his sons, who took the conveyance with knowledge of his financial condition, and without parting with anything of value at the time, they were chargeable with sufficient notice to put them on inquiry, and hence became participants in the fraud.

Appeal from superior court, Walla Walla county; Thomas H. Brents, Judge.

Action by John E. Reed against Charles Loney and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Thomas & Dovell and B. L. & J. L. Sharpstein, for appellants. Lester S. Wilson, for respondent.

ANDERS, J. Action by John E. Reed against Charles Loney, Charlotte Loney, his wife, C. C. Loney, and W. D. Loney, to set aside conveyances of certain described lands in Walla Walla county, made by Charles Loney and wife to the other defendants, who are their sons, for the purpose, as alleged, of hindering, delaying, and defrauding the creditors of the community composed of Charles and Charlotte Loney, and to subject said lands to the lien of a judgment obtained by said plaintiff against said Charles Loney. The facts in the case are as follows: On the 5th day of May, 1897, the plaintiff obtained a judgment against John T. Loney and Charles Loney for the sum of \$4,055, together with interest, attorney's fees, and costs, aggregating in all a sum in excess of \$5,000. The judgment was recovered upon joint and several notes executed by John T. and Charles Loney for the purchase price of a tract of land

conveyed by plaintiff to said John T. Loney, and in the action in which judgment was rendered it was expressly determined that the said Charles Loney joined in the execution of said notes as principal. John T. Loney was a son of Charles and Charlotte Loney, and had worked on his father's farm for about five years after becoming of age, without receiving compensation therefor. His father, however, had, according to his son's testimony, promised to help him get a start in life, and, with that object in view, had joined in the execution of the notes given for the land conveyed to him. On the 16th day of February, 1897, and while the suit in which said judgment was rendered was pending and undetermined, the defendants Charles Loney and wife, for an alleged consideration of \$1 and the assumption by the grantee of certain mortgages, executed and delivered to the defendant W. D. Loney a deed of conveyance to a portion of the premises in controversy, and by another deed conveyed to defendant C. C. Loney, for a like consideration, another portion of said premises. The grantees at the same time also received, under an alleged contract of sale, all the farm implements, horses, cattle, and wagons and all other personal property on the premises, necessary in the farming and management of the same. On the 1st day of May, 1897, and four days before the judgment aforesaid against Charles and John T. Loney was filed in the cause, but after the filing of the findings and conclusions of law by the referee upon which said judgment was rendered, the defendants Charles Loney and wife executed to defendant C. C. Loney a deed of conveyance covering the remainder of the lands in question. All the property, real and personal, of the community, with the possible exception of some exempt personalty, was thus transferred to their two sons, W. D. and C. C. Loney, but all the defendants subsequently to said transfers continued to reside together upon the premises and cultivate the lands as they had formerly done. An execution was issued on the judgment against said Charles Loney, and was returned by the sheriff as wholly unsatisfied; and supplemental proceedings were thereafter instituted by plaintiff, but no property subject to execution was discovered, whereupon plaintiff instituted this proceeding to set aside the deeds and subject the lands to his judgment. Defendants set up as an affirmative defense that the conveyances and transfers of the lands, and of the chattels necessary in their management, were in execution of a trust, under an agreement which was entered into at the time the lands were acquired by Charles Loney (that is, on December 8, 1892); that the legal title to the lands was taken in the name of the father, but that he held merely in trust for his two sons, W. D. and C. C. Loney, under an agreement that they should all work together to pay off a mortgage indebtedness of some \$17,000 on the premises, which had been assumed as consid-

eration for the conveyance from Charles Loney's grantors, and that, when such indebtedness was paid off, the lands and personalty should be conveyed on demand by the said Charles Loney to the said two sons, who were to provide a home thereon for their parents during the remainder of their lives. No proof, however, was introduced by defendants to establish this defense; the defendants apparently regarding the matter as having been proved by plaintiff by reason of his introduction in evidence of Charles Loney's testimony taken in the supplemental proceedings, where he stated his reasons for making the conveyances to his two sons, and what the respective interests of himself and sons were in the premises which he conveyed. It appeared in evidence that the sons who received this land worked for their parents and assisted in cultivating it for a number of years after becoming of age, without receiving compensation therefor. The mortgage indebtedness on the lands had been reduced by Charles Loney, but at the date of the first alleged fraudulent transfer (February 16, 1897) the lands were still incumbered to the extent of \$16,708. A large portion of this indebtedness, however, was secured by a mortgage upon other land than that in controversy. The only evidence regarding the value of the land in controversy placed its value at \$17,280. The case was heard before a referee, upon whose findings of fact and conclusions of law the court rendered judgment in favor of the plaintiff, from which judgment the defendants appeal.

The appellants attack the complaint in this cause on the ground that it does not allege with particularity the fact that appellants Charles and Charlotte Loney had no other property sufficient to satisfy respondent's judgment at the time of making the conveyances and transfers complained of, or at the time of the commencement of this action. While such allegation is not made in the complaint by particular averment, yet sufficient facts are set forth to show the utter insolvency of the judgment debtors both at the time of the transfers, and at the date of the commencement of this action. It is shown by the complaint that execution was issued on the judgment within two months after its rendition, and that it was returned wholly unsatisfied; and the complaint further alleges "that the above-described property so pretended to be sold, conveyed, and transferred to the defendants W. D. Loney and C. C. Loney as aforesaid constitutes all and singular the property belonging to the said community of the defendants Charles Loney and Charlotte Loney, or either of them, out of which the said judgment could be satisfied in whole or in part, and unless this said property can be reached and applied to the payment of said judgment the same must remain wholly unpaid." Under the prior decisions of this court the complaint is good as against a demurrer based on the ground that it fails to state facts sufficient to constitute a cause of

action. "If the property conveyed was all the property owned, it necessarily follows that there was no other property out of which the execution could be satisfied." *O'Leary v. Duvall*, 10 Wash. 666, 39 Pac. 168. See, also, *Cook v. Tibbals*, 12 Wash. 207, 40 Pac. 935.

Upon the trial the respondent, for the purpose of impeaching and rebutting the allegations of appellants' answer setting forth the oral contract of trust between father and sons, introduced in evidence (distinctly stating at the time the purpose of its introduction) the testimony of appellant Charles Loney, which had been given by him in the proceedings supplemental to the execution. This was the only evidence introduced by either side bearing on the alleged trust agreement, and it is the contention of appellants that respondent thus made Charles Loney his own witness, and is bound by any of his testimony that can be construed against him, while the respondent contends that the testimony, having been introduced for purposes of impeachment only, and being in no way essential to the making out of his own case, is not binding on him. As already intimated, the object was simply to show that the defendant Charles Loney had previously testified contrary to the allegation set forth in his verified answer. We are constrained to hold that this testimony, having been introduced for the sole purpose of meeting and rebutting the allegations of the answer, did not thereby become evidence in chief for the plaintiff, nor was it incumbent on him to contradict the assertions therein. *Bank v. Fancher* (Sup.) 36 N. Y. Supp. 742. But, even if it were conceded that the testimony so introduced was binding on the respondent in every respect, still, in our judgment, it does not, taken as a whole, prove the trust agreement set forth in the defendants' answer. The appellants therefore must be held to have failed in establishing their affirmative defense.

We think that the community character of the debt upon which the judgment against Charles and John T. Loney was founded was satisfactorily established. It had already been determined that Charles Loney was a principal, and not a surety, on the notes sued on. The presumption, where a promissory note is executed by the husband, is that it evidences a community debt, and there is nothing in this case to overthrow such presumption. On the contrary, there is proof showing that the father had, in carrying out a previous promise to assist his son John T. Loney in getting a start, assisted him in buying the land, joined him in giving notes for the purchase price, agreed to help him pay them off, and in fact paid \$1,015 thereon. The strong moral obligation resting upon parents to provide for a son has in this case become a legal one; resting upon a promise made, which was afterwards fully executed by the act of the father in obligating himself to pay for the land provided by him for his son. It was an act certainly of more bene-

ficial interest to the community than to the husband alone.

In answer to the appellants' contention that the respondent could not have been injured by the conveyances, for the reason that the lands were incumbered to such an extent that, with a homestead exemption of \$1,000, to which the grantors were entitled, there would be nothing left for creditors, it is sufficient to say that there is no issue in this case as to whether the grantors are entitled to a homestead in the premises. However, whatever rights the grantors may have by way of exemption in the premises are amply protected by the decree, which provides that said judgment constitutes a lien upon all of said real and personal property, and that the same, or so much thereof as may be necessary, be sold as upon execution against said defendants Charles Loney and Charlotte Loney; saving to said defendants Charles and Charlotte Loney any right of exemption that they may have, etc. As to the participation of the grantees in the alleged fraud, although there is no direct proof of knowledge and intent on their part, sufficient appears to render them chargeable with such notice as to put them on inquiry, and that is all the law requires. See *State v. Mason* (Mo. Sup.) 34 Am. St. Rep., note, page 309 (s. c. 20 S. W. 629); *O'Leary v. Duvall*, supra. It is conceded that they are the children of the grantors, and lived with them and worked with them on the lands in controversy for some years, endeavoring to pay off a heavy mortgage indebtedness thereon; and they must, from their family and business associations, have been fully acquainted with the financial condition of their parents. It is hardly possible to believe that they were ignorant of the fact that the father was being sued for a claim amounting to some \$5,000 on account of a farm previously purchased for a brother of the grantees; and, besides, they took these conveyances without parting with anything of value at the time, knowing that their father was divesting himself of all of his property, real and personal, in the face of an impending judgment. It appears from all of the evidence in the record that the judgment of the superior court is right, and it is therefore affirmed.

DUNBAR, REAVIS, and FULLERTON, JJ., concur.

STATE SAV. BANK v. DAVIS et al.
(Supreme Court of Washington. April 26, 1900.)

PROCESS—SERVICE—RETURN—CERTAINTY—COUNTY INDEBTEDNESS—CONSTITUTIONAL LIMIT—BONDS—DIVERSION OF FUNDS—WARRANTS—VALIDITY OF ACTS OF COUNTY COMMISSIONERS—COUNTY'S RESPONSIBILITY—MANDAMUS.

1. A sheriff's return of service on an application for mandamus, which recites that he served it on "the within-named defendants, B. and A., by delivering a true copy thereof, with

a copy of the affidavit, to the above named, the said defendants, personally," is not void for uncertainty, as indicating but a single service on one defendant, and a motion to dismiss the proceedings is properly overruled.

2. Const. art. 8, § 6, limits the amount of county indebtedness to $1\frac{1}{2}$ per cent. of the taxable property, except on consent of three-fifths of the voters, when it may be extended to 5 per cent. Sess. Laws 1890, pp. 37-40, authorize a county to contract debts for strictly county purposes, not to exceed 5 per cent. of its taxable property, if three-fifths of the voters shall assent thereto, and to issue bonds therefor. A proposition was duly carried on August 6, 1890, for the issuance of bonds to fund the existing county indebtedness of \$60,256, and to build a court house and jail. The bonds realized \$232,341, and were just within the constitutional limit. The county commissioners contracted for a court house to cost \$142,402, and on December 2, 1890, for a jail to cost \$17,287. Between August 16th and December 2d county warrants, for purposes other than public buildings, were issued, amounting to \$61,885, which were paid, after December 2d, out of the proceeds of the bond. *Held*, that such payment was a diversion of funds, and did not invalidate the jail warrants as representing an indebtedness exceeding the constitutional limit, and hence the holders of the jail warrants were entitled to mandamus to compel the levy of a tax to pay such warrants.

3. 1 Ballinger's Ann. Codes & St. § 267, provides that the county's powers can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law; and section 342 gives county commissioners care of the county property and the management of the county funds and business. Defendant county commissioners wrongfully apportioned certain funds voted by the people for public buildings and the refunding of outstanding indebtedness to the payment of debts for other purposes. *Held*, that the county was liable on warrants issued against such funds for the building of a jail, since it was responsible for the wrongful acts of its commissioners in diverting the funds.

4. The proper remedy for holders of county warrants drawn against a particular fund, which has been diverted and exhausted by the county authorities, is mandamus to compel the commissioners to levy and collect a tax to pay such warrants.

Appeal from superior court, Jefferson county.

Application for mandamus by the State Savings Bank against Simon Davis and others, as the board of commissioners of Jefferson county, to compel a tax levy. From a judgment awarding the writ, and from an order sustaining a demurrer to defendants' answer, they appeal. Affirmed.

W. W. Felger and Burke, Shepard & McGilvra, for appellants. Benton Embree, for respondent.

GORDON, C. J. The respondent is the owner and holder of certain warrants drawn upon the general fund of the county of Jefferson, and payable to the order of the Pauley Jail Manufacturing Company. Application was made by the respondent to the superior court for a writ of mandate compelling the appellants, the board of commissioners of Jefferson county, to levy the maximum rate of taxes for the indebtedness fund of the county based upon the assessed valuation of

the taxable property of that county for the year 1898, and to compel such board, in making the levy, to take into consideration the amount of the indebtedness of the county and the interest accruing thereon. The application included also a prayer for general relief, and was supported by affidavit. A preliminary motion to dismiss the proceeding was made and overruled, and a demurrer to the affirmative answer was sustained. The trial resulted in a judgment awarding the writ, from which judgment and the order sustaining the demurrer to the affirmative answer this appeal is taken.

The first error assigned is the ruling of the court which denied a motion to dismiss the proceeding. The motion was based upon the alleged insufficiency of the service of the affidavit and motion for the writ. The return of the sheriff shows that he served it "upon within-named defendants William Bishop, Sr., and W. A. Andrews, as members of the Jefferson county board of commissioners, by delivering a true copy thereof, with a copy of the affidavit, both certified by the plaintiff's attorney, to the above named, the said defendants, personally in Jefferson county." It is contended that this return indicates but a single service on one of the defendants, and is therefore void for uncertainty. In support of the contention, appellants cite the case of *Rape v. Heaton*, 9 Wis. 328. In that case the return of the officer was as follows: "I have served this writ on defendant Peter Rape and William Rape by leaving a certified copy with his family, in their residence." The supreme court of Wisconsin very properly, as we think, held that this return showed but a single service, while in the present case the return shows that both the defendants were personally served.

2. The next assignment is that the court erred in sustaining the demurrer to the affirmative defense. This assignment goes to the merits of the controversy. The ground upon which plaintiff's warrants are assailed is that the indebtedness evidenced by them was attempted to be incurred in excess of the constitutional limit of indebtedness. It appears from the allegations of the affirmative answer that on August 16, 1890, the assessment for that year was equalized, and amounted to \$4,642,553, and that the amount of valid outstanding indebtedness existing against the county on that date was \$60,206.59. On the same day the board of commissioners made an order providing for the calling of a special election to be held on the 19th of September, 1890, in the several precincts of the county, whereby was submitted to the legal voters the question of funding "the present indebtedness, and also incurring an additional indebtedness for the purpose of erecting public buildings for the use of said Jefferson county, said present indebtedness to be funded, and the money to meet said additional indebtedness to be raised by and upon the bonds of Jefferson county, Washington;

each of said bonds to be of the denomination of \$1,000, and the total amount of said bonds to be \$225,000." The authority for holding this election is found in an act approved March 21, 1890. Sess. Laws, pp. 37-40, inclusive. In section 5 of that act it is provided that the bonds may be sold by the county commissioners at not less than their par value, "and the proceeds shall be applied only for the purpose for which said bonds were issued." It appears that at the election so provided for the requisite three-fifths vote was given, and thereafter, in pursuance thereof, bonds of the county were issued to the amount of \$225,000, and the sum realized from their sale aggregated the sum of \$232,341.29. It thus appears that the amount of the bonds authorized and issued falls within the limit of indebtedness permitted by section 6, art. 8, State Const. It further appears that on or about October 1, 1890, the commissioners of the county, in anticipation of the sale of the bonds, awarded a contract for the building of a court house, and that the total cost thereof, including compensation to the architect and superintendent of construction, as well as all extras contemplated by the contract, amounted to the sum of \$142,462.30; and that on December 2, 1890, the commissioners entered into a contract with respondent's assignor, viz. the Pauley Jail Building & Manufacturing Company, whereby that company agreed to provide and construct a jail in the court house which was then in course of erection, and the commissioners, on behalf of the county, agreed to pay therefor, as full compensation, \$17,287. Respondent's warrants are a part of the warrants issued in payment for the jail, pursuant to that contract. It also appears that, between August 16th, being the date of the submission of the bonding proposition, and December 2, 1890, the date of awarding the contract for the jail, warrants of the county were issued (for other purposes than the building and erection of public buildings for the use of the county) in an amount aggregating the sum of \$61,885.88; also that respondent's warrants were not in fact issued until May 2, 1892; that, of the sum received by the county from the proceeds of the bond sale, \$19,054.13 was placed to the credit of its general fund, \$105,000 to the credit of its road fund, and the remainder, viz. \$108,287.16, to the credit of a fund denominated its "Court House Fund." This is the substance of the affirmative answer, and appellants contend that it is sufficient to establish that the county of Jefferson had already exceeded the limit within which it was authorized to incur indebtedness at the time when it entered into the contract with respondent's assignor for the services which constituted the basis for the issuance of respondent's warrants. The important question is, not what was the condition of the county at the date of the issuance of the warrants, but what was its financial condition at the time of making the jail contract. It is conceded by appellants' coun-

sel that the rule of law is that the obligation is incurred by the making of the contract in pursuance of which the warrant is issued. Such appears to be the established law. *Childs v. City of Anacortes*, 5 Wash. 452, 32 Pac. 217; *Town-Lot Co. v. Lane* (S. D.) 65 N. W. 17; *Culbertson v. City of Fulton*, 127 Ill. 30, 18 N. E. 781.

Applying this rule to the facts in the present case, it is found that December 2, 1890, and not May 2, 1892, was the date upon which the liability to plaintiff's assignor was incurred by the county. The proceeds of the bond issue were sufficient to have funded the indebtedness which the vote authorized, and also to erect the buildings. It is conceded in the affirmative answer that the court house and jail were public buildings of the county, the erection of which was contemplated in the submission to the voters of the proposition to incur indebtedness; so that, had the proceeds of these bonds been devoted to the purpose authorized by the voters and solely thereto, no question could arise here as to the validity of these warrants. But it appears that the authorities not only funded the valid indebtedness of the county outstanding at the date of the submission of the question of bonding to the voters, viz. \$60,206.59, but also included the warrants issued between that date and December 2, 1890, which aggregated \$61,885.88. This appears to have been done subsequent to the time of entering into the contract for the jail, and it cannot be claimed that the respondent or its assignor acquiesced in the action so taken by the county authorities. When it is conceded, as it is here, that the jail improvements are part of the public buildings contemplated in the bonding proposition, and when it is further ascertained that the proceeds of the bond sale were sufficient to have provided payment of all indebtedness incurred in the building and construction of such public buildings, as well as sufficient to pay the outstanding indebtedness which by the vote was authorized to be funded, nothing remains of the contention that this indebtedness was incurred in excess of the constitutional limit. We have nothing to do in this case with any question touching the validity of the warrants issued or authorized between August 16, 1890, and December 2, 1890. The question of their legal status is not involved here. The respondent's assignor is presumed to have acted upon the assumption that the sum realized from the sale of the bonds would be properly applied as the law required that it should be, viz. "only for the purpose for which said bonds were issued." He is presumed to have known what the law required the county officers to know, viz. that there was no authority conferred upon the county, either by the statute or by the vote which had been taken, to pay warrants issued subsequently to August 16, 1890, from the proceeds of the bond sale.

Another position urged by counsel for appellant is that, conceding the sufficiency of

the bond proceeds to pay the valid indebtedness existing at the time of the bond authorization, and the obligations arising under the court-house contract, and also the jail contract, a diversion of a part of the proceeds of the bond sale would not render the county liable, upon the theory that, if a diversion of the fund has occurred, it was the act of the treasurer for which the county is not liable; that the county cannot act, in the custody and disbursement of its funds, except through the treasurer; that it has no choice as to whom these powers and duties shall be devolved upon in its behalf; and that, having no control over the treasurer's act of misfeasance in using the bond proceeds to redeem void warrants, it could not have prevented him from doing so, and is not chargeable with liability for his act of misfeasance. The position cannot be maintained. It has been shown that the county commissioners apportioned the proceeds of the bond sale to various funds. The county acted through its commissioners. "Its powers can only be exercised by the county commissioners, or by agents or officers acting under their authority or authority of law." 1 Ballinger's Ann. Codes & St. § 267. They are specially authorized to compound debts due their county, and "have the care of the county property and the management of the county funds and business." Section 342, 1 Ballinger's Ann. Codes & St. The diversion of the bond proceeds was caused by the county commissioners, for whose action in this respect the county must be held liable. *Potter v. City of New Whatcom*, 20 Wash. 589, 56 Pac. 394; *Northwestern Lumber Co. v. City of Aberdeen* (Wash.; decided April 26, 1900) 60 Pac. 1115.

3. Mandamus is the proper remedy to compel the payment of these warrants, and it was not incumbent upon the respondent to bring an action at law to collect them. *Bacon v. City of Tacoma*, 19 Wash. 674, 54 Pac. 609, and cases therein cited.

4. The lower court found as a fact the "reason for the refusal of the board of commissioners of the county to make a greater levy than they did make [namely, one mill on each dollar of the authorized valuation of the taxable property of said county] for the indebtedness fund to be the claim of the defendants and the county that the said warrants of plaintiff are illegal and void, as being issued beyond the legal and constitutional debt limit of the county," that in making its levy the board of commissioners did not base the same upon the indebtedness of the county, "but such board arbitrarily, and at the behest of some of the taxpayers of the county, fixed said rate of levy at one mill." No exception to these findings was preserved, their correctness is not here questioned, nor is it contended that mandamus is not a proper remedy to compel the levy of a tax under such circumstances. The warrants were *prima facie* valid. The burden was upon the appellants to show their invalidity, if invalid.

The findings justify the judgment, and the exceptions to the conclusions of law are, in our opinion, not well taken. The judgment is affirmed.

DUNBAR, FULLERTON, and REAVIS, JJ., concur.

GRIFFITH v. DENVER CONSOL. TRAMWAY CO.¹

(Court of Appeals of Colorado. Feb. 12, 1900.)
STREET RAILROADS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—MATTER OF LAW.

Where plaintiff's intestate, running diagonally across the street to the corner where defendant's street cars stopped to take on passengers, and waving her handkerchief to the motorman of an approaching car as a signal to stop, crossed one of defendant's tracks, and in attempting to cross the second was struck by the car and killed, she was guilty of contributory negligence, as a matter of law, in attempting to cross the track in front of the car, which she knew was coming.

Appeal from district court, Arapahoe county.

Action by Edward M. Griffith against the Denver Consolidated Tramway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Patterson, Richardson & Hawkins, for appellant. A. M. Stevenson, for appellee.

THOMSON, J. The appellant brought this action against the appellee to recover damages for the death of his wife, Amanda Griffith, caused, as it was alleged, by the negligence of the employes of the appellant in running and managing a train of cars upon its railroad track. The answer denied the charge of negligence, and averred that the injuries which caused the death of Mrs. Griffith were the consequence of her own fault and carelessness. The answer was denied by the replication. When the plaintiff rested, the defendant asked for a nonsuit. The motion was allowed, and judgment entered accordingly. The plaintiff appealed.

Three persons witnessed the accident, and testified to the facts and the attendant circumstances. In all important particulars, their narratives agree, and the evidence, as a whole, presents us with a very clear idea of the situation. The accident occurred in the city of Denver, on Curtis street, at its intersection with Twenty-Eighth, on the 27th day of November, 1896. Curtis street, and the streets crossing it, vary from the cardinal points; but, for the purpose of simplifying our statement, we shall regard Curtis street as running due east and west, and the cross streets due north and south. The cross streets are designated by numbers, the numbering being from west to east. The defendant occupied the street with two tracks, as part of its railroad system. The tracks extended from the business center of the city

¹ Rehearing denied May 14, 1900.

outwards. According to a map before us, which was in evidence, and is part of the record, the street was about 80 feet in width; the tracks were in the center of the street, and were about $3\frac{1}{2}$ feet wide; and the distance between the tracks was about 8 feet. Cars going out used the track on the south side of the street; and returning, that on the north side. It was the duty of the servant of the company in charge of a car or train, when signaled for the purpose, to stop at the further side of a cross street to receive or discharge passengers. It was also his duty to be on the lookout for signals, and to see whether the track was clear. The plaintiff, with his family, lived on the southeast corner of Curtis and Twenty-Eighth streets. On the day of the accident, Mrs. Griffith left her house to take the incoming car. She stopped on the sidewalk in front of her house, and at or near the corner, to wait for a car to come in sight. While waiting she was engaged in conversation with Mrs. Phillips, a neighbor, and a witness in the case. Finally a train consisting of a motor car, and what is called a "trailer," was observed approaching. When first seen, it had just crossed Twenty-Ninth street. It was going at a very rapid rate of speed. The track upon which it was going was on the north side of Curtis street, and the place where it should stop was on the west side of Twenty-Eighth. To reach the train, she must cross the track on the south side of the street; and, to reach the place where it should stop, she must cross Twenty-Eighth street. She borrowed a handkerchief from Mrs. Phillips, and ran from the place where she was standing, diagonally across both streets, in the direction of the northwest corner of Curtis and Twenty-Eighth streets, waving the handkerchief as she ran, as a signal for the motorman to stop. Obliquely, her direction was that of the moving train. She crossed the first track, which was unobstructed, and attempted to cross the second, on which the train was approaching, and just as she stepped upon the track the motor car ran upon her and killed her. The place where she was struck was near the center of Twenty-Eighth street,—perhaps a few feet beyond the center, towards the west side of the same street. The regular stopping place was 25 or 30 feet further on. The motion of the train had not been slackened, and no gong or bell had been sounded. Her stepping upon the track and the collision occurred at almost the same instant of time.

The plaintiff sought to prove that the train was going at an unusual rate of speed, but the court refused to receive the evidence. The plaintiff also offered an ordinance of the city of Denver making it the duty of the tramway company to provide every car or train of cars with a gong or bell; and making it the duty of the motorman, when approaching any street crossing, to ring or sound the gong or bell within a distance not exceeding 60 feet from the

crossing, and also at any point on the line, when the motorman should have reason to believe that there was danger of the cars colliding with any person, vehicle, animal, or obstruction. The defendant objected to the introduction of the ordinance on the ground that it was not pleaded, and the objection was sustained. We can conceive of conditions under which the proposed evidence of unusual speed would be admissible. If a street-railway company has a customary rate of motion for its trains, its patrons may perhaps act in reliance upon that rate, and damage may be sustained in consequence of its being suddenly and unexpectedly accelerated. And the reason given in support of the objection to the ordinance is not altogether sound. When a cause of action is based upon the violation of an ordinance, the ordinance, and also the facts constituting its violation, must be pleaded. But disregard of duties imposed by an ordinance upon a railway company in the management and operation of its cars may subject it to the imputation of negligence; and the ordinance, supplemented by other proof, might be competent evidence in a suit against the company for injuries sustained, where the averment is that they were the result of the defendant's negligent conduct in the management and operation of its cars. In such case it would be no more necessary to plead the ordinance than to plead any other evidence upon which the plaintiff might rely to prove the charge of negligence. It is not proper to plead evidence. It is the ultimate facts that should be stated, and all evidence of every kind which tends to support their averment is admissible. In actions like this, negligence is an ultimate fact. It is issuable, and it is for the evidence to show in what it consisted. If it consisted in whole or in part in the disregard of a duty enjoined by an ordinance, the ordinance is admissible in support of the statement alleging it, and the ordinance is upon the same footing with any other evidence which tends to sustain the charge. Bliss, Code Pl. §§ 206, 211; *Railway Co. v. McDonnell*, 43 Md. 534; *Wright v. Railroad Co.*, 4 Allen, 283.

But we do not think that, if the ordinance had been introduced and the other evidence admitted, the result would or could have been different. Even if the rulings were erroneous, they were harmless. There was some evidence which tended to show that while the train was proceeding from Twenty-Ninth to Twenty-Eighth street the motorman was engaged in conversation with a woman sitting in the motor car, and paying no attention to what was ahead of him. If the question of the defendant's negligence were the controlling question in the case, we think the evidence which was admitted was sufficient to put the defendant upon its proof, and the case should not have been taken from the jury. But, conceding ev-

everything that the plaintiff alleges respecting the negligence of the defendant, the catastrophe was the result of Mrs. Griffith's own voluntary act, done with full knowledge of the situation. Let us briefly review the facts: Standing upon the south side of the street, she saw the train approaching on the north side. She struck out in the direction of a corner on the other side, diagonally opposite to that on which she stood. It is clear that the train was proceeding very rapidly. Every one who saw it noted the swiftness of its motion. She saw it, and, in seeing it, saw what the others saw. There was nothing hid from her. The train was in open view, and its speed plain. The loudest sound of a gong or bell would have acquainted her with nothing she did not already know. She passed the first track, and when she reached the second the train was so near that she must have known that in attempting to cross it she was taking desperate chances. The train had not reached the place where she could expect it to stop, and its speed was still undiminished. Yet she undertook to cross the track at a time and place when and where her act meant almost certain destruction. There was no compulsion upon her to do this, and, even for the purpose of boarding the car, there was no necessity for her action; for the evidence shows that, upon its stopping at the regular place, she could have entered it as well from one side as the other. There can be no recovery for an injury of which the imprudent or negligent conduct of the person injured is the proximate cause. The well-established doctrine relating to contributory negligence is thus stated by the supreme court in *Railroad Co. v. Holmes*, 5 Colo. 197: " * * * The proper question * * * is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune, by his own negligence or want of ordinary and common care and caution, that but for such negligence or want of ordinary care and caution on his part the misfortune would not have happened. In the first case the plaintiff would be entitled to recover; in the latter, not,—as, but for his own fault, the misfortune would not have happened. Mere negligence or want of ordinary care and caution would not, however, disentitle him to recover, unless it were such that, but for that negligence or want of ordinary care and caution, the misfortune could not have happened." It was not in crossing the street that the negligence of Mrs. Griffith consisted. To reach the train, she was obliged to cross the portion between herself and the track on which it was traveling, and upon that portion there was nothing to occasion solicitude for her personal safety; but having reached the track upon which the train was coming, and upon which she knew it was coming, at a place

where it had the right of way, and to which she knew, or ought to have known, it was in dangerous proximity, if she was determined to place herself on the other side of the track the smallest degree of forethought would have warned her to stop until the train had passed, and, had she exercised the caution demanded by the most ordinary prudence, she would have been unhurt. In the language we have quoted, but for her own fault the misfortune would not have happened.

Ordinarily the question of negligence is to be determined by the jury. They are the judges of the credibility of witnesses, and of the weight to which testimony is entitled; and if the evidence, in any material particular, is in any degree conflicting, or if, upon the facts and circumstances exhibited, there is room for an honest difference of opinion, the question must be submitted to them. But where the facts are not in dispute, and there can be but one opinion as to their effect, the question is one of law, and it is proper for the court to decide it. *Shear. & R. Neg.* § 56; *Railroad Co. v. Holmes*, supra; *Behrens v. Railway Co.*, 5 Colo. 400; *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. 148; *Mau v. Morse*, 3 Colo. App. 359, 33 Pac. 283. Whatever is matter of common knowledge and experience, courts are bound to recognize; and where, in the light of such knowledge and experience, an act is obviously imprudent, the law determines its effect, and the court declares the law. *Gaynor v. Railway Co.*, 100 Mass. 208. If one suffers injury from throwing himself knowingly and needlessly into the mouth of danger, he receives what he invites, and the law affords him no redress. To step upon a railroad track immediately in front of a rapidly moving train, with knowledge of its approach, is an act concerning the character of which there can be no disagreement, and the responsibility for the consequences is upon the deer. *Whart. Neg.* § 333; *Butterfield v. Forrester*, 11 East, 60. The court properly held that, as a matter of law, the act of Mrs. Griffith was such contributory negligence as would bar a recovery for the injuries she sustained.

But the plaintiff meets us with another doctrine which is equally well established; this, namely: That there may be a recovery for an injury, notwithstanding the contributory negligence of the person injured, if the defendant, with knowledge of the situation, by the exercise of reasonable care and prudence might have prevented it,—and seeks to make the principle applicable here. In order that the party inflicting the injury may be held responsible, as against the negligence of the injured party, the latter must be in such position that he is exposed to the injury, and the former must be chargeable with knowledge of his position in time to render an avoidance of the injury feasible. *Whart. Neg.* § 333; *Transit Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106; *Coasting Co. v.*

Tolson, 139 U. S. 558, 11 Sup. Ct. 653, 35 L. Ed. 270. If Mrs. Griffith had been upon the track, heedlessly oblivious of danger, or if there had been reason to suppose she was about to place herself in a position of peril, and the motorman, with time to stop his train, had wantonly run her down, the company could not escape liability. Her negligence, however gross, would count for nothing. It would be no defense. But the case before us presents no such situation. When Mrs. Griffith first sought to attract the attention of the motorman, and during all the time she was crossing the street, until she reached the outermost track, she was in no danger. The car could not have hurt her. Nor could the motorman have anticipated that she would put herself in danger. To board the car, it was unnecessary to cross that track; and it would occur to any onlooker that her purpose in running was that she might not miss the train, and that when it should stop she might be sufficiently near to board it without subjecting it to undue detention. By waiving her handkerchief as a signal to stop, she notified the motorman that she saw the train, and was fully aware of its approach. Her running in the same direction with the train was not an indication that she proposed to cross the track ahead of it, but the reverse. If such had been her purpose, the natural supposition is that she would have taken the shortest route, directly across the street, and would not have pursued the longer, oblique course, with the direction of the train, thus allowing it to overtake her. There was nothing in her actions to render it supposable that she would undertake to cross the track at that time and place. The motorman may have been guilty of gross negligence in running and managing his train, and he may have had no intention of responding to Mrs. Griffith's signal and stopping at the proper place. By failing to stop, he might have subjected her to inconvenience, and possibly to damage of some kind; but, in her situation, his negligence involved no danger to her person. That she was struck by the car was due to her own rash and unnecessary act, which there was nothing in her immediately previous conduct to suggest, and which could not, by the use of the ordinary faculties with which humanity is endowed, have been foreseen. The facts which would warrant an application of the doctrine invoked by counsel, of a liability for an injury notwithstanding the negligence of the person injured, did not exist. Mrs. Griffith was guilty of no negligence until she stepped upon the track, and then avoidance of the collision was impossible. The most subtle reasoning leaves unobscured the controlling fact that Mrs. Griffith, with knowledge of the vicinity of the train, and with a knowledge which is common to high and low, ignorant and learned, that to go upon a railroad track immediately in front of a train in full motion is dangerous, nevertheless undertook the ex-

periment. She was therefore herself responsible for the result.

In compliance with the request of counsel for the plaintiff, we have carefully examined each one of the numerous decisions to which they have referred us. For the most part, they are the productions of learned and able men, and our time has not been wasted. They state in varying language, and apply to different facts, doctrines which were old when the opinions were written. Respecting the principles they enunciate, there is, so far as our observation extends, no conflict of authority. There is not one of them, and we do not believe there is one in existence, which, upon the facts here, would authorize a recovery. To review the cases *seriatim* would be impracticable as well as useless, but we shall notice two which counsel seem to regard as of special importance. These are the cases of *Railway Co. v. Lifcowitz* (Md.) 43 Atl. 762, and *Oliver v. Tramway Co.* (Colo. App.) 59 Pac. 79. In the first case, the appellee, having in her hands some purchases she had just made, undertook to cross the tracks of the appellant at a street crossing. The tracks occupied almost the entire bed of the street on which they lay; the distance from the rail on which the car was approaching, to the curb of the sidewalk, being 6 feet. In the direction from which the car was coming, it could be seen in time to be avoided, but the appellee testified that she did not see it. When she stepped from the curbing to the street, she was walking very slowly, and was seen by the motorman. He testified that as soon as he saw her he tried in every way possible to stop his car, which was going at the rate of 10 or 11 miles an hour, but he did not say that he rang his gong or called out to warn her. He also said that it required 30 feet to stop the car, in the condition in which the train then was. The other witnesses testified that at the time of the accident the car was going very fast. There was evidence that the gong was rung, and there was evidence that it was not. The appellant asked the following instruction: "That the plaintiff testified that she looked for a car upon Pratt street before attempting to cross, and immediately upon stepping upon the track she was struck, and the plaintiff's evidence also shows that there was nothing to prevent the car being seen. This evidence is not satisfactory and legally sufficient to enable the plaintiff to recover, and the verdict must be for the defendant." The court refused the instruction in that form, but gave it after having modified it by adding to it these words: "Unless the jury shall further find that after the motorman saw, or could reasonably have seen, the peril of the plaintiff, he failed to exercise ordinary care to avoid the accident." The modifying of the instruction gave rise to the only question which was considered by the court. Before referring to the opinion, it may be well to

note the difference between the relative situation of the parties in that case, and the relative situation of the parties in the case at bar. In that case the appellee did not propose to become a passenger. She was returning home with some purchases she had made. Her act in stepping from the curb meant that she was about to cross the tracks, and the motorman so understood it. He saw that she was giving no attention to the car, and therefore had reason to believe that she was not aware of its approach, and it was his plain duty to warn her that it was coming, so that she might stop in time; and the evidence was not conclusive that he slackened in the least the speed of his car after he saw her. In the present case, Mrs. Griffith saw the car, and notified the motorman that she saw it. She therefore needed no warning that it was coming. Her act in stepping from the sidewalk upon the street did not of itself, as in the Maryland case, mean that she intended to cross the further track, and the direction she took did not indicate that such was her purpose. Nothing she did was calculated to excite apprehension that she was about to endanger her person. The opinion of the court was that the instruction was properly modified; that the case was not so free from doubt as to justify the court in taking it from the jury; that there was evidence from which the jury might have found that the motorman could, by the exercise of care on his part, have prevented the consequence of the neglect or carelessness of the appellee. But at the same time, the court reaffirmed the doctrine that where the facts are undisputed, and but one reasonable inference can be drawn from them, the question of negligence becomes one of law for the court. In the second case, an ordinance of the city of Denver was pleaded, which made it unlawful for street cars or trains or cars coming from opposite directions to pass each other on any intersecting street, and, in case of cars or trains approaching each other, requiring the one furthest from the intersecting street to come to a full stop at such point and in such manner as not to obstruct travel upon the intersecting street, and to so remain until the other car or train should have entirely passed. The plaintiff further alleged that on a certain night, when it was quite dark, he desired to take passage on a car running on the track furthest from his own side of the street; that, at the time this car was approaching, a car was coming from the opposite direction, on the track nearest the plaintiff; that the latter car was further from the intersecting street than the other, but it sounded no gong and did not stop; that the plaintiff, misled by its failure to sound its gong, and relying on the stoppage of the car in obedience to the requirements of the ordinance, undertook to cross the street to board the car passing on the further side; that the person in charge of the car which

should have stopped saw, or by the exercise of reasonable care could have seen, the perilous position of the plaintiff, and by the exercise of reasonable care could have avoided a collision with him, but that nevertheless the car was suffered to continue its course, and to strike and injure him. A demurrer was sustained to the complaint, and this court reversed the ruling and adjudged the complaint sufficient. The opinion was delivered by Bissell, P. J.; and, while the failure of the car to stop as required by the ordinance was alluded to, the main ground of the decision was the allegation that the gripman saw or might have seen the appellant as he was crossing the track, and by the exercise of ordinary care might have prevented the injury, notwithstanding the negligence, if any there was, of the appellant. Why counsel regard that case as important, we do not know. The feature of the culpable conduct of the gripman after he knew or ought to have known that the appellant was in actual peril sharply distinguishes it from the case now under consideration. And we might suggest still another distinction: The place where the appellant undertook to cross was in front of the place where the car should have stopped. If the ordinance had been observed, as the appellant had the right to suppose it would be, he would have passed unharmed, because the car would have been brought to a halt before it reached the place where he was. But the place where Mrs. Griffith undertook to cross was a place where the car had the right of way, and a considerable distance short of the point where it was required to stop, or where she had any right to expect it to stop. From what we have said, it will be perceived that we do not look upon these cases as being in point. The judgment will be affirmed. Affirmed.

BISHOP v. BROWN.¹

(Court of Appeals of Colorado. March 13, 1900.)

NEGLIGENCE—BOILER EXPLOSION—TRIAL—DIRECTION OF VERDICT—EVIDENCE—HARMLESS ERROR.

1. Where the evidence of the owner of a building, injured by a steam-boiler explosion in a hotel adjacent thereto, failed to show that the boiler was not properly constructed and out of good materials, or that defendants were negligent in its use and maintenance, the fact of the explosion raised no presumption of negligence, and hence the granting of a nonsuit was proper.

2. Where the owner of a building injured by a steam-boiler explosion in an adjoining hotel failed to prove, and did not offer to prove, that an engineer in defendant's employ was in charge of the boiler at the time of the explosion, or that he failed to do what a reasonably prudent and careful man would have done, and thereby contributed to the injury, a refusal to allow plaintiff to introduce evidence tending to show that the engineer was intemperate and drunk on the night of the explosion was without prejudice.

¹ Rehearing denied May 14, 1900.

Appeal from district court, Arapahoe county.

Action by Edward F. Bishop against Benjamin B. Brown, as administrator, etc. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Wells, Taylor & Taylor, for appellant. Ward & Ward, for appellee.

BISSELL, P. J. The growth of the state and the development of its industries are giving rise to an increasing litigation, and constantly thrusting on our attention questions as yet undetermined in our jurisdiction, and compelling the court not only to apply settled principles, but often to determine what line of conflicting adjudications shall be followed. It is not probable that a question of more intrinsic difficulty and of graver importance has been presented for consideration than the one suggested by this record. The distressing casualty killed the owners of the Gumry Hotel, who were buried in its ruins, totally destroyed the building, and wrought injury to the adjoining premises. The administrator of the estate was heretofore sued by one who was injured by the explosion, and in that suit we had occasion to determine whether the action against the proprietors, who were killed by the accident, survived their death. We held that the action did not survive. *Letson v. Brown*, 11 Colo. App. 11, 52 Pac. 287. The present suit was brought by the appellant, Bishop, to recover the damages resulting from the partial destruction of a part of the adjacent building, which he owned. The necessities of the decision require the briefest statement of the circumstances of the accident. It occurred on the 18th of August, 1895. The hotel was then owned and operated by Gumry & Greiner, and they had put and maintained in the basement of the hotel a boiler which furnished power for hoisting purposes, and the various uses for which power was requisite in the management of the establishment. The boiler was in charge of one Lescher, who was the engineer employed by the proprietors. The plaintiff substantially alleged his ownership of a four-story brick and stone building, occupied by a tenant at a fixed rental. The ownership of Gumry & Greiner was stated, and the use of a steam boiler averred. The plaintiff then alleged that they did not keep the boiler in safe, sound, and good repair, and did not employ skillful, competent, and prudent servants, but permitted the boiler, which they knew to be weak, unsafe, and out of repair, to be kept in use, and retained Lescher in their service, knowing him to be unskillful, negligent, and addicted to the use of liquor. The plaintiff then charged that by reason of the weakness of the boiler and the failure to repair it, and the incompetency and negligence of the servant, the boiler exploded. The plaintiff then laid his *ad damnum* at \$6,000. Issue was taken by

proper answer, and the case came to trial. On the conclusion of the plaintiff's evidence he was nonsuited, and from this judgment of nonsuit he prosecutes this appeal.

It would be profitless, and not other than an attempt to satisfy counsel, who would probably remain unconvinced, to essay even a summary of the plaintiff's testimony. We shall, therefore, in the discussion, simply express our conclusions as to the result or legal effect of the plaintiff's case as he made it, under the appropriate subdivisions of the opinion, and express in detail only the law, which as we conceive, bars the plaintiff's recovery. In bringing a suit to recover damages for injuries occasioned by the act of another, as a general proposition the plaintiff assumes the burden to establish that the act which occasioned him the injury was negligently done, or that the plaintiff had omitted the care which the law imposes on him in the conduct of his own affairs, or the management and use of his own property. The old maxim, "*Sic utere tuo ut alienum non laedas*," is frequently used to express the idea of the duty which every man owes to his neighbor, but it is likewise frequently held to express an obligation other and greater than that which the law imposes. While a much-abused maxim, in the extent to which its central idea has been applied, it contains a germ of legal truth, which is as well expressed in that form as in any other. It is almost universally true that he who would recover from his neighbor, because of what he did, must show that the thing which the neighbor did was negligently done or done without right. There are exceptions to the rule, and we shall ultimately consider whether this case is brought within an exception. If not, the case is still subject to the general doctrine, which is of first importance, and established by all the decisions, that the case must contain evidence which establishes, or from which the jury may reasonably conclude, that the defendant was negligent in what he did, or in omitting to do that which he ought to have done, to protect his neighbor. This is one of the fundamental principles in actions of negligence, and wherever, as it has often been said, the evidence is consistent with either view, or as it is put in the *Cotton Case*, with "the existence or nonexistence of negligence," the matter should not be left to the jury. This principle must be kept in view during the consideration of this case. It ought not to be lost sight of in any action based on the negligence of a defendant. It does not often happen that the importance and significance of this principle stand out so clearly as in the present case, and there are few in which its importance is more evident, because, as we shall ultimately decide, it comes within none of the exceptions laid down by well-considered cases in the United States. *Cotton v. Wood* 8 C. B. (N. S.) 568; *Baulec v. Railway Co.*, 59 N. Y. 356; *Hayes v. Railway Co.*, 97

N. Y. 259; *Smith v. Bank*, 99 Mass. 605; *Wells v. Coe*, 9 Colo. 159, 11 Pac. 50; *Holman v. Security Co.*, 20 Colo. 7, 36 Pac. 797. Many other cases might be cited, but, since there are none to the contrary, these will suffice to support our first premise.

So far as concerns the evidence, it may be here stated that the plaintiff introduced no proof showing or tending to show that the defendants Gumry & Greiner were negligent in the use or maintenance of the boiler. It is quite true that there is evidence by one or two witnesses to the point that the boiler had been permitted to get out of repair, and in this respect the proprietors were negligent. Taking the plaintiff's case, however, as a whole, and taking all of his evidence together, this fact was not established, because he produced proof which tended to show, not only that the boiler was a good boiler when purchased, but also that it had been put in complete repair, and had been properly tested by the authorities whose duty it was to examine it, and that a certificate was issued to the owners, authorizing them to use it at a certain pressure. When the plaintiff made this proof, he surely negatived and overcame the very slight proof which he offered to the other proposition, and in this respect, and to this extent, failed to show that the accident occurred because of the negligence of the owners, either in putting the boiler in, using it after it was placed in the hotel, or continuing to use it after it had gotten into a condition which rendered its use unsafe. This premise is so closely interlocked with the subsequent proposition that we shall only further state the testimony in connection with the discussion of this element of the case. The basic principle on which the appellant contends he ought not to have been nonsuited is the presumption which he insists results from the accident. Put in simple shape, the appellant contends that when he made proof of the use of a boiler and of the explosion, and then proved his injuries, the presumption of negligence to be deduced from the fact of the explosion was enough to entitle him to go to the jury. This proposition we shall controvert, and hold the law to be that no such presumption arises from the explosion of a stationary steam boiler. We will now state our conclusions respecting the proof:

The only witnesses offered by the plaintiff were some half dozen in number, and all of them mechanics. According to their testimony, offered to establish their competency, it appeared that all but two were what are known as practical mechanics or boiler makers, who had worked at their trade, and had been engaged in the running of stationary plants and plants using steam power, for a series of years. Whatever knowledge they had was acquired by experience in the use of metals, the manufacture of boilers, and the operation of steam plants. None of them, save two, made any pretension to what would probably be aptly termed a scientific mechan-

ical and engineering education. In stating these facts, we have no purpose to minimize the weight, force, or value of the testimony given by them, because we are quite ready to concede, and in fact firmly believe, that a large practical experience, if combined with an investigating spirit and an attempt to learn the principles by which scientific results may be ascertained and expressed, may, equally with a technical education, qualify the person to testify. What impresses us most with regard to the testimony of these witnesses is that none of them, or at least not more than two of them, seem to have much conception of either the structural or chemical properties of steel and iron, or of the modes and methods by which educated engineers, in an investigation of this sort, attempt to determine whether an explosion occurred by reason of a patent defect, or from some latent and inherent defect which the owner and operator of the boiler could not detect by the use of ordinary care. It is only with reference to this limitation that the suggestion has been made. As is the case with most boiler explosions, judged by the records to be found in the books written by those who have made the subject a matter of scientific investigation, few explosions can be satisfactorily or easily explained. They are always involved in mystery, because the explosion which occasions the injury destroys the evidence by which what caused it can be determined. Indeed, it may be said that such is the consensus of opinion of the best authorities. We have taken the trouble to examine the scientific treatises on this subject, more probably for our own satisfaction than as a guide to aid us in the determination of this case, because we recognize the fact that we must find in the record itself the material on which to rest our decision; yet we may be permitted to say that our investigations lead us to the conclusion that in few of these accidents, there being no other proof than the fact of the explosion, the examination of the boiler thereafter furnishes no material by which even scientific men can conclude what the cause was. There have been many accidents of this sort, and, as to the great bulk of them, unless there was direct testimony to some fact or some condition established by competent proof tending to show a negligent act, from which the jury might reasonably conclude that the explosion resulted from negligence, there has been nothing whereon the jury could safely or rightly base a verdict. Where a boiler is in good condition, and the plates of proper original strength, and where the boiler has been well made, and is properly equipped with safety valves, which are in operation, and an explosion occurs, an engineer can never, as a matter of certainty or even of great probability, express a satisfactory opinion with reference to the cause. Recurring to the testimony, we find no evidence in the record tending to show any act of negligence on the part of Gumry & Grei-

ner. It is quite true, and we concede, that one or two of the witnesses testified that the boiler was in bad shape; that the flues were rusty and not clean, and some rivet joints were leaking; that the manhole had an iron rim in place of a steel one; and that, on inspection, they were ordered to put the boiler in proper shape. It may be urged that this is enough to entitle the plaintiff to go to the jury. Had he there rested, this might possibly have been true, and it might have cast the burden on the defendant to overcome the presumption of negligence which might be indulged from such proof. The trouble is that the plaintiff went further, and he introduced the boiler inspector of the city, who showed as much competency as most of the other witnesses, and by him it was established: That in May, less than three months prior to the time of explosion, the boiler had been examined. It had been put in proper condition. It had been submitted to the hydrostatic test, which is the severest test by which the power and sufficiency of a boiler are ascertained. It stood this test satisfactorily, and the inspector issued a certificate authorizing them to run it, and run it at a pressure of 75 pounds per square inch. By this proof the plaintiff rebutted any presumption which might arise from the statements made by one or two of the other witnesses, whose examination was made long prior to this time, and who were without knowledge of the character or condition of the boiler at the time the explosion occurred. It may be well to suggest that there is other evidence in the case, offered by these witnesses, with reference to what they saw of the boiler after the explosion, and the parts of it which they examined later. The boiler was blown into pieces, and remained in the fire for some time, but some of the plates and tubes were rescued from the ruins, and submitted to the examination of these mechanics. We do not discover, from reading their testimony, that this examination disclosed anything whereon a presumption could be based that the boiler was made of poor material, not adapted to such uses, or that it was such material as ought not to have been used in the manufacture of a first-class boiler. The boiler was new in 1888, and this explosion, it will be observed, was but three months after it had been put into good condition, and submitted to an inspection which proved satisfactory, and whereon a certificate was issued. When it came to the inquiry whether the material of which the boiler was made was adequate, and such as a boiler ought to be made of, the evidence was exceedingly slight and unsatisfactory. The makers appear to have been reputable makers. This of itself is very slight, but it further appeared that the boiler possessed a certain tensile strength, according to the certificate of the builder. We do not discover from the record that the

explosion, to determine whether the tensile strength, which the boiler maker said was 80,000 pounds, was true or otherwise. Neither do we discover any satisfactory evidence to show that these mechanics submitted the portions of the boiler which they saved to tests by which its ductility was ascertained. We do find, however, evidence which leads us to conclude that it must have possessed tensile strength of high grade, and probably a good deal of ductility. It would perhaps be folly to incorporate into this opinion a statement of the scientific methods by which engineers determine these two qualities. It is enough to say that the metal is subjected to a strain in the direction of its length, and the rupture point, measured by pounds of applied power, determines the tensile strength of the metal. If it takes 80,000 pounds power to sever the rod or the plate, that is the measure of its tensile strength, expressed in pounds. The plates are then subjected to various known engineering tests to determine ductility. They are bent so that the inner radius of the circle at the bend does not exceed $1\frac{1}{2}$ times the thickness of the metal, it being reduced by pressure or by blows to this point. The ductility is ascertained by an examination of the circumference of the circle to determine to what extent, if at all, the metal exhibits evidences of fracture. This may be done either while the metal is cold, or after it has been subjected to a well-known degree of heat, immersed in water of a particular temperature, and then bent. These two methods are ordinarily used to determine the two qualities which boiler plates ought to possess. To some extent, perhaps, these tests were used, although we do not discover any thorough, complete, and scientific test in this direction which would be satisfactory as a determination of the two questions. At all events, there was nothing proven by the plaintiff tending to show that the plates of which the boiler was made did not possess both qualities to a degree sufficient to warrant their use in the construction of the boiler. It therefore follows the jury might not be permitted to infer negligence, or conclude that the proprietors had used a boiler made of improper materials, and had consequently been negligent in its use and maintenance. There is no evidence tending to show the absence of a safety valve. In fact, there is evidence tending to show there was one, because, when the boiler inspector made the hydrostatic test, he weighted it down, in order to reach a pressure of 120 pounds. One of the mechanics attempted to give evidence to show negligence, on the basis of leaky joints at some of the rivets; but this in no manner tended to show the boiler was in bad shape, or that the explosion resulted therefrom, because a leaky joint is in many ways like the safety valve itself, and, if the steam becomes too high or the pressure too great, it operates to permit the escape of

steam, and therefore to relieve the pressure. There was evidence given by some of the witnesses to the point that where the plates were ruptured there seemed to be what I can best term, to the apprehension of the ordinary professional reader, an attenuation of the plates. This condition always exists where the plates possess great tensile power, combined with a marked degree of ductility. As the scientific engineers put it, if a bar or plate be subjected to a strain to determine its tensile strength, and at the point of final rupture there is no attenuation, but a direct fracture of the bar or plate, it remaining of its original size, this may demonstrate (dependent on the pounds of applied power which it stands) great tensile strength and little ductility; in other words, if the plate or the rod breaks without getting thin or stretching, as it were, the plate or bar probably possesses very little ductility. These witnesses, however, testified that the plates seem to have been stretched, and to have gotten thin at the point of rupture. This fact is of considerable significance, since, the tensile strength of the plates being established, the ductility appearing from the attenuation would tend to show that the plates possessed the two qualities essential to first-class metal for the manufacture of boilers. This is as full as we need state the history of the testimony, because the whole case turns on this testimony, and this alone, so far as concerns any practical proof of the negligence of the deceased owners, and we are called thereon to apply the law, and determine whether from these facts, none other being proven, there arises any presumption of negligence, and whether this amounts to any proof of negligence which entitled the plaintiff to go to the jury. We are in thorough accord with the trial judge, who concluded that the evidence did not show, and did not tend to show, negligence on the part of Gumry & Greiner either in the purchase or in the use of the boiler.

Such being the condition of the proof, we must next inquire whether therefrom there will arise a presumption of negligence on proof of the fact of the explosion and the happening of the injury. Our answer must, under the American authorities, undoubtedly be in the negative. We very freely concede that the English doctrine is to the contrary. While I personally do not accept the Rylands Case (*Rylands v. Fletcher*, L. R. 3 H. L. 330), I concede that it is the law in England, although I do not believe that it is in accord with the general American doctrine. It has been cited by the supreme court of this state, as I shall attempt to show, only in support of one proposition, or to uphold a recovery in a case which to my mind is clearly within exceptions to the general doctrine which prevails in this country. The Rylands Case undoubtedly goes to the extreme length in the application of the underlying principle of "Sic utere tuo." Apply it to all the cases to

which the principle must of necessity be applied, if it is to be adopted, and there are a multitude of cases which have been decided in this country which would have to be overruled, and which could not, on principle, be distinguished or maintained. When that case is examined, it will be observed that the defendant built a reservoir on his own property, to contain water. The plaintiff had mined underneath the soil without his knowledge. Without evidence of negligence in the construction of the reservoir, or of negligence in its use or operation, a recovery was upheld on the ground that a man is bound to so use his own property that it does not hurt his neighbor. The principle was not expressed in exactly this form, but that is the logical result of it. This being true, I do not concede that it is the law in the United States, nor do I believe that the doctrine has been approved by the supreme court. We feel bound to notice this distinction, because it is the gravamen of the argument of counsel. We are cited to *Railway Co. v. Eagles*, 9 Colo. 544, 13 Pac. 606, as a case which approves the Rylands Case. The only possible basis for this contention is that the case is cited in the opinion. There is nothing in the decision, in the facts presented, or in the principles involved which would either require or permit or warrant any assertion that it is an approval of the Rylands decision. That was a case where a contractor, in constructing a railroad grade, was compelled to blast out rocks. In blasting the rock and cutting down the hill, rocks were thrown onto adjacent property, and worked injury to the person who brought suit against the railroad company. Recovery was had,—rightly, we think; but, as we view it, the case is a direct exception to the general proposition that he who relies on negligence as a basis of a recovery must prove it, and offer evidence which tends to show it. This was true because, as the court put it, the wrong was the proximate cause of the injury, and the natural and probable consequence of the act, and, in the light of the attendant circumstances, it ought to have been foreseen. With this principle we have no quarrel. It must always be true that wherever injury is done, and results from the act of the defendant, and the injury is the natural and probable consequence of the act, and ought to have been foreseen, there is a presumption of negligence, and the defendant may be held liable, though the plaintiff does not fully sustain the burden which is imposed on him in another class of cases. The inquiry here is, was the explosion of the boiler, and the consequent damage, the natural and probable result of its use, and ought the owners to have foreseen these consequences as a probable result of its use? This suggested inquiry must be answered in the negative. As a general proposition, boilers do not explode. Steam boilers, stationary and movable, are in constant use all over the country; and

while there have been a large number of calamitous accidents, both in this country and the old, from the use of steam, which is a dangerous and powerful element, the proportion of explosions to the number of boilers in use is exceedingly small. As a matter of information, it may be stated that the authorities who write on the question of boiler explosions state that in the matter of inspected boilers, both in this country and in Great Britain, but 1 out of every 10,000 explodes while in use. This is certainly a small percentage, and we know, as a matter of personal observation, that boilers are in use all over the state, and that it has rarely happened that an explosion has occurred. The reasons why they explode are past finding out, even by educated engineers, although they have resorted to all sorts of tests in order to discover the probable cause. They have permitted the water to get low, and then run in cold water; they have permitted it to become high, and run in water; they have heated it to an undue and tremendous heat, and then subjected it to the introduction of water; and they have done all the various things which engineers and experts have said were the causes to which explosions were attributed,—in order to ascertain the conditions and circumstances under which an explosion would occur. The result seems to be that there is no known cause to which a boiler explosion can be attributable, without proof of some specific act of negligence. Whether this would be accepted by all engineers is not certain, though it accords with the statement of some of the most scientific of them. It is, however, needless to discuss it, because in the present case there is no proof of any specific act of negligence to which the explosion could be assigned. There is no proof of a thing done or omitted to be done; no evidence of the use of a boiler made of insufficient materials, and nothing from which the jury would have a right to conclude that Gumry & Greiner were negligent in its use. Under these circumstances, we are not prepared to accept the doctrine that in an explosion there is a presumption of negligence. Boilers are too much of a necessity to the maintenance and success of the various industries in this country, to the production of steam for the heating of houses, hotels, and blocks, and the furnishing of power which renders our mighty structures permissible and possible. The far-reaching effects of a contrary decision can be easily imagined, and would almost forbid the use of boilers for many purposes to which they are now regarded as indispensable. The doctrine of the Rylands Case has been examined by many appellate courts in this country. A large number of the states have concurred in the opinion that there is no presumption of negligence to be deduced from an explosion of a boiler, and, if the plaintiff would recover because of an injury occasioned by an explosion, he is put to proof of some specific act

of negligence to which it can be attributed. This rule is supported by so many able courts (in fact, we may say there are substantially none to the contrary), that we now regard it as a settled American doctrine. Illinois is quoted as a state holding otherwise, but we do not regard this as true, because the late case which is cited is in accord with the general trend of decision in the United States. *Losee v. Buchanan*, 51 N. Y. 478; *Marshall v. Welwood*, 38 N. J. Law, 339; *Cosulich v. Oil Co.*, 122 N. Y. 118, 25 N. E. 259; *John Morris Co. v. Southworth*, 154 Ill. 118, 39 N. E. 1009; *Railway Co. v. Lynch*, 147 Ind. 166, 44 N. E. 997, 46 N. E. 471; *Huff v. Austin*, 46 Ohio St. 390, 21 N. E. 804; *Racine v. Railway Co.*, 70 Hun, 453, 24 N. Y. Supp. 388; *Young v. Bransford*, 12 Lea, 232; *Reiss v. Steam Co.*, 128 N. Y. 103, 28 N. E. 24; *Railway Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.*, 60 Ohio St. 560, 54 N. E. 528. Vide, also, *Nitroglycerine Case*, 15 Wall. 524, 21 L. Ed. 206; *Railway Co. v. Elliott*, 149 U. S. 266, 13 Sup. Ct. 837, 37 L. Ed. 728. This array of strong and well-considered cases, reviewing the law applicable to the inquiry, supported by the most cogent reason, and presenting irrefragable arguments, satisfies us that it is the law of the United States that proof of the explosion of a steam boiler under these circumstances does not make out a prima facie case. When, therefore, we conclude, as we must, that the plaintiff offered no proof of any specific act of negligence from which the jury could rightly conclude that the explosion was the result of negligent acts or negligent omissions by Gumry & Greiner, the court very properly granted a nonsuit.

There is but one other proposition to which we need advert, and to this we need revert but casually. There was an attempt made to show that Lecher, the engineer employed by Gumry & Greiner, was a man of intemperate habits, and an unfit person to be intrusted with the management and operation of the boiler, and perhaps some evidence offered to the point that on the night of the explosion he was intoxicated and unfit for duty, though the proof did not tend to show, nor was there any offered to show, that he was on duty at the time he was seen to be intoxicated. The counsel's statement as to what he intended to prove was very broad, but such was not his offer, nor did his questions, as put, accord with what he stated he intended to prove. It only presents the naked question whether it can be shown, in a case like this, that the engineer in charge of the boiler was a man of dissipated habits, and a person unfit to be intrusted with the management of the boiler, when the intoxication is in no manner, by testimony or by offer, connected with the accident itself. In other words, when the plaintiff fails to offer to prove, or fails to prove, that the dissipated servant was in charge of the boiler at the time

the explosion happened, or that he did or failed to do, at the time of the explosion, what a reasonably prudent and careful servant would have done, thereby contributing to the injury, may his habits be made a matter of evidence? As already suggested, we do not regard this inquiry as a pivotal one. If the plaintiff had offered to prove or had attempted to prove that an act of a dissipated servant at the time contributed to the injury, then he might have gone quite a long way in making the proof essential to show negligence, or proved a fact from which the jury would have been warranted to conclude that the explosion happened because of the negligence of the owners. Failing to go to this extent,—and we think it is quite clear that this is true,—we do not regard the admission or rejection of the proof as of much consequence, or that for the error, if it was one, the case should be reversed. When we conclude, as we do, that the plaintiff wholly failed to show any negligence either in omission or commission, and failed to prove or offer to prove that a negligent act of a dissipated servant contributed to the injury, then we are brought face to face with the premise heretofore established,—that the plaintiff has failed to sustain his burden by showing affirmatively that Gumry & Greiner were negligent. Had the evidence been introduced, it would in no manner have tended to prove negligence from which the jury could conclude that the explosion was the result of what the owners did or failed to do. We have grave doubts, however, whether this evidence is admissible unless there be some direct proof to the point that the negligence of the dissipated servant contributed to the injury, and that the injury resulted from something which was done or from something which ought to have been done by the dissipated servant who was on duty at the time the injury occurred. This seems to be a principle established by the authorities, though, as we have already said, we do not regard this as a fundamental inquiry essential to the disposition of the case. *Warner v. Railway Co.*, 44 N. Y. 465; *McNally v. Colwell*, 91 Mich. 527, 52 N. W. 70; *Railway Co. v. Decker*, 82 Pa. St. 119; *Ward v. Railway Co.*, 85 Wis. 601, 55 N. W. 771; *Sullivan v. City of Salt Lake City*, 13 Utah, 122, 44 Pac. 1039. We readily concede that in the *Pennsylvania* case cited, when it went up again to the supreme court the admission of the evidence of the dissipated habits of one of the employes was upheld; but the case shows that the testimony not only tended to prove the incompetency of the employe, but tended to show that the collision was the result of this employe's carelessness. *Railway Co. v. Decker*, 84 Pa. St. 419. We are not prepared to hold otherwise, nor do we know what our conclusion would be, nor do we intend to express what it might be, under circumstances like those. All we hold is that there is nothing in the case to show, and

nothing which tended to show, nor in fact anything in the offer which tended to prove, that the explosion was the result of any negligent act of the alleged dissipated servant. This being true, we discover no error in the rejection of the testimony. It is quite evident from what we have stated that the nonsuit was, in our judgment, right and proper, and the judgment entered thereon ought to be, and accordingly is, affirmed. Affirmed.

(15 Colo. A. 1)

EISENHART et al. v. McGARRY.¹

(Court of Appeals of Colorado. April 9, 1900.)

REPLEVIN—SUIT ON BOND—DEFENSE—ATTORNEY'S LIEN—WANT OF ENFORCEMENT—PARTIES—WRITTEN ASSIGNMENT—FAILURE TO OBJECT—PROOF OF EXECUTION—WAIVER.

1. Where, in replevin, plaintiff gives a replevin bond for the payment of any sum which may be adjudged against him, and the jury find for the defendant, assess the value of the property, and further find that the property has been delivered to plaintiff, and cannot be returned to defendant, and judgment is thereupon rendered for defendant for the value of the property, it is not a defense to an action on the bond that an alternative judgment for either the return of the property or damages in lieu thereof was not rendered.

2. Where it does not appear that attorneys who, defendants allege, claim a lien on a judgment rendered in a replevin suit have given notice of such lien, either to the judgment debtor or to the assignee of the judgment creditor, or have ever taken any steps to enforce such lien, such attorneys are not necessary parties to an action against defendants as sureties on the replevin bond.

3. Where a written assignment of a judgment is offered in evidence, and received without objection, proof of the due execution of the instrument and of the signature attached to it is waived.

Appeal from district court, El Paso county.

Action on a replevin bond by H. McGarry against John H. Eisenhart and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Cunningham & Musser and Ward & Ward, for appellants. H. McGarry, pro se.

BISSELL, P. William Hamilton brought a replevin suit in El Paso county in May, 1896, against E. C. Dixon to recover certain personal property. Therein, as required by statute, and in conformity with its terms, he filed an undertaking in the sum of \$3,000, which was double the alleged value of the property stated in the affidavit, which contained several conditions,—one for the prosecution of the action without delay, another for the return of the property if the return was adjudged, and a third for a payment to the defendant of whatever sum of money might be recovered against him. This bond was signed by the appellants, Eisenhart and Goshen. This replevin suit proceeded to trial and judgment, and therein it was found that Dixon was the owner of the property, and entitled to its possession. In the judgment

¹ Rehearing denied May 14, 1900.

entered it was found that the property had been delivered to Hamilton, and, further that it could not be returned to Dixon, who had been damaged by the seizure in the sum of \$510.93, for which judgment was given, and execution ordered. In the present suit the plaintiff counted on this undertaking, alleging an assignment of the judgment to him, and otherwise in form and substance stated a good cause of action thereon. The defendants filed an answer setting up two defenses, both of which were about equally worthless. In the first it was stated that the court failed to render a judgment for the return of the personal property, and that no damages were adjudged, as they were informed and believed. They set up a further defense, on information and belief, that in the replevin suit a law firm, with another, were the attorneys for Dixon, and that prior to the assignment by Dixon to the plaintiff the attorneys claimed a lien, and filed among the papers in the case a written statement of their claim, and, as they were informed and believed, they now and at all times claimed a lien. There were sundry motions and demurrers filed, but the only one which need be referred to is that which sustained the demurrer to the second defense. When the case came on for trial, the plaintiff introduced the record in the replevin suit, the bond, the assignment of the judgment, and rested. All of this evidence was received without objection. The defendants offered no testimony, and judgment for McGarry necessarily followed. Prior to the trial, when the demurrer to the second defense had been sustained, the appellants filed a motion to have the law firm and the other made parties. On what basis the appellants moved we are not advised by the abstract. The motion is not set up, nor are any of the facts appearing therefrom called to our attention by the paper book. We assume, however, it is on the basis that they claimed a lien, according to the allegations of the answer.

This statement practically disposes of the appeal, and permits the affirmance of the judgment without any reference to the legal propositions which have been argued. We might here conclude the opinion with entire justness, looking only to the record which the parties have presented. The first defense pleaded the failure to adjudge the return, which is, as we have already several times decided, utterly valueless, under the circumstances disclosed. Alternative judgment is always proper, and many times necessary, in order to give the obligees in the undertaking a right of action for the breach of some of its conditions. Wherever there are several conditions in the bond, and wherever it has been found and adjudged that the return is impossible, an action may be maintained on the undertaking, even though there be no alternative judgment. *McCarthy v. Strait*, 7 Colo. App. 59, 42 Pac. 189; *Cox v. Sargent*, 10 Colo. App. 1, 50 Pac. 201. Many other cases might be cited, but these are enough to show that,

under the finding of the court in the replevin suit, the plaintiff in this action, having shown an undertaking by the appellants to pay whatever judgment might be rendered, that the return could not be had, and proved a breach, was entitled to maintain the suit.

The demurrer to the other defense was well taken. The extent and possibility of an attorney's lien in this state is well settled. We had occasion to consider it some years ago, and the court, speaking by Judge Thomson, analyzed the provisions of the statute with reference to attorney's liens, and decided what was necessary to maintain and enforce it, and practically thereby determined the conditions which must exist in order to make the attorneys necessary parties to an action brought on the judgment, or on an undertaking given to pay it. *Bank v. Davidson*, 7 Colo. App. 91, 42 Pac. 687. This case subsequently came before the supreme court after a new trial, and in an exhaustive opinion by the chief justice that court very fully declared the law. *Davidson v. La Plata Co.*, 59 Pac. 46. Therein an attorney's right to a lien was fully upheld. Its enforcement against an assignee was adjudged. The proof established the lien. The case was also full to the point that both the creditor and the assignee had notice of the attorney's claim, and the intention to insist on the lien before either transfer or payment. Herein the trouble with the defense as it was pleaded and with the motion as it appears in the abstract is, there is in no way and in no manner a statement of facts showing that the attorneys had a lien on the judgment. There is nothing pleaded, and nothing stated in the motion papers, to show that the attorneys who claimed the lien had ever commenced proceedings to enforce it, or that at the time of this trial, or of this plea, they had done anything towards maintaining their claim or establishing a lien, or had given any notice of it to the debtor or to the assignee. Their claim cannot, therefore, be said to be a subsisting lien enforceable either against their client or against the judgment debtor; and nothing appears which would prevent the judgment debtor from paying the creditor or the clerk, as he might see fit. The mere claim of a lien, followed by no suit to establish it, or any proceedings to enforce it, or notice of an intention to claim it, is not a lien in the sense which makes the persons who are said to be claiming it necessary parties to a suit begun to collect the judgment. We have no intention to minimize the force of the decision in the Davidson Case. Judge Thomson's opinion is justified by the case as then presented. The later decision by the supreme court can be clearly defended on the facts stated in the opinion. Nor do we conceive that it at all departs from the earlier decisions of that court. This question has been so well presented by the counsel who appeared on the oral argument—though he did not participate in the trial—that we have gone further than the record requires. It may well be the at-

torneys had a lien. Possibly, even, without initial proceedings, if they had given the proper notices, it would have been so far preserved that they might have been proper, if not necessary, parties, and the court might have committed error in not ordering them brought in. The error, if any, is not demonstrated by the terms of the plea or by the substance of the motion. It does not appear from either or both that the attorneys had a lien, or the right to insist on one.

This practically disposes of all the questions urged, except we find it suggested in the brief that there is no proof of the assignment of the judgment. This does not accord with the facts, because the assignment was offered in evidence, and received without objection, and this circumstance is always held enough to prove the due execution of the instrument which is offered, permit the assignment to be produced, and waives any proof of its execution or of the signature. This seems to be a well-settled doctrine, supported by many cases, and laid down by an eminent author. 1 *Thomp. Trials*, § 883 et seq. We can discover no other matters suggested in the arguments which, in our judgment, are worthy of consideration; and while we have spent more time than, perhaps, the case deserves, we have only done it because of the apparent conviction of counsel that the appeal had some merits. Everything being disposed of, and no error appearing in the record, the judgment will be affirmed. Affirmed.

CITY OF LEADVILLE v. BISHOP.¹

(Court of Appeals of Colorado. Feb. 12, 1900.)

POLICEMAN—CITY COUNCIL—POWER OF REMOVAL—DAMAGES.

1. Where the trial court finds that plaintiff was improperly removed from the office of policeman of defendant city, and that he is entitled to recover salary for the remainder of the year for which he is found to have been appointed, it is error to refuse defendant's evidence, offered in mitigation of damages, of the sums plaintiff had earned or might have earned in other employments, by reasonable and ordinary diligence, during such period.

2. Where no statute or ordinance fixes the term of office of a policeman, such an officer is removable, without notice or hearing, at the arbitrary pleasure of the city council electing him, though at the time of the officer's election by the council the mayor declared him elected for one year. Gen. St. § 3383, as amended by Laws 1887, p. 439, § 1, provides that in certain cities, of which defendant is one, "the marshal and police shall be elected by the city council, and the city council may elect a solicitor or city attorney, and a police judge or magistrate, who shall hold their respective offices during its pleasure." Laws 1893, p. 460, makes all such officers, but policemen, elective, by the voters of the city, for the term of two years. *Held*, that the words, "who shall hold their respective offices at its pleasure," included policemen, and that the statute is not an implied restriction on the power of a city council to arbitrarily remove a police officer.

3. Ord. Leadville, c. 4, § 1, authorizes the election by the city council of numerous officers, including "such number of policemen as may be deemed necessary." Section 3 provides that any such officer may be removed by a majority of the city council, for incompetency or dereliction or violation of duty, after notice and hearing. Chapter 20 provides the procedure for preferring charges, notice, trial, etc. *Held*, that these ordinances did not abridge the city council's arbitrary power of removing a policeman without notice or hearing, since an abridgment of the council's statutory power by ordinances, if permissible at all, would not be presumed unless the intention to do so was clear.

4. Where the judgment of the trial court for plaintiff is reversed on the holding that he cannot recover in the action, the cause will not be remanded, but judgment will be rendered for defendant in the supreme court, to avoid increasing costs.

Appeal from district court, Lake county.

Action by Patrick D. Bishop against the city of Leadville for salary as policeman. From a judgment in favor of plaintiff, defendant appeals. Reversed.

R. D. McLeod and L. Frank Brown, for appellant. Jos. W. Taylor and Clinton Reed, for appellee.

WILSON, J. Plaintiff, Bishop, claims to have been regularly appointed a policeman of the defendant city for the fiscal year commencing April —, 1896, and that he was unlawfully removed from such position, without cause and without hearing, in October of that year. He sues to recover the salary which he would have received if he had served during the remainder of the year. The cause was submitted and tried upon an agreed statement of facts, printed in the record in full, but from which we shall make, during the course of this opinion, only such quotations as may be necessary to a proper understanding of the questions raised and determined. It is admitted that plaintiff's right to the position during the term claimed is based solely and only upon the action of the city council, of which the following is a record:

"May 6th, A. D. 1896. Patrick Bishop was nominated a special policeman, to serve at the pleasure of the council. On motion Ald. Donnen, the clerk cast the unanimous vote of the council. Seven votes cast. The mayor declared Patrick Bishop duly elected special policeman for the ensuing fiscal year.

"May 7th, A. D. 1896. Ald. Donnen stated a mistake was made in regards to appointing Jerry Driscoll as special policeman. The mayor also stated the same in regards to Patrick Bishop. On motion Ald. Counbs, the former action of the council was reconsidered in appointing Jerry Driscoll and Patrick Bishop as special policemen. Ayes: Counbs, Joy, Donnen, Mitchell, Page, Nicolai—6. On motion Ald. Joy, the clerk cast the unanimous vote of the council for Patrick Bishop as regular policeman. Seven votes cast. The mayor declared Patrick Bishop duly elected as policeman for the ensuing fiscal year."

¹ Rehearing denied May 14, 1900.

The first contention of the defendant is that there was no legal or valid appointment, because of noncompliance with the provisions of Gen. St. § 3324, which required that all appointments of officers by a city council "shall be by ballot, and the concurrence of a like majority shall be required, and the names of those who voted, and the vote each candidate received upon the vote resulting in an appointment shall be recorded." This argument assailing the validity of the appointment is urged with much force. We shall not determine it, however, because there are other questions more controlling and conclusive of the issues involved, and about which there can be, in our opinion, no doubt.

The finding of the court upon the question of plaintiff's right to recover at all was in favor of the plaintiff, and thereupon the defendant offered to introduce testimony to the effect that the plaintiff had earned, or might have earned, sums of money during the months for which salary was claimed, and that such sums should apply as a set-off on the amount sued for herein. This offer was made by virtue of the terms of clause 12 of the agreed statement of facts, which reads as follows: "The defendant contends that in case the court should find, as a matter of law, that plaintiff can recover, then the defendant is entitled to offset against any recovery in such amount as the plaintiff earned in other employments during the months sued for, or might have earned, by reasonable and ordinary diligence, during such time. On the other hand, plaintiff claims that the defendant is entitled to no offset on account of such matters; but, if the court finds that defendant is entitled to such offset, then the defendant may introduce evidence on the trial with reference to that matter, in addition to this statement of facts." The court denied the offer, and refused to receive such evidence. This, of itself, would be reversible error, under the ruling of this court. *City of Denver v. Burnett*, 9 Colo. App. 536, 49 Pac. 378. We do not propose, however, to rest our decision solely upon this point. There are other questions, properly raised and presented for our consideration, which are final and conclusive against plaintiff's right to recover anything.

We find nothing in the statute and nothing in the ordinances of the defendant city which prescribed or fixed any term of office for a policeman. It will be observed from the proceedings of the council which we have set forth that the council did not pretend to elect or appoint for any specified term. It is true that, after the vote was had, the mayor announced that the plaintiff was elected for the term of the fiscal year. This declaration of the mayor was, it is scarcely necessary to say, ineffectual for any purpose. In the absence of a statute or of a valid ordinance, if it could be fixed by ordinance at all, the may-

or had no right to declare the term of office to which a person was elected. He was entirely without power or authority in the premises. The plaintiff was therefore not appointed for any specified term. In such case the rule is well settled that the power of removal is incident to the power of appointment, and it may be exercised at the pleasure of the appointing power; that is to say, it may be arbitrarily exercised, without the assignment of any cause, without notice, and without hearing being accorded to the officer. The incumbent holds only during the pleasure of the appointing power. *Mechem, Pub. Off.* §§ 445, 454; *Tied. Mun. Corp.* § 83; *Ex parte Hennen*, 13 Pet. 256, 10 L. Ed. 138; *Blake v. U. S.*, 103 U. S. 227, 26 L. Ed. 462; *People v. Robb*, 126 N. Y. 181, 27 N. E. 287; *Field v. Com.*, 32 Pa. St. 481; *State v. City of St. Louis*, 90 Mo. 19, 1 S. W. 757; *People v. Board of Fire Com'rs*, 73 N. Y. 437; *People v. Hill*, 7 Cal. 97. Hence, independent of any statutes specially granting such power, the city council of Leadville had the power to remove the plaintiff and discharge him at its pleasure, without notice to him, without charges being preferred, and without giving him a hearing. In addition to this, however, the power to so remove was expressly conferred by statute upon the city council. The concluding sentence of section 3383, Gen. St., as amended by Laws 1887, p. 439, § 1, reads as follows: "In all such cities, the marshal and police shall be elected by the city council, and the city council may elect a solicitor or city attorney, and a police judge or magistrate, who shall hold their respective offices during its pleasure." Counsel for plaintiff most vigorously urge that the concluding words of the sentence refer only to the offices of solicitor and police judge, who might or might not be chosen by the council, in their discretion. They contend that any different construction would not only do violence to the rules of statutory construction, but would utterly ignore, and be in defiance of, the well-settled rules of English grammar. This entire section, as it appears in the laws of 1887, is but very slightly different from the section as it appears in the General Laws of 1877 and the statutes of 1883. Gen. Laws, p. 912, § 2720; Gen. St. § 3383. This last sentence which we have quoted is substantially the same in all, except that in the last enactment the word "respective" is inserted before "offices," and the words "or city attorney" follows "solicitor," and the words "or magistrate" follow "police judge." Considering the entire section, wherever it is found, its object was undoubtedly, as is apparent at a glance, to provide for the election and appointment and terms of office of the officers necessary to administer municipal affairs in cities of the second class, other than that of mayor, which was provided for in the preceding section. It provides first for the election by the voters of aldermen, and fixes the duration of their term. It provides also for the

election of a treasurer, and specifies his term of office. It then, in the concluding sentence which we have quoted, embraces all other officers which the legislature deemed necessary to specifically mention, specifies the manner of their election, but fixes no term whatever. Even if it be held that the qualifying words at the end of the sentence apply only to the solicitor and police judge, the statute fixes no term of office for the marshal or for the police; and hence, as we have already said, their term would only be at the pleasure of the board. In such case the concluding words of the sentence would be only a legislative affirmation of the law in reference to the marshal and the police, even if the words had been omitted. We do not see, therefore, that it would be a strained construction to hold that the words applied to all the officers enumerated in the sentence. It was, we think, the evident intent of the legislature. Legislative bodies are presumed, in the enactment of laws, to have in view the furtherance of the best interests of the people for whom they are enacted. Where, by the use of either bad language or bad grammar, the intent of the legislature is in doubt, that construction will be favored which tends best to subserve the welfare of the public; this being presumably the object of the legislature. It needs no argument to support the proposition that in municipal affairs it is essentially in the interest of good government that the council or other controlling power in a city should be invested with authority to summarily remove policemen. This power is more important with respect to these officers than to any other, because it is upon them that most largely depends the peace and good order of the community, the safety of property, and security of life. There may be, and it is a matter of common knowledge that there are, emergencies when, if it were necessary to present formal charges and have a judicial hearing and investigation before a policeman could be removed, the peace of the community might be greatly endangered, and serious consequences might follow. As a matter of public policy, therefore, we think that this summary power of removal should be invested in some department of the city government, and that such was the intent of the legislature in this instance. It is true, the sentence is somewhat awkwardly constructed, but this is not such a rare occurrence in legislative enactments as to require or attract special attention and comment. A strict observance of the rules of grammar would possibly require that relative, qualifying, or limiting words or clauses in a statute are to be referred to the next preceding antecedent, but an inflexible observance of such rule would present many serious complications in the construction of statutes. It is equally well settled by numerous adjudications that in statutory construction this rule has many exceptions, and must yield to the evident sense and meaning of

the statute as gathered from the context. As said by a distinguished law writer, following high judicial authority: "It is better always to adhere to a plain, common-sense interpretation of the words of a statute, than to apply to them a refined and technical grammatical construction. It is not always safe to assume that the draftsman of an act understood the rules of grammar. Neither bad grammar nor bad language will vitiate a statute." *Suth. St. Const.* §§ 258, 259; *Black, Interp. Laws*, § 65.

We are met, however, with the contention that the ordinances of the defendant city prescribed that no officer should be removed, except in a certain manner therein specified, and that such mode was not followed in this instance. Section 1, c. 4, of the city ordinances provides for the election by the city council of numerous officers, including "such number of policemen as may be deemed necessary." Section 2 provides for the giving of bonds in certain amounts by the various officers, and fixes the conditions of the bonds, etc. Section 3 of the same ordinance provides as follows: "Any officer named in section one (1) elected by the city council may be removed by a majority of all the members elected to the city council, for incompetency or any dereliction or violation of duty, whenever the council shall think the interests of said city require such removal: provided, that no officer shall be removed as aforesaid until he shall have had notice of such intended removal, and of the charges preferred against him, served upon him by the officer designated in the ordinance providing the mode in which charges shall be preferred, and a hearing had before the council, and an opportunity given such officer to exculpate himself before the city council." Another ordinance (chapter 20), entitled, "Mode of Preferring Charges and Regulations Concerning Hearings before the City Council," provided that, whenever complaints should be made to the council, it should be the duty of the council to vote on the question as to whether there should be charges preferred against a party; and, if it was so determined, the council fixed the time and place of trial, etc. The remainder of the ordinance provided for the proper notice, form of trial, etc. The question here presented has been passed upon by our supreme court. *Carter v. City of Durango*, 16 Colo. 535, 27 Pac. 1058. The court in that case had under consideration an ordinance reading in the identical language as that used in section 3, which we have quoted above, as applied to a case in which an officer had been summarily removed without the preferment of charges or any hearing. The court said: "We cannot assume that in adopting this ordinance the councilmen intended to curtail their statutory power of removing at pleasure, and limit themselves to removals for the specified causes alone. Besides, it is extremely doubtful if such intent, had it existed, could be thus given any force or effect; for it is not within

the power of a municipal corporation, by ordinance or by-law, either to extend or restrict the authority conferred by statute. 1 Dill. Mun. Corp. § 317." This decision is directly in point, and conclusive of the case at bar. It would be unreasonable to assume that the city council, by the adoption of this ordinance, intended to surrender the power which it had to summarily remove certain officers, appointed to serve only during its pleasure. It would be more reasonable to say that it was intended to apply only to the officers mentioned in the preceding sections, who had been elected or appointed for a specified term, or whose tenure of office was fixed by statute, and possibly to apply also to all officers in cases where charges of some special misconduct or dereliction of duty were preferred by some one outside of the council, and a hearing was proper, so that the council might determine whether the officer had been guilty of such misconduct. A waiver or surrender of a statutory power vested in a city council, even if permissible at all, will not be presumed, unless such clearly appears to have been intended. The incompetency of a policeman, from want of physical or mental capacity, or from supposed sympathy with the criminal classes, or from numerous other causes, might be apparent, to the satisfaction of every member of the council, and might be exceedingly difficult of proof, because, after all, depending merely upon opinion. There might, also, in the unanimous opinion of the council, which is responsible for the proper administration of municipal affairs, be urgent necessity for immediate and prompt action. In such case it seems to us absurd to require that the council, which in any event has the ultimate power of removal, must, before it can exercise this power, undergo the delay incident necessarily to the preferment of formal charges and a public trial and investigation. The council would in some instances be compelled to prefer charges to itself, and sit in judgment upon its own charges; it being all the time conceded that, whatever might be its judgment, it would be final and conclusive, and could not be questioned, whatever the evidence upon which it was founded. Surely neither the legislature nor city council ever contemplated such farcical proceedings.

In further confirmation of the correctness of these views as to the legislative intent, in 1893 the legislature passed an act providing that in cities of the second class the marshal, police magistrate, and city attorney should be elected by the qualified electors of the city, and should hold their respective offices for the term of two years. Laws 1893, p. 460. It did not in any other respect attempt to change, modify, or amend section 3383, Gen. St. It simply took these officers from without the operation of the last sentence of the section, by providing for their election by the people, and fixing for them a specific tenure of office, thus leaving the entire sentence applicable to policemen only.

For these reasons, we are clearly of the opinion that the plaintiff cannot recover in this action. The judgment will therefore be reversed, but, it being unnecessary to occasion additional costs, the cause will not be remanded. Judgment will be entered in this court in favor of the appellant for its costs. Reversed.

DUNCAN v. BURCHINELL, Sheriff.

(Court of Appeals of Colorado. March 12, 1900.)

SHERIFFS AND CONSTABLES—ATTACHMENT—WRONGFUL LEVY—EXEMPT PROPERTY—SHERIFF'S LIABILITY—TRESPASS—RETURN—EFFECT—REASONABLE TIME—QUESTION FOR JURY.

1. Gen. St. § 1808, declares that, if any officer or other person shall seize or levy on exempt property, he shall be liable for treble damages, to be recovered in an action for trespass. *Held*, that where a sheriff notified plaintiff that he was about to levy on certain oats, which were exempt as feed for defendant's horses for less than six months, under section 1806, whereupon plaintiff asked defendant if he had a bond, and, on being answered in the affirmative, said, "All right, go ahead," such statement warranted the sheriff in making his levy, and exempted him from liability as a trespasser.

2. Where an officer levied on exempt property under an attachment writ, and the debtor's language and conduct warranted the officer in making the levy, there was no duty on the officer to return the property until after demand made within a reasonable time thereafter.

3. Where an officer levied an attachment on exempt property, and the debtor's language and conduct at the time of the levy warranted the officer in making it, and the debtor demanded a return within 48 hours, and 10 days after the levy commenced an action of trespass against the officer, and 8 days after suit brought the officer tendered a return of the property, the question whether such return was within a reasonable time, so as to exempt the officer from liability in trespass, was for the jury.

4. Where a sheriff levied an attachment on exempt property, the fact that he afterwards returned the same, and left it on plaintiff's premises, and that it was removed to plaintiff's granary, did not affect his right of action against a sheriff for trespass further than to reduce the amount of damages, since plaintiff's right of action could not be barred after suit brought.

Error to Arapahoe county court.

Action by William Duncan against William K. Burchinell, sheriff. From a judgment in favor of defendant, plaintiff brings error. Reversed.

Chas. H. Dyett and J. W. Horner, for plaintiff in error. Hugh Butler, for defendant in error.

THOMSON, J. On the 24th day of November, 1894, William K. Burchinell, as sheriff of Arapahoe county, by virtue of a writ of attachment issued in a suit against William Duncan and another, then pending in the county court of that county, attached and took into his possession 51 sacks of oats, the property of William Duncan. Duncan was present when the property was taken, and service of the writ was made upon him at

that time. When the officer communicated his purpose to Mr. Duncan, the latter asked him if he had a bond, and, upon his replying that he had, said, "All right, go ahead." The sheriff then took the property, and removed it from the premises. Two days afterwards Duncan served Burchinell with a written notice that he claimed the property taken as exempt from levy under the writ, and that, unless it was returned within 48 hours, he would bring suit for three times its value, pursuant to the statute. The notice was served by Duncan himself, and upon receiving it Mr. Burchinell said that, unless he was furnished with a good and sufficient bond, he would have to return the oats. Four days afterwards the attachment plaintiff furnished the sheriff with an indemnifying bond, and the demand for the return of the property was, for the time being, disregarded. This action is against Burchinell for the recovery of three times the value of the property. It was brought on the 4th day of December, 1894, before a justice of the peace. On the 11th day of December the defendant brought the oats back, and offered them to the plaintiff, but the latter refused to receive them, and they were left under a shed near his house. On the 12th day of December the defendant paid the costs which had accrued in the attachment suit. On the 14th this cause was tried, and judgment rendered for the defendant. The plaintiff made his appeal to the county court, where a trial without a jury resulted in a judgment for the plaintiff. By agreement of parties, this judgment was vacated, and a new trial ordered. The cause was then tried in the presence of a jury, and after the evidence on both sides was heard the court directed the jury to find for the defendant, and they returned their verdict accordingly. Some time after the oats were placed in the shed,—but when is uncertain,—they were removed, and put into the plaintiff's granary.

The direction of a verdict by the court gives rise to the only important questions in the case. It is provided in our statute concerning exemptions that working animals to the value of \$200, when owned by any person being the head of a family, as well as the necessary food for such animals for six months, shall be exempt from levy and sale upon any execution, writ of attachment, or distress for rent. Gen. St. § 1866. The statute also contains the following provision: "If any officer or other person, by virtue of any execution of other process, or by any right of distress, shall take or seize any of the articles of property hereinabove exempted from levy or sale, such officer or person shall be liable to the party injured for three times the value of the property illegally taken or seized, to be recovered by action of trespass, with costs of suit." Id. § 1868. The evidence was that the plaintiff was the head of a family; that he was the owner of certain working animals; that the value of these animals did not ex-

ceed \$200; and that the oats in question, together with all the other food that he had, was not more than sufficient to supply the animals for six months. It has been held by our supreme court that as to property which by law is absolutely exempt from liability, it is unnecessary for the debtor to claim it as exempt; that the officer is bound to know that the property is exempt; that it is his duty to leave it with the debtor; and that, under such circumstances, the seizure of it is a trespass. *Harrington v. Smith*, 14 Colo. 376, 28 Pac. 331. In that case the levy was made in the absence of the debtor, and without his knowledge, so that there was not, and could not have been, any waiver of his rights. This case resembles that in the fact that the officer took property which it was his duty to know was exempt, but it is unlike that in the fact that the seizure was made in the presence of the debtor. If the latter had stood by, and said nothing, what the effect of his silence would have been, it is unnecessary to decide, for he was not silent. After ascertaining that an attachment bond had been given, he told the officer to go ahead. Whether his language might be regarded as a waiver of his exemption claim is a question which counsel have not discussed, and upon which, therefore, we express no opinion: but we feel certain of this, at least: that it warranted the officer in proceeding, so that in taking the property he was not a trespasser. The sheriff's act not being unlawful, it was incumbent upon the attachment defendant, if he proposed to assert his right to the property, to make formal demand for its return, and this he did two days afterwards. It then became the duty of the sheriff to return the property to him within a reasonable time. *Madera v. Holdrege*, 4 Colo. App. 126, 35 Pac. 52. He did attempt to return it, and did return it, in so far as he could return it at all, one week after this action was commenced. The sheriff was not bound by the time limited in the notice; but, if a reasonable time had elapsed before the suit was brought, then at the commencement of the action his liability was fixed, and any attempt to make the return afterwards, unless with the concurrence of the debtor, would not relieve him from responsibility. If, however, a reasonable time had not elapsed, the action was commenced prematurely. But it is argued that the duty to return the property must be equivalent to and commensurate with the right of the debtor to claim his exemption, and that, when the claim is not made at the time of the levy, it must be made within a reasonable time afterwards; that is to say, according to the greater number of the adjudications, at any time before the sale of the property under the execution. The conclusion reached may be best expressed in the language of counsel: "If, according to the authorities referred to, the appellant had the right to demand a return of the property before the sale (and this doctrine

seems to have been concurred in in *Harrington v. Smith*, 14 Colo. 376, 23 Pac. 331, it follows that the sheriff had an equivalent right to stop proceedings under the execution before sale, and to return the property to the judgment debtor." Respecting the time within which the claim must be made, the decisions vary, and the variance is occasioned by differences in the statutory provisions construed. The cases are collected, and the situation clearly outlined, in 12 Am. & Eng. Enc. Law (2d Ed.) 226 et seq. Decisions upon statutes dissimilar to our own are not of much assistance to us. Our statute does not, in terms, make it incumbent upon the debtor to claim an exemption at all; but, where the officer is not chargeable with knowledge of the debtor's right to retain any specific property, and makes the levy in good faith, upon settled principles, in order that the duty of returning the property taken may be cast upon the sheriff, demand must be made for it. In the absence of any statutory direction on the subject, the demand must be made within a reasonable time after the levy; and what, in a given case, is a reasonable time, is determinable from the facts and circumstances of that case. The right to make the claim may be waived, and the waiver may be evidenced by conduct as well as words. We think that circumstances might exist which would render it dangerous for the debtor, after knowledge of the seizure, to remain needlessly inactive, while the expenses incident to the custody of the property were accumulating. We hardly believe that, after knowingly and unnecessarily allowing costs to accrue, which, if the property be released, the creditor must pay, the debtor could successfully assert his claim. We are not prepared to say that the general statement of counsel that the duty of the officer to return the property is equivalent to and commensurate with the right of the debtor to claim his exemption is objectionable. No duty towards the debtor rests upon the officer until after the claim is made. But, as the claim must be made in a reasonable time, an equivalent duty rests upon the officer to make the return in a reasonable time. If the claim be not made until immediately before the sale, the officer discharges his duty by stopping the sale, and returning the property then; but a statement that when the demand is made, as in this case, immediately after the levy, the officer can wait until the time of sale, and then protect himself by a return, is not in harmony with doctrines announced in analogous cases, and involves, moreover, an inconsistency which mars its meaning. When the demand is made, the right accrues, and the duty arises. If the officer acknowledge the debtor's right, there will be no sale. If there can be a delay until the time of an event which will never happen, there may never be a return. On the other hand, proceeding towards a sale notwithstanding the demand would be a denial of the right, and a

refusal to make return. It seems manifest to us that upon receipt of the notice of the claim it is the duty of the officer, provided always that the claim is lawful, to stop all further proceedings against the property, and return it in a reasonable time.

Whether the defendant should have returned the property prior to the bringing of this suit was a question to be determined by the jury under the instructions of the court. Unless there were circumstances, undisclosed by the record, which justified further delay, eight days would seem to be ample time for action; but whether it was or not was for the jury to say. Two days after the notice was given, the attachment creditor, E. L. Oakes, executed a bond to the defendant, requiring him to retain the property, and agreeing to indemnify him against any liability he might incur by refusing to deliver it. A natural inference from the action of Mr. Oakes would be that he did not intend to permit a return of the property, although his purpose may have been only to preserve its status until he had time for the investigation which he afterwards made. It appears that there was some doubt whether the plaintiff, or J. M. Duncan, who was sued jointly with him, was the owner of the oats. The latter was the former's son, and was unmarried. The two lived together. If the oats were the property of J. M. Duncan, they were not exempt. As a joint liability was asserted against the father and son, the question of the ownership of the oats was one of some importance. Mr. Oakes finally satisfied himself that they belonged to the plaintiff, and directed their return. But he took his first step towards an investigation on the 4th day of December, the day this suit was brought. There is nothing to show that what he did after that day could not as well have been done before. There may have been valid reasons for the delay, but, if there were, the record does not disclose them. When the oats were brought back, the plaintiff refused to receive them. They were left under a shed, and sometime afterwards were removed to the plaintiff's granary. The testimony was that, on account of the bad condition of the sacks which contained them, they were wasting, and that they were put into the granary to preserve them. It does not appear that the plaintiff ever used them. But, if the statutory liability against the defendant had accrued when the action was begun, we do not conceive that, even if there was an appropriation of the oats by the plaintiff, the defendant was thereby released. If there was a liability against the defendant at all, it was fixed before the oats were brought back, and it was for three times their value. Their acceptance by the plaintiff might be shown in reduction of the amount of liability, but not in satisfaction of the claim. It is plain that the case was not very closely tried. It is probable that important facts might have been elicited

which were not. The counsel who now appears for the defendant in error had nothing to do with the trial. He was not then connected with the case. If he had been, it is safe to suppose that the record would not be in quite its present condition. Upon the history of the case which the record presents, we have no hesitation in saying that the facts should have been submitted to the jury, and that the court, in directing a verdict, and thus substituting its judgment for theirs, erred. The judgment is reversed. Reversed.

PIERCE et al. v. MERRILL et al.
(S. F. 1,351.)

(Supreme Court of California. May 3, 1900.)

NOTE AND MORTGAGE—COLLATERAL GUARANTY—BREACH—RIGHT OF ACTION—ABSOLUTE GUARANTY—STATUTE OF LIMITATIONS.

1. By the terms of a loan to a corporation, plaintiffs took as security a second mortgage, which was not to be recorded; and, in consideration of the note and mortgage, defendants guarantied payment at the times and according to the terms expressed in the note and mortgage, and further pledged 1,500 shares of the capital stock of the company procuring the loan. *Held*, that the guaranty was not one with a condition precedent to the enforcement of defendants' liability that the mortgage be foreclosed, but was absolute and unconditional, under Civ. Code, § 2866, providing that a guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor.

2. Where plaintiffs made a loan to a corporation June 12, 1889, payable June 1, 1891, and defendants gave an absolute and unconditional guaranty of a note and mortgage securing the loan, and the corporation defaulted, and the mortgage was foreclosed, with a deficiency decree, an action on the guaranty, to recover such deficiency, begun in 1896, is barred under Code Civ. Proc. § 337, providing that an action founded on an instrument in writing executed in the state shall be begun within four years.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Henry Pierce and others against Samuel Merrill and others on a guaranty securing payment of a note and mortgage. From a judgment in favor of plaintiffs, and from an order denying a motion for a new trial, defendants Bonebrake and Howes appeal. Reversed.

Samuel M. Shortridge and Frank P. Flint, for appellants. E. S. Pillsbury and Alfred Sutro, for respondents.

GRAY, C. This is an appeal of the defendants Bonebrake and Howes from a judgment in favor of plaintiffs for \$21,458.97 and costs, and from an order denying defendants' motion for a new trial. The action was brought to recover on a written guaranty in words and figures as follows: "Los Angeles, Cal., June 10, 1889. To Henry Pierce, Emily F. Pope, and W. H. Talbot, Trustee, San Francisco, California: In consideration of your making a loan to the Semitropic Land &

Water Company, a corporation having its principal place of business at Rialto, San Bernardino, of the amount of \$50,000, and taking as security therefor a 2nd mortgage upon its property, and in consideration of your refraining from putting the same on record, we, the undersigned, guaranty the payment of the said loan, with interest thereon, at the times and according to the terms expressed in said note and mortgage, and pledge herewith (1,500) fifteen hundred shares of the capital stock of said company now standing in our names, in the following proportions: Sam'l Merrill, (600) six hundred shares; Geo. H. Bonebrake, (500) five hundred shares; and F. C. Howes, (400) four hundred shares; and we authorize the pledging of our further interest of (%) two-thirds of (10,000) ten thousand shares of said stock now in the treasury of said company. And whereas the said first parties have deposited with second parties the first above-mentioned 1,500 shares of the capital stock of the Semitropic Land and Water Company: Now it is understood by and between all of the parties that upon payment of said note and satisfaction of said mortgage that said 1,500 shares of stock shall be redelivered to the said Merrill, Bonebrake, and Howes in the proportions in which it has been delivered by them. Witness our hands and seals the day and the year first above written. Sam'l Merrill. Geo. H. Bonebrake. F. C. Howes." The complaint was filed January 31, 1896, and sets out a copy of the above guaranty and then proceeds as follows: "That in consideration of said guaranty, and in reliance thereon, the plaintiffs did, on the 12th day of June, 1889, loan to the said Semitropic Land & Water Company the said sum of fifty thousand dollars, and that thereupon, and on said 12th day of June, the said company made its promissory note for fifty thousand dollars, payable to the plaintiffs on or before June 1, 1891, in United States gold coin, with interest at the rate of eight per cent. per annum, payable quarterly, and, to secure the payment thereof according to its tenor, made, executed, and delivered to the plaintiffs a second mortgage upon its property, and which property was situated in the said county of San Bernardino. That thereupon the plaintiffs agreed to refrain, and did thereafter, pursuant to the terms of the said guaranty, always refrain, from putting the said mortgage on record, and the said mortgage was never recorded. That at the same time with the execution and delivery of the said note and mortgage by the said company as aforesaid, and as a part of the same transaction, the defendants delivered to the plaintiffs the said agreement and guaranty, and also then delivered to them in pledge, pursuant to the terms of said guaranty, and to secure the performance thereof, certificates for fifteen hundred shares of the capital stock of said Semitropic Land & Water Company, whereof the defendant Samuel Merrill contributed six hundred shares, the defendant

Geo. H. Bonebrake five hundred shares, and the defendant F. C. Howes four hundred shares. That the said mortgage executed and delivered to the plaintiffs by the said Semitropic Land & Water Company as aforesaid was a second mortgage upon the property described therein, and that the plaintiffs would not have loaned the said sum of fifty thousand dollars to the said company upon the security of the said second mortgage, and would not have refrained from recording the same, but for the said guaranty, and that the plaintiffs loaned the said sum of fifty thousand dollars to the said company upon the security of the said second mortgage, in reliance solely upon the said guaranty so as aforesaid delivered to them by the defendants." The complaint then goes on to state that certain amounts were paid at various dates on account of the interest and principal of said promissory note, and that on January 25, 1894, plaintiffs brought an action against the said Semitropic Land & Water Company to enforce the payment of the residue of said note and foreclose said mortgage, and such proceedings were had that on the 8th day of July, 1895, a decree was duly made and entered fixing the amount then due on said note at the sum of \$32,573.44, and directing that the premises mortgaged be sold to satisfy that sum; that after a sale and application of the proceeds thereof there remained a deficiency of some \$19,024.85 due on said note, and judgment for that sum was entered against said defendant therein; that an execution was issued thereon and returned wholly unsatisfied; that the said Semitropic Land & Water Company has no property, is insolvent, and no part of said amount can be collected from it, and no part of the same has been paid. It is also alleged that defendants had notice of said foreclosure sale, and that the same was once postponed for the period of four weeks at the instance and request of defendants. The prayer of the complaint is for judgment against defendants in the amount of said deficiency, together with interest and costs, and that said 1,500 shares of said stock be sold, and the proceeds applied on said indebtedness, and that a judgment for any deficiency be entered against defendants. The appellants demurred to said complaint, and, among other grounds, they pleaded the four-year statute of limitations, by reference to the provisions of sections 337 and 343 of the Code of Civil Procedure. The demurrer was overruled, and in their answer, among other defenses, appellants again pleaded the four-year statute of limitations. A trial was had, and plaintiffs had judgment as demanded in their complaint.

It will be seen from the complaint that this action was commenced about four years and seven months after the note guaranteed was due; and hence, if the residue of the note was due from defendants on the date on which they agreed in their guaranty it should be paid, the cause of action set out

in the complaint was barred, and the demurrer should have been sustained. But respondents contend that to the guaranty was attached the condition precedent that the security consisting of the second mortgage should be exhausted before the guarantors were liable for anything, and before any action could be maintained against them, and that consequently the statute of limitations did not begin to run on the guaranty until the mortgage was foreclosed, and the deficiency for which they were to be liable had been ascertained. We are of opinion, however, that the guaranty was absolute and unconditional, and that a breach thereof occurred, upon which to base an action, when the note therein mentioned fell due and remained unpaid. *Bank v. Smith*, 101 Cal. 415, 35 Pac. 1027; *Adams v. Wallace*, 119 Cal. 67, 51 Pac. 14; *Roberts v. Riddle*, 19 Pa. St. 409; *Klein v. Kern*, 94 Tenn. 34, 28 S. W. 295; *Huff v. Slife*, 25 Neb. 448, 41 N. W. 289; *Shropshire v. Smith* (Tex. Civ. App.) 37 S. W. 174; *Maxwell v. Capehart*, 62 Minn. 377, 64 N. W. 927; *Clay v. Edgerton*, 19 Ohio St. 549; *Brown v. Curtis*, 2 N. Y. 225; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2; *Bank v. Babcock*, 94 Cal. 96, 29 Pac. 415. "A guaranty is to be deemed unconditional unless its terms import some condition precedent to the liability of the guarantor." Civ. Code, § 2806. "A guarantor of payment or performance is liable to the guarantee immediately upon the default of the principal, and without demand or notice." Id. § 2807. Whether or not the condition contended for attached to the guaranty is to be determined from the language of the contract. *Adams v. Wallace*, supra. The guaranty is of payment at the times expressed in the note and mortgage. It does not follow, because a part of the consideration of the guaranty was that the guarantees should take a second mortgage and refrain from recording the same, it was also understood to be a condition to the liability of the guarantors that such mortgage should be foreclosed, and a deficiency ascertained. The language of the contract does not import any such condition, but, on the contrary, negatives any presumption to that effect. To hold that payment was not to be made by defendants until after a foreclosure of the mortgage would be to ignore their agreement that payment should be made "at the times and according to the terms of said note and mortgage." The intention of the parties, as it is to be derived from the language used, is to control in the construction of a contract, and this rule applies to time of performance as well as to all other matters; and when the time of performance is expressed, as it is here, in plain, unambiguous terms, the court will not presume that some other time was intended. The plaintiffs here were in the position of creditors having their claim secured by two several written obligations, each of said obligations

being also secured by a distinct lien, one of which consisted of the second mortgage, and the other was on the hypothecated shares of stock. These obligations fell due simultaneously, and plaintiffs had a right to proceed at once thereafter, upon either or both of them, to enforce payment of the amount due. It appears from the complaint that action could have been properly brought against the guarantors for the entire \$50,000 on the 2d day of June, 1891. More than four years after that date this action was begun, and it follows that the cause of action set out in the complaint was then barred by the statute of limitations, and the demurrer should have been sustained on that ground.

Respondents, in support of their contention that the guaranty sued on is conditional, and that the guarantors were not liable until the mortgage security was exhausted, cite the following cases: *Dutton v. Pyle* (Pa. Sup.) 45 Atl. 429; *Cottrell v. Furniture Co.*, 94 Wis. 176, 68 N. W. 874; *Burton v. Dewey* (Kan. App.) 46 Pac. 325; *Bouche v. Louttit*, 104 Cal. 230, 37 Pac. 902; *Newell v. Fowler*, 23 Barb. 628; *Borden v. Gilbert*, 13 Wis. 670; *Kramph's Ex'r v. Hatz's Ex'rs*, 52 Pa. St. 525; *Brainard v. Reynolds*, 36 Vt. 614. Many other cases are cited by respondents. We have examined all of them, and find that in none, except in some of the Pennsylvania cases, which seem to be in irreconcilable conflict with others in the same state, was the guaranty one of payment, as in the case at bar. In most of them the contract was one of indemnity against loss, or that the claims were collectible, and in some it was expressly made a condition of liability that suit should first be brought against the principal obligor. In all of these cases the guaranties are clearly conditional, but there is a clear distinction between them and the obligation under consideration in this case, as is well illustrated in the case of *Burton v. Dewey*, *supra*, wherein it is said: "There is a well-understood difference between a guaranty of payment and a contract of indemnity against loss as the result of the nonpayment of a debt. In the first case the liability of the guarantor is fixed by the failure of the principal debtor to pay at maturity, or at the time when payment was guaranteed. In the second, the contract partakes of the nature of a guaranty of collection, no liability being incurred until after, by the use of due and reasonable diligence, the guarantee has become unable to collect the debt from the principal debtor." See, also, *Evans v. Bell*, 45 Tex. 553, and *Klein v. Kern*, *supra*.

That defendants had notice of the proceedings in the foreclosure case, and requested the postponement of the sale therein for four weeks, in no way affects their right to contend that the guaranty executed by them matured on June 1, 1891, and that the statute of limitations has run in their favor as

to the contract on which the present suit is based. There was nothing in this request of defendants which could have misled plaintiffs, or which prevented them from suing on the guaranty before it was barred. Indeed, the request to postpone the sale was not made until after the right of recovery on the guaranty had expired by limitation; for the complaint shows that the judgment in the foreclosure suit was entered on July 8, 1895,—more than four years after the note and guaranty fell due,—and certainly no postponement of the sale could have been had until after entry of judgment. It is only in relation to contracts that are uncertain or of doubtful construction on their face that the conduct of the parties is to be looked to in aid of construction. Where the terms are plain and certain, as they are in the contract here under consideration, the court will be guided by the language used, and construe the intention of the parties to have been in accordance with their agreement. *Hawley v. Brumagim*, 33 Cal. 394. On the point here in controversy, which is the date of the maturity of the guaranty, the contract is so plain that there is no room for construction.

If plaintiffs relied upon a written acknowledgment of indebtedness within four years prior to the commencement of the action, or upon any other fact, to take the case out of the statute of limitations, they should have pleaded the same in their complaint. They did not do so, and therefore, as the complaint stands, it is clearly insufficient as against the demurrer based on the statute of limitations. *Sublette v. Tinney*, 9 Cal. 424; *Smith v. Richmond*, 19 Cal. 477; *Carpentier v. City of Oakland*, 30 Cal. 439, at page 444.

Several other questions are discussed in the briefs, but inasmuch as the judgment must be reversed on the ground already discussed herein, and on a new trial these questions may not again arise, and because a disposition of them now would involve a discussion and consideration of the sufficiency of the evidence to justify the findings, and some objection is made to the sufficiency of the specifications of particulars, we deem it unnecessary to determine those questions on this appeal. We advise that the judgment and order appealed from be reversed as to defendants Bonebrake and Howes, and the cause be remanded, with directions to the court below to permit plaintiffs to file an amended complaint if they shall be so advised.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are reversed as to defendants Bonebrake and Howes, and the cause is remanded, with directions to the court below to permit plaintiffs to file an amended complaint.

123 Cal. 473

PIERCE et al. v. MERRILL et al.
(S. F. 1,394.)

(Supreme Court of California. May 8, 1900.)

STATUTE OF LIMITATIONS—ACKNOWLEDGMENT OF DEBT.

Code Civ. Proc. § 337, provides that an action founded on an instrument in writing executed in the state shall be begun within four years. Section 360 declares that an acknowledgment relied on to take a contract out of the statute of limitations must be a direct and unconditional admission of the debt, which the party is liable and willing to pay. Defendants in 1889 gave plaintiffs a guaranty of a note and mortgage given by a corporation to secure a loan payable in 1891. The mortgage was foreclosed, and a deficiency decree entered. In an action on the guaranty to recover such deficiency begun in 1896, plaintiff offered in evidence, to remove the bar of limitations, a letter of defendants, written in 1893, in which they thought, "We could use a portion of these bonds in some way to wipe out all the company might owe you," and a telegram, "Make no assignment of our debt." The letter and telegram were not addressed to plaintiffs. Held insufficient to remove the bar of the statute.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Henry Pierce and others against Samuel Merrill and others on a guaranty securing payment of a note and mortgage. From an order denying a motion for a new trial, defendant Merrill appeals. Reversed.

Samuel Merrill and A. R. Cotton, for appellant. E. S. Pillsbury and Alfred Sutro, for respondents.

PER CURIAM. This is an appeal of defendant Merrill from an order denying his motion for a new trial. Defendants Bonebrake and Howes appealed from the judgment, as well as from an order denying a new trial, which appeal was determined in S. F. No. 1,351 (61 Pac. 64). In the opinion therein a copy of the guaranty hereinafter referred to is set out. The action was commenced, as the complaint shows, on the 31st day of January, 1896, to recover on a written guaranty of the payment of a loan of \$50,000, and interest thereon, at the times and according to the terms of a note and mortgage given by the Semitropic Land & Water Company. The note and mortgage referred to in the guaranty provided for the payment of the entire amount mentioned, with interest, on or before June 1, 1891. The defendant and appellant herein, Merrill, made a separate answer to the complaint, in which he pleaded the statute of limitations (section 337 of the Code of Civil Procedure). A trial was had without a jury, and the court, among other findings, made the following: "That the cause of action set up in the complaint of plaintiffs herein is not barred as to said defendants, or either of them, by the provisions of section 337 * * * of the Code of Civil Procedure of this state." The evidence in the case showed the facts to be substantially as alleged in the complaint, and as above set forth.

The principal contention of appellant is that the finding quoted above has no evidence to support it, and that the evidence proves directly the contrary thereof. This contention can be incorrect only on the theory that there was some evidence to show that the case stated in the complaint was in some way taken out of the operation of the statute of limitations. We have already held, in S. F. No. 1,351, supra, that the guaranty was absolute and unconditional, and that the complaint shows on its face that the cause of action therein stated is barred by the statute of limitations, and it must follow that evidence simply showing the truth of the allegations of the complaint would not support the quoted finding. Respondent contends, however, that there was evidence, consisting of a letter and telegram written and signed by appellant before the statute had run, and within less than four years prior to the commencement of this action, to take the case out of the statute. The letter referred to reads as follows: "Los Angeles, Cal., September 19, 1893. Orestes Pierce, Esq.—Dear Sir: I have delayed answering yr. letter relative to the balance due you as taken from the Sather Banking Co., of some \$1,700, because of a contract to deliver to the Citrus Belt Irrigation Dist. 300 inches of water, and receive \$150 M bonds. I thought we could use a portion of these bonds in some way to wipe out all the company might owe you. There has been a delay in completing the title to the water, because the water stock was held by the San Francisco Savings Union, but they have agreed, upon a favorable report as to the legal status of the bond, to release their holdings, and take some \$60 M bonds as collateral instead of the stock. This favorable report on bonds will be forwarded in two or three days, and then, by the action of the directors of the companies, all will be completed. There seems to be no hitch from any source to prevent the completion of the contract and receive the bonds. As soon as this is accomplished, either myself or some representative of the Semitropic Company will visit you and see if we cannot make some satisfactory arrangement with you. Very truly, yours, Samuel Merrill." The following is the telegram: "San Bernardino, Cal., December 1st. Orestes Pierce, 728 Montgomery St., San Francisco: Make no assignment of our debt. Insist on payment. Must have my stock. Please send as soon as possible. S. Merrill." From the reading of the letter, we can discover no reference to the liability of the defendants in this case. In the sentence, "I thought we could use a portion of these bonds in some way to wipe out all the company might owe you," the word "company" evidently alludes to the Semitropic Company,—a corporation of which this appellant had been, and perhaps was then, the president. The liability of defendants on the guaranty was distinct and separate from the liability of the corporation on

the note and mortgage, and a declaration or acknowledgment that might remove the bar of the statute from the latter would not necessarily have the same effect on the former obligation. We can discover nothing in the letter that signifies an acknowledgment of liability on the guaranty. Under section 360, Code Civ. Proc., the acknowledgment relied on to take the contract out of the statute of limitations "must be a direct, distinct, unqualified, and unconditional admission of the debt which the party is liable and willing to pay." *McCormick v. Brown*, 38 Cal. 180; *Biddel v. Brizzolara*, 56 Cal. 374. The telegram is not addressed to any of the plaintiffs, and we are unable to discover from the record before us that it has any reference whatever to the claim here in controversy. Our attention has not been called to anything, nor are we able to find anything, that would operate to take the contract out of the statute of limitations as to this appellant, or that would extend the time, within which suit might be brought against him, to the date of the commencement of this action. There is nothing in the eighth finding to take the case out of the operation of the statute. The promise or acknowledgment relied on for that purpose must be in writing. Code Civ. Proc. § 360; *Booth v. Hoskins*, 75 Cal. 271, 17 Pac. 225. The eighth finding makes no reference to any writing, and says nothing about any admission of this appellant as to any liability on the guaranty. It is not necessary to determine whether or not the findings called in question, other than the one quoted, are justified by the evidence, because, if we admit the truth of everything stated in such findings, it would not answer the vital question on this appeal, to wit, is the cause of action as to this appellant barred by the statute of limitations? For the reason that there is no evidence to justify the finding above quoted, the order appealed from is reversed.

(128 Cal. 431)

Ex parte LORENZEN. (Cr. 601.)

(Supreme Court of California. April 30, 1900.)

STREET RAILROADS—PASSENGERS—TRANSFERS—MUNICIPAL REGULATIONS—CONSTITUTIONAL LAW.

1. San Francisco Ordinance No. 2,992, designed to correct and prevent abuses of the transfer system, by requiring a street-car passenger to use his transfer within the time limit, and prohibiting him from selling or giving it away, and prescribing a penalty for a violation thereof, is legitimate, and within the scope of the powers granted to cities by Civ. Code, § 503, authorizing them to make regulations for the government of street railroads.

2. A city ordinance designed to prevent abuses of the transfer system by compelling a street-car passenger to use his transfer within the time limit, and prohibiting him from selling or giving it away, does not violate the guaranty of personal liberty contained in Const. U. S. Amend. 14, § 1, and Const. art. 1, § 1, nor is it an unconstitutional interference with private property rights.

3. A city ordinance designed to correct abuses of the transfer system by compelling a street-car passenger to use his transfer within the

time limit, and prohibiting him from selling it or giving it away, is not invalid as unreasonable or oppressive.

Van Dyke and Garoutte, JJ., dissenting.

In bank. Petition by Henry Lorenzen for habeas corpus. Remanded.

Jas. G. Maguire and Frederick MacGregor, for petitioner. Peter F. Dunne, for respondent.

HENSHAW, J. The petitioner was convicted of the violation of a penal ordinance in the city and county of San Francisco. He sued out this writ of habeas corpus, alleging that the ordinance under which he was convicted and sentenced is void. The ordinance in question is as follows:

"Order No. 2092. Providing regulations in the operation of street railroads and prohibiting the issuance or delivery of transfers to passengers except upon or within the car from which the passenger is transferred.

"The people of the city and county of San Francisco do ordain as follows:

"Section 1. Every person, firm and corporation operating street cars within the city and county of San Francisco that issue transfers to passengers to enable them to transfer to other cars operated by the same or different owner, shall issue and deliver said transfers upon or within the car from which the passenger is transferred, and not elsewhere.

"Sec. 2. Every person, firm and corporation operating street cars within the city and county of San Francisco that receives transfers as fare from passengers shall take said transfers from the passengers who received the same within or upon the car to which the passengers are transferred, and not elsewhere.

"Sec. 3. No person, except a duly authorized conductor or agent of a person, firm or corporation operating a line of street railroad within the city and county of San Francisco, shall within said city and county issue, deliver, give or sell, or offer to issue, deliver, give or sell, to any other person whatsoever, any transfer, transfer check or ticket, issued or purporting to be issued by such person, firm or corporation so operating such line of street railroad, for passage on any street railroad car or line.

"Sec. 4. Every person, firm or corporation violating the provisions of this order shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment."

Lorenzen was charged with having given and disposed of a transfer in violation of section 3 of the ordinance.

Against the validity of this ordinance it is urged that it violates the guaranty of per-

sonal liberty contained in the constitutions of the United States and of the state of California (Const. U. S. Amend. 14, § 1; Const. Cal. art. 1, § 1); that it is an unconstitutional interference with a right of private property; that it is arbitrary, oppressive, and unreasonable; and finally that it is an illegal attempt to enforce the obligations or assumed obligations of private civil contracts by penal legislation.

As to the nature of the "transfer," it is well recognized and admitted that the street railroads of the city and county of San Francisco have provided that passengers upon their cars who have paid the usual fare may receive transfers entitling them to leave the car at a certain designated point, and there, within a limited time, and without further payment of fare, but upon presentation and delivery of the transfer check, pursue their travels upon the connecting line. It is, then, a part of the passenger's contract with the company that he may thus transfer to and ride upon the connecting road. As conditions of this privilege, it is further a part of the contract that the passenger shall board the cars of the connecting line at a designated point, and within a time limit after the issuance to him of the transfer indicated by a punch mark upon its face, and that the transfer shall not be transferable or assignable to another, but, if used at all, shall be used by the person to whom it is issued. The paper slip or ticket designated a "transfer," when in the hands of the passenger, thus serves a twofold purpose: First, to the passenger, as an evidence of his contract by which he is entitled to continue his journey upon the connecting road; and, second, to the company, as a means of identification afforded to its conductors and servants, by which they may know that the passenger presenting the transfer is entitled to ride without further payment of fare. Such being the nature of the contract between the company and its passenger, consideration may be paid to the objections raised against the validity of this ordinance.

The power of the general legislature acting within constitutional limitations, to make penal an act theretofore indifferent or even innocent, may not be doubted. *People v. West*, 106 N. Y. 293, 12 N. E. 610. This, however, is not a statute of the general legislature, but a municipal by-law; and while it is true that article 11, § 11, of the constitution of this state expressly confers upon a city the power to make and enforce within its limits "all such local, police, sanitary and other regulations as are not in conflict with general laws," this language is not to be construed as enlarging the powers which municipalities theretofore enjoyed in these respects, but it is merely an express grant of a power which formerly they possessed by implication. *People v. Newman*, 96 Cal. 607, 31 Pac. 564. The ordinance in question, then, is to be scanned and judged like any

other municipal ordinance. So judging it, regard is to be had to the end sought to be accomplished,—whether that end be a reasonable one, and one within the powers of the municipality to accomplish; and regard is also to be had to the question whether the mode adopted to accomplish the end is itself reasonable or unreasonable. Street-car companies are public utilities, which are almost necessities to our present mode of life. While in one aspect their ownership is private, and they are operated for private gain, in another they are servants of the people, and the lawmaking powers reserve and freely exercise the right to regulate and control them in their operations. It is upon the theory, and only upon the theory, that they may be operated for the public good, that a franchise permitting their existence may be given; and the power to pass reasonable regulations for their operation and management is expressly granted by section 503 of our Civil Code. It is strictly within the power of the municipal authorities of the city, and properly within the exercise of their duties, to pass any reasonable regulations affecting street-car lines, to remedy a threatened or actual interference with the comfort, convenience, and general welfare of the traveling public.

It is urged against this ordinance that it is an attempt by penal legislation to enforce a private civil contract; in other words, that it is an attempt to compel the passenger who has received his transfer to use it within the limits of his contract, and not to violate that contract by giving it to a person who may make improper use of it. Could it be perceived that this was the only purpose, or even the main purpose, of the ordinance in question, we should be inclined to hold that the objection was fatal, but we cannot perceive that its main object or design was to accomplish this result. Rather, we think it clear that its primary object is to protect and advance the convenience and welfare of the traveling public; for if, to the legislative mind, an abuse of the transfer system has grown up, the inevitable result of such unrestricted abuse must be one of two things,—either that transfers would be discontinued entirely, to the material injury of the community, or the transfer system would be hedged and safeguarded by onerous conditions and requirements for the protection of the company, which would work great inconvenience to the passengers. It was certainly right for the supervisors, if they saw or anticipated the existence of such an evil, to destroy or avert it by proper legislation tending to correct the abuse; and it is no objection to the validity of an ordinance designed for this purpose that it may incidentally tend to prevent frauds, and compel men honestly to abide by their contracts. It is concluded, therefore, upon this point, that the purpose of the legislation, to promote the convenience and welfare of the

traveling public in regulating the business of the street-car companies of San Francisco in their dealings with their passengers, is legitimate, and within the scope of the powers expressly granted to the municipal authorities.

But are the means adopted to accomplish this end unreasonable or oppressive, or in violation of any constitutional rights of the citizen? It is here first insisted by petitioner that the transfer issued to him by the company is his property, and that an essential and inalienable right to the enjoyment of property is the right to sell, give it away, or otherwise dispose of it. This, however, is but partially true. A man may not be deprived of his property or of his property rights for any private considerations whatever, nor for considerations of public good, without compensation first made; but the legislature has the unquestioned right, and every day exercises it, of restricting the use to which private property may be put. As is said in *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 24 L. R. A. 152: "The franchises of railroads acting under charters or acts of incorporation are of a public nature, so far as the safety, convenience, and comfort of passengers are concerned. The reasonable regulations affecting the conduct of such public employments are fit subjects for legislative action. The lawmaking power may provide means for remedying such evils as in its opinion may exist in the management of these public agencies of transportation, and in doing so it may sometimes impose restrictions which are deemed to be necessary upon the use and enjoyment of property. A man is not deprived of his property unless it is taken away from him so that he is divested of his title and possession. To limit the use and enjoyment of property by legislative action is not to take it away from the owner, when the property whose use and enjoyment are so limited is invested in a business affected with a public use, or used as an accessory in carrying on such business." But, aside from this, in the case of this ordinance it cannot be perceived that its terms limit or circumscribe any of the just and legal rights which a passenger receiving a transfer theretofore enjoyed. In receiving it, he took it under the conditions above set forth. It was a part of his contract that, if used, he alone would use it; and if he sold it or assigned it, or gave it to another, to the end that that other might use it, he clearly violated his contract, and put a fraud upon the company. A court will not hear with much patience one insisting upon his right to violate his contract and consummate a fraud. The ordinance in question, therefore, so far as the passenger is concerned, leaves him all the rights which theretofore he enjoyed under his contract, and interferes in no way with any legal or legitimate use which at any time he could have made of the transfer. At the most, so far as he is concerned, it has but

made penal what before was illegal and against good morals.

Finally, it is urged against the ordinance that by the generality of its terms it is unreasonable and oppressive; that every person who, taking a transfer, shall hand it to any one other than the person authorized to receive it, no matter how innocent the act may have been in fact or intent, is guilty of a misdemeanor. In illustration of the position it is said that if the conductor should give to the father traveling with his family three or four transfers, and he in turn should hand them over to his wife and children, he would at once become amenable to the ordinance; that so, too, would be the passenger who handed his transfer to another upon the car, to be delivered to the conductor; so, too, would the witness in court who gave the transfer to the judge for inspection, or the judge who in turn might deliver it to the clerk. To some of the objections thus presented answer may be made that the life of the transfer ends with the passage of the time indicated upon its face. It ceases then to be a transfer,—to have any value at all other than that which may attach to it as a bit of paper. But for the more substantial objection that the ordinance, by its terms, would oppress and lead to the conviction of persons guilty of no fraudulent act, it is to be remembered that the letter of a penal statute is not of controlling force, and that the courts, in construing such statutes, from very ancient times, have sought for the essence and spirit of the law, and decided in accordance with it, even against express language; and in so doing they have not found it necessary to overthrow the law, but have made it applicable to the class of persons or the kind of acts clearly contemplated within its scope. The rule was thus early expressed in Bacon's Abridgment: "A statute ought sometimes to have such an equitable construction as is contrary to the letter." The oft-cited instance of the Bologna law, which enacted that whoever drew blood in the streets should be punished with the utmost severity, was wisely held not to apply to the barber who opened the veins of a sick man to aid in his cure. The statute of Edward II., declaring guilty of a felony any person who broke prison, was held, upon considerations of the most ordinary common sense, not to apply to one who did so to escape from a burning jail. The law declaring it a felony to lay hands upon a priest, by the same principles of common-sense reasoning, was held not to apply to one who did so by way of kindness or warning, but only to those who acted with illegal or improper intent. In *U. S. v. Kirby*, 7 Wall. 482, 19 L. Ed. 278, the act provided "that if any person shall knowingly and willfully obstruct or retard the passage of the mail, or of any driver or carrier," etc. " * * * for every such offense shall pay a fine not exceeding one thousand dollars." A mail carrier was arrested by a state

officer on an indictment for murder. The act came within the letter of the law. Mr. Justice Field, delivering the opinion of the court, discusses the exemption of mail carriers from detention under civil process, but declares that they are liable to arrest and detention under criminal process for acts mala in se. Therefore, notwithstanding the fact the defendant had "knowingly and willfully" retarded the mail carrier, it is said: "When the acts which create the obstruction are in themselves unlawful, the intention to obstruct will be imputed to their author, although the attainment of other ends may have been the primary object. The statute has no reference to acts lawful in themselves, from the execution of which a temporary delay to the mail unavoidably follows."

* * * All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice or oppression or an absurd consequence. It will always be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter." In *Donnell v. State*, 2 Ind. 654, a statute prohibiting the retailing of spirituous liquors without license contained no exception in favor of a druggist selling for medicinal purposes. A druggist who had so sold liquor was discharged after conviction, as being clearly excepted from the intent, though not the letter of the law. In *State v. Clark*, 29 N. J. Law, 96, the statute made it a misdemeanor for any one to willfully open, break down, injure, or destroy any fence. It was held not to apply to the destruction of a fence by one who was in its lawful possession, and it is said that the literal import of the terms and phrases implied will be controlled by the objects which the act was designed to reach. In *Holmes v. Paris*, 75 Me. 559, it is said, "It has been repeatedly asserted in both ancient and modern cases that judges may in some cases decide upon a statute even in direct contravention of its terms." In all of these cases the apparent defect of the statute is cured by making it apply according to its spirit to the act in its nature illegal or fraudulent. So, here, notwithstanding the generality of the language, no lawful or innocent use of the transfer would subject the passenger to the penalties of the ordinance. It is concluded, therefore, that the ordinance is valid, and the prisoner is remanded.

We concur: BEATTY, C. J.; TEMPLE, J.; McFARLAND, J.

I dissent: VAN DYKE, J.

GAROUTTE, J. (dissenting). I agree with a great many of the views expressed by Mr. Justice HENSHAW, but must dissent from the conclusion declared, and from his construction of the ordinance, as evidenced by

the language in the closing portion of his opinion, to wit: "In all of these cases the apparent defect of the statute is cured by making it apply according to its spirit to the act in its nature illegal or fraudulent. So, here, notwithstanding the generality of the language, no lawful or innocent use of the transfer would subject the passenger to the penalties of the ordinance." Stripped of immaterial matters, the ordinance declares all persons guilty of a misdemeanor, other than some agent of the company, who "should deliver, give or sell, or offer to deliver, give or sell, to any other person whatsoever a transfer." Now, the opinion says no innocent or lawful use of the transfer by the passenger would make him guilty of a misdemeanor. In other words, as construed by the opinion, the ordinance reads that any passenger "who gives away or sells a transfer, with intent that it shall be used by some other party, is guilty of a misdemeanor." An ordinance so framed appears to me to be perfectly valid, but this court has no right to frame such an ordinance, even by construction. An ordinance of that kind would be entirely dissimilar to the one passed by the board of supervisors. In such an ordinance this particular intent becomes the very heart of the act, overshadowing everything else. How can this court say that the lawmaking body passed any such an ordinance? How can this court even say that such body intended to pass that kind of an ordinance? We only know what the intention of the board of supervisors was from what it did, and this court can only measure and test this act by what it says. According to the main opinion, a complaint against a passenger, worded in the language of this ordinance, would not charge an offense; for, as there said, a passenger might do all the things forbidden, and still be innocent. It thus appears that a complaint sufficient to sustain a cause of action must go beyond anything found in the ordinance, and allege that the passenger sold or gave away the transfer "with intent that it should be used by another person." There being no authority in the ordinance itself which justifies the pleader in inserting these words, he clearly has no right to do so. The opinion relies upon various decisions to support this liberal construction of the statute, notably an ancient and somewhat celebrated case which arose under the law of Bologna,—a law which read that "whoever drew blood in the streets should be punished with the utmost severity"; and it was there held that this law did not apply to the surgeon who in his professional capacity bled a sick man in the streets. I find no fault with the decision of that case, to the end that the surgeon was not guilty, but do dissent from the implication found in the opinion here,—that certain classes of persons could be legally convicted of violating a law so worded if found on our statute books. The indefiniteness of the penalty is only a fair illustration

of the indefiniteness of the entire act. A law so worded is beyond all salvation by construction, and that case is not valuable as an authority here. For many reasons I am quite clear that such a law in these times would not stand the test of judicial scrutiny for a second. To support the validity of a law of that kind at the present time by construction would partake rather of the character of Solomon's justice, as administered by that great king in the celebrated trial of the title to the baby. I have a curiosity to know what decision would have been rendered by the Bologna court if some public-spirited citizen, similar to those we have in these days, for the purpose of testing this law had drawn blood in great quantities in the street by slashing the throat of a goat or an ox. If a question similar in principle to the one here presented came before the cadl who sits daily upon his mat in front of the opening of his tent, administering justice under the soothing fumes of his hookah, from whose decisions there is no appeal, and who acts as judge, jury, and attorney, untrammelled by legislatures and constitutions, I have no doubt but that he would enforce the ordinance, promptly declare the prisoner guilty, and probably affix the penalty at a fine of five goats and a helper, and do it all within a few minutes; for he administers justice on very general principles, and makes the law fit the case. But the practice and procedure are different in this country. In the days when the Bologna case was decided, in that and similar jurisdictions such a thing as the invalidity of a law was not known. The power that made the law was supreme. Every law was a constitution unto itself, and woe betide the judge who would have the temerity to set it aside. His probable fate would be to be "punished with the utmost severity." Things in these days and in this country are not as they were in those days and in those countries. The Indiana case cited in the opinion, as to the selling of liquor, is opposed to the later case of *Com. v. Kimball*, 24 Pick. 370, where Chief Justice Shaw says: "If the law is more restrictive in its present form than the legislature intended, it must be regulated by legislative action." I fully indorse the doctrine of *U. S. v. Kirby*, 7 Wall. 482, 19 L. Ed. 278, as to the stoppage of the United States mails. The court there said: "The statute of congress by its terms applies only to persons who 'knowingly and willfully' obstruct and retard the passage of the mail or its carrier; that is, to those who know that the acts performed will have that effect, and perform them with the intention that such shall be their operation." I find nothing in that case supporting the construction given the ordinance in this case. And I venture to say that no case can be found where, by judicial construction, a specific particular intent has been placed in a statute. If by construction you may inject the words into this ordinance, "with intent that it shall be used,"

then it seems that the legislature has enacted a vast mass of useless legislation; for by the language of a hundred different sections of the Penal Code various acts are declared to be either felonies or misdemeanors, when done with a certain particular intent. If the certain intent may be supplied by construction, it was idle to insert in it these various sections. For example, section 356 of the Penal Code reads, "Every person who cuts out, alters or defaces any mark upon any log, lumber, or wood, or puts a false mark thereon, with intent to prevent the owner from discovering its identity, is guilty of a misdemeanor." In the absence of a particular intent in this statute, would the court legislate a certain intent into it? How would a court know what intent to insert? Naturally, I should have supposed the intent to be inserted in this statute would have been an intent to appropriate the "log, lumber, or wood." Yet not so, for the intent named is an intent "to prevent the owner from discovering its identity." It is thus plain that a court cannot do these things, for the reason, among many reasons, that it does not and cannot know what intent the legislature had in mind.

128 Cal. 422

CLARKE et al. v. FAST. (L. A. 712.)

(Supreme Court of California. April 28, 1900.)

INSURANCE—POLICY—CONDITIONAL ASSIGNMENT—SALE—ACCOUNTING—PLEADING—TRIAL—BURDEN OF PROOF—HARMLESS ERROR—NEW TRIAL—REMARKS OF COUNSEL—INSTRUCTIONS—EVIDENCE.

1. Code Civ. Proc. § 418, provides that the due execution and genuineness of an instrument is admitted when a copy thereof is pleaded in the answer, unless plaintiff denies the same by affidavit; and section 462 declares that new matter contained in the answer is deemed controverted. Defendant sued for an accounting of the proceeds of a policy assigned to him to secure a loan, and pleaded affirmatively that insured had subsequently sold the policy to him for its actual value, and set out a copy of the alleged transfer, which stated the consideration. *Held*, that plaintiff's failure to deny the genuineness and due execution of the transfer by affidavit merely admitted that the transfer was the instrument executed by insured, and, the prior relation of the parties being that of mortgagor and mortgagee, the burden was on defendant to show the fairness of the transaction, and hence a ruling compelling defendant to first introduce evidence in support of such defense was proper.

2. Where, on defendant testifying that he had received and destroyed a certain letter, plaintiff handed him an alleged copy in the sender's handwriting, which defendant stated was similar in some respects, but that he had never received a letter of that composition. The contents of the alleged copy not being disclosed to the jury, it was not prejudicial error to allow plaintiff to ask, over objection, what there was in the copy different from a letter received by him, and for defendant to answer that he could not remember, because of the lapse of time, though there was no proof that it, or the letter of which it was a copy, had been mailed to defendant.

3. Though it was error for plaintiff's counsel to assume, in commenting in his argument to the jury, on the truthfulness of defendant's testimony as to the authenticity of an alleged copy of a letter which plaintiff had unsuccessfully sought to introduce in evidence, the original of

which defendant admitted to have received and destroyed, such error did not justify the reversal of an order denying a new trial, where it did not appear that the court had not thereafter instructed the jury to disregard the reference to the alleged copy.

4. Beneficiaries sued defendant for an accounting of a policy in a company not recognizing conditional assignments, which policy had been transferred to him by insured in 1885, by an instrument conditioned on payment of insured's note for \$200, which was not given. Defendant claimed that shortly thereafter insured made an absolute assignment of the policy to him, but no written acknowledgment was made by defendant that the \$200 loan to insured had been paid, and his testimony was conflicting, and showed no consideration for the sale. It appeared that insured had written defendant with regard to the policy, that defendant had destroyed the letters, and that his answer to one of them in 1891 was not inconsistent with the policies being held as securities. *Held*, that the jury were justified in finding that the policy was held by defendant as security only.

Commissioners' decision. Department 2. Appeal from superior court, Santa Barbara county.

Action by Rose Clarke and another against Salathiel Fast for an accounting of the proceeds of an insurance policy. From an order denying a motion for a new trial, defendant appeals. Affirmed.

C. A. Storke, for appellant. J. J. Boyce and Boyce, Taggart & Kellogg, for respondents.

HAYNES, C. This appeal is from an order denying defendant's motion for a new trial, based upon alleged errors of law occurring upon the trial, and upon the further ground that the verdict of the jury was not justified by the evidence. After the jury was sworn, counsel for plaintiff read the pleadings, and moved the court to direct the defendant to first introduce evidence in support of his affirmative defense. The court so directed, and the defendant excepted, and assigns this ruling as one of the errors upon which he relies for a reversal of the order. The plaintiffs are the widow and minor son of C. W. Clarke, deceased, and the complaint alleged that said C. W. Clarke, on the 21st day of February, 1881, took out a certain policy of insurance upon his own life in the sum of \$5,000, payable upon his death "to his heirs, executors, administrators, and assigns"; that on February 13, 1885, said policy being in full force, said C. W. Clarke assigned it to the defendant by way of mortgage to secure the repayment of the sum of \$200 loaned by defendant to him on that day; that said C. W. Clarke died on August 6, 1895, intestate; that on October 23, 1895, the defendant received from the insurance company upon said policy the sum of \$3,399.25, which sum plaintiffs allege the defendant holds in trust for them, less the amount of said debt and the premiums paid by the defendant upon said policy, and legal interest thereon, and alleged a demand upon the defendant for an accounting and payment. The answer contained certain denials, two of which were of

matters not alleged in the complaint, another was of an immaterial matter, and the only other denial was of a matter of law. But "for a further affirmative defense" the defendant alleged that on February 13, 1885, said Clarke borrowed from him the sum of \$200, and promised to repay the same within three months from that date, "and, to secure the same, transferred and assigned" to defendant, "by way of mortgage, said policy of insurance." He then alleged: "That thereafter, and on the 28th day of July, 1885, the said C. W. Clarke was unable to pay the sum so loaned and secured, and on said day, for its actual value, absolutely sold, transferred, and delivered said policy of insurance to said defendant free of all mortgage or other trust, by an instrument in writing," and proceeded to set out a full copy of the written transfer which purports, "for one dollar" in hand paid, "and for other valuable considerations," to assign and transfer all the right, title, and interest of Clarke in said policy to the defendant; and concluded by alleging that from said day he has been the owner of said policy, that he had paid all the premiums thereon, and was entitled to receive the moneys paid thereon after the death of said Clarke. The plaintiffs did not file an affidavit denying "the genuineness and due execution" of the said written transfer so set out in the answer, and hence its genuineness and due execution is to be deemed admitted under the provisions of section 448 of the Code of Civil Procedure. In *Moore v. Copp*, 119 Cal. 432, 51 Pac. 631, it was said that: "By genuineness and due execution is meant nothing more than that it is not spurious, counterfeited, or of different import on its face from the one executed, but is the identical instrument executed by the party;" and "that it may be controverted upon any ground other than its genuineness and due execution." See, also, *Myers v. Association*, 122 Cal. 675, 55 Pac. 689. In *Brooks v. Johnson*, 122 Cal. 571, 55 Pac. 424, it was said: "It could never have been intended that the plaintiff is required to make an affidavit denying the instrument, or be precluded from making any defense whatever. There are many defenses which he is and should be entitled to make while possibly compelled to admit that he executed the instrument, and that it is genuine; and which defenses it was intended by the Code he might make under section 462." So, in *Moore v. Copp*, supra, it was said: "But the plaintiff may controvert the instrument by evidence of fraud, mistake, undue influence, compromise, payment, statute of limitations, estoppel, and the like defenses, under section 462 of the Code of Civil Procedure." All other affirmative allegations in the answer are deemed denied under the provisions of section 462, Code Civ. Proc., and hence it is denied that Clarke sold the said policy to the defendant, or that he sold it for its actual value, or that it was transferred or delivered to the defendant free of all mortgage or oth-

er trust, or that the defendant was the owner of it. Such denials, in view of the fact, conceded by the answer, that prior to and upon the date of this transfer the defendant held said policy as security only, are not inconsistent with the admission of the genuineness of the instrument set out in the complaint, since it may be absolute in form and yet held only as security, just as deeds of real estate, absolute in form, are often given as security simply, and are held, under such circumstances, to be a mortgage.

In the absence of such a provision as that contained in section 448, there could be no doubt that the burden of proof in this case would be upon the defendant; and while, in many cases, it is doubtless true that a failure to deny an instrument set out in the answer, and upon which an affirmative defense is based, would shift the burden of proof to the plaintiff, I do not think it would do so in this case; not only because the denial of the allegations of the answer, hereinbefore stated, goes to the purpose and true character of the transaction, but because the principles governing a subsequent release of the equity of redemption by a mortgagor of real estate to the mortgagee applies here, including the maxim "Once a mortgage, always a mortgage," though that maxim has never been construed to prevent a mortgagee, by a subsequent contract, from purchasing the equity of redemption, or from obtaining a release of it for an adequate consideration. 1 Jones, Mortg. § 340. In *Peugh v. Davis*, 96 U. S. 332, 337, 24 L. Ed. 776, Mr. Justice Field, speaking for the court, said: "Without citing the authorities, it may be stated as conclusions from them that a release to the mortgagee will not be inferred from equivocal circumstances and loose expressions. It must appear by a writing importing in terms a transfer of the mortgagor's interest, or such facts must be shown as will operate to estop him from asserting any interest in the premises. The release must also be for an adequate consideration." The allegation of the answer is that Clarke sold the policy "for its actual value," but this allegation is deemed denied by the provisions of section 462, Code Civ. Proc. The transfer states the consideration of "one dollar and other valuable considerations," but this does not show that the consideration was adequate. It is not even alleged that the debt secured by the first transfer was discharged. In *Villa v. Rodriguez*, 12 Wall. 323, 339, 20 L. Ed. 411, it was said: "The law upon the subject of the right to redeem, where the mortgagor has conveyed to the mortgagee the equity of redemption, is well settled. It is characterized by a jealous and salutary policy. Principles almost as stern are applied as those which govern where a sale by a cestui que trust to his trustee is drawn in question. To give validity to such a sale by a mortgagor, it must be shown that the conduct of the mortgagee was in all things fair and frank, and that he

paid for the property what it was worth. He must hold out no delusive hopes; he must exercise no undue influence; he must take no advantage of the fears or poverty of the other party. Any indirection or obliquity of conduct is fatal to his title. Every doubt will be resolved against him. * * * The form of the instruments employed is immaterial. That the mortgagor knowingly surrendered and never intended to reclaim is of no consequence. If there is vice in the transaction, the law, while it will secure to the mortgagee his debt, with interest, will compel him to give back that which he has taken with unclean hands. Public policy, sound morals, and the protection due to those whose property is thus involved require that such should be the law." It appearing from the answer that defendant's interest in the policy was, in its inception, that of a mortgagee, the burden rested upon him to show that the subsequent transaction, by which he claims to have become the owner of it, was fair, that no advantage was taken of Clarke's necessities, and that the consideration paid was adequate. These facts do not appear upon the face of the transfer, a copy of which is set out in the answer; while the fact of the sale, as well as the allegation that it was absolute, and for the actual value of the policy, are alleged in the answer, and are denied by force of the statute. Under these circumstances we think the court did not err in holding that the burden of proof was upon the defendant.

2. Appellant contends that "the court erred in permitting the plaintiffs to examine the defendant on what was alleged to be a copy of a letter sent to defendant by Carey W. Clarke, when there was no evidence that it was a copy of any letter sent to defendant." Plaintiffs produced and read a letter written by the defendant to Carey W. Clarke, bearing date February 9, 1891, acknowledging the receipt of a letter from Clarke dated January 6, 1891, and which he testified had been destroyed. Plaintiffs' counsel handed the witness (the defendant) what purported to be a copy of a letter written by Clarke to defendant, dated January 6, 1891, and he testified that he never got a letter like that or of that wording. "There is some things in there similar to his inquiry, but then I never got a letter of that composition." The witness was then asked, "Now state what there is in there that is different from the letter you got." Counsel for defendant objected upon the ground that it was incompetent, and the objection was overruled, and an exception taken. The witness answered: "I cannot do that. It is six years ago." The letter received by the witness had been destroyed by him. Clarke, the alleged writer of the letter in question, was dead. The alleged copy was shown to be in his handwriting, but there was no evidence that it, or a letter of which it was a copy, had been mailed to the defendant. The contents of the alleged copy were not disclosed to the jury, and, if it be con-

ceded that the question should not have been allowed, we fail to see that defendant was prejudiced by the ruling.

3. During his argument to the jury, counsel for plaintiffs said: "I say to you, and ask you in all sincerity whether or not Mr. Fast, when I tried to press him to acknowledge something about the letter we had a copy of, which we sought to introduce,—I will ask you whether his testimony was truthful." The defendant objected to this line of argument, and asked the court to confine counsel to the evidence in the case; to which the court replied, "Of course, if counsel goes outside the record, they will have to take their chances in the matter." Of course, counsel should not have assumed that the paper about which the defendant was examined "was a copy" of anything, since it was not admitted in evidence; but he had a right to comment upon the testimony of the defendant relating to a letter which he admitted he had received and answered and destroyed, and submit to the jury the question whether it was truthful. The fault of counsel was not sufficient to justify a reversal of the order denying a new trial, especially as the instructions of the court to the jury are not in the transcript, and it does not appear that the court did not, in its final instructions, instruct the jury to disregard said reference to said alleged copy.

4. It is also contended that the evidence was not sufficient to justify the verdict. It is true the transfer of the policy was, upon its face, absolute. But it does not follow from this admission that the transfer was not intended as a security simply. The policy in question was issued by the Equitable Life Assurance Society. Mr. Shields, the manager of that society for Southern California, whose deposition was taken by the defendant, testified that he had in his possession the assignments of February 13 and July 28, 1885; that the second assignment appeared to have been the company's printed form filled out; that he had nothing to do with the original assignments, and had no personal knowledge in regard to them. He was then asked: "Does the Equitable Life Assurance Company use any other or different form of assignment in the case of an assignment for collateral security than where there is an absolute sale of the property? Ans. No, sir. They decline to, because it would involve them in endless trouble and annoyance. They must have an absolute assignment so as to deal with one party. They will not deal with two or three parties. No partial assignments are recognized." The first assignment contained the following: "Upon the following condition, however, that a certain promissory note for the sum of two hundred dollars, bearing date 13th day of February, 1885, given by said Carey William Clarke to the said Salathiel Fast, is well and truly paid according to the terms thereof, then this assignment is to be void." The defendant testified that no note was giv-

en; that Judge Dillard advised him he did not need a note; that the note was to bear 1½ per cent. per month interest, but Dillard would not make any note. If no note was given, it is clear that no note was canceled and returned to Clarke; nor is there any pretense that any written acknowledgment was given that the \$200 loaned to Clarke was paid, satisfied, or canceled, either by a sale of the policy or otherwise. The defendant testified, however, that at the time the absolute assignment was made Clarke agreed to pay him \$75 for him (the defendant) to keep the policy; and two or three weeks afterwards gave him a note for \$76.70, being said \$75 and \$1.70 that he owed for cooking utensils that he had sold. This note defendant testified was lost, and had never been paid. Defendant's answer concedes that the transaction was originally a mortgage, and the testimony of the agent of the insurance company is that no transfer of a policy is recognized by the company for any purpose, unless it is absolute on its face, and therefore it was essential that a new transfer, absolute in its terms, should be made, in order to make the security effective. The presumption arising from the second transfer, the first having been given as security only, is that it was intended simply to perfect the transfer as security, the first being ineffectual for any purpose. Clarke and the notary who took his acknowledgment of each of said transfers are both dead. The defendant testified that the second transfer was an absolute sale. He alleged in his answer that Clarke was unable to pay the money loaned at the time the second transfer was executed, and for the "actual value" of the policy sold it to him. What that actual value was is not alleged, but he testified that Clarke gave him his note for \$75 to get him to keep the policy; that "the policy was not worth what he [Clarke] said it was worth, and he agreed to make his word as good as he could in that way." This note, he said, was dated the 13th or 15th of August, 1885. But, before this testimony was given, the defendant was asked: "Did Clarke ever pay you or deliver you any papers besides the policy of insurance? A. He gave me a note for seventy-five dollars and seventy cents, a sum due since in a transaction two or three weeks after the last absolute assignment of the policy for an indebtedness that he owed me." Here is a clear inconsistency. After having testified that the \$75 note was for a sum due in a transaction two or three weeks after the absolute assignment of the policy, he testified that Clarke agreed to give him \$75 to keep the policy, and, the money not having been paid, the note was given, and this, he testified, had been lost. If the \$75 was money due in a subsequent and different transaction, it was not a consideration for the sale of the policy; and, if that note was given by Clarke to induce the defendant to buy the policy, the transaction was, to say the least, peculiar. The defendant held the pol-

icy as security for \$200. Inasmuch as Clarke could get rid of the policy at any time by ceasing to pay the premiums, it is not likely that he would offer a bonus of \$75 to induce the defendant to buy it, while he might be willing to pay a bonus of \$75 to have the defendant continue to hold it as security. But in either case there was no consideration given by the defendant to obtain the actual ownership of the policy. The testimony further shows that on at least two occasions Clarke wrote the defendant in regard to this policy, but these letters were not produced by the defendant, he having destroyed them. Defendant's answer to one of these letters, dated February 9, 1891, was put in evidence, which, while not admitting that he held the policy as security, was not in any respect inconsistent with that hypothesis, since Clarke was not entitled to the benefit of the policy without payment of the money secured and interest, and also the premiums paid and interest thereon, and which were lumped by the defendant at a sum considerably in excess of the actual amount due. It is not contended that defendant has not been fully paid for the money loaned and all that he has expended in paying premiums, together with interest on each, and we think the conclusion reached by the jury that the defendant held said policy as security simply is justified by the law and the evidence, and that the order denying defendant's motion for a new trial should be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

CHAPMAN v. HUGHES et al. (S. F. 908)
(Supreme Court of California. May 8, 1900)

In bank. Petition for rehearing. Granted.
For former opinions, see 58 Pac. 298, 916
60 Pac. 974.

PER CURIAM. Upon petition of Frank H. Short, representing Corinne F. Hughes, administratrix of the estate of Matilda B. Hughes, and heretofore substituted for Matilda B. Hughes, deceased, a rehearing is granted in the above-entitled cause upon the single proposition, namely, the sufficiency of the evidence to sustain the finding of the trial court upholding the deed of conveyance made by Hughes to said Matilda B. Hughes.

128 Cal. 521

RAUER v. MERANI et al. (S. F. 1,383.)
(Supreme Court of California. May 4, 1900.)

APPEALS—COURT'S FINDINGS—OVERRULING
OF DEMURRER—REVIEW.

1. The court's action in overruling a demurrer cannot be reviewed on appeal from an order refusing a new trial.

2. Where the evidence was conflicting, the court's findings will not be disturbed on appeal.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by J. J. Rauer against Joseph Merani and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

James A. Devoto, for appellants. Geo. H. Perry, for respondent.

BRITT, C. Action for the price of goods sold to the defendants. A demurrer to the plaintiff's complaint was overruled by the court. Afterwards the case was tried by the court without a jury, and findings and judgment were for the plaintiff. The appeal is from an order denying defendants' motion for a new trial. Appellants claim that the court erred in overruling the demurrer. Even if this were so, the error is not susceptible of correction on appeal only from an order refusing a new trial. This has been often decided. It is further said that the findings of the court were not sustained by the evidence. The record shows that the evidence was quite conflicting upon the only issue of fact contested at the trial, viz. whether the action was brought before the expiration of the term of credit on which the goods were sold. The court below believed the testimony of the witnesses for plaintiff, and made its findings accordingly. That is the end of the matter, so far as this court is concerned. The order appealed from should be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

128 Cal. 521

JOHNSON v. MINA RICA GOLD MIN. CO.
(Sac. 579.)

(Supreme Court of California. May 4, 1900.)

ACTION TO QUIET TITLE—EQUITY—TRIAL BY
JURY—STIPULATIONS—GENERAL VERDICT
—FINDINGS BY COURT—EFFECT.

Where, in an action to quiet title to a mining claim, defendant denied plaintiff's ownership, and averred its ownership and exclusive possession, and it appeared from the judgment that a jury was impaneled to try the legal issues tendered by defendant, and that it was specially agreed that a general verdict should be returned in favor of either party, and a verdict was returned in favor of plaintiff, which was not repudiated by the court, the fact that the court found facts "in addition to the verdict" did not entitle defendant to claim that, the suit being in equity, the general verdict should be discarded, and that the facts found by the court were not sufficiently full to establish plaintiff's title.

Department 2. Appeal from superior court, Placer county.

Suit to quiet title by George P. Johnson against the Mina Rica Gold Mining Company.

From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bruner & Bruner and Pullen & Wallace, for appellant. Tuttle & Wright and F. P. Tuttle, for respondent.

McFARLAND, J. The matter involved in this suit is the ownership of a mining claim. Judgment went for plaintiff, and defendant appeals from the judgment, bringing up the judgment roll alone, without any bill of exceptions. Appellant's contention is that the findings do not justify the judgment, because they do not find, in detail, all the various facts and acts necessary to constitute a perfect location by respondent of the mining claim in controversy. This contention, in our opinion, cannot be maintained.

According to the complaint, the action is, in form, an action to quiet title. In the complaint it is merely averred that respondent is the owner of the premises, and appellant claims an adverse interest therein which is without right. In its answer appellant denies the ownership of respondent, and avers that "it is, and for more than five years last past has been, the exclusive and sole owner, and in actual and exclusive possession, and entitled to such exclusive possession, of the above-described mining claim." It appears in the judgment that a jury was "regularly impaneled to try the legal issues of the answer tendered by the defendant"; that it was "specially agreed by the attorneys for the respective parties that a general verdict should be returned by the said jury in favor of the plaintiff or in favor of the defendant"; and that the jury, "having heard the evidence," returned the following verdict: "We, the jury, find a verdict in favor of the plaintiff." The court also found a few facts "in addition to the verdict of said jury," and the position of appellant is that, this being an equity case, the verdict of the jury must be entirely discarded, and that, under appellant's contention, the facts found by the court are not full enough to show respondent's title; therefore the judgment must be reversed. It is not necessary to inquire whether either party in the case at bar was entitled to a jury under the constitution, and in accordance with the principle declared in *Donahue v. Meister*, 88 Cal. 121, 25 Pac. 1096, and other cases like it. No such question arises here. Neither party objected to a jury, and it was apparently desired by both parties, and they expressly stipulated that the jury should try the "legal issues" tendered by the answer, and that these issues should be determined by a general verdict "in favor of the plaintiff or in favor of the defendant." This was a perfectly legitimate stipulation. If the parties preferred a general verdict to the submission of a long list of special issues, they had the right to agree to that form of verdict, and, having so submitted their case to the jury, the losing party cannot now repu-

diolate the verdict. The verdict disposed of all the legal issues raised by the answer, and as there were no issues, either legal or equitable, other than those raised by the answer, the verdict was conclusive of the whole case in favor of the respondent. The further findings of the court were unnecessary. The court did not repudiate the verdict; the other findings were expressly stated to be "in addition to the verdict." In section 592 of the Code of Civil Procedure, after an enumeration of the cases in which a jury may be demanded (although the constitutional right to a jury trial could not be thus limited), it is expressly provided that as to issues of fact in other cases the court has "power to order any such issue to be tried by a jury." It is true that in a purely equitable case the court is not bound by the verdict, but when it calls a jury to its assistance it may accept its verdict. In the case at bar all the issues in the case were sufficiently determined. The judgment is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

128 Cal. 527

SMITH v. PECK et al. (Sac. 487.)

(Supreme Court of California. May 5, 1900.)

JUDGMENT—ASSIGNMENT—SUFFICIENCY.

H. telegraphed to G., who held a judgment against another, as follows: "For \$200 cash, will you assign your claim?" G. replied: "Will assign claim for \$200 cash. Send by draft on any New York bank,"—to which H. replied: "All right. Sign papers mailed to you, and return." A draft for the amount on a New York bank was forwarded to G. by mail. *Held*, that there was a valid assignment of the judgment, under Civ. Code, § 1052, declaring that "a transfer may be made without a writing in every case in which a writing is not expressly required by statute"; there being no provision requiring the assignment of judgments to be in writing for the purpose of passing title.

In bank. Appeal from superior court, Placer county.

Action by Du Ray Smith against W. E. Peck and another. From a judgment for defendants, plaintiff appeals. Affirmed.

Welles Whitmore, for appellant. F. P. Tuttle and Pullen & Wallace, for respondents.

HARRISON, J. Ida M. Gusha recovered a judgment in the justice's court of township No. 2 of the county of Placer, May 19, 1894, against the Columbia Gold & Silver Mining Company. March 21, 1895, she signed and acknowledged an assignment of this judgment to the plaintiff herein, which was received by him about a week thereafter. April 1, 1895, the amount of the judgment (\$315.68) was paid to the defendant Peck, who was at that time the justice of the peace for that township, and a satisfaction of the judgment was then entered by him on the margin of the case. The plaintiff had on March 25th informed the justice that he was the owner of the judgment, but he did not

present any assignment of it, or any evidence of his ownership, other than his verbal statement. Upon the defendant's refusal to pay to the plaintiff the moneys so received by him, the plaintiff brought the present action for its recovery. The cause was tried by the court without a jury, and findings of fact made by it in accordance with averments in the defendants' answer to the effect that the judgment creditor had sold and assigned the judgment to one Hartley prior to her aforesaid assignment to the plaintiff, and that the satisfaction of the judgment had been made at the instance of Hartley. Judgment was accordingly entered in favor of the defendants. The plaintiff has appealed.

The question involved in the appeal is the ownership of the judgment. If Hartley had become its owner prior to the assignment to the plaintiff, the plaintiff was not authorized to recover from the defendants the money which had been paid for its satisfaction. In support of the averment that Hartley was such owner, it was shown that Mrs. Gusha resided in North Bangor, in the state of Maine, and that on March 11, 1895, Hartley sent her the following telegram to that place: "For two hundred dollars cash, will you assign your claim, and take me for balance? Answer quick. B. F. Hartley." On March 13th Hartley received from her the following reply by telegraph: "To B. F. Hartley, Auburn, Cal.: Will assign claim for two hundred dollars cash; you for balance. Send by draft on any N. Y. bank. Ida M. Gusha." On the same day Hartley replied to her by telegraph as follows: "To Ida M. Gusha, North Bangor, Maine: All right. Sign papers mailed you by Robinson, and return. B. F. Hartley." On March 16th Hartley procured from the Placer County Bank, and forwarded to her by mail, a draft on a banking house in New York in her favor for the sum of \$200. On the same day he sent to her the following telegram: "Have forwarded you New York draft for two hundred dollars. B. F. Hartley." Mrs. Gusha, upon the receipt of this communication, wrote to Hartley that, since her arrangements with him, she had had a better offer from a man by the name of Smith, in Oakland, and would do business with him instead of Hartley, and inclosed the papers made out by Robinson, and returned the draft without having collected it. There was sufficient evidence before the court to authorize it to find that the claim referred to in the telegrams was the aforesaid judgment, and it must be held that the telegrams in reference thereto between Hartley and Mrs. Gusha constituted a valid agreement for the sale of the judgment to him upon his depositing in the post office at Auburn a draft in her favor upon any New York bank for the sum of \$200. His proposal to her to "take me for balance," and her assent thereto, was an agreement on her part to sell the judgment to him upon his personal credit for all but the \$200, and for this bal-

ance she would have an immediate right of action against him. The direction in the telegram of March 13th, "Sign papers mailed you by Robinson, and return," did not purport to change the terms of the agreement already assented to by both parties, but was merely a provision for written evidence of the transfer, which would be complete without such writing. *Lewis v. Brass*, 3 Q. B. Div. 667; *Bonnewell v. Jenkins*, 8 Ch. Div. 70; and cases cited in note "o" to section 40a, *Benj. Sales*. It was not necessary that the sale should be evidenced by any written assignment. Section 1052, Civ. Code, declares, "A transfer may be made without writing in every case in which a writing is not expressly required by statute;" and there is no provision in the statute which requires the assignment of a judgment to be in writing, for the purpose of passing the title thereto. The deposit of the draft in the post office was in accordance with Mrs. Gusha's directions to Hartley, and had the same effect as if he had on that day paid the \$200 into her hands at Auburn. *Benj. Sales*, § 710. See, also, *Bennett's Am. Notes to Benj. Sales* (7th Ed.) p. 776, and cases therein cited; *Tied. Sales*, § 154; *Morgan v. Richardson*, 13 Allen, 410; *McCluskey v. Association*, 77 Hun, 556, 28 N. Y. Supp. 931. By this deposit Hartley became the purchaser from her of the judgment on March 16th, and was thereafter its owner. It follows that on March 21st she had no interest in the judgment, and that her purported assignment to the plaintiff on that day gave him no right to the money that had been paid to the defendant. The judgment and the order denying a new trial are affirmed.

We concur: BEATTY, C. J.; GAROUTTE, J.; McFARLAND, J.; VAN DYKE, J.

123 Cal. 511

BONESTELL v. BOWIE et al. (S. F. 1,427.)
(Supreme Court of California. May 4, 1900.)

MORTGAGES—FORECLOSURE—PLEADINGS—
COMPLAINT—PAYMENT OF DEBT—
ATTORNEY'S FEES.

1. A complaint in a suit to foreclose a mortgage, drawn on the theory that there is but one debt, and containing the usual allegations as to the execution and nonpayment of the note which the mortgage was given to secure, is not demurrable on the ground that it contains unnecessary allegations concerning the delivery of the original note to defendant by mistake, and the execution of a series of notes in renewal of the original after it became due, and the execution of a new note outside of the series, which was substantially a copy of the original note, and intended to take the place of it.

2. A mortgagor executed a series of notes in renewal of the original note secured by the mortgage after it became due, and the original was returned to him, marked "Paid." In addition to the series, he executed a new note, which was substantially a copy of the original, with the intention that it should take the place of the original, and be attached to the mortgage, which was not canceled, and no request to have it satisfied of record was ever made. *Held*, that

the original debt secured by the mortgage was not extinguished.

3. A decree allowing \$100 as a reasonable attorney's fee in a suit to foreclose a mortgage for \$500 was warranted, where no part of the principal was paid, and the mortgage provided for the payment of "counsel fees at the rate of — per cent. on the amount found due."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by L. H. Bonestell against W. A. Bowie and others. From a judgment for plaintiff, and an order denying a new trial, defendants appeal. Affirmed.

Nowlin & Fassett, for appellants. C. K. Bonestell, for respondent.

GRAY, C. Appeal from a judgment, and from an order denying defendants' motion for a new trial. This is an action on a promissory note, and to foreclose a mortgage given to secure the payment of the same. The original complaint was filed February 24, 1896. The note sued on was dated February 11, 1892, and was due 60 days after date.

1. The first point urged on appeal is directed to the action of the court in overruling the demurrer to the third amended complaint. Three amended complaints were filed in the case, and the first allegation of each of them, as well as of the original complaint, was as follows: "That on the 11th day of February, 1892, the defendant W. A. Bowie executed to plaintiff a promissory note in the words and figures following, to wit." And then follows a copy of the note upon which the action is based, the same being identical in the original and all of the amended complaints. Beyond any question, the third amended complaint, filed October 7, 1896, upon which the action was tried, stated the same cause of action as the original and other amended complaints. It is equally beyond question that the basis of the action, as set forth in the third amended complaint, was the original note alleged to have been executed February 11, 1892. There was but one note in the case executed on that date, so that it is not possible to construe the complaint, or any amended complaint, as being based on any copy or renewal of that note. The third amended complaint contains the allegations usual in a suit brought to foreclose a mortgage, and also some allegations of evidentiary matter which may be treated as surplusage. Of this latter class are the allegations concerning the delivery by mistake of the original note to defendant, and the execution of a series or succession of notes in renewal of the original after it became due, and also the execution of a new note outside of said series, which was substantially a copy of the original, and intended to take the place of it, after said original had been delivered up by mistake as aforesaid. These allegations could have been omitted from the complaint, to the improvement thereof as a pleading, and yet

they did not render it amenable to any objection included in the demurrer to the third amended complaint. This complaint stated a cause of action in foreclosure, and did not state or attempt to state any cause of action for the correction of a mistake. There was a distinct allegation of nonpayment of the \$500 evidenced by the note first set out in the complaint, and which the mortgage was given to secure, and it was entirely unnecessary to allege nonpayment of any subsequent note, or to make any other reference thereto. The complaint was drawn on the theory that there was but one indebtedness secured by the mortgage, or represented by any or all of the notes, and to allege the nonpayment of this once was sufficient. It is alleged in the complaint that the note in suit had been "by mistake surrendered to one of the defendants, and marked 'Paid,'" but it does not necessarily follow from this allegation that either the note or mortgage was in fact paid or extinguished. The allegation of nonpayment, with the other allegations of the complaint, show a present, subsisting debt, and a mortgage securing the same; and no allegation of any renewal of the mortgage was necessary. We have seen that the cause of action in the original and amended complaints is identical, and that the action was commenced within four years after the note in suit fell due. The complaint therefore shows on its face that the cause of action is not barred by the statute of limitations. The demurrer to the third amended complaint was properly overruled.

2. Appellant contends that the evidence shows that the note which the mortgage was given to secure was paid off and extinguished by another note, and that the mortgage was not in any way renewed, and did not by its terms secure any obligation other than the original note; and therefore defendants' motion for a nonsuit should have been granted, and the finding of nonpayment is not supported by the evidence. The evidence showed that when the original note fell due it was in the hands of the Tallant Banking Company. The accrued interest was then paid by defendant Bowie, and a new note was given by him to Bonestell & Co. for \$500, dated April 11, 1892, and payable in 60 days thereafter. This note was delivered to the cashier of the bank, who received it as the agent of plaintiff, and thereafter delivered the original note to defendant Bowie; the same bearing, stamped on the face thereof, the words: "Tallant Banking Company. Paid." This original note was thereafter kept by Bowie, and by him placed in evidence at the trial. On the maturity of the second note it was exchanged for a third, the second being surrendered as the original had been before, and thereafter similar exchanges were made, new notes being executed,—some 18 or 20 of them altogether,—and each exchanged for the one immediately preceding it in date of execution. The interest on the original \$500 indebtedness

was paid up to some time in June, 1894, but the principal and interest since that date have not been paid, and the mortgage has not been satisfied of record. The testimony of defendant Bowle tended to show that the second note was given in payment and extinguishment of the original note and indebtedness. It appears, however, that, some time after the original had been surrendered to Bowle, he signed and delivered to plaintiff's agent, Doan, a new note, other and in addition to the regular series hereinbefore referred to. This new note was introduced in evidence at the trial, and proved to be, substantially, a copy of the original note. Bowle testified that he signed this copy note with the understanding that it was one of the renewal notes, that he had no knowledge whatever that it was to be substituted for the original, and that it was not dated at all when he signed it. In regard to this copy note, Doan, who acted in the matter as the agent of plaintiff, testified to facts which tend strongly to show that it was not the understanding, even of the defendant himself, that the original indebtedness was canceled by the giving of the subsequent notes. In support of the decision of the trial court, this testimony of Doan must be taken as true, and it shows that defendant, with full knowledge, signed and delivered a new note which was a copy of the original, and was to be substituted for such original and attached to the mortgage. This act of defendant was a broad admission of liability on the original note, as well as on the mortgage, and, coupled with the fact that the mortgage was not in fact canceled, and no request was made to have it satisfied of record, we deem it, in view of the law governing the question, amply sufficient to support the finding of the court that the original note was not extinguished by any subsequent note, as well as to justify the court's action in denying the motion for a nonsuit. The rule of law applicable to the case seems to be that the note of a debtor or of a third party, if not itself paid, does not constitute a payment, unless received by the creditor under an express agreement to accept it as an absolute payment. "The presumption is not in favor of its being received as payment." *Dingley v. McDonald*, 124 Cal. 90, 56 Pac. 700; *Savings Bank of San Diego Co. v. Central Market Co.*, 122 Cal. 33, 54 Pac. 273; *Dellapiazza v. Foley*, 112 Cal. 380, 386, 44 Pac. 727; *Society v. Burnett*, 106 Cal. 514, 528, 39 Pac. 922, 925; *Steinhart v. Bank*, 94 Cal. 362, 29 Pac. 717; *Comptoir D'Escompte de Paris v. Dresbach*, 78 Cal. 15, 20, 20 Pac. 28, 30; *Welch v. Allington*, 23 Cal. 322. That the original note was surrendered, and marked "Paid" on its face, was not conclusive evidence of the extinguishment of the debt which the mortgage was given to secure. In *Welch v. Allington*, supra, the original had been surrendered on the execution of the new note, and in *Steinhart v. Bank*, supra, the original was marked "Can-

celed," and yet it was held in both these cases that the original debt was not extinguished.

3. The mortgage provided that on foreclosure a decree might be had that out of the proceeds of the foreclosure sale there might be retained the principal and interest of the note, together with the costs and charges of making such sale, and of suit for foreclosure, including counsel fees, at the rate of — per cent. upon the amount which may be found to be due. The decree provides that said commissioner, out of the proceeds of such sale, may, among other things, pay to plaintiff the sum of \$100 attorney's fees. The court had in the findings fixed this sum of \$100 as a reasonable attorney's fee, and it was recited in the decree that the same was secured by the mortgage. The provisions of the decree in respect to the attorney's fee were warranted by the provisions of the mortgage above set forth. *Alden v. Pryal*, 60 Cal. 215; *O'Neal v. Hart*, 116 Cal. 69, 48 Pac. 57.

4. The decision is not against law, as the findings dispose of all the material issues. It was necessary to find only on ultimate facts alleged on the one hand, and denied on the other, in the pleadings. It was not necessary to find on those facts stated in the pleadings which were merely evidentiary of the ultimate facts in the case. The judgment and order appealed from should be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

128 Cal. 568
ANAHEIM UNION WATER CO. et al. v.
JURUPA LAND & WATER CO.
et al. (L. A. 606.)

(Supreme Court of California. May 12, 1900.)

CHANGE OF VENUE—DISQUALIFICATION OF
JUDGE—RESIDENCE OF PARTIES—CON-
VENIENCE OF PARTIES.

Under Code Civ. Proc. § 308, requiring transfer of an action for trial to the nearest or most accessible court whenever the judge is disqualified, it was the duty of a judge, when such disqualification was shown, and request made to change the venue, to immediately transfer such case, without exercise of further discretion than to transfer such case to the most accessible court, if the nearest court could not be as easily reached, and without regard to the residence or convenience of the parties.

Commissioners' decision. Department 1. Appeal from superior court, Orange county.

Action by the Anaheim Union Water Company and others against the Jurupa Land & Water Company and others. From an order changing the place of trial without considering the residence and convenience of the parties, the Jurupa Land & Water Company and other defendants appeal. Affirmed.

Collier & Evans, Byron Waters, P. S. Castleman, R. E. Houghton, Houghton & Houghton, and E. W. Freeman, for appellants. Chapman & Hendrick, A. W. Hutton, Richard Melrose, and E. E. Kech, for respondents.

COOPER, C. This appeal is by certain defendants from an order made by the superior court of the county of Orange, changing the place of trial from said county to the superior court of Los Angeles county. The order was made at the request of plaintiffs upon affidavit showing that the judge of the superior court of Orange county was disqualified by reason of personal interest in the corporation plaintiff. The fact that the judge was disqualified was conceded, but upon the hearing of the motion affidavits were filed on behalf of certain defendants tending to show that it would be more convenient and less expensive for the defendants making the application to have the case transferred either to the superior court of San Bernardino or of Riverside county. These affidavits did not tend to show that the superior court of the county of Los Angeles was not the nearest and most accessible court to the superior court of Orange county; but the defendants who have appealed claim that the court must take into consideration the residence of defendants and their witnesses, and the convenience of witnesses, in determining which is the most accessible court, and transfer the cause to such court. We do not think this the correct interpretation of the statute. It is provided in the Code of Civil Procedure (section 398) that where, from any reason, the judge of the court where the action is pending is disqualified, and the parties do not agree as to the court to which the place of trial shall be changed, then the action "must be transferred for trial * * * to the nearest or most accessible court where the like objection or causes for making the order does not exist." There was no question as to the disqualification of the judge, and the parties did not agree as to where the action should be transferred for trial. The case was clearly such that it was the plain statutory duty of the judge to transfer the cause to the nearest or most accessible court. It was said by this court in construing said section 398, in *Krumdick v. Crump*, 98 Cal. 119, 32 Pac. 800: "There should have been no postponement on account of the absence of the defendant, no continuances, no time given for the filing of briefs, no holding under advisement, no entertaining of any counter motion based upon grounds calling for the exercise of judicial discretion. The plain injunction of the statute leaves the disqualified judge in such cases no discretion. He has but one thing to do, and it is his duty to do that thing at once." It is claimed that since the decision in *Krumdick v. Crump* the words "or most accessible" have been added to the section by amendment, and that the decision for this

reason does not apply. We think the decision applies, and that the words "most accessible" refer to and mean most accessible from the court in which the action is pending. The word "nearest" clearly means the court nearest to the court in which the action is pending. The words "most accessible" mean that, in case the nearest court cannot, on account of mountainous roads or want of railroad communication, be reached as easily as some other court having railroad or other communication, then the court may transfer the action to the most accessible court to the court from which it is transferred, although it may not be the nearest. The statute says the action must be transferred to the nearest or most accessible court. In this case the transfer was made to the nearest court, and the court clearly had the right to so transfer it. The order also recites that the court to which the action was transferred is the most accessible. It is presumed that an action will always be brought in the proper county; that the proper county is the most convenient for all parties; that if, for any reason, it cannot be tried in the county in which it is brought, the nearest or most accessible county to the county in which the action is pending is the nearest or most accessible to the parties. After the action has been so transferred to a court in which the judge is qualified, all matters may be heard and determined by him. If the convenience of witnesses and the ends of justice would be promoted by a change of venue, the judge will hear and pass upon a proper motion for such change. We do not think the statute contemplates that a judge who is disqualified shall hear evidence and pass upon a motion which may very materially affect the rights of the litigants. But if we were to assume that by the affidavits the defendants, who have appealed, moved for an order changing the place of trial to San Bernardino or Riverside county, and that the disqualified judge could pass upon such motion, the order would have to be upheld, as there would not appear to have been any abuse of discretion.

It does not appear how many plaintiffs there are in the case. It does appear that there are over 250 defendants, and only some 45 joined in the motion. The affidavits filed are contradictory as to which county would be the most convenient for witnesses, San Bernardino or Riverside, and does not set forth the names of the witnesses, nor what the defendants expect to prove by either of them. The names of six attorneys or firms are signed to the notice of appeal, but there is nothing in the record to show what defendant or defendants either of them represents, except it appears that Collier & Evans represent some 35, whose names are given in the affidavit of Lyman Evans contained in the record. It does appear that many defendants are represented by other attorneys, and that these defendants were not parties

to the motion, and have not appealed from the order. We advise that the order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

128 Cal. 493

FISHER v. ZUMWALT. (Sac. 682.)

(Supreme Court of California. May 4, 1900.)

NUISANCES—PUBLIC AND PRIVATE—ABATEMENT—SIMILAR MANAGEMENT—EXCLUDING TESTIMONY—EQUITY CASES—JURY—VERDICT—APPEAL AND ERROR.

1. Under Code Civ. Proc. § 731, providing that an action may be brought for a nuisance by any person whose property is injuriously affected or whose personal enjoyment is lessened by the nuisance, where defendant had erected a creamery, and a nuisance was caused by the odors from refuse, affecting a number of persons, plaintiff, being specially affected by its proximity to his home, can maintain an action in his private capacity to abate the nuisance.

2. In an action to abate a nuisance caused by odors arising from refuse of a creamery, it was not error to exclude defendant's testimony as to how the management of his creamery and the premises about it compared with the management of other creameries and the premises about them, as such management was no defense.

3. The verdict of a jury in an equity case being only advisory to the court,—it filing its own findings and decisions,—a refusal to give instructions was not sufficient to reverse a judgment on appeal; for the correctness of the decision of the court, and not the propositions of law given for the guidance of the jury, are then to be determined.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county.

Action by C. H. Fisher against D. K. Zumwalt to abate a nuisance. From a verdict in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Affirmed.

U. T. Clotfelter, for appellant. E. O. Larkins, for respondent.

COOPER, C. Action to abate a nuisance and for damages. Plaintiff obtained judgment, and from this judgment, and an order denying his motion for a new trial, defendant appeals.

The plaintiff and defendant are neighbors, and have for a long time lived in the same community. In the year 1893 the defendant erected on his own land a creamery, for the purpose of manufacturing butter and cheese. This creamery is located near a public highway, and in a thickly-populated portion of the county of Tulare; there being many farmhouses in the vicinity, and some 80 people living within a radius of three miles therefrom. After the erection of said creamery, and until after the commencement of this action, the defendant permitted the refuse—whey, milk, and debris—to accumulate in certain tanks, troughs, and ditches, and to stand so as to become sour and putrid, in such manner as to throw

off vile and noxious odors and gases, very offensive to the senses and dangerous to the health of plaintiff and his family and all others living in the immediate vicinity. The plaintiff lives on his own farm, only a short distance from said creamery, and nearer thereto than any other resident of the neighborhood, and therefore he and his family are more exposed to the said unwholesome and noxious gases than any one else. The said odors and stench pollute the air in and about the dwelling house of plaintiff, and at times render it unfit for occupation, causing plaintiff great distress and inconvenience. There is no controversy as to the fact that the creamery, as it has been and was maintained at the time or the commencement of the action, is a nuisance, but defendant claims that it is a public nuisance, and that it affects all the people of the neighborhood, and that the nuisance is not especially injurious to plaintiff; that the damage is not different in kind or character from that suffered by the general public; and that for this reason the plaintiff, in his private capacity, cannot maintain the action. This question presents the main and controlling point in the case. There is no doubt but that there are many nuisances which may occasion an injury to an individual for which an action will not lie by him in his private capacity, unless he can show special damage to his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to similar injury. Among such may be mentioned the invasion of a common and public right which every one may enjoy, such as the use of a highway or canal or public landing place. But this class of nuisances is confined in most cases to where there has been an invasion of a right which is common to every person in the community, and not to where the wrong has been done to private property, or the private rights of individuals, although many individuals may have been injured in the same manner and by the same means. In the one case the invasion is of a public right which injures many individuals in the same manner, although it may be in different degrees. In the other case no public or common right is invaded, but by the one nuisance the private rights and property of many persons are injured. Because the nuisance affects a great number of persons in the same way, it cannot conclusively be said that it is a public nuisance, and nothing more. The fact that a nuisance is public does not deprive the individual of his action in cases where, as to him, it is private, and obstructs the free use and enjoyment of his private property. *Blanc v. Klumpke*, 29 Cal. 180; *Yolo Co. v. City of Sacramento*, 36 Cal. 195. It is provided in Code Civ. Proc. § 731: "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as

to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." It is said in *Wood, Nuis.* (3d Ed.) § 671: "So, too, in the case of a noxious trade upon a highway, but away from habitations, so long as every person sustains a common injury, only, therefrom, as by being annoyed by its offensive and unwholesome smells, it is purely a public injury; but, if its effects extended to the dwellings or places of business of any persons to such an extent as to render their occupancy materially uncomfortable, then it becomes a private nuisance to those whose dwellings or places of business are so affected, and they may have their action therefor, although there are many persons who are thus affected, and the result will be to promote a multitude of suits." In *Parker & W. Pub. Health*, p. 253, § 216, it is said, in speaking of offensive trades in public cities or populous districts: "At the same time, to those living upon the street, and within the immediate sphere of the noxious influences, it is both a public and a private nuisance. Those individuals, therefore, to whom the injury is real and substantial,—as, for example, if it consists in impaired health of the individual or members of his family,—are entitled to a private remedy for the damages sustained, and for the protection of their special interests." In *Wesson v. Iron Co.*, 95 Mass. 95, it was held that an action could be maintained by an individual in his private capacity for a nuisance to his dwelling house, caused by carrying on works and operating machinery in the vicinity, which filled the air with smoke and cinders, and rendered it offensive and injurious to health, although many persons in the vicinity had sustained similar injuries. The rule is well stated by Bigelow, C. J. He says: "But it will be found that in all these cases, and in others in which the same principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired, by the carrying on of offensive trades and occupations, which create noisome smells or disturbing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience, and injury to persons and property thereby occasioned. * * * But it has never been held, so far as we know, that in cases of this character the injury to pri-

vate property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right, which they would otherwise have, to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act. Nor would such a doctrine be consistent with sound principle. Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that, in effect, a wrongdoer would escape all liability to make indemnity for private injuries by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance. * * *

The rule of law is well settled and familiar that every man is bound to use his own property in such manner as not to injure the property of another, or the reasonable and proper enjoyment of it, and that the carrying on of an offensive trade or business, which creates noisome smells and noxious vapors, or causes great and disturbing noises, or which otherwise renders the occupation of property in the vicinity inconvenient and uncomfortable, is a nuisance for which any person whose property is damaged, or whose health is injured, or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed thereby, may well maintain an action to recover compensation for the injury." In *Francis v. Schoellkopf*, 53 N. Y. 154, it was held that plaintiff, as an individual, might maintain an action against defendant for a nuisance for carrying on a tannery in the vicinity of plaintiff's lot, and boiling putrid animal matter in such a way as to create offensive smells, so as to render the house of plaintiff unfit for habitation. It was held that it was no defense that the nuisance was common, and affected other houses in the same way. In the opinion the court said: "The idea that if by a wrongful act a serious injury is inflicted upon a single individual a recovery may be had therefor against the wrongdoer, and that if by the same act numbers are so injured no recovery can be had by any one, is absurd. This, stripped of its verbiage, is the ground of the motion. It is said that holding the defendant liable to respond in damage to each one injured will lead to a multiplicity of suits. This is true, but it is no defense to a wrongdoer, when called upon to compensate for the damage sustained by his wrongful act, to show that he by the same act inflicted a like injury upon a large number of persons. The position is not sustained by any authority." The supreme court of Ohio, in *Story v. Hammond*, 4 Ham. 377, held that a private action might be brought for a nuisance caused by

the erection of a dam which rendered the atmosphere in the community impure and unhealthy. The defendant claimed that the alleged nuisance was public, and that plaintiff could not maintain the action. The court said of this defense: "The defense set up is entirely without foundation. If a man were to sally forth into the public streets of a town and commit an assault and battery upon every person he met, it would hardly be competent for him, in a suit by an individual for special damages, to set up as a defense that he had not only beat the plaintiff, but had also beat the whole town. Or if a man was to poison a reservoir of water for the supply of a city, and thereby create a general sickness among the inhabitants, it would not be seriously contended that the magnitude of the offense was a bar to a private action, or, in other words that the defendant might exculpate himself by proving that he had not only poisoned the plaintiff, but had poisoned all the inhabitants of the city." In *Coke Co. v. Thompson*, 39 Ill. 600, the plaintiff, as an individual, had obtained a judgment for injuries done to his well by the defendant, in having suffered to flow from its gas works, and to be deposited and placed in and around and near the well, certain noxious and offensive substances used in and about the manufacture of gas and coke. The defendant claimed that the facts showed that the acts complained of constituted a public nuisance. The court on appeal at first sustained this view and reversed the case. A rehearing was granted, and the judgment affirmed. In the opinion on rehearing, the court said: "On a former hearing of this cause, we were of opinion this position was correct, and reversed the case. A rehearing having been granted, we have re-examined the question, and find considerable conflict in the authorities. We now incline to the opinion that the weight of authority is in favor of the action." It would be useless to cite further extracts as illustrating the rule in support of our conclusion. The following additional cases are to the effect that this kind of action can be maintained: *Ross v. Butler*, 19 N. J. Eq. 204; *Cranford v. Tyrrell*, 128 N. Y. 341, 28 N. E. 514; *Weir's Appeal*, 74 Pa. St. 230; *Lansing v. Smith*, 4 Wend. 10; *Knight v. Gardner*, 19 Law T. (N. S.) 673; *Lind v. City of San Luis Obispo*, 109 Cal. 343, 42 Pac. 437, and cases cited. In view of what has been said, the special findings of the jury are not in conflict with their general verdict.

The defendant, when on the witness stand, was asked by his counsel: "How does the management of your creamery, and the premises about it, compare with the management of other creameries, and the premises about them?" The court sustained an objection made by plaintiff to this question, and it is claimed the ruling was error. We think the ruling was clearly correct. It would be no defense to defendant if he could

show that other persons were violating the law. Counsel by the question evidently desired to show that, although defendant was doing wrong, yet that many others were doing the same thing.

Counsel argue that the court erred in giving certain instructions asked by plaintiff, and refusing others asked by the defendant. Without discussing the question as to the legal propositions involved in the instructions, it is sufficient to say that, if error was committed in the respects claimed, it would not be sufficient ground for reversing the judgment. The case was in equity. The verdict of the jury was, at most, only advisory to the court, and the court filed its own findings and decision. The correctness of the decision of the court, and not the propositions of law it laid down for the guidance of the jury, is the question for determination here. *Schneider v. Brown*, 85 Cal. 205, 24 Pac. 715; *Sweetser v. Dobbins*, 65 Cal. 523, 4 Pac. 540; *Richardson v. City of Eureka*, 110 Cal. 446, 42 Pac. 965; *Scheerer v. Goodwin*, 125 Cal. 154, 57 Pac. 780. It follows that the judgment and order should be affirmed, and so we advise.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

128 Cal. 489

HARPER v. GORDON. (S. F. 1.606.)

(Supreme Court of California. May 4, 1900.)

APPEAL AND ERROR—PRESENTATION OF QUESTION IN TRIAL COURT—BILL OF EXCEPTIONS—SPECIFICATION OF ERRORS—CHATTEL MORTGAGES—ACTION TO RECOVER POSSESSION BY MORTGAGEES.

1. Statements made by plaintiff's counsel in opening the case to the jury cannot be considered on review of the action of the trial court in granting a motion for nonsuit on the opening, where such statements were not made one of the grounds of the motion.

2. No errors of law need be specified in a bill of exceptions in order to entitle it to the consideration of an appellate court.

3. A mortgagee in a chattel mortgage which provides that he shall be entitled to possession after default may, after default, maintain replevin to obtain possession of the chattels, though he does not seek to foreclose the mortgage in such action, notwithstanding Code Civ. Proc. § 726, which provides that there can be but one action for the recovery of a debt, or the enforcement of any right secured by mortgage on personal property.

4. The question whether or not a cause of action set out in plaintiff's complaint had been previously adjudicated adversely to plaintiff cannot be considered on appeal from an order granting a nonsuit on plaintiff's opening to the jury, where not set up in the answer.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by J. H. Harper against C. W. Gordon. From a judgment granting a nonsuit on plaintiff's opening to the jury, he appeals. Reversed.

F. H. Smithson and Carpenter & Black, for appellant. T. W. Nowlin, for respondent.

CHIPMAN, C. Replevin. Defendant had judgment on motion for a nonsuit upon the opening statement of counsel for plaintiff. Plaintiff appeals from the judgment, by bill of exceptions.

The complaint sets forth the ordinary action of claim and delivery. Counsel for plaintiff in his opening statement stated to the court the nature of the suit; that the chattels, the subject of the action, were included in a chattel mortgage executed by defendant to plaintiff's assignor, and that the action is one of claim and delivery, based solely on said mortgage; that "the mortgage contained a provision that the party of the first part [defendant in this action] might retain possession of said personal property until default of the payment of the interest or principal, and after default the mortgagee [plaintiff herein] should be entitled to the possession of the property in said instrument described." It appeared, also, that default had been made, and that defendant still retained possession. It was conceded that an action to foreclose the mortgage had been brought, and had been dismissed upon application of the mortgagor (defendant herein), without notice to plaintiff, and without any trial of the merits of the action, and "that such dismissal of said action in favor of said defendant, Gordon, was duly entered and recorded on the 23d day of March, 1896." It does not clearly appear whether the concession last above stated was made before or after the motion was made.

Counsel for defendant moved for a nonsuit on two grounds: "(1) That only one action can be maintained for the foreclosure of a mortgage, and only in accordance with the Code of Civil Procedure (chapter 1, tit. 10); * * * and (2) that the suit here at bar is an action of replevin, based exclusively upon a mortgage of personal property."

1. The facts stated in relation to the bringing of an action to foreclose the mortgage, and its dismissal, cannot be considered, as they were not made one of the grounds for the motion. *Palmer v. Publishing Co.*, 90 Cal. 168, 27 Pac. 21.

2. Respondent claims that appellant cannot be heard, because he failed to include any specifications of errors in his bill of exceptions. No specifications were necessary. *Bartfield v. Irrigation Co.*, 111 Cal. 118, 43 Pac. 406.

3. Replevin will lie in a case like the present one. Section 2927, Civ. Code; *Flinn v. Ferry* (Cal.) 60 Pac. 434, and cases there cited.

4. Section 726 of the Code of Civil Procedure reads: "There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon

real estate or personal property, which action must be in accordance with the provisions of this chapter," etc. The point now raised, that this section forbids the action, was not presented in the case above noted, and no case is cited where this precise question was decided. The action here is clearly not to recover the debt; nor do we think it an action "for the enforcement of any right secured by mortgage," in the sense intended by the clause restricting the action upon a debt secured by mortgage to foreclosure. The action of replevin determines only the right of possession. Section 2927 of the Civil Code recognizes what it was always competent for the parties to do, to wit, agree that the mortgagee might, either before or after condition broken, have possession. The section, however, makes the condition that the mortgagee is not entitled to possession "unless authorized by the express terms of the mortgage," and this agreement may be entered into after the execution of the mortgage. Civ. Code, § 2020, defines a mortgage to be "a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession." The primary purpose of the mortgage is to secure the payment of the debt by creating a lien on the property. The object of foreclosure under section 726, Code Civ. Proc., is to enforce the lien by subjecting the property to sale. The interest of the mortgagee is not enlarged or affected by the fact that he is in possession under the mortgage. He takes possession for the purpose of increasing his security; and whether he does this by the voluntary act of the mortgagor, or by action upon condition broken, the debt remains unpaid, and the title still remains in the mortgagor. The agreement as to possession is but an incident to the mortgage, and unless it can be enforced the recognition given it by the Civil Code, *supra*, would have no value. Respondent cites an Idaho case holding, under a statute similar to ours, that after foreclosure proceedings have been begun, and pending foreclosure, the mortgagee cannot have the remedy of replevin. *Cedarholm v. Looftborrow*, 2 Idaho, 176, 9 Pac. 641. And it is claimed that the case is authority for the judgment here. The facts are not the same in the two cases, and hence the Idaho case does not apply. But if that case was rightly decided, and it should be held, also, that before foreclosure the mortgagee could not have an action for possession of the mortgaged property, it would result in entirely nullifying the agreement; for the mortgagee could not have possession either before or after foreclosure. The statute having given the right of possession to the mortgagee on the default of the mortgagor, where expressly provided for in the mortgage, the legislature must have intended that the right might be enforced without foreclosure. It is so held in many

states. Jones, Chat. Mortg. §§ 430, 431, 705, 706. And, in our opinion, the rule is not affected by our section 726, Code Civ. Proc. We think the plaintiff should have been permitted to put in his evidence. If it be true that his rights under the mortgage have already been determined, and defendant should set up the defense by appropriate answer, the question of res judicata can then be properly passed upon. As the matter is now before us, we cannot consider that question. The judgment should be reversed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

(128 Cal. 477)

PEOPLE v. LINDA VISTA IRR. DIST.
(L. A. 599).¹

(Supreme Court of California. May 3, 1900.)

COURTS—STATE STATUTES—CONSTRUCTION—UNITED STATES SUPREME COURT DECISION—EFFECT—JUDGMENT IN REM—RES JUDICATA—QUASI PUBLIC CORPORATIONS—ORGANIZATION—COLLATERAL ATTACK—STATUTES—VALIDITY—TITLE.

1. A state court of last resort is not bound by the judgment of the United States supreme court construing a state statute, but is entitled to construe the same according to its own judgment.

2. Act March 7, 1887, authorized the organization of irrigation districts; and St. 1889, p. 212, confirming proceedings taken under the prior act, declared the manner of organization and government of such districts, authorized the acquisition of water and other property, and provided for the examination, approval, and confirmation of proceedings for the issuance and sale of bonds issued thereunder, declaring that the notice of suit for such confirmation should state the time and place of hearing, and that any person interested in the organization of such district, or in proceedings for the issuance and sale of the bonds, might appear and answer or demur to the petition. *Held*, that a proceeding brought under the latter act for confirmation of proceedings taken in the organization of an irrigation district, and for a declaration of the validity of bonds issued, was a proceeding in rem, to which the state might have made itself a party, and, not having appeared, a judgment validating the proceedings was res judicata against it, and hence it could not thereafter question the validity of the organization of such district in quo warranto proceedings.

3. A corporation organized for irrigation purposes is a quasi public corporation, the validity of the organization of which cannot be collaterally attacked.

4. It is not necessary that the title of a legislative act should express an abstract or catalogue of its contents in order to be invulnerable to the objection that it is invalid in that it contains provisions not expressed in its title, but it is sufficient that the general purpose of the act is declared; the details provided for the accomplishment of that purpose being regarded as mere incidents.

5. St. 1889, p. 212, entitled "An act supplemental to an act entitled 'An act to provide for the organization and government of irrigation districts, and for the acquisition of water and other property, and the distribution of water for irrigation purposes,' approved March 7, 1887, and to provide for the confirmation of proceed-

ings for the issuance and sale of bonds issued under the provisions of said act," is not invalid by reason of the fact that it contains a provision validating proceedings previously taken for the organization of irrigation districts, under the act of 1887, in that such provision is not within the title of the act, since such provision is a condition precedent and incidental to the validity of the bonds issued by such district for the confirmation of which the act provided.

In bank. Appeal from superior court, San Diego county.

Quo warranto by the state, on relation of the attorney general, against the Linda Vista irrigation district. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Atty. Gen. Ford and Geo. Fuller, for appellant. L. A. Wright, F. W. Stearns, and Wadham & Stearns, for respondent.

GAROUTTE, J. This is an action brought in the name of the people of the state by the attorney general, in the nature of quo warranto, against the Linda Vista irrigation district, a district organized in this state under an act of the legislature popularly known as the "Wright Irrigation Act." Though litigation occasioned by the Wright act, amendments thereof, and acts supplemental thereto, as evidenced by a reference to the later volumes of the Reports of this state, has been most prolific, yet the present action is the first of its kind bearing upon irrigation legislation. It is sought by the state to secure a judgment declaring this irrigation district was never organized according to law, and excluding it from all corporate rights, powers, and franchises. The complete history of the organization of the district is set out in the complaint in detail, and also we find set out therein the proceedings taken under the confirmatory act of 1889, which culminated in a decree of the superior court of San Diego county to the effect that the district was regularly organized, and the bonds issued composed a valid issue. A general demurrer, accompanied by a special plea of the statute of limitations, was presented to the complaint and sustained. The sufficiency of this demurrer is the only issue before the court upon this appeal.

A great many important legal questions are discussed by the respective counsel in this case, especially as to the bearing had upon this litigation by various special and general statutes of limitations. But, in view of our conclusion as to the scope and effect of the act of the state legislature known as the "Confirmatory Act," we find that other matters do not demand our consideration.

The confirmatory act found in St. 1889, p. 212, to which we have previously referred, is entitled "An act supplemental to an act entitled 'An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes,' approved March 7, 1887, and to provide for the

¹ Rehearing denied June 4, 1900.

examination, approval and confirmation of proceedings for the issue and sale of bonds issued under the provisions of said act." And it is now insisted that the proceeding taken in the superior court of San Diego county for the organization of the district under authority of this act, which culminated in a declaration of the court that the organization of the district was valid, and likewise that the issue of bonds was valid, operates as a bar against the state in the prosecution of this action. It is first claimed that it is a bar by judgment; and next it is claimed that if the proceeding prescribed by the act be one which does not culminate in a judgment, but simply culminates in a certificate of the validity of the proceedings, which certificate may be used as evidence in other litigation, still this certificate would be conclusive evidence of the validity of the organization of the district, and therefore would be as effective and available as though it amounted to *res adjudicata*.

The supreme court of the United States, speaking through Mr. Justice Brewer, in *Tregea v. Irrigation Dist.*, 164 U. S. 179, 17 Sup. Ct. 52, 41 L. Ed. 395, held that this confirmatory act was simply legislation enacted for the purpose of procuring evidence of the validity of the organization of irrigation districts, in order that such evidence might be used in subsequent litigation in which the district was interested. In the opinion of the court in that case, in speaking of the decree or judgment which might be rendered under the confirmatory act, the court said: "We do not mean to intimate that it may not have effect as evidence like the certificate of an auditor declared by a legislature to be conclusive; but is it not simply as evidence, and not as *res adjudicata*? * * * Would it not be held, in effect, whatever the form, a mere *ex parte* case to obtain a judicial opinion, upon which the parties might base further action? It seems to us that this proceeding is, after all, nothing but one to secure evidence; that in the securing of such evidence no right protected by the constitution of the United States is invaded, and that the state may determine for itself in what way it will secure evidence regulating the proceedings of any of its municipal corporations; and that, unless in the course of such proceeding some municipal right is denied to the individual, this court cannot interfere on the ground that the evidence may thereafter be used in some further action in which there are adversary claims." And by reason of the foregoing views of the court the appeal in that action was dismissed.

The action of *Tregea v. Irrigation Dist.* was one arising under the confirmatory act. The construction given the act by the highest court in the land is one new to this court. If the act be one alone to secure evidence of the validity or invalidity of the organization of irrigation districts, the state legislature, beyond a doubt, enacted legislation

never contemplated by that body. Indeed, this court, in construing the act, has given it a construction of an entirely different character. When the case of *Tregea v. Irrigation Dist.* was before this court (88 Cal. 334, 26 Pac. 237), the act was then construed, and the court said: "The object of the proceedings is, of course, to compel every person interested in the district, and whose property is to be bound for the payment of its debts, to come into court, and within the time limited present and submit to judicial investigation any and all objections he may have to the regularity of the organization of the district, and all other matters affecting the validity of the bonds, so that it may be finally and conclusively determined by a judgment, which neither he nor his successors in interest can thereafter question, whether such bonds are legal and valid, or not." In the case of *Irrigation Dist. v. Brandon*, 103 Cal. 384, 37 Pac. 484, the act is construed as follows: "It was not error to admit the decrees of the superior court affirming the regularity of the proceedings for plaintiff's organization as an irrigation district to establish facts therein decreed. The proceeding in which that decree was rendered was a proceeding *in rem*, had and authorized for the express purpose of fixing the legal status of the corporation. And that decree concluded the whole world upon all the questions involved." The foregoing construction of the statute is fully supported by the cases of *Crall v. Irrigation Dist.*, 87 Cal. 140, 26 Pac. 797, and *Cullen v. Water Co.*, 113 Cal. 503, 39 Pac. 769, 45 Pac. 822, 1047. Indeed, it may be said that almost every line of the act supports the aforesaid conclusion of this court as to its scope, purpose, and effect. The fact that a motion for a new trial is provided for, an appeal therefrom to this court allowed, and also a right of appeal given from the judgment, stamps the act as one providing for judicial action, and one intended to lay down a procedure which should culminate in the judgment of a judicial tribunal. This court has no doubt but that it is both its right and duty to construe statutes enacted by the law-making power of its own state according to its own lights. Whether or not the supreme court of the United States should follow this court's construction of state statutes is not a matter here material. And, while perfectly willing to change its views, as to the true construction of this act when good cause is shown therefor, yet, as now advised, it still adheres to the construction given it in the previous decisions of the court.

It may be suggested, in passing, that if this act should now be construed by this court upon the lines of the decision in *Tregea v. Irrigation Dist.*, as decided by the supreme court of the United States, then grave doubts are at once presented as to its constitutionality; for that the title of the act in any way suggests legislation of the character

there intimated presents a question admitting of the gravest consideration, and that, too, whether the decree of the superior court be held to amount to conclusive evidence of certain facts, or only *prima facie* evidence of those facts. In *Tregea v. Irrigation Dist.*, 164 U. S. 179, 17 Sup. Ct. 52, 41 L. Ed. 395, much is said tending to weaken the force and vitality of the confirmation act as an act providing for judicial procedure and judgment. It is there said, in speaking of the appeal then before the court: "But, going beyond this matter, we are confronted with the question whether in advance of the issue of bonds, and before any obligation has been assumed by the district, there is a case or controversy with opposing parties, such as can be submitted to and can compel judicial consideration and judgment. This is no mere technical question. * * * All that could be accomplished by an affirmance of the decision of the state court would be an adjudication of the right to make a contract, and, unless, the board should see fit to proceed in the exercise of the power thus held to exist, all the time and labor of the court would be spent in determining a mere barren right,—a purely moot question. * * *" And again the court said: "It may well be doubted whether the adjudication really binds anybody." It is thus plainly manifest that, under the construction this court has always given the act, we find it badly malmed by this decision of the supreme court of the United States rendered in dismissing the appeal in the *Tregea* Case. It is to be regretted that the opportunity did not present itself to that court at that time to test the validity of the act in the crucible furnished by the constitution of the United States, giving the act the construction placed upon it by this court. But by our decisions the constitutionality of the act has been directly and impliedly passed upon and approved more than once, and we will not now enter into a discussion of that question. The issue was squarely made and met in *Crall v. Irrigation Dist.*, 87 Cal. 140, 26 Pac. 797, and *Cullen v. Water Co.*, supra, and we leave the matter resting upon those decisions and the cases there cited.

It is next insisted that the state is barred and estopped from bringing this action by reason of the proceedings taken under the confirmatory act in San Diego county, which resulted in a judgment to the effect that the organization of the district was regular, and the issue of bonds constituted a valid issue. If the construction of this confirmatory act heretofore given by this court be the correct construction; if the judgment rendered under that act be a judicial decision, possessing the scope, effect, dignity, and efficacy of the usual and ordinary judgment of courts of general jurisdiction; if it be not only such a judgment, but a judgment *in rem*,—then the state, like an ordinary individual, is estopped from questioning it. Such a judgment is

binding on the whole world, and the state comes within that territory. No case is cited, and we believe there is none, holding that a judgment *in rem* does not bind the state. This question as to the binding force and effect of such a judgment upon the state was directly raised and decided in *State v. McGlynn*, 20 Cal. 233. That was an action brought by the state, and it was held that the state was barred by a judgment *in rem* which had been rendered upon the probate of a will declaring that will to be a valid and testamentary instrument. And likewise in *State v. Blake*, 69 Conn. 78, 36 Atl. 1023, as to the probate of a will, it was held as to the state: "The present plaintiff was a party to that proceeding sufficiently to be bound thereby." In speaking as to the right of the state to inquire into these matters by *quo warranto*, the supreme court of Texas (*State v. Goodwin*, 69 Tex. 57, 5 S. W. 678) said: "The legislature, however, may make the fact of incorporation or no incorporation to depend upon the action and determination of some official or tribunal whose determination the courts will have no power to revise, and if this be done, in a proceeding by *quo warranto* against persons who assume to exercise powers given by the act of incorporation, no inquiry can be made into the legality of the corporation." If such action and determination of an official or tribunal is a conclusive bar to subsequent proceedings by the state in *quo warranto*, it surely cannot be urged successfully that a judgment, such as we have here, unappealed from and final in all respects, is not a bar to a proceeding in *quo warranto* by the state. The decisions from this state which we have heretofore quoted, and others not quoted, declare that proceedings taken under this act are judicial in character, culminating in the judgment of a judicial tribunal, and that such judgment is one fixing the status of these irrigation districts, and binding on all the world. For this reason it seems the state is foreclosed, by the judgment rendered in San Diego county, from attacking the validity of the organization of this district, and the validity of the issue of bonds made by the district.

It is sought by this action to re-examine the identical questions passed upon by the superior court of San Diego county. The judgment rendered in that court is not attacked on any equitable grounds, even if such a thing were within the law. But it is alone sought to again go over in the various steps leading up to the order made by the board of supervisors, and the judgment of the superior court declaring defendant an irrigation district regularly and legally organized under the *Wright* irrigation act. As supporting a claim of right to now review that action, it is urged that the state was not a party to the confirmatory proceeding. If the judgment was one *in rem*, it would seem, ex necessitate, that the state was a party to the proceeding. It was so held in the *McGlynn*

Case. We cannot imagine a judgment in rem to which the state would not be a party. The very nature and character of such a judgment forbids any other conclusion. It is insisted that the confirmatory act itself does not contemplate or allow the state to appear as a party at the trial held under the provisions of the confirmatory act. The act says: "The notice shall state the time and place fixed for the hearing of the petition and the prayer of the petition, and that any person interested in the organization of said district, or in the proceedings for the issue or sale of said bonds, may, on or before the day fixed for the hearing of said petition, demur to or answer said petition." St. 1889, p. 212, § 3. Again the act says: "Any person interested in said district, or in the issue or sale of said bonds, may demur to or answer said petition." Id. p. 213, § 4. When we look at the purpose of this act, as indicated by its face, and as more clearly indicated by the decisions of this court, it is apparent that there never was any intention upon the part of the state legislature that the state should be allowed by quo warranto, or in any other way, to attack the organization of these districts after a judgment of confirmation had been had. If that could be done, then the entire confirmatory act is useless legislation,—a mere nullity. A judgment under the act would settle nothing. Again, under the provisions of the act just quoted, we are satisfied that the state could have appeared at the trial held under the confirmation act, and have denied the organization of the district. The opportunity then presented itself, and the state should have embraced it. Hence it has not been deprived of an opportunity to make the attack which it is now making.

This court has repeatedly held that corporations of the character of defendant are quasi public corporations, and by the complaint in this action it appears that the defendant is, at least, a de facto quasi public corporation. This court has also repeatedly held that upon collateral attack the validity and regularity of the organization of this class of corporations cannot be questioned. *People v. La Rue*, 67 Cal. 530, 8 Pac. 84; *First Baptist Church v. Branham*, 90 Cal. 22, 27 Pac. 60; *People v. Water Co.*, 97 Cal. 276, 32 Pac. 236; *Reclamation Dist. v. Gray*, 95 Cal. 601, 30 Pac. 779; *Swamp Land Dist. v. Silver*, 98 Cal. 51, 32 Pac. 866; *Quint v. Hoffman*, 103 Cal. 506, 37 Pac. 514; *Reclamation Dist. v. Turner*, 104 Cal. 334, 37 Pac. 1038; *Hamilton v. County of San Diego*, 108 Cal. 284, 41 Pac. 305. If a proceeding in quo warranto by the state must be resorted to in order to test the de jure character of these corporations, the confirmatory act would serve no purpose on the statute books, if the state be not bound by the judgment rendered in the proceeding. Indeed, it would seem, in the light of the above decisions of this court, that this statute was enacted for the very object of binding the state. We see no other practical pur-

pose that could have actuated the mind of the legislature in creating it.

It is claimed that the confirmatory act is unconstitutional, in this: That the subject-matter thereof is not covered by the title. The title of this act is hereinbefore set out. It is not necessary that the title of an act should embrace an abstract or catalogue of the contents. "When the general purpose of the act is declared, the details provided 'or the accomplishment of that purpose will be regarded as necessary incidents.'" *Ex parte Liddell*, 93 Cal. 636, 29 Pac. 251. In *Spler v. Baker*, 120 Cal. 370, 52 Pac. 650, it was held that an act, by its title pertaining to primary elections, could not contain legislation as to political conventions. Such character of legislation furnishes a clear example of a violation of the provision of the constitution here involved. In a proceeding brought for the purpose of determining the validity of an issue of bonds, one of the most vital questions arises upon the validity of the organization of the district contemplating the issue of said bonds. A valid organization of the district is a condition precedent to a valid issue, and, of necessity, the validity of the organization must be considered and passed upon in a proceeding brought directly to test the validity of the issue of bonds. For this reason we deem the title sufficiently broad to cover the subject-matter of the act. It is ordered that the judgment be affirmed.

We concur: BEATTY, C. J.; VAN DYKE, J.; McFARLAND, J.; HARRISON, J.

(128 Cal. 558)

TOY v. HASKELL et al. (S. F. 1,370.)

(Supreme Court of California. May 10, 1900.)

ATTORNEY AND CLIENT—AGREEMENT—DISMISSAL OF CASE—CONTROLLING CASE IN COURT—VACATING JUDGMENT—NOTICE OF MOTION—APPEARANCE—WAIVER—BILL OF EXCEPTIONS—SUFFICIENCY—AFFIDAVIT OF MERITS.

1. Where plaintiff, prior to commencement of an action, had agreed with his attorneys that they should receive one-half of any recovery, it was error to enter judgment of dismissal against plaintiff under his stipulation with the attorneys for defendants, made without knowledge or consent of plaintiff's attorneys.

2. Plaintiff agreed with his attorneys that they should receive one-half of any recovery, after which judgment of dismissal was entered under stipulation with defendants' attorneys without the knowledge of plaintiff's attorneys. A motion of plaintiff to set aside such judgment of dismissal was overruled. *Held*, a bill of exceptions showing, as one of the grounds of the motion that plaintiff's attorneys did not know of such action, and that defendants appeared at the hearing of the motion resisting it on its merits, with no objection that previous notice had not been given, showed a waiver of the usual notice of motion.

3. Under Code Civ. Proc. § 473, providing for relief from judgments where plaintiff, prior to commencement of an action, had agreed with his attorneys that they should receive one-half of any recovery, after which judgment of dismissal was entered against plaintiff, under his stipulation with defendants' attorneys, without knowl-

edge of his attorneys, no affidavit of merits was necessary on motion of plaintiff to set aside such judgment, as such proceedings need not be in accordance with section 473; the stipulation being invalid, the other grounds of the motion may be disregarded.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Morgan S. Toy against Sarah E. Haskell and another. From an order denying a motion to set aside a judgment of dismissal, plaintiff appeals. Reversed.

Borna McKinne and A. F. Benjamin, for appellant. Carson & Savage, for respondents.

GRAY, C. Appeal from an order denying plaintiff's motion to set aside a judgment of dismissal. In the beginning of this case the plaintiff appeared by the attorneys whose names are signed to the complaint herein. Previous to the commencement of the action plaintiff entered into a written contract with said attorneys by which they were to have one-half of whatever might be recovered in the action as compensation for their services, said attorneys agreeing to pay the necessary costs of the case. Thereafter, without any substitution or change as to his attorneys, and without their knowledge or consent, the plaintiff, in person, signed and delivered to defendants' attorneys a written stipulation prepared by them authorizing a dismissal of the case, and a judgment of dismissal was accordingly entered.

1. It is the law of this state, settled by repeated decisions, that a party must be heard in court through his attorney, when he has one, and the court has no power or authority of law to recognize any one in the conduct or disposition of the case except the attorneys of record. So thoroughly has this question been canvassed that it is useless to do more than to cite some of the more important cases on the subject. *Canal Co. v. Montgomery*, 124 Cal. 134, 56 Pac. 797; *Wylie v. Gold Co.*, 120 Cal. 485, 52 Pac. 809; *Mott v. Foster*, 45 Cal. 72; *Commissioners v. Younger*, 29 Cal. 149. It should be borne in mind that the question here under consideration relates to the power of a party to control the course of the action in court; and the case, therefore, is to be distinguished from those which merely involve the right of a party to compromise, settle, and acknowledge satisfaction of the claim on which the action is based, and the effect of such a settlement as a defense to the action. Of this latter character is the case of *Hogan v. Black*, 66 Cal. 41, 4 Pac. 943, cited in respondent's brief. See *Theilman v. Superior Court*, 95 Cal. 224, 30 Pac. 193. We think the court erred in recognizing the stipulation signed only by the plaintiff, and should have corrected that error by granting plaintiff's subsequent motion, properly made through his attorneys, to set aside the judgment.

2. We think the record before us sufficient

to present the questions discussed on this appeal. The bill of exceptions, to be sure, cannot be recommended as a model, but it appears on the second page thereof that one of the grounds of the motion to set aside the judgment of dismissal will be "that the attorneys for the plaintiff did not consent to or have any knowledge of the stipulation or agreement signed by the plaintiff for said dismissal." The bill of exceptions shows that much of the evidence presented on the hearing was directed to the ground of the motion above quoted, and that some of the affidavits which are set out were "filed and read by the defendants on the hearing of said motion." It also appears that the motion was argued, submitted, and by the court denied. The appearance of the defendants at the hearing of the motion, and their resisting it on its merits, without any objection that no previous notice had been given, was a waiver of the usual notice of motion. We cannot, therefore, uphold respondents' objection based on the insufficiency of the record.

3. Nor do we think that an affidavit of merits was necessary. The motion was not to open a default, but to set aside a judgment that had been entered without authority of law. The stipulation on which the judgment of dismissal was based was unauthorized, and the judgment was no better than it would have been if the court had arbitrarily dismissed the action without any stipulation or motion at all. It is apparent, therefore, that the proceeding to set aside a judgment like this need not be in accordance with the provisions of section 473, Code Civ. Proc., nor is it subject to the rules governing motions made to vacate judgments in pursuance of and for the reasons stated in that section. To be sure, one of the grounds of the motion stated was "inadvertence and surprise," but the motion should have been granted for the invalidity of the stipulation, and the other grounds stated may therefore be disregarded. That no affidavit of merits is necessary on a motion of this character is held in *Norton v. Railroad Co.*, 97 Cal. 338, 30 Pac. 585, 32 Pac. 452, and in *Canal Co. v. Montgomery*, supra. For the foregoing reasons, we advise that the order appealed from be reversed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

128 Cal. 523

RAUER v. FAY. (S. F. 1461.)

(Supreme Court of California, May 5, 1900.)

APPEAL AND ERROR—MOTION FOR NEW TRIAL—SPECIFICATION OF ERRORS—INSUFFICIENCY OF EVIDENCE—FINDINGS—ANSWER JUSTIFYING JUDGMENT.

1. Where a motion for new trial under Code Civ. Proc. § 659, requiring specification of par-

ticular errors when insufficiency of the evidence is designated as the ground of a motion, and that the statement be disregarded if no specification is made, contained no specification of insufficiency of evidence as to affirmative defenses found by the trial court to be true, no examination of such statement to determine the sufficiency of the evidence can be made on appeal from an order granting the motion.

2. Where an answer in a suit for work done under a contract between plaintiff's assignor and defendant pleaded as a defense that plaintiff's assignor, at the time of making the contract, agreed that defendant should not be compelled to pay for any of such work, and executed an acquittance from all liability under the contract, which defense was found by the court to be true, a motion for new trial on a statement of the case, which did not contain specifications of particulars as to insufficiency of the evidence to support such defense, was erroneously granted, though such motion contained specifications of particulars as to portions of the complaint supported by the evidence, but found to be untrue, since a failure to specify insufficiency of the evidence was an admission of its sufficiency; and, as such defense justified a judgment, the decision did not rest on the allegations of the complaint, and they were immaterial, and an erroneous finding that they were untrue was of no consequence.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by J. J. Rauer against David Fay to recover for work and labor. There was a judgment for defendant, and from an order granting a new trial he appeals. Reversed.

Wm. H. Chapman, for appellant. Geo. D. Shadburne, for respondent.

CHIPMAN, O. The cause was here once before, and is reported in 110 Cal. 361, 42 Pac. 902. The action there was to enforce a mechanic's lien for certain street work done under a contract entered into between the plaintiff's assignor and defendant. The plaintiff had judgment, which was reversed. It was held that the contract was too uncertain and indefinite to entitle it to be admitted under the allegations of the complaint, but it was suggested that "possibly, had the contract been set out in the complaint, with proper averments of the intention and object of the parties, it might, upon proof, have been so reformed as to be available as a basis of recovery." The amended complaint sets forth the contract in its legal effect, and not by its terms, and does not ask for its reformation. It calls for a personal judgment, and the matter of lien is eliminated. At the trial, defendant had judgment, and on plaintiff's motion the court made an order granting a new trial. Defendant appeals from the order. The trial was by the court without a jury, and it made general findings as follows: "(1) That none of the allegations of plaintiff's complaint are true; (2) that all the allegations of defendant's answer are true." And, as conclusion of law therefrom, "that defendant is entitled to judgment against plaintiff for his costs," and judgment was accordingly entered.

Plaintiff, in his specifications of particulars, pointed out several averments of the complaint, which, as is claimed, in fact were fully supported by the evidence, but which the court found to be untrue. At the former trial, when the contract was offered in evidence, it was objected to, but the objection was overruled. The ruling was held to be error on appeal, for the reasons above stated, and that it should have been excluded. At the last trial the contract was admitted in evidence without objection, and witnesses were permitted, without objection, to state the work performed pursuant to the contract. Defendant denied specifically the allegations of the complaint, and pleaded, by way of a second defense, a release and full acquittance, and also a third defense, based upon certain ordinances of the city, which required a permit from the superintendent of streets, based upon a contract signed by three-fourths of the property owners on the portion of the street where the work was proposed to be done. There is no specification of insufficiency of evidence to sustain the last two affirmative defenses, and appellant claims that as to these the statement must be disregarded,—citing section 659, Code Civ. Proc.; and it is contended that, if either of these defenses is good, the judgment should stand, and the new trial should have been denied. It is well settled that the party moving for a new trial, upon a statement, for insufficiency of the evidence, must point out the particulars wherein the evidence is insufficient, and that, failing to do so, the statement relating to the alleged insufficiency must be disregarded. Upon an appeal from an order denying a new trial this court cannot consider the sufficiency of either the complaint or of the findings to support the judgment. *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186. The above rules are applicable also where the appeal is from an order granting a new trial. There being no specifications of particulars relating to the evidence in support of defendant's second and third defenses, we cannot examine the statement to determine whether or not the evidence was insufficient to support them. We must assume that it was sufficient, and it follows that the only question before us is whether the judgment necessarily rested upon the findings as to the truth or falsity of the allegations of the complaint. If the cause was properly decided upon the issues raised by the special defenses, and the decision did not necessarily rest upon the allegations of the complaint, the latter became immaterial, and it is of no consequence whether the finding as to them was or was not contrary to the evidence. *Brison v. Brison*, supra; *Moore v. Copp*, 119 Cal. 429, 51 Pac. 630; Code Civ. Proc. § 475. The court found the facts as to the special defenses alleged in the answer to be true, and, as this finding cannot be attacked as the record stands, we are to determine whether the result would

have been the same if the court had found the allegations of the complaint to be true. The answer alleged that simultaneously with the execution of the contract sued on "the said J. G. Duffy [plaintiff's assignor] agreed that this defendant should not be required to pay any sum of money whatever for any of said proposed work, and then and there, and as a part of the said contract, the said J. G. Duffy made, executed, and delivered to defendant a full acquittance from any and all liability on said contract by reason of this defendant so having signed the same; and that said contract herein referred to is the only contract ever entered into between said Duffy and this defendant." As to the alleged release the court said in the former appeal: "The mere fact that the plaintiff was not aware of this release at the time he took an assignment of the contract is of no moment. He must be deemed to have taken such contract cum onere, subject only to the duty of defendant to notify him of any conditions not specified in the contract itself; such as its full execution, payment thereunder," etc. This defense was, therefore, sufficiently pleaded, and, if supported by evidence, would constitute a complete defense to the action. The court found the allegations of the answer to be true. We cannot see but that it justified the judgment in favor of defendant, even if it be admitted that the allegations of the complaint are true, and were erroneously found to be untrue. With this finding before the trial court, unassailed for insufficiency of the evidence to support it, the court had no discretion to grant a new trial. A failure to specify insufficiency of the evidence is an admission that it is sufficient. The reason of the rule is obvious. The trial court is entitled to have the insufficiency of the evidence pointed out in order that it may intelligently pass upon it, and in order, also, that the statement may be amended, if necessary, to conform to the evidence. And this court will not consider the statement unless such specification is made, for the reason that it can take notice only of what was first presented to the lower court. If plaintiff had desired to challenge the findings as to defendant's special defenses, it was his duty to present specifications of insufficiency of the evidence to support them. Having failed to do so, we cannot consider the evidence to see whether it does or does not support such defenses. It is not necessary to inquire whether the third defense was sufficient, as the judgment may rest upon the second defense.

Respondent quoted, in his brief, from the opinion of the learned trial judge when rendering judgment at the trial. Whether the court granted a new trial because it thought the reasons given for its decision at the trial were wrong we do not know. The court gave no reasons for the order, and it is not material what the reasons were. Appellant claims that the court had a right to recon-

sider its conclusions of law drawn from the proof of the special defenses pleaded by defendant. This would be true if respondent had properly presented the matter by specifications. How can we say that the court reconsidered its conclusions when it appears that it did not have any specifications before it pointing out the insufficiency of the evidence? It is advised that the order be reversed.

We concur. GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is reversed.

(128 Cal. 516)

CARPENTER v. SAN FRANCISCO SAV.
UNION. (Sac. 776.)¹

(Supreme Court of California. May 4, 1900.)

SWAMP LANDS—RECLAMATION DISTRICTS—
SWAMP-LAND FUND—EVIDENCE OF RECLA-
MATION—SALE OF LAND—STATUTORY CON-
STRUCTION.

1. Pol. Code, § 3472, provides that reclamation districts of swamp lands may be formed. Section 3476 declares that when the board of supervisors is satisfied that the work of reclamation is completed, or \$2 per acre has been expended on the work, such facts shall be certified to the register. Section 3477 authorizes repayment to the original purchasers from the swamp-land fund after the certificate to the register. Plaintiff's assignor on November 13, 1895, presented evidence that he had expended \$2 per acre in reclamation of swamp lands, which evidence was acted on by the board of supervisors July 15, 1897. On December 31, 1895, the lands were conveyed to defendant, who collected the amount found due. *Held*, in an action to recover the payment, that when the evidence was presented November 13, 1895, and acted on in July, 1897, the right to the money related back to the date of presenting such evidence, and as such amount was personal property, and did not follow the land, the party who expended the money and became entitled to payment did not lose such right because he afterwards sold the land, and payment made defendant could be recovered.

2. Under Pol. Code, § 3477, authorizing repayment to original purchasers or their assigns of money expended in reclaiming swamp lands, the word "assigns" refers to one to whom the indebtedness had been assigned by the owner, and not to a purchaser of the land.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Mrs. Elizabeth Carpenter against the San Francisco Savings Union to recover payment made of swamp-land funds for reclamation of swamp lands. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

H. H. McCloskey, for appellant. Needham & Dennett, for respondent.

COOPER, C. Judgment was entered in favor of plaintiff upon an agreed statement of facts, and defendant has appealed from the judgment. The statement, so far as material here, shows the following facts: On and prior to the 13th day of September, 1895, one

¹ Rehearing denied May 21, 1900.

J. H. Carpenter was the owner of about 845 acres of swamp land, and on said day, upon proper petition to the board of supervisors, two reclamation districts including said lands were formed under the provisions of Pol. Code, § 3447 et seq. The districts were formed without the intervention of trustees or the establishment of by-laws. Sections 3472, 3473, Pol. Code. On November 13, 1895, the said Carpenter presented to the board of supervisors of the said county in which the lands were situated, in accordance with law, evidence and affidavits showing an expenditure of more than \$2 per acre upon the works of reclamation in said districts, and each of them in compliance with section 3476, Pol. Code. On the 31st day of December, 1895, the said Carpenter and plaintiff, who is his wife, made and delivered to defendant a deed of trust, which included the said lands herein referred to, as security for a large amount of money borrowed from defendant. On September 12, 1896, in consideration of the surrender and cancellation of the promissory notes and indebtedness for which the said deed of trust was given, the said J. H. Carpenter and the plaintiff executed and delivered to defendant an absolute deed of grant, describing the premises as described in the prior deed of trust. On the 15th day of July, 1897, the board of supervisors of said county in which the lands were situate, upon the evidence and affidavits so furnished by said J. H. Carpenter, on the 13th day of November, 1895, ordered that the said evidence be approved, and the facts of the expenditure of more than \$2 per acre upon the said lands be certified to the register of the state land office. On June 2, 1898, the said J. H. Carpenter sold and assigned to plaintiff his title and interest in and to the money due or to become due from the said county upon said swamp land. On July 8, 1898, the treasurer of said county paid to defendant the moneys due, upon the said order of the board of supervisors, upon said swamp land, which, after deducting expenses, amounted to the net sum of \$506.30. The plaintiff, as assignee of her husband, J. H. Carpenter, claims the said sum; and the defendant, having collected it, claims that it was and is entitled to the amount by virtue of the deeds so made to it by plaintiff and her husband. The sole question to be determined is as to the title to the \$506.30 so collected by defendant. The Code provides that when any district susceptible of one mode of reclamation is entirely owned by parties who desire to reclaim the same, and to manage the reclamation without the intervention of trustees, that by certain proceedings a reclamation district may be formed to be operated without trustees. Pol. Code, § 3472. Sections 3476 and 3477 of the Political Code are as follows:

"Sec. 3476. Whenever the trustees, or owners of land if there be no trustees, certify under oath to the board of supervisors who form the district, and show to their satisfac-

tion that the works of reclamation are completed, or that two dollars per acre, in gold coin, has been expended on the works of reclamation, the board of supervisors must thereupon certify such facts to the register.

"Sec. 3477. The register must thereupon credit each purchaser in the district with payment in full for such lands, and the purchasers are entitled to patents therefor; and the register must forward to the treasurer of the county in which any part of the district is situated a statement showing the amount paid by each purchaser in the district, including interest; and the county treasurer, after deducting all amounts chargeable against the lands in said district by reason of moneys drawn from the 'swamp land fund' of the county, must divide the balance pro rata amongst the original purchasers of land in the district, or their assigns, and must pay to each purchaser, or his assigns, on demand, the amount found to be due him from such computation out of the moneys in his hands to the credit of the 'swamp land fund' of the county. Neither this nor the preceding section applies to districts having outstanding indebtedness represented by controller's warrants drawn on the state treasury until all such warrants are fully paid."

When plaintiff's assignor on the 13th day of November, 1895, presented evidence that he had expended \$2 per acre in the reclamation of said land, which evidence was acted upon afterwards by the board of supervisors and the register, the right to the money related back to the date of presenting such evidence. On the said 13th day of November, 1895, the assignor of plaintiff had expended the money which, under the statute, entitled him to be repaid by the treasurer of the county. The fact that the agents of the county or of the state in the routine of business delayed passing upon the evidence and issuing the necessary legal documents did not in any way affect the question as to the time when the money was earned. The party entitled to it could not get it until the board of supervisors had certified the facts to the register, and the register had forwarded to the county treasurer the statement provided for in section 3477. It then became the duty of the treasurer, after otherwise complying with the section, to fix the pro rata among the original purchasers "and must pay to each purchaser or his assigns on demand the amount found due him from such computation." Here the purchaser was J. H. Carpenter, and his right to the money had been assigned to plaintiff. It follows that plaintiff was the party entitled to the money. The amount due was personal property, and in no way followed the land; nor was it a covenant real. When it became due it was an indebtedness to the owner of the land, and subject to the same rules as any other indebtedness. The party who had expended the money and who became entitled to the payment did not lose such right because he

afterwards sold the land. A farmer, having made a contract to deliver his grain for a certain sum upon its being harvested, properly sacked, and kept in a warehouse for six months, would not, by a conveyance of his farm upon which the grain was raised, after it was harvested, and before the expiration of the six months, also convey the amount to become due for the grain. There is nothing in the law in regard to sales of swamp land that changes the rule. It is claimed that the act of March 28, 1874 (St. 1873-74, p. 770), provides that the fund of a district shall be paid out "only for the purpose of reclaiming such land, or to the owners of such land, after reclamation." If the act of March 28, 1874, were inconsistent with section 3477 of the Political Code, the section of the Code would govern, as it was passed March 30, 1874, and is therefore a later statute. But there is nothing in the statement inconsistent with the fact that the land had been fully reclaimed before J. H. Carpenter parted with the title. He will be presumed to have been the owner after reclamation, and the expenditure of more than \$2 per acre on the work of reclamation. We think the word "assigns," as used in section 3477, under the circumstances of this case, refers to one to whom the indebtedness was assigned, and not to the purchaser of the land. The judgment should be affirmed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

128 Cal. 506

FIDELITY & CASUALTY CO. v. THOMPSON et al. (S. F. 1,218.)

(Supreme Court of California. May 4, 1900.)

FRAUDULENT CONVEYANCE—ASSIGNMENT WITHOUT CONSIDERATION—INSOLVENT DEBTOR.

Decedent's widow, without consideration, guarantied payment of decedent's past-due note on the back thereof, and the payee indorsed and delivered the note to the widow, taking back a written declaration that she held it in trust for collection and to pay the sums collected for certain specific purposes, retaining any balance for her children. Later, and while insolvent, she made an assignment of decedent's life insurance policy to the payee. *Held*, that such assignment was void as to existing creditors of the widow, though their judgments were obtained subsequent to the assignment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Fidelity & Casualty Company against Mary R. K. Thompson and others to compel defendants to interplead. From a judgment in favor of certain defendants, J. K. Boothe, a defendant, appeals. Affirmed.

W. H. Chapman, for appellant, Boothe. T. B. Hutchinson and John T. York, for respondents.

BRITT, C. The plaintiff, an insurance corporation, instituted this action to compel the defendants to interplead concerning their respective claims to the money due on a policy of insurance issued by plaintiff on the life of one James M. Thompson, which policy was, by its terms, payable to the defendant Mary R. K. Thompson, surviving wife of the insured. Said James M. Thompson died November 1, 1892. The fund in dispute—\$4,000 in amount—was paid into court to abide the result of the action, and the plaintiff, by consent of the other parties, was dismissed from the case; Mrs. Thompson disclaimed any interest in the fund. The defendant Miss J. K. Boothe claims the whole sum in virtue of an assignment of the policy and the demand for the money due thereon, to her executed by Mrs. Thompson after the death of said insured. The defendants Chapman, Preece, Derby, and the Bank of Napa, who hold judgments against Mrs. Thompson, resist the claims of Miss Boothe, and aver that such assignment was in fraud of their rights as creditors of the assignor. They pray that the fund be adjudged subject to the lien of certain executions they have caused to be levied upon the same as a credit of Mrs. Thompson in the hands of the plaintiff. The debts on which said judgments are founded existed at the time of said assignment, but the judgments were recovered subsequently. The court below found as facts, among other things, that the assignment was made by Mrs. Thompson with intent to hinder, delay, and defraud her creditors, and that Miss Boothe paid no consideration therefor, and rendered judgment that the money in dispute be applied, so far as necessary, to satisfy the judgments aforesaid against Mrs. Thompson. Miss Boothe has appealed.

The main effort of appellant is to show that the findings just mentioned were not justified by the evidence. On appeal we must, of course, consider as facts established such reasonable implications derivable from the evidence as tend to uphold the findings, for it was the province of the trial judge to draw the deductions expressed in the findings, and it is to be assumed that his understanding of the effect of the evidence was correct. Thus viewing the evidence,—it was unquestionably sufficient to sustain the finding of fraudulent intent in the mind of Mrs. Thompson at the time of the assignment. It tended to show that she was then insolvent, and had reason to be aware of the fact; that about the same time she took steps to place certain real property beyond the reach of creditors by declaring a homestead thereon; and the complex arrangement she made with Miss Boothe (without legal consideration, as will presently appear), when considered in connection with the other facts mentioned, was itself of a character to induce strong suspicion of fraud. See *Emmons v. Barton*, 109 Cal. 662, 671, 42 Pac. 303; *Judson v. Ly-*

ford, 84 Cal. 505, 24 Pac. 286; Swartz v. Hazlett, 8 Cal. 118; Woolridge v. Boardman, 115 Cal. 74, 46 Pac. 868.

The only question of any moment in the case is whether the evidence sustains the finding that Miss Boothe rendered no consideration for the assignment of the policy. If she did not, then she cannot hold the assigned property as against the creditors of the assignor, however ignorant she may have been of the latter's fraudulent intent. *Lee v. Figg*, 37 Cal. 328. When James M. Thompson died, November 1, 1892, he was indebted to Miss Boothe on a promissory note, then long past due, in the sum of \$4,200, besides interest. On July 23, 1893, the widow, said Mary K. Thompson, wrote a guaranty of payment, with her signature thereto on the back of said note, and Miss Boothe then indorsed and delivered the note to Mrs. Thompson. The latter next executed a written declaration of trust, dated July 26, 1893, reciting the transfer of the note to her by Miss Boothe, and stating that she held the same in trust for collection, and to pay the sums collected thereon as follows: To Miss Boothe, during her life, the interest to be received, and upon her death to pay certain sums to certain third persons mentioned; then to pay the expenses of Miss Boothe's last illness and of her funeral; and to retain any balance for herself. The last provision was afterwards changed by the parties to the trust so that the balance was to be retained for the use of two named children of Mrs. Thompson. On August 15, 1893, Mrs. Thompson made to Miss Boothe the assignment of which the respondents complain. At the time of these transactions Mrs. Thompson was executrix of the will of her deceased husband. His estate, the evidence tended to show, was insolvent, but it is not shown that Miss Boothe had knowledge of that fact, or of the insolvency of Mrs. Thompson herself. There is no evidence that Mrs. Thompson was under legal obligation to pay the note of her husband to Miss Boothe. She testified that she had been benefited by the consideration for the same, and was morally obliged to pay it. How she was benefited is wholly unexplained, and her moral obligation to pay seems to rest on the circumstance testified by her that she had promised her husband before his death that she would pay it, and the further facts that Miss Boothe is her aunt, and is in feeble health. The guaranty of payment of the note by Mrs. Thompson was a gratuity to which Miss Boothe had no legal right, and for which she parted with no value. The merely moral obligation which Mrs. Thompson conceived herself to owe was not a sufficient consideration to support the guaranty. *Peek v. Peek*, 77 Cal. 106, 19 Pac. 227, 1 L. R. A. 185. The evidence tended to show that the obligation created by this guaranty was the consideration for the assignment of the insurance policy. Mrs. Thompson tes-

tified: "The only consideration for the assignment of this policy to Miss Boothe was the fact that my husband was owing her upon this note, and I had signed [guaranteed] the note." Miss Boothe testified: "The consideration for making that indorsement of the note and the assignment and the declaration of trust was her honest heart. She [Mrs. Thompson] desired to secure me." As Miss Boothe gave nothing for the guaranty, it is clear that what she received in performance of it cost her nothing.

An attempt is made to show that the transfer of the note by Miss Boothe to Mrs. Thompson in trust was a legal consideration for the guaranty of payment of the note, and also the assignment of the policy. The testimony we have quoted was to the effect, however, that the consideration was the supposed moral obligation of Mrs. Thompson to pay her husband's debt. Moreover, by the transfer of the note and the terms of the trust Miss Boothe parted with the right to collect the note, and Mrs. Thompson became the person entitled to receive and hold the amount due thereon. It is, therefore, evident that the assignment of the policy by Mrs. Thompson to Miss Boothe as a means of enabling the latter to receive the proceeds as payment of that amount on the note was to that extent a departure from the trust and a violation of its provisions; and we are quite unable to perceive how the transfer of the note in trust could be the consideration for another transaction violative of the provisions of the trust. There is an irreconcilable conflict of ideas in such a conception. In any aspect of the evidence we conclude that Miss Boothe gave nothing of value for the assignment, and cannot withhold the proceeds thereof from the creditors of the assignor.

Some other findings are assailed for alleged want of evidence to sustain them. We have attentively read the evidence brought up, and think it quite sufficient to uphold all the findings which, in their turn, are necessary to support the judgment. There is no material error in the record, and the judgment and order denying a new trial should be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

(128 Cal. 556)

HOTALING v. MONTEITH et al.

(S. F. 1,313.)¹

(Supreme Court of California. May 9, 1900.)

MORTGAGES — INTEREST — RATE — CONSTITUTIONALITY OF ACT — FORECLOSURE — ATTORNEY'S FEES — ALLOWANCE — EVIDENCE.

1. Evidence of a parol agreement, entered into at the time of the execution of a mortgage, to the effect that the rate of interest should be

¹ Rehearing denied June 9, 1900.

greater than it otherwise would have been, to cover taxes which it was anticipated the mortgagee would have to pay, is incompetent and immaterial in an action to foreclose, since the considerations which led the parties to adopt the rate specified in the mortgage are immaterial, since such an agreement does not constitute a violation of the constitutional provision.

2. The question of whether or not an act authorizing the allowance of an attorney's fee in a mortgage foreclosure suit is unconstitutional, on the ground that it does not provide for the allowance of attorney's fees in other actions, does not properly arise on an objection to the allowance of attorney's fees in an action to foreclose a mortgage which stipulates for the allowance of an attorney's fee in case of foreclosure.

3. Under Act March 27, 1874 (St. 1873-74, p. 707), authorizing the court to fix the amount of attorney's fees in mortgage foreclosure suits, notwithstanding any stipulation in the mortgage, the court cannot allow a fee in excess of the amount stipulated for by the mortgagor.

4. Where an attorney commences and tries an action to foreclose a mortgage before the court which renders the judgment of foreclosure, it is competent for the court to fix the amount of attorney's fees to be allowed for such services, without further evidence of the value thereof.

Department 2. Appeal from superior court, Marin county.

Action by Anson P. Hotelling against George W. Monteith and another to foreclose a real-estate mortgage. From a judgment in favor of plaintiff, defendant George W. Monteith appeals. Affirmed.

George W. Monteith, pro se. Hepburn Wilkins, for respondent.

McFARLAND, J. This is an ordinary action to foreclose a mortgage executed by defendants George W. Monteith and his wife to secure the payment of a promissory note made by the former to plaintiff. Judgment went for plaintiff, from which, and from an order denying a motion for a new trial, George W. appeals. There are only two points made by appellant which need be noticed: (1) That the court erred in sustaining objections to certain evidence offered by appellant; and (2) that the court erred in allowing an attorney's fee.

1. Appellant offered to prove by witnesses that when the note and mortgage were executed there was a verbal agreement between the parties, which was, in substance, this: That the interest which the note was to bear was made 2 per cent. greater than it otherwise would have been, in order to cover the anticipated taxes on the mortgage. To this offer an objection of respondent that the agreement was not in writing, and was incompetent, irrelevant, and immaterial, was sustained, and exception taken by appellant. The objection was properly sustained. *Daw v. Niles*, 104 Cal. 106, 37 Pac. 876; *Harrelson v. Tomich*, 107 Cal. 627, 40 Pac. 1032. In the cases just cited the offer was to prove a parol agreement of the mortgagors to actually and directly pay "the taxes to be assessed or levied upon the mortgage," while in the case at bar the offer was, in effect, merely to prove that the parties, when agreeing upon the amount of interest to be paid, considered the fact

that the mortgagee would have to pay taxes on the amount of the loan. In the absence of a usury law, any rate of interest for which the parties contract is legal, and it is immaterial what ordinary business considerations lead them to adopt the stipulated rate.

2. The mortgage provided for a counsel fee of "fifty dollars, and a percentage at the rate of five per cent. upon the amount of judgment recovered," which amounted to over \$200. The court allowed a counsel fee of only \$125. Counsel contends that it is unconstitutional to allow any counsel fees in a foreclosure suit, because such fees are not allowed in other actions; but no such question arises here, because the allowance was based upon the express contract of the mortgagor. The act of March 27, 1874 (St. 1873-74, p. 707), entitled "An act to abolish attorneys' fees, and other charges, in foreclosure suits," which authorizes a court to fix "the attorney's fee" notwithstanding "any stipulation in the mortgage to the contrary," has been properly construed in *Monroe v. Fohl*, 72 Cal. 570, 571, 14 Pac. 514, as referring only to "the attorney's fee provided for in the mortgage," and as having "no application where none is so provided." The act merely gives the court power to fix the fee at any sum not exceeding the amount stipulated by the mortgagor. It cannot allow a fee greater than that amount. *Monroe v. Fohl*, supra; *Hewitt v. Dean*, 91 Cal. 14, 27 Pac. 423. Appellant also contends that the allowance of an attorney's fee was erroneous, because there was no evidence of the attorney's services or their value. Waiving all other views, the fact that the case was commenced in and tried before the court rendering the judgment afforded sufficient evidence of the services of plaintiff's attorney, and the court had the discretion to fix the fee, without calling for the opinion of witnesses to assist it. There certainly was in this case no abuse of discretion. In *Woodward v. Brown*, 119 Cal. 309, 51 Pac. 2, 542, where a similar question was presented, this court said: "The attorney brought the action and tried it, and this appears from the record. No further evidence of employment was required. The duty of fixing the amount of compensation was cast upon the court, and no evidence of the value of the services was necessary." See, also, opinion of Harrison, J., in *Watson v. Sutro*, 103 Cal. 169, 37 Pac. 201. The judgment and order appealed from are affirmed.

We concur: **HENSHAW, J.; TEMPLE, J.**

(128 Cal. 501)

NIPPERT et al. v. WARNEKE et al.
(S. F. 2,042.)¹

(Supreme Court of California. May 4, 1900.)²
ADJOINING LANDOWNERS-EXCAVATIONS-NOTICE-PARTY WALL-APPEAL-NOTICE OF MOTION FOR NEW TRIAL-REVIEW.

1. An objection that a notice of intention to move for a new trial was not served in time

¹ For dissenting opinion, see 61 Pac. 270.

² Rehearing denied May 31, 1900.

should be overruled on appeal, where such fact does not appear in the record, and the statement was in fact settled by the judge below.

2. Under Civ. Code, § 832, requiring reasonable previous notice to be given an adjoining lot owner before excavations are made, a notice to plaintiff that defendant was about to excavate certain premises directly adjoining plaintiff's lot to a depth below his foundation, and notifying him to take necessary precautions for the protection of his property, did not refer only to excavation immediately adjoining plaintiff's house, but was sufficient to cover those made generally on the lot, and, it not being claimed they were not properly made, plaintiff could not recover for damages to his premises resulting therefrom.

3. A wall built by the owner of two adjoining lots on the boundary line between them, as a common foundation of two houses built on the lots, was a party wall, for the removal of which by a subsequent grantee of one of the lots a grantee of the other could recover damages.

4. Where plaintiff removed a party wall after defendant had repudiated the claim that it was a party wall, and warned him that he intended to continue excavations being made, and advised him to take care of his building, such removal was caused by defendant, and hence plaintiff could recover for damages resulting therefrom.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by Laura Nippert and others against Christian Warneke and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed on condition.

Stafford & Stafford, for appellant Warneke. Thomas F. Graber, for appellant Marshall. E. W. McGraw, for respondents.

SMITH, C. Plaintiff Laura Nippert and defendant Warneke are owners of adjoining lots in San Francisco, and the action is for damages to the lot of the plaintiff caused by excavations made on defendant's lot. The complaint contains three counts, of which the first and third are similar. In the first count the material allegation is "that on or about the month of April, 1897, the defendant Christian Warneke, without any warning or notice to this plaintiff, caused the front portion of the lot so owned by him as aforesaid to be excavated to a great depth; that said defendant J. A. Marshall made said excavation; that in consequence of said excavation the soil on the front portion of plaintiff's lot, together with sidewalks, flowers, shrubbery, etc., fell into the lot of defendant Warneke," etc. The third count refers to the back portion of the lot, but is in other respects substantially similar. In the second count the averments are, in effect, that in September, 1884, one Hinkle, from whom both parties derive title, was the owner of the two lots in question, and built adjoining houses thereon, "which said houses had a common foundation, built partly on the lot aforesaid now owned by the plaintiff Laura Nippert, and partly on the lot aforesaid now owned by the defendant Warneke, and that said foundation wall was built as, and was, a party wall," etc.; that in the same year Hinkle conveyed the lots, the one to plaintiff's predecessor in title, the

other to the predecessor of defendant Warneke; that by said conveyances, and the mesne conveyances following, defendant Warneke took his lot subject to an easement in favor of the owner of plaintiff's lot for the support of the party wall; and that defendant Warneke caused this wall to be removed by the defendant Marshall, the contractor, thus rendering it necessary for the plaintiff to build a new foundation to support her house, etc. All the above allegations are found to be true, and substantially in the language of the allegations. The judgment was for plaintiffs upon the first cause of action for \$50, upon the second for \$300, and upon the third for \$100. The appeal is from the judgment, and from an order denying a new trial.

A preliminary objection is made by respondents' attorney to the hearing of the appeal of Marshall from the order denying a new trial on the ground that his motion of intention to move for new trial was not served in time. But, as the fact alleged does not appear in the record, and the statement was in fact settled by the judge, the objection should be overruled. *Pico v. Cohn*, 78 Cal. 384, 20 Pac. 706; *Gage v. Downey*, 79 Cal. 143, 21 Pac. 527, 855; *McShane v. Carter*, 80 Cal. 312, 22 Pac. 178; *Scott v. Wood*, 81 Cal. 399, 22 Pac. 871; *Richardson v. City of Eureka*, 92 Cal. 65, 28 Pac. 102; *Southern Pac. R. Co. v. Superior Court of City and County of San Francisco*, 105 Cal. 86, 38 Pac. 627.

1. The points involved in the first and third causes of action are substantially the same, and will be considered together. The excavations were made on the lot of the defendant for purposes of construction; and it is neither alleged nor found that they were not proper or usual, or that the defendants did not use ordinary care and skill, or that they omitted to take reasonable precautions to sustain the land of the plaintiff. Civ. Code, § 832. All that is alleged is simply that the excavations were made "without any warning or notice to this plaintiff," and that the damage complained of resulted from the excavation. The question of notice must therefore be regarded as the sole point at issue, and on this point it appears from the evidence that in April, prior to the beginning of the excavations, the plaintiff received the following notice: "Dear Madam: As we are about to excavate the premises on the southeast corner of Haight and Devisadero streets, directly adjoining your lot, to a depth somewhat below your foundation, you are hereby notified to take the necessary measures to protect your property. Very respectfully, Cunningham Bros., Architects. For Christian Warneke." The question therefore resolves itself into the question of the sufficiency of this notice, and on this point it is contended by plaintiff's attorney that the notice is to be construed as referring only to excavations immediately adjoining the plaintiff's house. But this construction cannot be maintained. The notice is of intention to excavate the lot generally,

and the foundation is referred to simply as indicating the depth of the proposed excavations. The findings on the first and third causes of action are therefore not sustained by the evidence. There is, indeed, much evidence as to the character of the excavation, from which it might be inferred that the defendants did not use ordinary care and diligence in making the excavations, and did not take reasonable precautions to sustain the land of the plaintiff. But the evidence on these points is conflicting, and, as there is no finding or allegation with regard to them, must be disregarded.

2. With regard to the second cause of action, it is claimed by appellants' attorney that the evidence does not sustain the finding that the wall in question was a party wall; and it is true that the only evidence in the record upon the point is the evidence that the wall was built by Hinkle on the boundary line, while owner of the two lots, as a common foundation of the two houses built on the lots. But this, we think, is sufficient to establish the character of the wall as a party wall, and the resulting easement. Washb. Easem. (4th Ed.) pp. 454, 606, et seq.; 18 Am. & Eng. Enc. Law, p. 7, tit. "Party Walls." It is also claimed by appellants' attorney that the evidence does not justify the finding that the wall was removed by defendant or his agents, and, indeed, it appears from the evidence that the wall was in fact removed by the agents of the plaintiff; but it also appears that this was done in pursuance of a correspondence between plaintiff and defendant's architects, in which the latter repudiated the claim of the former that the wall was a party wall, and announced their intention to continue the excavations, with advice to the plaintiff to take care of her house; and this sufficiently supports the finding that the defendant Warnecke caused the foundation wall to be removed and taken away.

We advise, therefore, that the judgment and the order denying a new trial be reversed unless the plaintiffs, within 30 days from the filing of the remittitur, file a written stipulation releasing \$150 of the amount allowed by the judgment as damages, thus reducing the amount of the judgment to \$300, and that, if such stipulation be filed, the judgment thus modified shall stand affirmed, and that the costs of this appeal be paid by the respondents.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed unless the plaintiffs, within 30 days from the filing of the remittitur, file a written stipulation releasing \$150 of the amount allowed by the judgment as damages, thus reducing the amount of the judgment to \$300, and that, if such stipulation be filed, the judgment thus

modified shall stand affirmed, and that the costs of this appeal be paid by the respondents.

128 Cal. 578

In re SCOTT'S ESTATE. (S. F. 1,612.)
(Supreme Court of California. May 14, 1900.)
BILL OF EXCEPTIONS—EX PARTE SETTLEMENT—ABSENCE OF EVIDENCE—PRESUMPTION ON APPEAL.

1. Under Code Civ. Proc. § 649, providing that a bill of exceptions may be presented to the court or judge for settlement at the time the decision is made, and, after having been settled, shall be signed, etc., a bill of exceptions cannot properly be presented to the court and settled on the day after the trial without notice to the opposite party or his counsel, though a rough draft thereof was presented to the judge during the trial, and in presence of opposing counsel, and the judge, after suggesting changes, stated that, if the copy were typewritten, he would approve it.

2. Where the record does not show the evidence on which the action of the trial court in disallowing certain items in an administrator's final account was based, it will be presumed on appeal that the testimony justified such action.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Judicial accounting by the special administrator of the estate of Kate Scott, deceased, in which one Rachel, a creditor, filed exceptions to the account. From an order sustaining the exceptions as to certain items, the administrator appeals. Affirmed.

D. C. Murphy, for appellant. El. Myron Wolf, H. Van Leuven, Jas. P. Sweeney, and Allen & Allen, for respondent.

COOPER, C. Appellant filed his final account as special administrator in the above-entitled estate. One Rachel, a creditor, filed written objections thereto. Upon the hearing of the 19th day of May, 1898, the court struck out and disallowed the item of \$262 claimed to have been paid for rent, reduced the attorney's fee from \$100 to \$50, and the fees of the administrator from \$35.63 to \$17.80, and allowed the account as to all other items. From this order the appeal is taken. There is in the record what purports to be a bill of exceptions containing the evidence relative to said items, and the statement that appellant excepted to the order so made by the court. It is claimed by respondent that the bill of exceptions cannot be considered, because it was not served upon respondent, nor settled at the time of the trial, nor when the order was made, and we think the contention will have to be sustained. The so-called "bill of exceptions" was not served on respondent, and he was not present in person or by counsel at the settlement thereof, and did not agree to the same. It is indorsed: "The foregoing bill of exceptions is hereby settled as correct. Dated May 20, 1898. Jas. M. Troutt, Judge." No claim is made that it was served upon the respondent, or that he

was present when it was signed, but it is stated in an affidavit filed by appellant: That, immediately upon the order being made, and in open court, the appellant did object and except to the order, and stated that he would at once present to the judge for settlement a bill embodying the said exceptions. That no objections were made by counsel for respondent. That appellant's counsel immediately prepared a rough draft of the proposed exceptions, and presented it to the judge. That the judge, after suggesting some changes, stated that, if the draft were properly engrossed or typewritten, he would approve the same. This was about noon on May 19, 1898. That afterwards, about 8 o'clock p. m., the appellant returned to the court room with said draft properly prepared, but that court had adjourned for the day, and the judge could not be found. That thereafter, on the morning of the 20th, he returned with the prepared bill, and secured the signature of the judge thereto. We do not think the judge, after the court had adjourned for the day, in the absence of respondent's counsel, without his consent, and without notice to him, could, on the ex parte application of appellant, settle the bill of exceptions. The facts do not bring the case within the provisions of section 649, Code Civ. Proc., which says: "A bill containing the exception to any decision may be presented to the court or judge for settlement at the time the decision is made, and, after having been settled, shall be signed by the judge and filed with the clerk." The section contemplates the settlement at the time the decision is made, during the trial, and in the presence of counsel for both parties. It does not contemplate a settlement of the bill after the adjournment of court, and without any notice to adverse counsel. If such bill could be settled the next day, why not the next week, or month, or year? The Code elsewhere makes ample provision for the settlement of a bill of exceptions after trial upon giving the adverse party notice and time to prepare amendments so that the facts may all be accurately stated. This court, in *Wetherbee v. Carroll*, 33 Cal. 553, in construing sections 188 and 189 of the practice act, which contained similar machinery for the settlement of exceptions during the trial as is now contained in sections 649, 650, Code Civ. Proc., said: "At the trial both parties are present, and in settling the exception can be heard. Each party can see that everything necessary to a presentation of the entire merits on both sides is introduced. * * * The policy of the act is that wherever there is a possibility that a partial record, for presenting a point, may be made, both parties shall have an opportunity to take part in settling it. And the two modes prescribed—one by settling the exception during the progress of the trial, in the presence of both parties, and annexing it to the judgment roll; the other by a subsequent statement in

the mode designated—afford an orderly and convenient mode of accomplishing that end." See *Hayne*, New Trial & App. § 256; *Kleinschmidt v. McAndrews*, 4 Mont. 81, 223, 2 Pac. 286, 5 Pac. 281; *McKay v. Railway Co.*, 13 Mont. 21, 81 Pac. 999; *Carpenter v. Bailey* (filed Feb. 18, 1900) 60 Pac. 162. As we are not to consider the paper purporting to be a bill of exceptions, there is nothing in the record to show the evidence upon which the court acted in arriving at its conclusions. We must presume that the testimony justified the action of the court. It follows that the order should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER OURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(128 Cal. 531)

HARRIGAN v. HOME LIFE INS. CO.
(S. F. 1,658.)

(Supreme Court of California. May 5, 1900.)

INSURANCE—FOREIGN COMPANIES—APPOINTMENT OF AGENTS ON WHOM PROCESS MAY BE SERVED—FAILURE TO APPOINT—STATUTE OF LIMITATIONS.

1. Act April 1, 1872 (St. 1871-72, p. 826), provides that foreign corporations doing business in the state shall designate a resident of the county in which the principal place of business is situated on whom process may be served, and file such designation in the office of the secretary of state, and in case of failure so to file such a designation it shall be denied the benefit of the statute of limitations. Pol. Code 1878, § 616, provides that foreign insurance companies, as a condition precedent to doing business in this state, must file in the office of the insurance commissioner the name of an agent within the state on whom process may be served, and that such person shall be the principal agent or general manager of the business within the state, and that, in case such an agent is not appointed, service may be made on the insurance commissioner. *Held*, that as to foreign insurance companies the two acts are in pari materia, and the latter is deemed to have superseded the former, and compliance with the latter alone is sufficient, and hence failure to also file a designation with the secretary of state does not preclude it from pleading the statute of limitations in an action against it.

2. Under Pol. Code, § 595, providing that the insurance commissioner must issue a certificate of authority to transact business to any foreign insurance company which has fully complied with the laws, a certificate issued by the insurance commissioner reciting that a company has complied with all the laws is prima facie evidence that such company has complied with the provisions of Id. § 616, requiring foreign insurance companies to file with the insurance commissioner the name of an agent on whom process may be served.

In bank. Appeal from superior court, city and county of San Francisco.

Action by Marguerite D. Harrigan, as administratrix, against the Home Life Insurance Company. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Sullivan & Sullivan, for appellant. Elliott McAllister, for respondent.

McFARLAND, J. Action on an insurance policy. The defendant is a New York corporation. A nonsuit was granted in the court below, and judgment went for defendant, from which, and from an order denying a new trial, plaintiff appeals. The motion for a nonsuit was upon these grounds: First, that it does not appear that any premiums were paid after the first annual premium; second, that it appears affirmatively that no such premiums were ever tendered; and, third, that the action is barred by the statute of limitations of this state, and particularly by subdivision 1, § 339, of the Code of Civil Procedure. The policy was made in 1888, and the insured, Hope, died in 1891. He gave a note for the first premium, although it does not appear whether or not he ever paid it; but it clearly appears that he never paid any part of either of the other three premiums which became due before his death. Nearly four years after his death this action was commenced upon the theory that, as a certain notice required by a New York statute had not been given by respondent, the failure to pay premiums did not affect its obligations in the policy. The appeal was first heard in department, and the judgment was there affirmed on the ground that the action was barred by subdivision 1, § 339, Code Civ. Proc. In the opinion of the department, delivered by Temple, J., all the main points in the case were discussed and passed upon, and we are satisfied with that opinion, and that the case, as then presented, was correctly determined, and said opinion is hereby adopted. See 58 Pac. 180, the name of the plaintiff being there incorrectly given as Harrington. The arguments as to the statute of limitations were there wholly directed to the question whether or not the policy was to be considered as a "writing executed out of this state." But on a petition for hearing in bank appellant for the first time called attention to an act of the legislature approved April 1, 1872, entitled "An act in relation to foreign corporations" (St. 1871-72, p. 826), and contended that under this act respondent was entirely precluded from pleading any part whatever of the statutes of limitation. Thereupon a hearing in bank was granted, and the case was subsequently argued and submitted in bank.

After full consideration of the question, we are of the opinion that the act of 1872 does not prevent respondent from availing itself of the statute of limitations. Waiving the question whether the subject of the act is expressed in the title, it must be construed in connection with other legislation on the subject of foreign insurance corporations. The act refers to foreign corporations generally, and provides that every such corporation doing business in this state must "designate some person residing in the county in which the principal place of business of such corporation is, upon whom process issued by authority of or under any law of this state

may be served," and "shall file such designation in the office of the secretary of state." Section 2 provides that a corporation failing to comply with the act shall be denied the benefit of the statute of limitations. The Political Code, from section 594 to section 634, inclusive, deals specifically with insurance corporations, both domestic and foreign, and prescribes conditions upon which the latter may do business in this state, and particularly provides in great detail how foreign insurance corporations must put themselves in position to be served with process in this state by appointing agents, entering into certain contracts, etc. Section 616 contains an elaborate scheme on the subject. Its main provisions are that a foreign insurance corporation, as conditions precedent to doing business in this state, must file in the office of the insurance commissioner the name of an agent and his place of residence in this state, upon whom process may be served; that process so served gives jurisdiction of the corporation; that "the agent so appointed and designated" shall be deemed a general agent, and "must be the principal agent or chief manager of the business of such corporation or company in this state." It is also further provided that the foreign insurance corporation must make and file with the commissioner an agreement or stipulation in writing, which is set forth in detail, with the form of the agreement given, by which it is stipulated, in substance, that if at any time the corporation shall be without an agent on whom process may be served, service thereof may be made on the insurance commissioner, who must within a certain time transmit to the corporation a copy of the process. When this section was first enacted it merely provided generally that the name of the agent should be filed with the insurance commissioner. All the other parts of the section were added by amendment in 1878, several years after the date of said act of 1872. These various enactments are all statutes in pari materia, all being on the subject of the appointment by foreign corporations of an agent resident here upon whom process may be served. They must therefore be construed together, and the intention of the legislature on the subject must be gathered by consideration of them all. This rule is well established. In *Frandsen v. San Diego Co.*, 101 Cal. 321, 35 Pac. 899, this court, quoting from a text-book, said: "Where there are in an act [and where several acts on the same subject are involved the rule is the same] specific provisions relating to a particular subject, they must govern in respect to that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate." The rule is aptly illustrated and expressed in the case of *The Elizabeth*, 1 Paine, 10, Fed. Cas. No. 4,352. In that case it was contended that the *Elizabeth*, al-

though engaged in the coasting trade, was forfeited under a general act of congress which provided that "if any ship or vessel shall depart from any port of the United States without a clearance or permit, such vessel, etc., shall be wholly forfeited"; but the court held that as under another act a vessel licensed for the coasting trade was compelled to give bonds that she would not proceed to any foreign port, it was not the intent to subject such a vessel to the necessity of taking permits or clearances every time it sailed. The court said: "From the very general and comprehensive phraseology here used, it is contended on behalf of the United States that the court cannot except vessels of any description whatever. It is very certain that this section, taken by itself, and without reference to other parts of this and other acts made in pari materia, would include the case of the Elizabeth. But it is the duty of a court in construing a law in doubtful cases to compare all its parts, in order to discover the intention of the legislature; and, however broad some of its expressions may be, yet if, on examination, it shall clearly appear that they are and were intended to be limited by other provisions of the same or other acts on the same subject, it cannot be improper to restrain them accordingly." And so with respect to the case at bar, the legislature having provided with great detail how a foreign insurance corporation must submit itself to the jurisdiction of our courts, it could hardly have been intended to subject them to the additional necessity of filing another appointment of an agent with the secretary of state. Section 616, Pol. Code, modifies the act of 1872. The former, dealing specifically with insurance companies, supersedes the general provisions of the latter. Moreover, the two are to a great extent inconsistent, and can be harmonized only by holding that the provisions of the Code alone apply to insurance corporations. By the act of 1872 the named agent must be a resident of the county where the principal place of business of the corporation is, and any kind of an agent so residing could be named; while under the Code he must be "the principal agent or chief manager of the business of such corporation or company in this state," without reference to his residence in any county, and he "must be deemed in law a general agent." One appointment of an agent would not, therefore, be a compliance with both the act of 1872 and the Code. Again, in accordance with the Code the corporation enters into a contract with the state by which, "in consideration of the permission granted by the state of California to it to transact insurance business in this state," it makes certain covenants as to how it may be served with process; and it is not to be supposed that the legislature intended to violate that contract. Our conclusion is that the act of 1872 does not apply to foreign insurance corporations, but that their rights and duties

with respect to the appointment of agents for the service of process are prescribed and regulated by the said provisions of the Code, and that, if they comply with the Code, they incur no penalty by not complying with the act of 1872.

Section 595 of the Political Code provides that the insurance commissioner must issue a certificate of authority to transact business in this state to any persons who are solvent, not in arrears of taxes, etc., and "who have fully complied with the laws of this state." In the case at bar the plaintiff herself introduced without objection such a certificate issued by the insurance commissioner in 1888 to respondent. In that document the commissioner, after reciting that respondent had "in all respects fully complied with the laws of California regulating and governing the transaction of insurance business in this state," and had "appointed and commissioned William H. Dunphy, of the city and county of San Francisco, as his attorney and agent in this state, as required by section 616 of the Political Code of this state," certifies, "by virtue of the authority conferred upon me by section 595 of said Code," that "said Home Life Insurance Company and its agent are duly authorized to transact the business of life insurance in this state." This certificate was sufficient prima facie evidence of the compliance by respondent with the provisions of the Code above mentioned.

The respondent having accepted the invitation of the state to do business here on the conditions imposed by our laws, and having submitted itself to the jurisdiction of our courts, and expressly provided the means by which it might be served with process here, and the state having granted its permission to do business here on these conditions, it is within the state for all purposes of suit with respect to matters growing out of such business; and it has all the ordinary rights of litigants here, including the right to rely on the statute of limitations; that right not having been by law denied it. It was so held in *Lawrence v. Ballou*, 50 Cal. 258. In that case a foreign corporation had pleaded the statute of limitations as a defense, and it was strenuously argued by counsel that such plea could not be maintained by such a corporation, and cases were cited to that point, particularly the case, much relied on, of *Olcott v. Railroad Co.*, 20 N. Y. 210; but the court held otherwise, and said: "We are of opinion that when a foreign corporation has a managing agent in this state (exercising openly his authority as such, and without fraudulent concealment) the corporation is within the state within the intent of the statute of limitations." See, also, *King v. Exploring Co.*, 4 Mont. 1, 1 Pac. 727, where *Lawrence v. Ballou* is approved, and other authorities cited. And *Lawrence v. Ballou* cannot be held to have been overruled or affected by a certain dictum in the opinion in *Pierce v. Southern Pac. Co.*, 120 Cal. 163, 47 Pac. 874, 52 Pac.

302, 40 L. R. A. 350. It was unnecessary to the decision of the case, and *Lawrence v. Ballou* was not called to the attention of the court, nor alluded to in the opinion. *Olcott v. Railroad Co.*, supra, and a few other cases like it, are founded on the notion that a foreign corporation being "out of the state" is within the saving clause as to absent parties, and that, as they cannot be sued in the state, the statute of limitations does not run in their favor. Of course, the statute does not run against a cause of action while there is an impediment to bringing a suit on it, which is made by the act or status of the party to be charged; but when there is no such impediment, and an action may be commenced and jurisdiction of the defendant obtained as soon as the cause of action accrues, the statute then begins to run. In the cases relied on by appellant no consideration appears to have been given to statutes like those of this state above mentioned, or to contracts like those in the case at bar in which foreign corporations agree to do business in the state upon the conditions that they will submit to the jurisdiction of our courts, and appoint persons and furnish means by which process may be served on them in the state. It would be a manifest legal inconsistency to say that for the purpose of bringing an action against it here, and serving process on it here, the respondent is within the state, but for the purpose of making a common and legitimate defense to such action it is "out of the state." The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; GAROUTTE, J.; VAN DYKE, J.; HARRISON, J.; HENSHAW, J.

128 Cal. 102

BALLOU v. ANDREWS BANKING CO.
(L. A. 703.)

(Supreme Court of California. May 12, 1900.)

FRAUDULENT CONVEYANCE—TRANSFER OF BOOK ACCOUNTS—PRESUMPTIONS—INSTRUCTIONS.

1. Insolvent Act 1880, § 55, provides that, if a transfer of property by a debtor is not in the usual course of business, it shall be prima facie evidence of fraud. A firm, within one month before insolvency, transferred to a surety on notes owing by it to defendant all its book accounts. Subsequently such accounts were transferred by the surety to defendant on condition that the sums collected thereon should be applied on the debt owing by the firm. *Held*, in an action by the assignee in insolvency of the firm against defendant to recover the value thereof, that the transfer was prima facie fraudulent as to creditors, and devolved on defendant the burden of showing the contrary.

2. Where a retail firm transfers to one collaterally liable on its notes all its book accounts, the transfer, not being in the usual and ordinary course of business, will be deemed to have been taken by the transferee with notice of the insolvency of the firm.

3. Where a debtor, less than a month before insolvency, with intent to defraud his creditors, and without consideration, transfers all his book accounts to one collaterally liable on the debt-

or's notes, one who, with knowledge of the debtor's intentions, purchases such book accounts from the debtor's transferee, though for full value, will take no title.

4. Where a debtor transfers to his surety all his book accounts within a month before insolvency, and the surety subsequently transfers them to the creditor, it is not error, in an action by the debtor's assignee against the creditor to recover the value of the property so received by it, to refuse an instruction that the plaintiff cannot recover if the transfer, when made to the surety, was not intended for the creditor, where there is no evidence of such fact.

5. In an action to set aside a fraudulent conveyance, an instruction that the jury may consider all the surrounding facts and circumstances so far as known by the parties at the time, is not erroneous as giving the jury authority to consider circumstances not in evidence.

6. An instruction, at plaintiff's request, that, if the jury believed certain facts, then they should find for plaintiff, taken in connection with an instruction, given at defendant's request, that, if there is no testimony to support any fact alleged in the complaint, then as to such fact they must find for defendant, will be deemed to have been understood by the jury as meaning that, if they found certain facts, then their verdict should be for plaintiff.

7. An assignment of a retail firm's ledger and each and every account therein contained, together with the blotters and journals and other books of account of the firm, in connection with testimony that such books were the books of account that the firm formerly had in their business, is sufficient evidence to warrant a finding that such assignment included all the account books of the firm, and authorizes an instruction that, if the firm transferred all of their account books, together with the accounts therein, such transfer is prima facie fraudulent.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by S. D. Ballou, as assignee, against the Andrews Banking Company, to recover the value of certain alleged fraudulent and preferential conveyances. From a judgment in favor of plaintiff, and from an order denying defendant's motion for a new trial, defendant appeals. Affirmed.

William Shipsey, for appellant. F. A. Dorn, for respondent.

COOPER, C. Plaintiff, as assignee of Greenberg Bros., a corporation, brought this action to recover of defendant the value of certain assets and book accounts alleged to have been fraudulently transferred to defendant within one month prior to the filing of the petition in insolvency. The cause was tried by a jury, and a verdict rendered in favor of plaintiff for \$1,052.18. Judgment was accordingly entered. This appeal is from the judgment and an order denying defendant's motion for a new trial.

The principal point urged here is that the evidence is not sufficient to sustain the verdict. We think, after a careful consideration of the evidence, that the verdict is supported by it. The co-partnership of Greenberg Bros. was composed of two brothers, M. Greenberg and L. J. Greenberg, who, in the co-partnership name, had, for more than one year prior to March, 1895, been carrying on a retail gro-

cery store in the city of San Luis Obispo. B. Schwartz is the father-in-law of M. Greenberg, one of the co-partners, and resides in the city of San Francisco. In the early part of the year 1894 the co-partnership borrowed from defendant \$9,000, giving two promissory notes therefor, both signed by said B. Schwartz as surety. In the latter part of February, 1895, there was unpaid upon said promissory notes about \$8,000, and defendant, having reason to believe that the co-partnership was insolvent, or in failing circumstances, telegraphed to said Schwartz at San Francisco that it would be necessary to look to him for payment of the said indebtedness. Immediately after the receipt of this telegram, on the 2d day of March, 1895, the said co-partnership made a transfer in writing, on page 1004 of their ledger, to said Schwartz, of the book or ledger, and each and every account therein, and all sums of money due the firm, together with the blotters, journals, and other books of account of said firm, which transfer was signed "Greenberg Bros." On March 18, 1895, the said firm, upon petition then filed, were adjudged insolvent. The transfer was, therefore, made within one month before the petition in insolvency was filed. Insolvent Act 1880, § 55. The assignment, being of all the accounts, books, journals, ledger, and blotters made by merchants in the retail grocery business in San Luis Obispo to the father-in-law of a member of the firm, residing in San Francisco, was not made in the usual and ordinary course of business of the co-partnership. Washburn v. Huntington, 78 Cal. 575, 21 Pac. 305; Matthews v. Chaboya, 111 Cal. 437, 44 Pac. 169. The transfer, not having been made in the usual and ordinary course of business, was prima facie evidence of fraud. Insolvent Act 1890, § 55; Haas v. Whittier, 97 Cal. 418, 32 Pac. 449. This shifted the burden of proof upon defendant to show that the transfer was in good faith, and not fraudulent. Tapscott v. Lyon, 103 Cal. 313, 37 Pac. 225. The transfer, not having been made in the usual and ordinary course of business, was sufficient to charge the purchaser with notice of the insolvency of the co-partnership. Ohleyer v. Bunce, 65 Cal. 547, 4 Pac. 549; Matthews v. Chaboya, 111 Cal. 438, 44 Pac. 169. This prima facie case entitled plaintiff to recover, unless the fraudulent presumption arising from the facts was overcome by competent evidence. Schwartz was not placed upon the stand by defendant, nor was either member of the insolvent co-partnership. The evidence does not show the object of, nor the consideration for, the transfer of March 2d to Schwartz. It is insisted that there is no testimony in the record tending to show that the transfer to Schwartz was for the benefit of defendant. The defendant had personal knowledge of the insolvency of the co-partnership in the latter part of February, 1895, when it telegraphed to Schwartz. Schwartz then had the transfer made on the ledger as hereinbefore stated.

For some days prior to March 23, 1895, Schwartz was in San Luis Obispo, and was in and out of the place of business of the defendant with the co-partners and their attorney several times. The books were taken to the place of business of defendant on March 23, 1895, and there, on the same page of the ledger and under the assignment made to Schwartz, a written assignment was made by Schwartz to defendant of "the books and accounts in the above assignment mentioned"; and the assignment further provided that "the moneys collected thereon to be credited on and be applied towards the payment of the promissory note of M. Greenberg and B. Schwartz, now held by said Andrews Banking Company." There does not appear to have been any consideration paid by Schwartz to said Greenberg Bros. for the accounts, nor were they indebted to him in any manner. He was then surety on the notes held by the defendant, and the assignment was made to defendant on the same page of the ledger, and within one month prior to the filing of the petition in insolvency. The defendant, with full knowledge of the insolvency of the co-partners, took the accounts and books, and applied the same on the indebtedness of the firm. It certainly seems to us that the defendant, knowing all these facts, taking the assignment under the one made to Schwartz on the same page of the ledger, for the purpose of being applied on the Greenberg Bros.' indebtedness, in the presence of the attorney for Greenberg Bros., must be held to have ratified the original assignment to Schwartz, and to have taken the transfer with reasonable cause to believe it was made for the purpose of giving them a preference. In any event, under the circumstances, the transfer to Schwartz being void, the defendant took no greater title than Schwartz had. Hobart v. Tyrrell, 68 Cal. 12, 8 Pac. 525; Brown v. Bank, 77 Cal. 544, 20 Pac. 71. The defendant must be held, under the circumstances, to have been aware of the intent of Greenberg Bros. in making the transfer. Under such circumstances the sale would be void as to defendant even if it had paid full value for the property. Tapscott v. Lyon, 103 Cal. 313, 37 Pac. 225. If the transfer in this case should be held valid it would be almost impossible for an assignee in any case to recover property transferred in violation of said section 55. Fraud is difficult to prove, and in most cases inferences must be drawn from the facts and circumstances capable of proof. The jury had before it the facts and circumstances, and it had the right to draw all natural and logical inferences from such facts and circumstances, in order to determine the one fact as to whether or not the transfer was made with a view to give defendant a preference.

Defendant insists that it was error in the court to refuse the instructions numbered 6 and 7 requested by it. The instructions were to the effect that if, at the time of making the transfer of March 2d to Schwartz, the

transfer was not intended for defendant, the plaintiff cannot recover. We think the instructions were properly refused. The reasons hereinbefore given demonstrate the vice of the instructions. Besides, there is no evidence in the record that the assignment was not intended for defendant, and the facts in evidence would not have justified the jury in drawing such an inference.

It was not error to give plaintiff's instructions numbered 1 and 3. If the law is as we have endeavored to show herein, then the instructions were proper, and applicable to the testimony before the jury.

The giving of plaintiff's instruction No. 4 is alleged as erroneous for several reasons. It is said that the jury were instructed that they "will consider all the facts and circumstances by which the parties were surrounded so far as known to them," and that by this instruction the jury were given a roving commission to guess at the facts and circumstances outside the evidence. The instruction is almost a literal copy of one given in *Haas v. Whittier*, 97 Cal. 414, 32 Pac. 449, and is correct. The words objected to referred to the previous words in the instruction, "at the time they made the assignment," and the jury could not have reasonably believed that they had the right to consider any facts and circumstances not proven in the case before them. The jurors may be assumed to have ordinary intelligence and good sense. *Davis v. McNear*, 101 Cal. 608, 36 Pac. 105. The instruction is criticised because the jury are told, "If you believe [certain things], then you should find for the plaintiff." The word "believe," as used in the instruction, could not have misled the jury. Taken in connection with the context, it clearly meant that if the jury should find certain things, etc. The court, at the request of defendant, elsewhere instructed the jury that, "if there is no testimony to support any one of the facts alleged in the complaint, then, as to such fact, you must find against plaintiff and in favor of defendant."

Instruction No. 7 given at the request of plaintiff is claimed to be error for the reason that there is no evidence in the record that the books transferred were all the books of Greenberg Bros. The portion of the instruction in which the word "all" is used is as follows: "Where a retail merchant transfers and assigns all his books of account, together with the accounts therein, such transfer is not in the usual and ordinary course of business." The instruction contains a proposition of law that is not criticised, and does not mention all the books of Greenberg Bros. If a retail merchant transfers all his books, it would not be in the usual and ordinary course of business. If Greenberg Bros. transferred a part of their books, such transfer was not in the usual and ordinary course of business. But we think the evidence was such that the jury might have found that the transfer was of "all the books of account" of

Greenberg Bros. The written assignment contained the description: "This book or ledger, and each and every account therein contained, together with the blotters and journals and other books of account of Greenberg Bros. from which said accounts are taken or made." And the president of defendant, in his evidence, said, in speaking of the books, "These were the books of account that Greenberg Bros. formerly had in their business."

Other instructions and portions thereof are criticised, but the objections pointed out are exceedingly hypercritical. It would serve no useful purpose to notice them in detail. We have discussed the ones that appear to us the most plausible, and we think no instruction was given that could have misled the jury to the injury of defendant. Taking them as a whole, they fully and fairly stated to the jury the law applicable to the facts proven. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(10 N.M. 138)

TERRITORY v. PRATT.

(Supreme Court of New Mexico. May 3, 1900.)

HOMICIDE—EVIDENCE.

An anonymous communication, containing an implied threat, is admissible in evidence in connection with the testimony of the defendant, charged with murder, showing his belief, and the grounds of such belief, that the threat was attributable to the deceased.

(Syllabus by the Court.)

Appeal from district court, Chaves county; before Justice Charles A. Leland.

Le Grande E. Pratt was convicted of murder, and appeals. Reversed.

Freeman & Cameron, for appellant. Edward L. Bartlett, Sol. Gen., for the Territory.

PARKER, J. The appellant was convicted of murder in the third degree in the district court of the Fifth district, in and for Chaves county, and brings the cause here by appeal. He assigns one error on the part of the court below, which will be considered.

It appears from the record that defendant had, at the end of an acrimonious litigation, been decreed certain rights to the use of water, and a right to take and use the same as provided in the decree, which right he was exercising at and before the time of the homicide. Several days before the homicide he found posted on the head gate of his ditch the following notice:

"Mr. Pratt

"Sr. you don't want to cut this water any moor unless you take it like the balance of the community if you shoood cut it without informing them

"Wee will have to wait on you."

On the morning of the homicide he went to the head gate of his ditch, armed with a shotgun, in company with a friend. Shortly after arriving at the head gate, the deceased and two other persons, all armed, came riding up to within a few feet of where defendant and his friend were and dismounted. Deceased stepped in front of his horse, towards defendant. At this point the testimony becomes conflicting. The territorial witnesses say that deceased said something which they did not understand, and reached his left hand to his right side, as if reaching for an inside pocket; that then defendant jumped up on the other side of the ditch, his gun in hand, and said, "Don't you come," and presented his gun, and deceased grabbed for his pistol, and defendant fired, and almost instantly deceased did the same. Defendant and his witness testify that, when deceased stepped in front of his horse, he said to defendant, "You throw down that gun," at the same time drawing his pistol; that defendant then sprang to his feet and said, "Don't you come;" that deceased presented his pistol and fired, and defendant then returned the fire, killing deceased. It was sought by the territory to show that the defendant, knowing that deceased was a deputy sheriff and had a warrant for his arrest (which deceased in fact had, but did not make known to the defendant at the time of the homicide), determined not to submit to arrest, and deliberately and maliciously killed deceased. Defendant, on the other hand, sought to show that he killed deceased in the reasonable exercise of the right of self-defense, without knowledge of the warrant for his arrest, and believing that deceased and his companion had come to carry out the threat implied in the anonymous communication mentioned above. It therefore appears that the communication was important to the defendant, as tending to show the circumstances as they appeared to him at the time he fired the fatal shot. The learned judge below excluded the communication upon the ground that it was not shown to have emanated from the deceased, nor was he shown to be in any way responsible therefor. But we think this action of the court was erroneous. The defendant offered to testify that he had good reason to believe, and did believe, that the deceased was the author of the communication. Whether that belief existed in the mind of the defendant or not, and whether it was reasonable from all the circumstances, or was too hastily drawn by defendant, were matters for the jury to determine. If the communication had been signed with the name of the deceased, it would have been clearly admissible, although the signature might in fact have been a forgery, and the deceased entirely innocent of any connection with it. And if, for any reason other than the signature of deceased's name to the notice, defendant believed, and had a right to believe, that deceased was the author of the notice, it was likewise admissi-

ble in connection with defendant's testimony as to why, in his mind, the same was attributable to deceased. For the reasons above stated, the judgment should be reversed, and the cause remanded, with instructions to grant a new trial, and it is so ordered.

MILLS, C. J., and CRUMPACKER and McFIE, JJ., concur.

(10 N.M. 141)

ELDODT v. TERRITORY ex rel. VAUGHN.
(Supreme Court of New Mexico. May 3, 1900.)

MANDAMUS—INSIGNIA OF OFFICE—STATE OFFICER—APPOINTMENT—STATE TREASURER.

1. One who possesses prima facie title to an office may compel delivery to himself of the books, papers, seal, and other property, insignia, and paraphernalia of such office, by a proceeding in mandamus; and the question of the actual or ultimate title to the office may not be raised in such proceeding, but must be reserved for an appropriate proceeding brought directly for the purpose. *Conklin v. Cunningham*, 38 Pac. 170, 7 N. M. 443, followed.

2. A strong prima facie presumption is indulged in favor of the legality and regularity of the acts of the executive; and where it appears that the governor has undertaken to appoint to an office which, under a certain state of facts, he is empowered to fill, it will be presumed, in the first instance, that the requisite facts existed at the date of the appointment, and that the appointment was regular and valid. *Conklin v. Cunningham*, supra, followed.

3. On March 2, 1897, E. was appointed treasurer of New Mexico by the governor, by and with the advice and consent of the legislative council, to hold office for two years, and until his successor should be appointed. On June 23, 1899 (the legislature for that year having adjourned without the confirmation by the council of any nominee to the said office), V. was appointed and commissioned by the governor to be territorial treasurer. V. then having qualified in the form prescribed by statute, and E. having, upon demand, refused to deliver to V. the books, papers, seal, insignia, and paraphernalia of the office in question, *held*, that V. was prima facie treasurer of New Mexico, and entitled to the immediate possession of the aforesaid belongings and appurtenances of the office, and that mandamus against E. was a proper remedy whereby to vest such possession in V. *Conklin v. Cunningham*, supra, followed.

(Syllabus by the Court.)

Error to district court, Santa Fé county; before Justice John R. McFie.

Action by the territory of New Mexico, on the relation of J. H. Vaughn, for a writ of mandamus against Samuel Eldodt. Writ granted, and defendant brings error. Affirmed.

On July 6, 1899, J. H. Vaughn, the relator, filed in the district court for Santa Fé county a petition, alleging his appointment, on June 23, 1899, by the governor of New Mexico, to the office of territorial treasurer, and his due qualification, and praying an alternative writ of mandamus against Samuel Eldodt, the respondent, requiring him to surrender to the relator all the insignia and paraphernalia of the office of treasurer, then in Eldodt's possession. Thereupon the alternative writ issued, and was as follows,

omitting formal portions: "The Territory of New Mexico, to Samuel Eldodt, Greeting: Whereas, our said court has been given to understand, upon the information of J. H. Vaughn, that he the said Vaughn was on the 23d day of June, 1899, duly appointed and commissioned by the governor of the territory of New Mexico as treasurer of said territory, and that the said Vaughn duly took and filed the oath of office required by law, and gave his bond as required by law, which bond was approved by the governor of the territory of New Mexico, and filed with the secretary of the territory, as required by law, on the 28th of June, 1899, whereby he fully and duly qualified himself to act as such treasurer, and as such was entitled to the custody and possession of the books, papers, moneys, seal, safes, bonds, and other insignia and paraphernalia of the said office of treasurer of the territory of New Mexico; and that on the 6th day of July, 1899, the said Vaughn demanded of you, then being the person in charge of such insignia and paraphernalia of the office of treasurer, that you deliver and turn over the same to him, the said Vaughn, as treasurer, to do which you then and there declined and refused, but retained and still retain the exclusive possession thereof in your custody and control, and unlawfully and wrongfully refuse to deliver the same, or any part thereof, to the said Vaughn, the lawfully commissioned and qualified treasurer of said territory, whereby he is unable to discharge his official duties as treasurer in any respect, and the public business is embarrassed and hindered, and that he is without any plain, adequate, and speedy remedy in the ordinary course of law: Now, therefore, we * * * do command you * * * that, immediately upon receipt of this writ, you deliver and turn over to the said Vaughn, as treasurer of the territory of New Mexico, all the books, papers, moneys, seals, safes, bonds, and other insignia and paraphernalia belonging or pertaining to the said office of treasurer of the territory of New Mexico, or that you show cause before this court at the chambers of the judge in the court house at ten o'clock a. m., on the 11th day of July, 1899, why you have not done so," etc. On July 11, 1899, the respondent filed an answer or return to the writ, of great length, wherein he denied specifically and generally the several allegations of the writ. This return also contained various allegations, in both negative and affirmative form, the substance and object of which were to avoid the allegations of the alternative writ upon the ground that, the respondent having been duly created treasurer of New Mexico in March, 1897, upon nomination and appointment of the governor, by and with the advice and consent of the legislative council, to hold office for two years, and until his successor should be appointed, and being alive, sui juris, and entirely capable of filling

the office, and never having resigned or been removed therefrom, but, on the contrary, being still in exclusive possession thereof, rightfully, and the relator never having been nominated to the council by the governor, that official was without power to confer the office in question upon the relator, as he had attempted to do. In other words, the purport of these allegations was to deny the power of the governor to appoint the relator, under the circumstances, and to assert the rightful possession and title of the office to be still exclusively in the respondent. Finally, the return excepted to the legal sufficiency of the averments of the writ. Upon motion of the relator, the court made an order striking out and quashing the greater part of the return, permitting only such portions as traversed the allegations of the writ touching the appointment and qualification of the relator to stand, the motion being sustained (to quote the language of the order) "in so far as the answer and return denies the right of the governor to appoint the relator to the office of treasurer, and asserts the title to the office in the respondent, and his right as such officer to retain and hold possession of the insignia and paraphernalia of said office." To this ruling the respondent excepted. A motion by the respondent that the issues raised by the pleadings be submitted to a jury was overruled, and the cause came on for hearing before the court. The relator introduced in evidence a commission issued and signed by the governor, under the seal of the territory, and countersigned by the secretary, dated June 23, 1899, appointing the relator, J. H. Vaughn, treasurer of the territory of New Mexico; a certificate of the secretary of the territory, dated June 28, 1899, certifying to the appointment and commission of the relator, to his having taken and filed his oath of office, and given a bond to the territory as required by law, and to the approval of such bond by the governor, and the filing thereof in the secretary's office; and a copy of the said bond, certified by the secretary. Lastly, the relator put in evidence a written demand upon the respondent, in substance requiring the latter to turn over to the former the office of treasurer, and its appurtenances and belongings, upon which document was written a statement signed, "Samuel Eldodt, Treasurer of the Territory of New Mexico," acknowledging service of the demand, and refusing compliance therewith. To the introduction of these several documents the respondent objected and excepted. The respondent then offered evidence to sustain the several affirmative allegations of his return concerning his own appointment, qualification, etc., all of which was excluded, over his exception, and the court gave judgment finding the facts to be as stated in the alternative writ, and adjudging the relator to be "prima facie treasurer of said territory, and as such entitled to the immediate possession of the in-

signia, paraphernalia, books, furniture, and other articles pertaining to said office." Motions for a new trial and in arrest of judgment having been overruled, the peremptory writ was issued July 14, 1890, and, in compliance with the command thereof, the respondent gave over everything appertaining to the office of treasurer to the relator.

T. B. Catron and H. B. Laughlin, for plaintiff in error. Edward L. Bartlett, Sol. Gen., for defendant in error.

CRUMPACKER, J. (after stating the facts). Where one has received an appointment to a public office from the authority invested with power to make such an appointment, and has duly qualified in accordance with statutory requirements, the law will presume, in the first instance, that the appointment was legal, and that the appointee is the rightful incumbent of the office designated in the appointment, and it will, upon his application, assist him to the possession of the insignia, paraphernalia, and everything appertaining to the office. The functions of the writ in such cases are narrow, but they are of vast importance in the orderly administration of government, and it is in this very narrowness that the peculiar power and efficacy of the remedy are founded. There must be some means afforded by the law whereby officials, legally created and qualified, may be enabled to enter, without delay, upon the performance of the duties which the law requires and the welfare of the society demands that they fulfill; otherwise, the course of public administration must be constantly obstructed, and its regularity and usefulness greatly impaired. It is therefore the established rule in this jurisdiction that mandamus lies to assist to the possession of the insignia and appurtenances of an office one who shows a clear *prima facie* right to it, and that the only question proper to be raised in the proceeding is the question whether a sufficient showing of a *prima facie* right has or has not been made. The question of the actual or ultimate title is not an issue in the case, and no rival claimant may be permitted to delay the relief sought by raising that issue. *Conklin v. Cunningham*, 7 N. M. 445, 38 Pac. 170. If it be argued that this rule, which forbids a full consideration of the legal rights of the respective parties, and refuses to go behind the *prima facie* showing adduced by the relator, may sometimes work injustice, by ejecting from office one who is actually and lawfully in possession of it, and inducting into his place another whose title thereto is defective and illusory, the answer is plain: The object of the rule is solely to secure the systematic and orderly administration of government, and not to adjust disputes of individuals. In the great majority of cases, it is actually true that he who exhibits the *prima facie* right has also the legal title to the office, and that his opponent is a usurp-

er. In some cases this is not true, and yet, even here, the general rule must be adhered to, though it work temporary individual hardship; for, were it to be departed from in one case, it must be ignored in all; the special value of the proceeding by mandamus—its rapidity—would be lost; the relief by mandamus *an quo warranto* would become, in all practical aspects, the same; and there would be no agency known to the law whereby, in a grave and critical emergency, the implements, paraphernalia, and property of a public office could be speedily delivered over to the lawful incumbent. Such being the principles applicable to the case at bar, the question first presented to this court for determination is, were the facts, as alleged in the alternative writ and as found by the court below, sufficient to establish in the relator a *prima facie* right to the insignia and appurtenances of the office of territorial treasurer? The court below found, as a matter of fact, "that the said relator, J. H. Vaughn, was commissioned by the governor of the territory of New Mexico as treasurer of the territory of New Mexico on the 23d day of June, 1890, and that said Vaughn, as such treasurer, took the oath of office prescribed by law therefor, and filed the same in the office of the secretary of the territory, as required by law; that the said Vaughn also made and executed his bond to the territory of New Mexico in the sum of four hundred thousand dollars, as required by law, which bond, with the sureties thereon, was approved by the governor of the territory of New Mexico, and also filed in the office of the secretary of said territory, as required by law." Such being the facts, it is clear that the relator was *prima facie* treasurer of New Mexico, if the governor was invested with legal power to make him such. *Conklin v. Cunningham*, *supra*.

It is earnestly and ably contended by counsel for the plaintiff in error that, the office involved in this controversy being a territorial office, the power of the governor to fill it by appointment without the advice and consent of the territorial council, and during a recess of the council, is by section 8 of the organic act of 1850, and section 1858 of the Revised Statutes of the United States, limited to cases of death or resignation, and that under no circumstances has the governor power to remove the treasurer and to appoint his successor. Several decisions of this court, besides numerous other authorities, are cited in support of this contention. The question thus raised is one, however, which we do not feel called upon to decide in the case at bar. Section 1858, *Id.*, is as follows: "In any of the territories, whenever a vacancy happens from resignation, or death, during the recess of the legislative council, in any office which by the organic act of any territory, is to be filled by appointment of the governor, by and with the advice and consent of the council, the governor shall fill such vacancy by granting a commission which shall expire at the end

of the next session of the legislative council." There are, then, at least two contingencies, the happening of either of which empowers the governor to fill the office of treasurer during a recess of the council. One is the death of the incumbent; the other is his resignation. Admitting, argumenti gratia, the force of the suggestion that the respondent could not be presumed to be dead in this case, it does not follow that, for the purposes of this proceeding, he could not be presumed to have resigned. The facts that he had refused to vacate the office upon the demand of the relator, and that he thereafter persisted in such refusal, do not exclude the possibility that his resignation had been tendered to, and accepted by, the governor before the new appointment was made. It must be borne in mind that we have to deal with a strict and technical rule established for the public protection,—a rule that is general, and not to be disregarded to suit particular instances. The presumption in favor of the legality and regularity of the acts of the executive is among the strongest known to the law. *Conklin v. Cunningham*, supra. It appearing that the governor had undertaken to appoint to the office, and there being one possible contingency (we do not say that there were not more) in which he might lawfully make the appointment, the court must presume, prima facie, that that contingency existed when the appointment was made; and to permit the introduction of one word of testimony to rebut this presumption would be to open the door to the whole question of title, and abolish the rule which we have above attempted to elucidate. When the allegations of the alternative writ are sufficient to show a prima facie right to the office in the relator, there is no recourse for the respondent but to traverse and contradict them. *Conklin v. Cunningham*, supra. Were this a proceeding in the nature of a quo warranto, we should be governed by quite different principles; for that proceeding (as remarked by Bronson, J., in *People v. Vail*, 20 Wend. 12) "reaches beyond those evidences of title which are conclusive for every other purpose, and inquires into and ascertains the abstract question of right." But the evidences of title referred to, of which a commission in proper form, issued by a competent appointing power, is one, are conclusive for every purpose, except when directly assailed in the special mode provided by law. Such a commission may not be attacked collaterally in a proceeding like the present, the prime and only object of which is to deliver the insignia and belongings of an office to the person prima facie entitled. The act of the governor in appointing to office, like the act of a canvassing board in issuing a certificate of election, is judicial or quasi judicial in character, and, where the appointment is within the scope of the gubernatorial power, may be reviewed only in some appropriate proceeding brought for the purpose. *Wood v. Peake*, 8 Johns. 69; *Wildy v. Wash-*

burn, 16 Johns. 49; *People v. Seaman*, 5 Denio, 409. *Wood v. Peake*, supra, was an action of trespass brought against Wood for the seizure of horses belonging to the plaintiff. The defendant justified the seizure under an execution and appointment of himself to be one of the constables of the county by three justices of the peace, who had acted under a statute conferring upon them the power to make such an appointment in case any constable elected by the town should refuse to serve and his successor should not be chosen at a special town meeting within 15 days after such refusal. Defendant's warrant of appointment stated as the ground of its issuance that one Laurence, one of the constables of the county, had for more than 15 days refused to serve in his office, and that the town had not filled the vacancy. The plaintiff proved that the said Laurence had not refused to serve as constable, as recited by the justices, and obtained a judgment in the court below. The supreme court, upon appeal, held that the admission of this evidence of the plaintiff was error, and in reversing the judgment said (page 71): "This appointment is a judicial act, for the justices must first determine and adjudge that there is a vacancy in the office, and that the town has neglected to fill it. It is not traversable in such a collateral action. The appointment remains valid until it is set aside or quashed in the regular course upon certiorari. * * * If two justices should appoint him (the constable) it would be a case in which no jurisdiction existed, and the appointment would be null and void. The distinction in the books is between the cases where the authority (of the constable) proceeds from a source having jurisdiction over the subject-matter and from one that does not. The ministerial officer can justify in the one case, and not in the other." In *People v. Seaman*, supra, which was a quo warranto proceeding to determine election to office, the same court remarked (page 412): "It was held in *Wood v. Peake*, 8 Johns. 69, sanctioned by *Wildy v. Washburn*, 16 Johns. 49, that such appointments by justices were judicial acts, which were not to be questioned in any collateral proceeding between individuals. This is sound doctrine, and is equally applicable to the decision of a board of canvassers declaring the results of an election to office." In fact, we incline to the opinion that an appointment may often involve much more of the judicial element than does the act of adding up election returns, which is "a mere mechanical, or rather mathematical, duty," as observed by the court in *People v. Head*, 25 Ill. 290; or "a simple matter of arithmetic," as remarked in *Morgan v. Quackenbush*, 22 Barb. 79. See, generally, *High, Extr. Rem.* §§ 73-75; *Crowell v. Lambert*, 10 Minn. 369 (Gil. 295); *Com. v. Athearn*, 3 Mass. 286; *In re Strong*, 20 Pick. 495; *Ewing v. Turner* (Okla.) 35 Pac. 951; *State v. Churchill*, 15 Minn. 455 (Gil. 369); *State v. Sherwood*, 15 Minn. 221 (Gil. 172); *People v. Head*, 25 Ill.

287. It follows that the action of the court below in quashing those portions of the respondent's return which alleged the possession and title of the office to be in him, and denied the power of the governor to make the appointment of the relator, and in excluding the evidence offered by the respondent in support of those allegations, was proper.

As to the assignment of error based upon the overruling of the respondent's motion for a trial by jury, we are constrained to the conclusion that the action of the court below must be sustained. The same point was made without avail before this court, under circumstances almost identical in this respect with those of the case at bar. *Conklin v. Cunningham*, supra. "The determination of the facts by a jury in a mandamus case is not necessarily preliminary to a valid judgment." *In re Delgado*, 140 U. S. 586, 588, 11 Sup. Ct. 874, 35 L. Ed. 578. There being no error in the record, the judgment of the court below is affirmed..

MILLS, C. J., and PARKER, J., concur.

(10 N. M. 67)

ROMERO, Treasurer, v. BOARD OF EDUCATION OF CITY OF LAS VEGAS.

(Supreme Court of New Mexico. May 2, 1900.)

STATUTE—REPEAL—SCHOOL DISTRICTS—GAMING LICENSES—APPLICATION OF FUNDS.

1. Section 35, c. 25, Sess. Laws 1891, providing that certain temporary funds for school purposes should be paid out of the county treasury to the account of the several school districts wherein such sums are collected, was, in effect, repealed by chapter 59, Laws 1893 (section 1548, Comp. Laws 1897).

2. After the repeal of section 35, c. 25, Sess. Laws 1891, revenue derived from gaming licenses for school purposes was distributable, as provided by section 13, Act 1891 (section 1526, Comp. Laws 1897), by apportionment to the several districts within the county in proportion to the number of children residing in each over 5 and under 21 years of age, that being the only law providing for its distribution.

(Syllabus by the Court.)

Error to district court, San Miguel county; before Chief Justice William J. Mills.

Application by the board of education of the city of Las Vegas for a writ of mandamus against Margarito Romero, treasurer of the county of San Miguel. From a judgment granting the writ, defendant brings error. Reversed.

Chas. A. Spless, Dist. Atty., for plaintiff in error. Frank Springer, Andrious A. Jones, and W. C. Reid, for defendant in error.

CRUMPACKER, J. On the 21st day of August, A. D. 1899, the board of education of the city of Las Vegas, of the territory of New Mexico, defendant in error herein, filed a petition for a writ of mandamus in the district court of San Miguel county, seeking thereby to compel Margarito Romero, treasurer of the county of San Miguel, and plaintiff in error herein, to place to the credit of

the school district of the city of Las Vegas, of the territory of New Mexico, certain moneys collected by him for gaming licenses from persons carrying on gaming in the school district of the city of Las Vegas. An alternative writ of mandamus was awarded in the case, directing Margarito Romero, the plaintiff in error herein, to credit the moneys described in the petition for the writ of mandamus to the account of the district of the city of Las Vegas, and to pay the money over to the treasurer of the board of education of the city of Las Vegas when demanded. For answer and return to the alternative writ and the petition in said cause, the plaintiff in error demurred, among other things, upon the ground that, under the laws of the territory of New Mexico, money collected upon account of gaming licenses is the property of the general school fund of the county wherein it is collected, and does not belong to the school district wherein it is collected. Upon a hearing in the cause, the demurrer filed therein was overruled, and a peremptory writ of mandamus was awarded in accordance with the prayer of the petition. The plaintiff in error, Margarito Romero, sued out a writ of error in this court to the district court of San Miguel county, and assigned the following as error in the record and proceedings in said cause, to wit: "(1) The district court erred in not holding that the petition and alternative writ of mandamus issued in said cause, and neither of them, stated no cause of action. (2) The district court erred in not holding that the petition, and the matters and things therein stated, were not sufficient in law to entitle the defendant in error to the relief prayed for in said petition. (3) The district court erred in not holding that it was not the duty of said Margarito Romero, treasurer, etc., to cover the moneys mentioned and described in said petition and alternative writ into the school funds of said county of San Miguel, to be credited to said district of East Las Vegas. (4) The said district court erred in awarding a peremptory writ commanding said Margarito Romero, etc., to cover the moneys mentioned and described in the petition and alternative writ into the school fund of San Miguel county, to be credited to the school fund of East Las Vegas."

The pleadings present the inquiry, what is the legislative will in regard to the distribution of revenue derived from gaming licenses? The answer must be found in the statutory enactments relating to our common-school system, or relating to the funds established for its maintenance, and in whatever judicial construction may heretofore have been given these acts. On February 12, 1891, an act was passed entitled "An act establishing common schools in the territory of New Mexico and creating the office of superintendent of public instruction." This act, together with the subsequent act, amendatory thereof, passed by the same legisla-

ture on February 26, 1891, was manifestly intended to cover the entire subject-matter of the establishment and maintenance of public schools, and supplanted all antecedent legislation on that subject. Thereby various school funds were created, and provision was made for their distribution. Gaming licenses were designated by section 35 of the act of February 12, 1891, as an item of one of the temporary funds, which funds were by said section made payable into the county treasury to the account of the several school districts wherein such sums are collected. Revenues available for school purposes, other than those designated as temporary funds, were distributable, under section 13 of that act, to the several districts within the county, in proportion to the number of children of school age residing in each. This court held in *Board v. Tafoya*, 6 N. M. 292, 27 Pac. 616, that, under section 35 of chapter 25 of the Laws of 1891, revenue derived from liquor licenses (which licenses were designated, together with gaming and other licenses, in the same subdivision 5 of said section 35, as parts of the temporary funds) belonged to the district wherein it was collected. In reaching this conclusion, this court there inquired into the intention of the legislature in enacting chapter 9 of the Laws of 1891. Appellant in the case contended that section 3 of said chapter 9 provided that the revenue derivable from liquor licenses belonged to the general county-school fund, and should be apportioned and distributed to all of the school districts in the county. But this court, speaking by Justice McFie, in this connection say: "It will be observed that chapter 9 is entitled 'An act licensing the sale of intoxicating liquors and regulating the same.' The entire chapter is devoted to the subject of license, having no reference by title to school purposes. It provides a graduated system of license, ranging in amounts from \$100 to \$400, and erects the legal machinery necessary to carry the system into successful operation. The legislative mind was therefore, at the time of the passage of what is known as the 'High License Law,' absorbed in the perfection of the law licensing and regulating the sale of intoxicating liquors, aside from all other subjects. Section 3 is the only section of the entire act that refers to schools or school funds, and that section is couched in very general terms. In adopting the license system, a large fund would necessarily be derived from it, which fund must be devoted to some proper purpose, and must have a custodian. The legislature determines that this fund shall be devoted to school purposes, and, while the language used is that it is to be covered into the general school fund of the county, it still remains apparent that this language is used in a general sense, and substantially says that the license funds shall be devoted to school purposes. But a single section is used for this purpose, and that section is one of accumulation, and not of distri-

bution. Under this section, the license fund is placed in the hands of the county treasurer of the respective counties, without any provisions whatever for its disbursement; and from this fact, and the further fact, of which we take judicial knowledge, that a few days later the same legislature passed an act for the disbursement of school funds, we have a right to presume that the legislature had in mind the subsequent act of distribution, and therefore remitted the whole subject of the distribution of the license and other school funds to the further act of the legislature."

Were there no legislation subsequent to the general school law of 1891 affecting the distribution of revenue derived from licenses imposed upon the gaming tables or games of chance, we should be compelled to conclude as to such licenses, as this court concluded in the case cited in construing the liquor license act, that by virtue of section 35 of that act, and of chapter 27 of the Session Laws of 1887, entitled "An act repealing certain sections of the gaming law and providing a substitute therefor," together with chapter 30 of the Laws of 1893, amending chapter 27 of said Laws of 1887, increasing the license and making minor regulations concerning gaming, such licenses belonged to the school district in which they were collected. The language designating the general use to be made of revenue derived under the liquor license act, which was construed in the case of *Board v. Tafoya*, supra, is "upon the payment of said license fee into the hands of the county treasurer, to be covered into the general school fund of the county"; and the language designating the use to be made of revenue derived from the gaming license law of 1887, and its amendment of February 17, 1893, here under consideration, is in the former, "the license, when collected, shall be paid into the school fund of the county," and in the latter, "said license fee shall be paid into the hands of the county treasurer, to be covered into the school funds of the county." This identical language, used in a similar connection, having been heretofore judicially construed to have a certain meaning, we must presume that the legislature, by the use of the same language in like connection subsequent to such judicial construction, intended it should have no different meaning.

Therefore the question arises, has there been any subsequent legislation affecting the distribution of licenses imposed upon gaming? This court has decided in *Board v. Tafoya*, supra, that chapter 25 of the Laws of 1891 itself provided for the distribution of all available funds for the support of the school system, and that the revenue derivable from liquor licenses was particularly distributable under section 35 of said act; analogously, revenue derived from gaming licenses was at that time distributable in like manner. However, on February 23, 1893, it was enacted (section 1306, Comp. Laws 1897) "that section 35 of chapter 25 of the Session Laws of

1891 be amended to read as follows." This enactment has the effect of repealing all of section 35 of chapter 25 of the Laws of 1891, and makes no mention whatever of revenue derived from, or of the distribution of revenue derived from, gaming licenses. The legislature, in effect, thereby declared to be repealed the provision of law under which all money arising from gaming tables or games of chance was payable into the county treasury to the account of the several districts wherein such sums were collected. We conclude, in considering this displaced legislation, that the legislature merely intended to change the mode of distribution of revenue derived from gaming licenses from a particular to a general one. Section 13 of the general school law of 1891 (section 1526, Comp. Laws 1897) provides for "apportionment of the revenue derived from a territorial tax levy for school purposes, together with all the county school fund for the same purpose to the several districts within the county in proportion to the number of children residing in each over five and under twenty-one years of age." Having found that the fund accumulated by virtue of the gaming license law was to be devoted to school purposes, and no particular mode for its distribution being by law now provided, we think it very clear that the fund so accumulated is subject to the general distribution by apportionment as provided by section 13 of the act of 1891, together with all the other county school funds not otherwise particularly distributed.

It has been urged upon the court that the school districts in which these licenses are collected, and where gambling is carried on under legislative sanction, should receive all possible benefit from the revenue derived from such source, in order to counteract, so far as possible, the evil of having gaming carried on within their limit; but these are matters which can be urged with propriety only upon the legislative department of the government. We conclude that the district court erred in not sustaining the demurrer to the petition. The judgment is therefore reversed, and the cause remanded, with directions to the court below to sustain the demurrer and to dismiss the petition.

PARKER and McFIE, JJ., concur.

(10 N.M. 99)

MILLHEISER et al. v. LONG et al.

(Supreme Court of New Mexico. May 3, 1900.)

WATERS—APPROPRIATION—EXTENT—PRIORITY—APPEAL—FINDINGS—REVIEW.

1. Capacity of ditch alone does not constitute a valid appropriation of water, unaccompanied by application of the water to some beneficial use.

2. Where two ditches are receiving water from the same stream,—one constructed in 1885, and the second in 1888,—the owners of water rights in the first at the time the second is constructed have a prior appropriation of so much water as has been actually applied by them to

some beneficial purpose; but sales of water rights by them, for the use of water to be conducted through the first ditch in excess of valid appropriation by the owner of water rights in the first ditch, after water has been diverted and beneficially applied through the second ditch, is void as to such excess, as against the rights of valid appropriators through the second ditch.

3. Where the controversy involves the prior appropriation of water between those claiming water rights in two ditches constructed at different times, proof which fails to show what tract or tracts of land water was conducted upon, how much of the land, for what years, and what portion each year, is not sufficiently specific to base a decree upon as to the prior appropriation of the water, where numerous tracts of land, and 10 years' time, are involved.

4. Where, in a cause tried by the court without a jury, the court fails to find material facts, which, being considered, demonstrate that the decree rendered in the court below was manifestly wrong, this court will consider such facts, to enable the court to arrive at a just conclusion.

5. The doctrine of prior appropriation governs the distribution of water in this case.

(Syllabus by the Court.)

Appeal from district court, Chaves county; before Justice H. B. Hamilton.

Action by Philip Millheiser and others against Leslie M. Long and others. Judgment for defendants, and two of the complainants appeal. Reversed.

This cause was tried before Hon. H. B. Hamilton, at the time judge of the Fifth judicial district, who decided the issues in favor of the defendants below (appellees in this court), and dismissed the bill, with judgment for costs against complainants. Two of the complainants have brought the case to this court by appeal. This is a suit in equity, by which the complainants in the court below sought to establish rights claimed by them to the use of water from the Rio Hondo, in Chaves county, by virtue of an alleged appropriation for agricultural and horticultural purposes by the plaintiffs and their grantees through and by means of a ditch known as the "Perry-Fountain," and various laterals, constructed in the spring of 1888. It is alleged that the complainants had improved and cultivated 320 acres of land owned by them, and had appropriated water to this land from the Hondo river. The defense is that in 1884 Leslie M. Long, Thomas Long, and Scott Truxton constructed a ditch from the Hondo river several miles above the mouth of the Perry-Fountain ditch; that the Long-Truxton ditch had a capacity sufficient to carry all of the water of the Hondo at its normal flow; that, by the construction of a dam in the river which diverted all of its waters into the Long-Truxton ditch, the Longs and Truxton thereby had a prior appropriation of all the waters of the river. The defendants Leslie M. and Thomas Long further allege that in the year 1884 they, together with Scott Truxton and Marguerite M. Long, made entry of about 3,000 acres of land under the homestead, pre-emption, timber-culture, and desert-land laws of the United States; that they began to improve and cultivate this land

from year to year, and that they had applied the waters of the river to about 200 acres of their land; that they had a prior right to all of the waters of said stream as against the complainants. Defendant Haynes asserts a prior right to water through the Long-Truxton ditch by virtue of a purchase of Truxton's timber-culture claim by him. The Pecos Irrigation & Improvement Company alleges that on the 19th day of December, A. D. 1887, the said Leslie M. Long, Thomas Long, and Scott Truxton, the owners of said Long-Truxton ditch, granted and conveyed unto Nathan Faffa and William S. Prager the right to use and convey by means of irrigation ditches all the water carried by the said Long-Truxton ditch, said water to be taken from said ditch at a point on the east line of the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of section 3, in township 12 S., of range 23 E., N. M. P. M., and also at a point on the west line of the S. W. $\frac{1}{4}$ of said section 3, which right was subsequently, and prior to the institution of this suit, acquired by this defendant, and which right is still owned by this defendant. The defendant the El Capitan Orchard Company joins in the answer of the Longs, and as to it the answer says: "These defendants, Leslie M. Long, Thomas Long, and the El Capitan Orchard Company, deny that Leslie M. Long, or any one else interested in the Long-Truxton appropriation of water from the Hondo, has transferred and delivered any part of their appropriation of water to the El Capitan Orchard Company. That water from the Hondo, in flood times (and there was abundance of water for all interested in the Hondo appropriation), has been used by the said El Capitan Orchard Company through the Long-Truxton Ditch, and with the consent of said Leslie M. Long and Thomas Long, and at several times, even when crops and growth at the Long ranch, on the Rio Hondo, were suffering for water, with the consent of the said defendants water was used by the El Capitan Orchard Company." The bill further alleges that the Longs and Truxton abandoned any appropriation of water which they may have made, by their failure to cultivate their lands and apply the water thereto from year to year in good faith, and also by selling and conveying to divers other persons and corporations named in the bill all of their rights and interest in the water flowing through the Long-Truxton ditch, and the use thereof. The bill further alleges collusion between the Longs and the orchard company to deprive complainants of the use of water of said stream appropriated by them, and prays for an injunction against these acts, and that the right of plaintiffs to the use of the water be decreed to be superior to the rights claimed under the said Long-Truxton ditch, and that the right and title of plaintiffs be quieted as against all claims of the El Capitan Orchard Company, and all other person or persons, individual or corporations, claiming a right to the use of the waters of the Rio Hondo

through the said Long-Truxton ditch, and for general relief. The bill was filed November 14, A. D. 1896, but the trial did not begin until the 25th day of March A. D. 1897. On the 29th day of March, A. D. 1898, the court filed its decree dismissing complainants' bill; each of the parties paying one-half of the costs. From this decree Philip and Moses Millhaiser appeal to this court.

Frank Springer, A. A. Jones, and A. J. Nesbit, for appellants. G. A. Richardson, for appellees.

McFIE, J. (after stating the facts). As a basis for the decree rendered in the court below, the court made numerous findings of fact and conclusions of law, all of which were duly excepted to, of which the following are deemed essential to the present review: "(1) That the defendants herein, in conjunction with certain other persons, did in the year 1884 take out, build, and construct a ditch from the south bank of the Hondo river, and did by means of said ditch divert and appropriate water from said stream for agricultural and domestic purposes; that said ditch was constructed of sufficient capacity to carry all the water then flowing in said Hondo river at its normal flow, or during the irrigation season. (2) The court doth further find that the said ditch, when so completed, in the year 1885, conveyed all of the water which flowed in said Hondo river during the irrigation season; that the said ditch has not, since its construction, been enlarged. * * * (3) The court doth further find that the said defendants have never, since the date of their said appropriation of said water and the location and improvement of said land, abandoned or given up the same, but continued to use and apply said water upon said land, and have continued to occupy, live upon, cultivate, and improve the said land. (6) The court doth further find that the said defendants, from the time of the diversion and appropriation of said water, have continued, with diligence, from year to year thereafter, to cultivate, improve, and apply the water from said ditches to said land, and that during the irrigation season it required all of the water originally appropriated by said defendants for use in the cultivation of their said lands. (7) The court doth further find that the grantors of the complainants herein also went upon the said stream in the year 1888, and located upon certain lands, and took out a ditch as mentioned and described in the bill of complaint herein; that the grantors of the complainants took up certain lands, and sought to apply the water so diverted from said ditch to the cultivation and improvement of said lands. (8) The court doth further find that the appropriation and diversion of the water, so made by said complainants' grantors in the year 1888, was made subsequent to the time of

the diversion, appropriation, and application of the water of said stream to a beneficial use by the defendants herein, and as made subject to any rights which the defendants herein had acquired to the waters of said stream. * * * (10) The court doth further find that the said complainants have no right to the use of the waters of said stream for irrigation, agricultural, or domestic use, as against the defendants herein."

Under the pleadings, the effect of the decree rendered by the court is to deny to complainants the right to the use of any of the water of the Rio Hondo; and as the court will take judicial notice of the fact that the lands in question cannot be successfully cultivated without irrigation, and as there is no other stream or source of water supply shown to be available for the irrigation of those lands, it follows that, if the complainants are denied the use of any of the water of that stream, cultivation of their lands (which the answer admits, and the court finds that to be a fact) must cease, the lands become practically worthless, and rights formerly enjoyed by them taken from them. In this view of the case, we have examined the record with care, and have arrived at the conclusion that the court below erred, in a reversible degree, as a result of a failure to observe the distinction between a diversion and appropriation of water, which led the court in this case to determine the rights of the parties according to priority of diversion, rather than priority of appropriation to a beneficial use. Diversion is one of several elements necessary to a legal appropriation of water, and, while a valid appropriation may follow immediately upon the diversion of water from a stream by reason of concurrence of the other necessary elements, it is still but an element of that appropriation, and is not equivalent to it. Water may be diverted from a stream, and still not be appropriated. It is only when diversion is accompanied or followed by application to some beneficial purpose that the water is appropriated so as to prevent a subsequent appropriator from acquiring a right to its use. It is not the capacity of the ditch, merely, that determines the appropriation of water. It is the amount actually applied to a beneficial use that is appropriated, within the meaning of the law. It is clear that the law of prior appropriations governs in this territory, and water rights must be determined by it. In 1876 the legislature enacted a law which provided: "All currents and sources of water, such as springs, rivers, ditches and currents of water flowing from natural sources in the territory of New Mexico, shall be and they are by this act declared free." Comp. Laws 1897, § 52. By this act private ownership of water in the public streams of the territory was prohibited, and a right to the use of such waters for beneficial purposes

was given to those who appropriated and applied them to such uses. In 1863 congress enacted a law which, in part, provided, "Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same." Rev. St. § 2339. In 1877 an act was passed by congress for the sale of desert lands, which contained in its first section this proviso (19 Stat. 377): "Provided, however, that the right to the use of water by the persons so conducting the same on or to any tract of desert land of 640 acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public, for irrigation, mining and manufacturing purposes subject to existing rights." In the case of *U. S. v. Rio Grande Dam & Irr. Co.*, 19 Sup. Ct. 770, 43 L. Ed. 1136,—a case decided May 22, 1899,—the supreme court of the United States discusses the law of water rights as follows: "Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all Western states an adoption or recognition of the common law, it was early developed in their history that the mining industry in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands; and there has come to be recognized in those states, by custom and by state legislation, a different rule,—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes." Mr. Kinney, in his able work on Irrigation, says that, to constitute a valid appropriation of water, there must be: "(1) A bona fide intention to apply the water to some beneficial purpose; (2) notice of such intent; (3) diversion of the water from its natural channel by construction of works within a reasonable time; (4) actual application of the water to the land for some beneficial use, with due diligence and without unnecessary delay." Mr. Kinney further says: "An appropriation of waters cannot be constructive, but must be actual. As has been shown, there must be first the bona fide intent to appropriate the waters of a stream, and apply the

same to some beneficial use or purpose. Then, in connection with this intent, there must follow the physical acts necessary to constitute the actual appropriation of the water, which include the notice to the world of the intent, the surveys, and commencement of the digging of the ditches, the building of flumes, or other works necessary, and their completion within a reasonable time after the notice; the actual diversion of the water appropriated from the natural stream into the appropriator's ditch; and finally the actual application of all the water appropriated, and so diverted to some beneficial use or purpose. No one of these acts can stand alone, but all are absolutely essential to the successful and valid completion of the appropriation." *Id.* pp. 246, 247. "The final element necessary to complete the appropriation is an application of all the water attempted to be appropriated to some beneficial use or purpose. Not only must there be an intent to apply the water to some such purpose, but, as the consummation of that intention, it must be actually applied within a reasonable time. * * * The true test as to whether the appropriation is a valid one is the application of the water to some beneficial use or purpose. And any delay for an unreasonable time in its application, or a failure for a time to use the water, if it has once been applied, is competent evidence on the question of abandonment; and, if such nonuse be continued for an unreasonable period, it may fairly create a presumption of intention to abandon." *Id.* pp. 254, 255.

The laws of this territory do not require a written notice of intent, as referred to by Mr. Kinney, and the failure to post such notice would not be fatal. The intent, however, with which water is diverted, it is necessary to gather from some source, in justice to subsequent appropriators, and the absence of the notice may have an important effect in determining the quantity of water sought to be appropriated. The record shows that the only notice given was dated January 14, 1893, and in this notice the Longs and Truxton claimed 100 cubic feet per second; but, as this notice was given long after the rights of both the complainants and defendants had attached, it is of no importance in the controversy. The record in this case is very complete, and the bill of exceptions contains all of the evidence taken at the trial. An examination of this evidence shows that many of the material facts in the case are not disputed. The court finds that the Long-Truxton ditch was constructed in 1885. The evidence shows that in 1884 Capt. Lee employed a man by the name of Danner to dig this ditch from the river to an old Mexican ditch which had been constructed many years before. Danner dug the ditch, and turned the water of the Hondo into it by erecting a dam in the river, and Lee paid him for his work. This ditch was from a quarter to half a mile

long from the river to where it emptied into the old Mexican ditch, and the Mexican ditch emptied into an old dry arroyo, and through the arroyo the waters went back into the river again, above the point where the Perry-Fountain ditch was taken out of the river. In 1885 Leslie M. and Thomas Long and Scott Truxton took possession of this new ditch, also the old Mexican ditch, paid nothing for them, and called it the "Long-Truxton Ditch"; and, the dam erected by Danner in the river having been destroyed, they erected a new dam to turn the water into the ditch. The water was still carried back to the river through the dry arroyo, but in 1886 the Longs and Truxton took out two small ditches running from the large portion of the ditch a distance of about three miles to and upon land which in the meantime the Longs and Truxton had filed upon or entered under the land laws of the United States. These small ditches, which, according to the proof, carried 10 to 12 cubic feet of water per second when constructed, discharged into the arroyo. The surplus water in the large ditch was discharged into the arroyo just below the mouths of the small ditches, and was thus carried back into the river above the mouth of the Perry-Fountain ditch. The court found as a fact that the Perry-Fountain ditch was constructed in February, 1888, as alleged in the bill. In fact, this was admitted in the answer, and the ownership of the land by complainants was not denied by the answer. The evidence fully sustained this finding, there being no conflict of evidence as to the fact of the construction of the ditch, and ownership of the lands by complainants; that numerous laterals were taken out from the main ditch in 1888; that the owners of the land began cultivation of their lands, planting orchards, raising crops, and making valuable improvements thereon. In fact, the answer of Long et al. in terms admits the settlement by Donahoo, Fountain, and Danner upon the lands described in the bill, and their sale and transfer of said lands to the parties named in the bill, and that they did some time within the year 1888 "appropriate from the stream known as the 'Rio Hondo,' in the county of Chaves, certain waters through and by means of a dam and ditch known as the 'Perry-Fountain Ditch.'" In an additional finding the court found that the defendants Long and Truxton in the year 1885 took up 3,000 acres of land under the public land laws of the United States, and that at the time this suit was commenced the defendants had about "twelve hundred acres thereof in use, and had applied water from said ditches to such land and improvements." The evidence in the record wholly fails to sustain this finding. The defendants in their answer allege that they had taken up about 3,000 acres, but the evidence fails to show any such amount. As to the amount of land in cultivation at the time the suit was brought, November 14, 1896, there is no reliable evidence to sustain

the finding of the court below. The evidence shows that there was not more than 200 acres actually cultivated by the defendants Long and Truxton by means of water conducted through the Long-Truxton ditch up to 1890. There was an application of water, and therefore a prior appropriation of water to that extent, by the defendants Long and Truxton. There is evidence, also, that about 1,200 acres was fenced up to 1897, but the evidence fails to show a continuous application of water to the land not actually cultivated. The defendant Leslie M. Long does state that this land was irrigated, but it is evident from the testimony that the facts are that some water was conducted through laterals, and allowed to run over some portions of this land. The amount of land thus covered each year, what tracts of land, or whether the same portions of the land were thus irrigated each year or not, the evidence wholly fails to show. To show that water was conducted upon the land for one or two years does not show an appropriation of water for a period of more than 10 years, which this litigation involves. In fact, the evidence for the plaintiffs is of such a general and indefinite character as to make it impossible to determine anything from it with certainty as to the amount of water that was applied to a beneficial use upon the lands of defendants Long and Truxton, nor upon what tracts of land, nor for what years; and this is to a large extent true as to the cultivated land, also. But the court was warranted in finding that water had been conducted to, and applied to a beneficial use upon, 200 acres which the testimony tends to show had been reduced to cultivation up to the year 1890, when the Perry-Fountain ditch, and many laterals therefrom, had been completed, and were in use by the grantors of the complainants.

The seventh finding of the court is that the Perry-Fountain ditch was second in point of time to the Long-Truxton ditch, being constructed in 1888. The record shows that the complainants in the court below and their grantors upon the completion of the Perry-Fountain ditch took out numerous laterals, began cultivation of their lands, planted orchards, one of which had about 1,600 trees; and in all the complainants had cultivated about as much land as the defendants up to the time this suit was brought, in 1896, except as to the cultivation by Haynes after his purchase. The record further discloses that the complainants and their grantors obtained water from the Rio Hondo through the Perry-Fountain ditch, and cultivated these crops and orchards by the application of it to their lands until 1896, when the El Capitan Orchard Company began using water obtained through the Long-Truxton ditch. In fact, there is no evidence of the construction of any other ditches from the Hondo river. The defendants Haynes, El Capitan Orchard Company, and the Pecos Irrigation & Improvement Company claim under the

Long-Truxton ditch and laterals, as they did not construct a new ditch from the Hondo river. The court made no findings as to the rights of the last above mentioned defendants, or as to when any rights claimed by them attached. The word "defendants" is used by the court in his findings, and this is equivalent to holding that all of the defendants have the same rights against the complainants. Defendant Haynes purchased 160 acres of land from Scott Truxton September 1, 1896, and Haynes testifies that when he purchased the land it was not in cultivation. He further testifies that he constructed four miles of ditch, taking water from the Long-Truxton ditch. Undoubtedly the complainants, owning water rights in the Perry-Fountain ditch, would have a prior right to the use of the water over this defendant, if his ditch was independent of the Long-Truxton ditch; and we are of opinion that the complainants' rights are superior, notwithstanding defendant's assertion of prior rights through the Long-Truxton ditch. This matter, however, will be discussed later. The El Capitan Orchard Company, as the record shows, had no water rights in either the Long-Truxton or Perry-Fountain ditches; but the proof is clear that this company constructed about 15 miles of ditch, and took water from the Long-Truxton ditch. The answer of Long and Truxton denies that they sold the company any rights in their ditch, or the use of water therefrom. Leslie M. Long testifies that the company had no interest in the Long-Truxton ditch, but later on admits that he gave the company permission to take water from the Long-Truxton ditch, as he had a contract to build a ditch for the company. The court below made no finding of fact as to the rights of the company, but in dismissing the bill the court, in effect, awarded the orchard company superior rights to those of the complainants, notwithstanding the company's ditch was not constructed until 1896, and in so doing the court undoubtedly erred. The defendant Pecos Irrigation & Improvement Company secures water through the Long-Truxton ditch by virtue of a purchase and conveyance from Jaffa and Prager, to whom the Longs and Truxton sold and conveyed the right to take water from their ditch. The conveyances from the Longs and Truxton, of which the record discloses three, are dated December 19, 1887; but as they were not acknowledged until July 3, 1891, they did not become effective until the latter date. Prager, however, testifies that he made the purchase in 1889. The record further discloses the fact that the company purchased from the Jaffas and Prager in September, 1896. It therefore appears that the purchase by Prager and Jaffa, and also the purchase by the defendant company, were made after the rights of those owning water rights in the Perry-Fountain ditch had attached,—at least, to the surplus water not beneficially applied by the Longs and Truxton.

The court has examined the record evidence for the purpose of ascertaining the time when the rights claimed by defendants other than the Longs originated, as the court below made no finding of facts as to them; and where the court below fails to find material facts, which, being considered, demonstrate that the decree rendered below was manifestly wrong, this court has the right to consider all such facts disclosed by the record as will enable the court to arrive at a correct and just conclusion. Proceeding, then, to the consideration of the rights of the defendants Haynes, El Capitan Orchard Company, and the Pecos Irrigation & Improvement Company, we find that the court below made no finding as to the sale of water or the use of water to be conducted through their ditch and laterals by the Longs and Truxton, but the record shows a large number of such sales and conveyances, not only to the other defendants, but also to numerous other persons. By a warranty deed dated December 19, 1887, acknowledged July 3, 1891, the Longs and Truxton conveyed to Nathan Jaffa and William S. Prager the right to use and convey, by means of irrigation ditches, all the water carried by the irrigation ditch known as the "Long Ditch"; said water to be from said ditch at a certain designated point. On February 1, 1889, Leslie M. Long conveyed to Jaffa and Prager the absolute right and privilege of tapping his irrigating ditch for irrigation purposes. On March 10, 1891, they conveyed to W. E. Palmer, by warranty deed, a water right in their ditch taken from the Hondo sufficient to reclaim 640 acres of land, which is covered by a ditch tapping the ditch of said Longs; said water right not to interfere with the priority right of the parties of the first part in cases of partial failure of water in the Rio Hondo. On May 10, 1891, they conveyed a similar water right, with similar reservations of priority, to S. M. Folsom, for 615.52 acres of land. On May 20, 1891, they conveyed a similar water right, with a similar reservation, to William P. Metcalf, for 453.52 acres. On January 10, 1892, they conveyed a similar water right to Mark Whiteman, for 610 acres, without any reservation whatever. On November 1, 1892, Long and Truxton, by warranty deed, conveyed to Marguerite M. Long 10 cubic feet of water per second; and on December 1, 1892, they conveyed to Mary L. Wells 5 cubic feet of water per second. On January 26, 1893, Leslie M. Long conveyed all his interest in their ditch and appropriation, for a stated consideration of \$10,000, to C. C. Blodgett. It thus appears that from 1889 to 1893 the Longs and Truxton attempted to convey water out of their ditch sufficient to irrigate 1,710 acres, reserving priority to themselves in case of drought, 640 acres without any reservation, 15 cubic feet of water per second without any reservation, and in addition to this all the water carried by their ditch, without reservation. The intention of

the Longs and Truxton in taking out their ditch was to apply it in the irrigation and cultivation of the lands taken up by them. The answer alleges this specifically, and denies that the water was to be used for stock. The answer does not allege that the water was diverted for the purpose of sale, but does admit that it was sold to be used by others. It is true, the answer avers that the water was sold temporarily for the purpose of enabling certain parties to prove up on desert-land entries, and then revert to the Longs, and Truxton and Leslie M. Long so swear; but reference to the deeds disproves this, as there is no such reservation contained in them; and, as the law requires persons proving up on desert land to swear that they are permanent owners of the water supply with which their lands have been irrigated, it will not be presumed that the parties purchasing these water rights entered into a conspiracy to defraud the government; and Prager, who was a witness, denies that the purchase was temporary, as testified by Long. The answer therefore makes definite the intention of the Longs and Truxton at the time the ditch was taken out. They had taken up about 2,000 acres of public land, and, no doubt, they intended to use so much water as would enable them to make final proof; and, to do this, they would be required to fulfill the conditions upon which the government grants public lands. It must be borne in mind, however, that the desert-land act was the only one which required that water be conducted upon each tract upon which final proof was made. Under the homestead and pre-emption acts, very little cultivation and irrigation, together with residence and improvements, would establish the good faith required to be shown by those laws. So, also, under the timber-culture act, a very small part of the amount entered was required to be cultivated and planted in trees. The entry of lands under those laws, therefore, does not establish an intention to beneficially apply water diverted to the entire tracts entered, but, rather, an intention to comply with the laws under which the lands were entered, which in this case the record shows to have been homestead, pre-emption, timber-culture, and desert-land laws.

The action of the parties shows that the water was diverted by the Longs and Truxton for use upon their own lands, as they began to cultivate small portions of their land in 1886, and continued to do so until 1889, when the first sale of water took place as testified by Prager. The Perry-Fountain ditch was using water from the Hondo when the Longs and Truxton began selling the water and rights in their ditch to other parties. The record shows that, when Mr. Donahoo and others were about to take out the Perry-Fountain ditch, they went to Leslie M. Long, who was managing the Long-Truxton ditch and interests, and asked if they could have water not used by the Longs and

Truxton. Mr. Donahoo testifies as follows: "Q. Do you remember what Mr. Long said? A. Told us we could have the water any time he was not using it, and when there was more water than he used we could have the water. Q. With that understanding, you went on and took out your ditch and your laterals? A. Yes, sir. Q. He made no objection to your taking the ditch at all? A. None whatever." Long substantially admits this in his testimony, and, as this conversation occurred before any water was sold by the Longs, it is clear that it was the intention of the parties that the Perry-Fountain ditch was second only to the use of the water by the Longs and Truxton, and certainly to the surplus water. That there was a large quantity of water unused by the Longs and Truxton is clearly proven by these numerous sales of water, but it is also shown by the fact that the owners of the water rights in the Perry-Fountain ditch, the complainants and their grantors, cultivated portions of their land from 1889 until 1896, when this suit was commenced, by means of water caused by the Longs and Truxton, and which flowed back into the Rio Hondo above the mouth of the Perry-Fountain ditch. The orchard of about 1,600 trees was grown, and complainants testify that they had about 340 acres in cultivation when the suit was brought, in 1896. Undoubtedly, therefore, the complainants and their grantors diverted and made a beneficial use of the water caused by the Longs and Truxton from the time of the completion of the Perry-Fountain ditch until the suit was brought, and prior to its use by any of the persons to whom the water had been sold. This complainants had a legal right to do, and their appropriation of so much of the waters of the Rio Hondo as was applied to a beneficial use by them upon their lands prior to an appropriation by defendants Haynes, El Capitan Orchard Company, and the Pecos Irrigation & Improvement Company constitutes a valid prior appropriation as against the last-named defendants; and in dismissing the bill as to those defendants the court below committed error, to correct which this cause must be reversed.

These defendants assert the right of priority by virtue of these sales and purchases of water on the ground of the appropriation of the Longs and Truxton. In the brief of counsel for the defendants it is contended that the defendants Long and Truxton have a legal right to sell water as they did, because they had a prior appropriation of all the water of the Rio Hondo during the irrigation season, and the court below, as a matter of law, sustained this contention; but as this conclusion of the court is not based upon diversion and application to a beneficial use, both of which are necessary to a legal appropriation, it was erroneous. The diversion of the water in this case was in fact simply turning the waters of the Rio Hondo into a new channel.

The Longs and Truxton took possession of a large ditch constructed by others, which, having been washed out, was of sufficient capacity to carry all of the water of the stream into an old Mexican ditch which had been constructed many years before, and from this old ditch the water was returned to the Hondo above the Perry-Fountain ditch through an arroyo. The Longs and Truxton erected a dam in the Hondo, thus changing the channel of the stream; but this did not constitute an appropriation, except to the extent that the water was conducted upon the lands and used for some beneficial purpose. The Longs and Truxton had a perfect right to change the channel as they did, as it did not interfere with the prior rights of others, but all the water of the stream did not belong to them by this diversion alone. Under such a construction of the law, the first person who diverts the water from the stream may have a monopoly of all the water of any stream by simply making this ditch large enough to conduct it from the usual channel. There need be but one appropriation, and all other settlers upon such stream must pay tribute to the person making the first diversion. This is not the law governing water rights in this territory, where the waters of natural streams are declared to be free to those who apply them to a beneficial use, until all are thus appropriated. Mr. Kinney, in his work on Irrigation, has this to say on this subject: "Under the later decisions relative to the capacity of the ditch being the limit of the extent of the appropriator's rights in and to the waters of a stream, it is held to be against the general policy of the entire modern system of the doctrine of appropriation, that the greatest good shall accrue to the greatest number. For, if this was the law upon the subject, a person might lay claim to the water of whole rivers for the ostensible purpose of irrigating immense tracts of land, which with the utmost diligence would take years to accomplish; and, although others might intervene and attempt to appropriate the water of a stream, they could only lay claim to it for a temporary period of time, and until the works of the first appropriator were eventually completed, and they would then be deprived of their appropriation." Thus would the way for speculation and monopoly be opened, and the main object of the law defeated. It is apparent that the Longs and Truxton assumed the right to sell the water of the river simply because it ran through what they claimed to be their ditch, and not because the same was appropriated upon their lands. These sales of water were not only in violation of the understanding between the Longs and Donahoo and others who constructed the Perry-Fountain ditch, but it was contrary to the law governing water rights in this territory, except to the extent to which the Longs and Truxton had made a valid appropriation. That the use of water held by virtue of a valid prior appropriation

is the subject of sale and conveyance is undoubtedly true, but the Longs and Truxton had no right to sell and convey the surplus water of this stream after the rights of complainants and their grantors attached by a valid appropriation through the Perry-Fountain ditch in 1888 and 1889, nor had the parties purchasing after such appropriation any right to interfere with it. The Longs and Truxton had a perfect right to sell their own water rights to the extent of their valid appropriation, but they could not sell and retain the water at the same time. If they sold their water rights, or any part of them, such sale was an abandonment of their right to the use of the water sold, and the purchaser succeeded to their rights to the extent of the purchase. The conveyances show that the Longs and Truxton sold the rights to use water on more land than the grantors ever claim to have applied water upon, continuously or otherwise; that is, about 1,700 acres. This water was sold for a money consideration, and, except to the extent of the 200 acres in cultivation, it was pure speculation and illegal so far as it interfered with the appropriators of water through the Perry-Fountain ditch, the complainants in this case.

It is difficult to understand how the court below arrived at the conclusions stated in the sixth finding of fact, as the evidence wholly fails to sustain the finding. "(6) The court doth further find that the said defendants, from the time of the diversion and appropriation of said water, have continued with diligence from year to year thereafter to cultivate, improve, and apply the water from said ditches to said land, and that during the irrigating season it required all of the water originally appropriated by said defendants for use in the cultivation of their said lands." That the cultivation of additional land, and application of water thereon, were not carried on with diligence and in good faith, appears from the evidence of defendant Haynes. He testifies that he purchased his land from Truxton in 1896, and that at that time there was no cultivation upon it; that he reduced 160 acres to cultivation. He testifies that there were only about 300 acres of the Long-Truxton land in cultivation at that time, including his own. Deducting his 160 acres from that amount leaves only about 140 acres of the Long-Truxton land in cultivation in 1896,—a less quantity than in 1889, a period of six or seven years. It thus appears that when the Longs and Truxton began selling water they practically ceased to reduce any additional land to cultivation or apply water thereto. This shows both a want of diligence and an unreasonable delay in appropriating water to additional land after 1889, which would authorize the appropriation of water unused by the Longs and Truxton by the complainants, and the intention of those defendants to sell, rather than apply water to their own lands, is clearly manifest after

1889. The further fact that the complainants and their grantors received water through the Perry-Fountain ditch, and cultivated land and orchards by the use of it, shows that the Longs and Truxton did not use or require all of the water as stated in that finding. The evidence shows that complainants' supply of water did not fail except at short periods when the river was dry or very low, until Leslie M. Long turned the water into the El Capitan Orchard Company's ditch in 1896, and this action caused the complainants to bring the suit. From what has been said, it is manifest that the rights of complainants were being invaded and interfered with by the defendants, and that the conclusion and decree of the court were clearly wrong, in denying the complainants any relief whatever against any of the defendants. The decree of the court below cannot be sustained upon the record, and the ends of justice require its reversal. The complainants request this court to finally determine and settle the rights of the complainants in this court, but we are unable to do so upon the evidence submitted, as it is of such an indefinite character, especially as to the quantity of land cultivated, and to which water was actually applied by either the complainants or defendants, that we are unable to ascertain with certainty what the rights of the parties were at the time the suit was brought. The interests of justice will be subserved by remanding this cause for a new trial, that more specific evidence may be produced, from which the rights of parties may be determined with certainty. There is another reason which, in our judgment, requires remanding of this cause. The lands claimed by the defendants were public lands, and the record fails to show that final proofs were made thereon, so as to invest title in the defendants Long and Truxton. Unless this proof was made, these lands have reverted to the public domain, and the defendants would be without rights to water upon those lands. Additional proofs will determine this, and such proof should have been produced on the former hearing of this cause. The decree of the court below will be reversed, and the cause remanded for a new trial, with directions to the lower court to require more specific evidence upon which to base a decree defining the rights of the parties herein.

MILLS, C. J., and PARKER and CRUMPACKER, JJ., concur.

(10 N.M. 257)

CRARY v FIELD et al.

(Supreme Court of New Mexico. May 3, 1900.)

APPEAL—REVIEW—COMMUNITY PROPERTY—
SALE BY SURVIVING HUSBAND.

1. The former decision of this court in this case, upon substantially the same evidence, is the law of the case, and will not be reviewed.

2. Where a husband remained in undisputed possession of community real estate from the

death of his wife, in April, 1868, until 1882, when he sold the same without objection to a bona fide purchaser for value, the law will presume that the sale was lawfully made, and this presumption will prevail to protect the title of such purchaser, whether there were community debts at the death of the wife or not, in a suit by the heirs of the wife.

(Syllabus by the Court.)

Appeal from district court, Bernalillo county; before Justice J. W. Crumpacker.

Action by Neill B. Field, executor, and others against Hattie E. Crary. Judgment for plaintiffs, and defendant appeals. Reversed.

Childers & Dobson, for appellant. F. W. Clancy, for appellees.

McFIE, J. This case is now before the court for the second time. The former trial in the court below resulted in a judgment in favor of the plaintiffs, appellees in this case, and the defendant, Hattie E. Crary, sued out a writ of error to this court. This court heard the case upon its merits, as shown by the testimony and briefs of counsel, and on the 2d day of October, 1897, filed an opinion reversing and remanding the cause. 50 Pac. 342. Upon the second trial in the court below, the testimony taken at the former trial was admitted as evidence, by agreement, and the appellees here introduced but one additional witness, Nicolas Lucero, and the court, who tried the case without a jury, rendered judgment for the appellees in this court. Hattie E. Crary, the appellant, appealed from this decision, brought the record here, and upon the hearing it was agreed that the record and briefs used in this court on the former hearing should be made a part of the record at the present hearing.

There is one point in this case upon which counsel seem to agree, and that is that the former decision of this court, if upon substantially the same evidence, so far as it states the law, is the law of this case, and will not be reviewed by the court at this hearing. The appellees admit this to be the general rule of law, but contend that the evidence in this record is substantially different, and that where such is the case the rule of law above stated is not applicable. The rule of law above referred to (and which seems to be the settled law) is fairly stated in the case of Phelan v. City and County of San Francisco, 20 Cal. 45, as follows: "A previous ruling by the appellate court upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits. But in the case in which it is made it is more than authority; it is a final adjudication, from the consequence of which the court cannot depart nor the parties relieve themselves." The supreme court of Vermont, in the case of Stacy v. Railroad Co., 32 Vt. 552, in stating this rule and giving some of the reasons for adhering to it, says: "The rule has long been established in this state, often declared from the bench, and

we believe uniformly adhered to, that in the same case this court will not revise nor reverse their former decisions. If all questions that have ever been determined by this court are to be regarded as still open for discussion and revision in the same cause, there would be no end to their litigation, until the ability of the parties or the ingenuity of their counsel was exhausted." Briefly stated, the facts are that Clara Candelaria was the wife of Miguel Montaño in 1862, when Montaño acquired title by deed, and thus brought into the marriage community the real estate which is the subject of this suit. Clara died in April, 1868, leaving five children, the issue of such marriage, and Miguel Montaño, her surviving husband. Miguel Montaño was appointed, and on the 26th day of April, 1868, qualified as administrator of the estate of his deceased wife. The record is silent as to any further proceedings by the administrator. Montaño remained in possession of the community property without objection, continuously, until the 27th day of January, 1882, when he conveyed a part of the property to one C. W. Lewis, and on the 2d day of October, 1883, he sold another portion of the property to Casiana Montaño De Sanchez, who was one of the children of Miguel Montaño and wife. Casiana Montaño De Sanchez became the wife of Nicholas J. Sanchez, and in 1891 they brought the original suit against the appellant and her husband, who succeeded to the Lewis title, to recover possession of an interest claimed by her (Casiana) as an heir to her mother's estate. Casiana and her husband both died while the original suit was pending, leaving a minor child, James Sanchez, as their sole survivor. Upon suggestion of the death of the plaintiffs being made, the suit was revived in the name of Neill B. Field, executor of the estate of Casiana, and an order was made authorizing the executor to prosecute the suit as guardian and next friend of James Sanchez. The above facts are equally applicable to the present, as well as the former, case, and upon these facts this court in its former decision declared the law of the case to be as follows: "It appears that Miguel Montaño qualified as administrator of the estate of his wife on the 26th day of April, 1868, and that he remained in possession of the community property, without interruption or objection, continuously from that date until January 27, 1882, when he conveyed a part of the property to one C. W. Lewis, and that on the 2d day of October, 1883, he parted with another portion of the property by deed to Casiana Montaño De Sanchez; but it is not shown in either case in which capacity he was such grantor, nor does it seem material whether he acted as survivor or administrator, as the presumption must be that he was realizing for the purpose of discharging the community debts. If he acted as survivor, his right under the civil law was indisputa-

ble; and, if as administrator, he was duly authorized, and his transfer of title was valid. That it is not shown of what the community property consisted, that it is not shown that the portion of it sold was for the discharge of the community debts, cannot affect or destroy the rights of the bona fide purchaser for value. If Montañó were abusing his trust as survivor, he should have been restrained by those whom he was wronging; and, if he were exceeding his authority as personal representative, redress should have been sought upon his bond. That Casiana Montañó De Sanchez recognized the right of her father to sell the community property is manifest; that she became purchaser of a part of it from him is not less true; and that this action of hers, and the payment of purchase money by her, indicates her approval both of the propriety and power of his conduct, in connection with her sisters, of converting a part of the same property into cash, may be logically claimed; and that she was cognizant that the proceeds were rightly used, either in the payment of the debts of the community, or in the distribution among the parties entitled, may be fairly inferred from her failure for many years to assert any antagonistic right in the premises." After quoting from numerous authorities to sustain the position announced, the court concludes as follows: "That the Spanish law, as heretofore announced, as to the property rights of married persons, prevailed in 1868 in the territory of New Mexico, is our conclusion, and that its application to this case is consonant with justice seems palpable. It does not appear that the property involved was not sold for an adequate consideration to pay the community debts. It is not pretended that there was any collusion or fraud in the disposition of it by Montañó, or that the contract value was not paid. It does not appear that the proceeds were not properly applied. It is not shown that if Clara Candelaria did not receive a proportion of the said proceeds, even if sold for partition, the community estate has been so administered and distributed that she cannot procure her share of it without damage to an innocent purchaser; nor is it shown that, if she has been deprived of her rights, she cannot secure redress upon the bond of the administrator. The presumptions of the law, not having been repelled, must be applied, and they seem to preclude a reasonable doubt that the title of the plaintiff in error is paramount, and must be sustained." *Crary v. Field* (N. M.) 50 Pac. 342.

It is clear from the record that upon the second trial of this cause in the lower court appellees proceeded with the case upon the theory that it was sufficient for them to show that no community debts existed at the death of Clara, in 1868, and therefore but one additional witness was produced upon the trial, and by him it was attempted to be established that there were no such debts. If it were

true that it was only necessary for appellees to show this, it is extremely doubtful whether the testimony of the witness Nicolas Lucero rises to the dignity of proof, or establishes anything on this point. There is absolutely no certainty about his testimony. He states, for instance, as to how much land was sold for: "I do not remember very well, but it seems to me they paid about \$2,500 or \$2,000." As to how much his wife received, he states: "It seems to me about \$350,"—while the consideration in the deed is \$312. Asked whether or not the land was sold to pay debts, he answers: "I believe it was not for the purpose of paying any debts. I think it was a good bargain, and he sold the land." He then swears that he never knew of any debts they owed. On cross-examination the witness was asked by the court if his father-in-law, Miguel Montañó, paid any money on debts which existed at the time his wife died, and to this he answered: "I know nothing of my own knowledge whether he owed debts or not at that time. He may have owed some. He never told me. He never communicated with me about them." It is apparent from this testimony that the witness had neither knowledge nor information as to whether community debts existed at the death of the wife or not. At best, it would be but an inference, and it would seem highly improper to unsettle titles of long standing to real estate upon testimony of such doubtful character as this. The legal presumption should prevail, where it has the effect of quieting title, over uncertain and unreliable evidence to unsettle such title, and especially should this be so where the title involved is that of a bona fide purchaser for value, as in this case.

But if the testimony offered established the fact that no community debts existed at the death of the wife, it would make no difference in this case, as the former decision of this court has declared the title of appellant not to be subject to attack in this way. This court has declared, as the law of the case: "That it is not shown of what the community property consisted, that it is not shown that the portion of it sold was for the discharge of the community debts, cannot affect or destroy the rights of the bona fide purchaser for value." *Crary v. Field*, 50 Pac. 342. The court then proceeds to define the remedy of the appellees for any supposed wrong done by the sale of the land by Montañó, as follows: "If Montañó were abusing his trust as survivor, he should have been restrained by those whom he was wronging, and, if he were exceeding his authority as personal representative, redress should have been sought upon his bond." It will be seen, therefore, that the court in its former opinion sustains the title of appellant, without regard to whether there were community debts or not, and, in effect, declares that where the title is that of a bona fide purchaser for value, and of many years' standing, it is not sub-

ject to the attack made upon it, where the parties failed to invoke the legal remedies open to them at the time the supposed injury was done.

The additional testimony offered upon the second trial did not substantially change the evidence upon which the first decision in this case was rendered, and therefore the law of the case remains the same. It follows from this conclusion that the court erred in rendering judgment for the plaintiffs in the court below, but should have rendered judgment for the defendant for costs. The judgment of the court below is reversed, and the cause dismissed, at appellees' costs.

MILLS, C. J., and PARKER, J., concur.

(10 N. M. 47)

ORANGE COUNTY FRUIT EXCHANGE v. HUBBELL.

(Supreme Court of New Mexico. May 2, 1900.)
WITNESS—CROSS-EXAMINATION—BILL OF LADING—APPEAL.

1. The limitation of cross-examination is a matter which rests in the sound discretion of the court, and unless there is manifest abuse of such discretion the higher court will not reverse the ruling of the trial court.

2. A bill of lading *prima facie* vests the ownership of goods shipped in the consignee, unless the contrary is shown, either in the bill of lading itself, or by some extrinsic evidence.

3. Where an appellee does not except to the amount of the judgment, the appellant cannot take advantage of it by exception and appeal, even if it is erroneous, as the ruling is in his favor.

(Syllabus by the Court.)

Appeal from district court, Bernalillo county; before Justice J. W. Crumpacker.

Action by the Orange County Fruit Exchange against Thomas S. Hubbell. Judgment for plaintiff, and defendant appeals. Affirmed.

Alonzo B. McMillen, for appellant. R. W. D. Bryan, for appellee.

MILLS, C. J. This is an action of trespass begun in the district court of Bernalillo county on the 6th day of July, 1896. The declaration alleges that on the 7th day of April, 1896, the defendant converted to his own use a car load of oranges, of the value of \$1,000, the property, goods, and chattels of plaintiff, and prays judgment for \$1,200. No exemplary damages are claimed. The defense is the general issue. A jury was waived, and the cause was tried by the court, who gave judgment for the appellee (the plaintiff below) for the sum of \$586.35.

Eight errors are assigned by the appellant, the first five of which relate to the rulings of the court in sustaining objections to the admission of certain evidence. The sixth and seventh assignments raise the question of the sufficiency of the evidence to warrant a judgment for the plaintiff, and the eighth seeks to attack the legality of the judgment of the trial court under his findings.

From the consideration of the record, which is not voluminous, it will be observed that exceptions as to the admissibility of evidence all relate to the rulings of the court on the cross-examination of the witness McKinley, who was called by the plaintiff. We have carefully examined the several objections to the admission of the evidence. The first relates to the amount of the paid-up capital of the Orange County Fruit Exchange, and by the last the attorney for the appellant seeks to ascertain whether or not there was an agreement among the subordinate fruit exchanges in California that no schedule of prices or quotations of prices should be issued by them. The other objections, as shown by the record, are as follows (the witness having sworn on direct examination that the oranges belonged to the appellee): "Q. Do you know to what particular person they belonged at the time they were shipped through the medium of this exchange? (The plaintiff objects, and the court sustains the objection, and defendant duly excepts.) Q. What is the relation of the growers to this organization, on which you base your opinion as to the ownership of the property in dispute by the plaintiff? (The plaintiff objects. The court sustains the objection, and defendant duly excepts.) Q. When or how did the plaintiff become the owner of this car of oranges? The Court: Objection is sustained to that, Mr. McMillen. (Defendant excepts.)" These are all of the objections saved, and we do not find reversible error in these rulings. It is a rule of very general application that the extent to which a witness may be cross-examined is ordinarily a matter of discretion with the presiding judge, to which no exception lies (*Brumagim v. Bradshaw*, 39 Cal. 24; *Thornton v. Hook*, 36 Cal. 223; *Stewart v. People*, 23 Mich. 63), and unless there is manifest abuse of such discretion the higher court will not reverse the ruling of the trial court in cross-examination (8 Enc. Pl. & Prac. 110; *Spear v. Sweeney*, 88 Wis. 545, 60 N. W. 1060). "It is enough to say that upon the cross-examination much must be left to the discretion of the judge." *Steele v. Aylesford*, 18 Conn. 253. Some courts go so far as to hold that "when the court sustains an objection to a question asked on cross-examination, and the party has the opportunity to call the witness and ask the question on examination in chief, the exclusion of the question will not be considered harmful error." *Bonnett v. Glatfeldt* (Ill. Sup.) 11 N. E. 250. We do not, however, at the present time, lay down this doctrine as the law of this territory.

As to the sixth and seventh assignments, it is true that the bill of lading offered in evidence shows that the car load of oranges was consigned to the Southern California Fruit Exchange; and it is also true that, in law, a bill of lading vests the ownership of the goods shipped in the consignee, unless the contrary is shown, either in the bill of lading

itself, or by some extrinsic evidence. The Sally Magee, 3 Wall. 457, 18 L. Ed. 197. At the time the car load of oranges, the value of which is in controversy in this case, was attached as the property of the Southern California Fruit Exchange (Fruit Exchange v. Stamm [N. M.] 54 Pac. 345), notice was given to the appellant herein, by a telegram from that company, that they were not their property, but belonged to the Orange County Fruit Exchange; and this latter company gave notice by wire that they would sue for their value if they were taken on attachment; and the railroad company which was transporting them to their destination also informed the appellant, in writing, that they had been "informed by the Southern California Fruit Exchange that they were not the owners of the oranges which you have attached, the same being the property of the Orange County Fruit Exchange." On the trial the witness McKinley, on direct examination, testified that the oranges were the property of and belonged to the Orange County Fruit Exchange. This testimony is not contradicted, and is ample evidence to show who was the real owner of the fruit, and to controvert the prima facie proof made by the bill of lading. There can, in any event, be no doubt but that the evidence shows that the plaintiff had a special ownership in the property, which would authorize it to sue a trespasser. It has been so often decided by this court that the findings of fact of a master or referee will not be disturbed by this court unless it is manifestly wrong, that it is stare decisis; and we have held at the present term that the findings of fact of a court which tries a case without the intervention of a jury are entitled to as much consideration as, if not more than, the findings of a master or referee. *De Baca v. Pueblo of Santo Domingo* (N. M.) 60 Pac. 73.

This leaves us only the eighth assignment of error to consider. The appellant contends that the court, having ruled that the measure of damages was the amount for which the goods sold at sheriff's sale at Albuquerque, to wit, \$520, erred in giving judgment for that sum, with interest, as the evidence showed that the defendant (the appellant) had paid the railway company for freight \$272.14, which was owing out of the money he received from such sale, and that the difference between the freight and the sum for which the oranges sold, or \$247.86, and interest, should be the amount of the judgment if any at all was given. As heretofore stated, the complaint shows that no special damages are claimed, and where special damages are not claimed the general rule of law is that for the "destruction of personal property, so that the owner is wholly deprived of it, he is entitled to recover its value at the time of the trespass, and interest from that time. This is the measure of damages for the entire loss of property." 5 Am. & Eng. Enc. Law, p. 39, and numerous cases cited. This court has chan-

ged this rule somewhat, and has decided in the case of *Cunningham v. Sugar* (N. M.) 49 Pac. 910, that "in all civil actions, whether ex contractu or ex delicto, * * * the person injured shall receive a compensation commensurate with his loss or injury, and no more." The value of the property in the nearest market is usually the measure of the plaintiff's damage. *Brown v. Allen*, 35 Iowa, 306; *Coolidge v. Choate*, 11 Metc. (Mass.) 79; *Starkey v. Kelly*, 50 N. Y. 677. And it is held in an Indiana case that, where the property is sold by the trespasser, the plaintiff is not limited in his recovery to the amount for which it was sold. *Smith v. Zent*, 83 Ind. 86. There is nothing in the record to show that Albuquerque was a market where car-load lots of oranges could be sold at public auction, or that any had been previously so sold. M. P. Stamm, who attached the oranges in the original suit, and at whose instance they were sold, testified on cross-examination that he bought the oranges; that he started the bidding at \$500, and that a man named Bachecl, who never bought any car-load lots, bid \$510; that he then bid \$520, and got the lot; that no other bids were made at the sale; and that only one other person in Albuquerque besides himself ever shipped in car-load lots of oranges. He further testified that he "did not get out even on them," and therefore did not consider they were worth what he paid for them. On the other hand, the witness McKinley testified that at the time of the sale the oranges were worth in Albuquerque \$602.00, exclusive of freight. We think that under the circumstances of this case the court erred in holding that the measure of damages was what the oranges sold for at the sheriff's sale. We rather think that the court should have been bound by the positive evidence of the witness McKinley as to their value, and that under the evidence the judgment should have been for \$602.00, instead of the amount for which it was given. The appellee, however, does not except to the amount of the judgment, and the appellant cannot take advantage of it by exception and appeal, even if it was erroneous, as the ruling was in his favor. *Bethell v. Mathews*, 13 Wall. 1, 20 L. Ed. 556. There is no reversible error, and the judgment of the court below is therefore affirmed.

PARKER and McFIE, JJ., concur. LE-
LAND, J., absent on account of sickness.
CRUMPACKER, J., having tried the case
below, did not participate in this decision.

(10 N.M. 53)

PUEBLO OF NAMBE et al. v. ROMERO
et al.

(Supreme Court of New Mexico, May 2, 1900.)

APPEAL—REVIEW—FINDINGS BY REFEREE—
ADVERSE POSSESSION.

1. A finding of fact made by a referee is equivalent to the special verdict of a jury, and cannot be disturbed unless the evidence is manifestly insufficient to support it.

2. Uninterrupted, open, visible, notorious, exclusive, and adverse possession for more than 10 years before suit instituted of a tract of land embraced within the pueblo of Nambe, entry being under an alleged deed of conveyance from said pueblo long prior to the act of confirmation by congress of said pueblo's grant, vests a perfect title by adverse possession by virtue of the statute.

(Syllabus by the Court.)

Appeal from district court, Santa Fé county; before Justice John R. McFie.

Action by Simon Romero and others against the pueblo of Nambe and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Benjamin M. Read and George Hill Howard, for appellants. R. C. Gortner, for appellees.

CRUMPACKER, J. This cause was instituted by complaint, seeking to quiet title, and to restrain repeated trespasses, under section 2685, subsec. 33, Comp. Laws 1897. Demurrer and answer were interposed by appellants. The demurrer was overruled, and the cause was referred, by consent, to a referee, who reported his conclusions of law and findings of fact. Appellants' exceptions to the report being overruled, final judgment was entered in favor of appellees by the court below. The pueblo of Nambe, being the owner of a league of land in Santa Fé county, as is shown by the referee's report, assembled on April 8, 1854, in public meeting, when an instrument alleged to be the fee-simple deed of the corporation of the pueblo of Nambe was there drawn, executed, read to all the people, acquiesced in, and publicly acknowledged and delivered. The seisin of the lands described, to the extent of the boundaries named, was delivered, and the vendees, Vicente Lopez and Manuel Romero, entered into open, notorious, adverse possession, built their houses on the cultivable portion of the land, cultivated that part, and occupied the tract, claiming under said instrument. Said vendees occupied these lands for many years. Their children and associates received the said lands from them, and continued uninterruptedly said adverse, open, and notorious possession, claiming under said instrument adversely to, and in the eyes of, the Indians of the Nambe pueblo. As evidencing that possession, mesne conveyances appear in evidence, showing the occupation, claim, ownership, and possession of said parties down to and including appellees.

It is argued by appellants' counsel that the fee of the land in controversy, being a tract within the ancient pueblo of Nambe, was, prior to the confirmation of said pueblo's grant, on December 22, 1858, not vested in said pueblo, but in the United States, and that said pueblo, therefore, could not, by deed in 1854, have conveyed the same. The question as to in whom or in what authority the fee of an Indian pueblo grant in New

Mexico was vested prior to confirmation of such a grant seems to have been settled by the supreme court of the United States in the case of *U. S. v. Joseph*, 94 U. S. 614, 24 L. Ed. 295, wherein that court held, in discussing the character of the tenure by which these communities hold their grants, that "the Pueblo Indians hold their lands by a right superior to that of the United States. Their title dates back to the grant made by the government of Spain before the Mexican revolution,—a title which was fully recognized by the Mexican government, and protected by it in the treaty of Guadalupe Hidalgo, by which this country and the allegiance of its inhabitants was transferred to the United States." This view of the law is abundantly sustained by the same court in the report of the recent case of *U. S. v. De La Paz Valdez De Conway* (decided Oct. 30, 1899) 20 Sup. Ct. 13, Adv. S. U. S. 13, 44 L. Ed. —, wherein is discussed the effect of the confirmation of the title of the grant of the pueblo of Nambe in its relation to the United States. But the view we take of this case renders unnecessary the determination of this question, as well as of the character of the instrument under which appellees' predecessors in title went into possession in 1854. The referee has found, as matter of fact, that the appellees, for considerable more than 10 years immediately preceding the institution of their suit, had been, in their relation to appellants, in open, notorious, exclusive, visible, and adverse possession of the tract in controversy. It may therefore be immaterial by what right or title the original entry was made; but the referee has found the further fact that appellees, or their predecessors in possession and title, went into possession of the tract under that certain instrument (alleged by appellees to be a deed in fee simple) in 1854, and held the premises so continuously adversely to appellants from that day to the time of instituting suit. The evidence contained in the record touching these findings is conflicting. But the referee's findings thereon are equivalent to the special verdict of a jury, and cannot be disturbed unless the evidence is manifestly insufficient to sustain it. Section 2685, subsec. 155, Comp. Laws 1897; *Givens v. Veeder* (N. M.) 50 Pac. 316; *Wells, Fargo & Co.'s Express v. Walker* (N. M.) 54 Pac. 877; *Medler v. Opera House Co.*, 6 N. M. 331, 28 Pac. 551. A careful review of the testimony is convincing that the facts found by the referee are warranted by the evidence. The adverse possession here shown was sufficient to vest in appellees a perfect title to the premises by virtue of the statute. Section 2638, Comp. Laws 1897.

This conclusion disposes of the case, and it is unnecessary to consider further assignments of error; that assigned to the overruling of the demurrer to the complaint, upon the ground of misjoinder of causes of action,

being not well taken. Section 2685, subsec. 33, clearly authorizes such joinder. The judgment of the court below is therefore affirmed.

MILLS, C. J., and PARKER, J., concur.

(10 N.M. 90)

LIVERPOOL & L. & G. INS. CO. v.
PERRIN et al.

(Supreme Court of New Mexico. May 3, 1900.)

NEW TRIAL—NEGLIGENCE OF ATTORNEYS—
APPEAL—REVIEW.

1. The neglect of attorneys of record to pursue and follow up the cases pending in courts of record wherein they appear of record as attorneys in certain cases, by reason of which neglect default judgment is rendered against one of their clients, is not a ground for a new trial.

2. The granting of a new trial being largely in the discretion of the trial court, a reviewing court will not disturb the ruling of such trial court on the question of granting a new trial unless a clear case of an abuse of the judicial discretion is made out, or palpable error is apparent on the face of the record.

(Syllabus by the Court.)

Error to district court, Bernalillo county; before Justice N. C. Collier.

Action by Martin Perrin & Co. against the Liverpool & London & Globe Insurance Company. This cause comes into this court on error to the district court of Bernalillo county. Plaintiff in error seeks to have a default judgment of the lower court reversed because of alleged error committed by the lower court in refusing to vacate and set aside its such default judgment. Plaintiff below recovered a default judgment against defendant below in a proceeding in garnishment for the sum of \$344.66, together with costs. Defendant below first filed a motion for a new trial, which motion was heard and overruled by the trial court. Then a motion for a rehearing on the motion for a new trial was heard, and this motion was overruled. Affidavits and counter affidavits were heard by the court in the hearing of the motion for a new trial. To reverse these various rulings and judgment of the court, defendant prosecutes error. Affirmed.

Warren, Fergusson & Gillett, for plaintiff in error. R. W. D. Bryan, for defendant in error.

LELAND, J. Defendant in error has filed a motion herein to dismiss the writ of error in this case, as it contends, pursuant to the provisions of subsections 172 and 173 of section 2685 of the Compiled Laws of 1897. We can find no language in either of those subsections that we think would warrant this court in such a ruling. Those sections are remedial, and very broad language is used by the legislature in their construction, and the rule that all remedial laws shall be liberally construed will not be departed from in this case. Therefore the motion to dismiss the writ of error is overruled and dismissed, and

the case retained in this court to be decided on its merits.

Plaintiff in error sets out four specific assignments of error, which are as follows, to wit: "(1) The court erred in allowing defendant in error to take a default against plaintiff in error at the time said judgment was taken and allowed. (2) The court erred in refusing to set aside the default against plaintiff in error. (3) The court erred in refusing plaintiff in error a new trial of this case. (4) The court erred in refusing plaintiff in error a new trial upon its motion for a new trial." For the purposes of this case, there is no reason why we cannot consider all of the above assignments of error as one question. The contention of counsel for plaintiff in error that the particular member of the law firm who had charge of this case was taken by surprise we do not think a valid legal argument in support of a motion for a new trial. In the case of *How v. Bodman*, 1 Dism. 115, a Cincinnati case, the court say that "the mistake, or error, or neglect of counsel are not within the rule. They are acts of the client, and are not sufficient to justify the court in granting a new trial on this ground." The assignment of error apparently relied on by plaintiff in error in its brief "that the court erred in refusing plaintiff in error a new trial of this case" must be determined from the whole record of the case, together with the affidavits and counter affidavits made a part of the record. The judgment below was rendered by the court after it had obtained jurisdiction of plaintiff in error. The rule day to plead had passed, and plaintiff below was clearly entitled to move the trial court for a judgment by default, and there is no error apparent in the record as to the phase of the case. Then the only phase of the case remaining to be determined is, did the lower court err in refusing to grant a new trial on the application and showing made by plaintiff in error? The lower court, having had before it the affidavit of merit of plaintiff in error, together with numerous other affidavits, as well as the affidavit of attorney of defendant in error, overruled the motion for a new trial. The rule by which courts are governed in the matter of vacating default judgments and granting new trials thereon we understand to be substantially as follows, to wit: Where a default judgment has been rendered, and a motion is made by the defendant to vacate such judgment and grant a new trial, the motion must be supported by showing a good and valid existing defense to plaintiff's claim, and a lawful justification for his absence from the court, covering the time of the rendition of such judgment. Because of the fact that the neglect of the attorney is in law the neglect of the client, and the fact that the neglect of the attorney in a case is not a ground for a new trial, the case at bar must be decided without our passing on the merits or demerits of the proposed defense set out in the affidavit

of plaintiff in error, and the case will be determined on the question of neglect of plaintiff in error to pursue his defense. The record discloses the fact that plaintiff in error had an agent and three lawyers employed in the city of Albuquerque, the county seat of Bernalillo county, to look after this business; and in the face of this fact it certainly does not lie in defendant's mouth to complain of surprise in the matter of a default judgment with so many "watchmen on the walls." The granting of a new trial being largely in the discretion of the trial judge, this court will not disturb the rulings of a trial court unless there is a clear case made of an abuse of the discretion or palpable error apparent on the face of the record. We are therefore of the opinion that there is no error apparent on the record, and that the case made by plaintiff in error is not strong enough to warrant this court in reversing the action of the trial court; wherefore the judgment of the district court is affirmed.

MILLS, C. J., and PARKER and McNE, JJ., concur.

(10 N.M. 62)

CEVADA v. MIERA et al.

(Supreme Court of New Mexico. May 2, 1900.)

APPEAL—ASSIGNMENT OF ERROR—WRONGFUL ATTACHMENT.

1. An assignment of error, such as, "The judgment of the court is contrary to the law," is too general, and will not be considered by this court.

2. In a suit for damages by one claiming to be the real owner, for the selling of wool taken on attachment from another person, on a writ issued by a justice of the peace, the trial court properly excluded the question, "Was the sale of the wool published in a newspaper for a period of three-four weeks prior to the date of the sale?" as our statutes do not require such publication, nor is it material, as the real question at issue is, did the wool belong to the plaintiff or to some other person? It is not material to the recovery of damages whether or not the forms of law were complied with, as to the sale of the wool attached.

(Syllabus by the Court.)

Error to district court, Bernalillo county; before Justice J. W. Crumpacker.

Action by Jose M. Cevada against Epimenio Miera and others. Judgment for defendants, and plaintiff brings error. Affirmed.

The record in this case shows that the principal defendant, Epimenio Miera, was a storekeeper in Bernalillo county, and that in the course of trade he sometimes purchased wool; that Jose Jesus Archibeque purchased on credit from the said Miera goods to the value of \$32, and that at the time of said purchase he agreed to turn over to Miera certain wool, which he was going to clip from bucks which he was herding; that on June 10, 1897, the wife of Archibeque went to the store of Miera, and got from his clerk five empty wool sacks, telling him that they were to be used to pack the wool clipped from the bucks,

which was to be delivered to Miera; that no charge was made for the sacks, as it was understood that Miera would get them back when the wool was delivered to him; that the wool was not so delivered, and that on a later day in June the defendant Miera, learning that the wool was being hauled to Albuquerque, sued out a writ of attachment before a justice of the peace of precinct No. 33, Bernalillo county, and levied on 1,069 pounds of wool; that Archibeque was brought before the justice on June 23, 1897, and that he then acted for a continuance until July 17th, which was granted; that, on the 17th of July, Archibeque was twice called, but refused to appear in court, remaining outside; that the plaintiff in error, the son-in-law of Archibeque, was in charge of the wool at the time it was attached, was then examined, and, to use the language of the justice of the peace as disclosed by the record, behaved himself very badly, "trying to belittle the court and the witnesses present there. The court commanded order in the court room, and they took up then with the constable, and they were outside wrangling, and they had a general row there." The justice of the peace sustained the attachment, and on the 9th day of the following August the wool was sold, as being the property of Archibeque. On September 4, 1897, Jose M. Cevada brought suit against the defendants in error, claiming damages. A jury was waived, and the cause was tried by the court, which found in favor of the defendants. Plaintiff duly excepted, and to reverse said judgment sued out a writ of error.

Fergusson & Gillett, for plaintiff in error.
W. C. Heacock, for defendants in error.

MILLS, C. J. (after stating the facts). This case should have never been brought before us for review, not only on account of the small amount involved, but also because of there being absolutely nothing in the record on which to base an appeal. Five errors are assigned. The first is purely formal ("The judgment of the court is contrary to the law"), as it does not point out in what particular such judgment is contrary to the law, and this court has held in the case of *Pearce v. Strickler*, 54 Pac. 748, and in *Schofield v. Territory*, 56 Pac. 306, that such a general assignment of error is not good ground for review.

The assignment that the judgment is contrary to the evidence is not supported by the facts as disclosed by an examination of the record. Such examination shows that the court below had ample testimony upon which to base the judgment. In fact, we think that the weight of the evidence was in favor of the defendants.

The assignment that the court erred in overruling the motion for a new trial is not well taken, as we have heretofore held that the granting or refusing to grant a motion for a new trial rests in the sound discretion

of the court, and is not alone appealable. *Coleman v. Bell*, 4 N. M. (Gild.) 28, 12 Pac. 657; *Buntz v. Lucero*, 7 N. M. 220, 34 Pac. 50; *Schofield v. Territory*, 56 Pac. 306.

The fourth assignment is "that the trial court erred in refusing to allow plaintiff below and in error to prove the time and manner of sale of the property belonging to plaintiff that was attached by the defendant Miera." We can find nothing in the record to sustain this contention of the plaintiff. All of the evidence concerning the manner of sale is that given by the witness Jose E. Romero. The attorney for the plaintiff asked him, "Was the sale of the wool published in a newspaper for a period of three-four weeks prior to the date of the sale?" and, an objection being made, the court, we think, very properly sustained such objection. Our statutes do not require that sales of property made on execution issued from the court of a justice of the peace shall be advertised in a newspaper (Comp. Laws 1897, § 3274), nor, if they did, do we think that this question would have been relevant. The issue in this case is, was the wool attached and sold the property of Jose M. Cevada, or did it belong to some other person? If it belonged to Cevada, and was attached and sold as the property of some one else, then he should recover damages; but, if it did not belong to him, then he should recover nothing. As to whether or not the property attached in the justice court was sold according to law is not material to the determination of the issues in this case.

An examination of the record shows that the court below had ample grounds on which to base the judgment. In fact, we think that the weight of the evidence was in favor of defendants, and we accordingly find that there is no error in the judgment complained of, and the same is therefore affirmed.

PARKER and McFIE, JJ., concur. CRUMPACKER, J., having heard the case below, did not participate in this decision, nor did LELAND, J., who was absent.

(10 N.M. 120)

RUIZ v. TERRITORY.

(Supreme Court of New Mexico. May 3, 1900.)

HOMICIDE—INDICTMENT—INTOXICATION AS DEFENSE—CONSTITUTIONAL LAW.

1. The omission of the word "unlawful" in an indictment for murder in this territory is not a fatal defect where the indictment, as in this case, clearly and distinctly alleges the facts showing a murder by the unlawful killing of a human being with malice aforethought. It is not necessary to use the very words of the statute defining the offense; it is sufficient if those used convey the same meaning.

2. Where, upon a trial for murder, the defense interposed was that the defendant was so grossly intoxicated that he was incapable of forming the necessary intent, the evidence showed that, without provocation, the defendant fired two shots, both of which took effect, killing one and injuring another of three children engaged at play; that the defendant ran away in an at-

tempt to escape, and changed horses after firing the shots. *Held*, that the evidence sustained the verdict of guilty of murder in the first degree, returned by the jury.

3. Where a defendant secures evidence in his favor by an admission that an absent witness would so testify if present, and such evidence is admitted over his objection that he is entitled to have such witness present, *held* not a violation of his constitutional right to face the witnesses testifying against him.

(Syllabus by the Court.)

Error to district court, Bernalillo county; before Justice J. W. Crumpacker.

Jose P. Ruiz was convicted of murder, and brings error. Affirmed.

Summers Burckhart, for plaintiff in error. Edward L. Bartlett, Sol. Gen., for the Territory.

McFIE, J. At the October term, 1898, of the district court of Bernalillo county, plaintiff in error was indicted for the murder of Patricio O'Bannon. Being without means to employ counsel, Mr. Edward Medler was appointed to defend, and upon trial in the district court of Bernalillo county the defendant was convicted of murder in the first degree, and sentenced to be hanged, as the law requires in such cases. The defendant in the court below sued out a writ of error, and brought the case to this court for review. A reversal of the judgment of the court below is sought upon the following grounds, which have been assigned as errors by the appellant:

The first assignment of error is: "The indictment is fatally defective, because it does not charge in words that the killing was unlawful." It appears that the word "unlawful" is omitted from the indictment in this case, but it further appears that other words are used in the indictment which undoubtedly convey the same meaning as the omitted word, and which, in the judgment of this court, made the use of the word "unlawful" unnecessary. The indictment in this case is identical, practically, with the indictment in the case of *Davis v. Utah Territory*, 151 U. S. 262, 14 Sup. Ct. 328, 38 L. Ed. 153, in which case the word "unlawfully" was omitted from the indictment, as in this case. At the time the indictment was returned in the case of *Davis v. Utah Territory*, the statute of Utah defining the crime of murder and the different degrees thereof was also identical with the statutes of this territory defining that crime and the different degrees thereof. In that case the defendant demurred to the indictment on the ground that it did not constitute an offense, and the point made by counsel was that, the word "unlawful" not being used in the indictment, the indictment was, therefore, fatally defective, as the statute defined murder to be "the unlawful killing of a human being, with malice aforethought," and was followed by the definition of murder in the first degree, which definition is identical with our statute. The demurrer being overruled, trial was had, and the defendant was convicted. An appeal was taken to the su-

preme court of the United States, and in passing upon this question that court said: "The first assignment of error relates to the overruling of the demurrer to the indictment. The point here made is that, as murder is defined by the statute to be the unlawful killing of a human being with malice aforethought, it was necessary to charge, in words, that the killing was unlawful. This position cannot be sustained, for the facts alleged present in clear and distinct language a case of unlawful killing. It is not necessary, as we have seen, to use the words of the statute defining the offense. It is sufficient if those used convey the same meaning. The indictment sets forth the case of an assault and battery committed by the defendant willfully, feloniously, and with deliberately premeditated malice aforethought, and resulting in instant death, whereby the defendant did kill and murder, contrary to the statute, etc. Such facts plainly import an unlawful killing." The doctrine announced above is not in conflict with the doctrine announced in the cases of *Territory v. Miera*, 1 N. M. 387, and *Territory v. Armijo*, 7 N. M. 571, 37 Pac. 1117. In the statutes under which the indictments in both of those cases were drawn the word "unlawfully" alone was used, without any other similar words, or those which imported practically the same meaning, and it was thereby sought to distinguish between an innocent act and an illegal assault. In the Case of *Miera* the statute provided that, "if any person shall unlawfully assault or threaten another, in a menacing manner, or shall unlawfully strike or wound another, the person so offending," etc. Rev. St. p. 360, § 11. In the case of *Territory v. Armijo* the indictment was drawn under the deadly weapon act, section 3 of which provides "that any person who shall unlawfully assault or strike at another with a deadly weapon," etc. Laws 1887, p. 56. It will be observed that the word "unlawfully" in both of these statutes is the gist of the offense, and without its use in the indictment no offense whatever is charged; but there is no similarity between these statutes and the statute defining murder, wherein a number of words are used, all of which enter into the offense, and import very much the same thing; and it is not necessary to use all of these words in an indictment for murder, but only such as are necessary to show that the offense was committed unlawfully, and this will supply the absence of the word "unlawfully" in such an indictment. The case of *Davis v. Utah Territory* is conclusive upon the first assignment of error in this case, and the same must be overruled as to the alleged defect in the indictment.

The next assignment of error that this court deems necessary to consider is the third, which is as follows: "The verdict is not supported by the evidence." While this assignment of error is too general, and, in an ordinary case, would not be sufficient, this is a capital case, and therefore the court will

consider this assignment, inasmuch as the argument of the learned counsel at the hearing in this court indicates what he deems to be the error intended to be raised by this assignment. The counsel contends, and in fact that was the sole defense urged in behalf of the defendant in the lower court, that the defendant was intoxicated to such a degree that he was totally incapable of forming a deliberate and premeditated intention to kill, which is necessary to a conviction of murder in the first degree; and that, therefore, his conviction of murder in the first degree cannot be sustained in view of the fact of the intoxication of the defendant. Voluntary intoxication is not a defense in law that will excuse the commission of the crime of murder in the first degree, or any other degree, unless such intoxication is so gross as to render the defendant incapable of knowing the difference between right and wrong, or incapable of forming a willful and deliberate intention to kill. The evidence in this case as to the intoxication of the defendant, and the extent and effect of it, was for the consideration of the jury, and in passing upon the guilt or innocence of the defendant it was for them to determine whether or not the defendant was capable or incapable of forming a willful and deliberate intention to kill the deceased, at the time he did so, by reason of the intoxication which the evidence disclosed. This evidence was fairly and properly submitted to the jury, and considered by them under fair and proper instructions by the court; and after a full consideration of the evidence, both for and against the defendant, and of the intoxication shown, the jury found the defendant guilty of murder in the first degree. The evidence further shows that the defendant and another person, with whom he had been associating and drinking on the afternoon of the day of the killing, rode off in the direction of the place where the child *Patricio O'Bannon* and two other children were playing, near a well on the premises of the father of the deceased; that while the three children were playing together, making no remarks or in any way provoking the defendant to do any act of violence towards them,—in fact without anything whatever to attract the attention of the defendant to them,—he drew his pistol, and fired two shots at the children, killing the deceased, and seriously wounding another of the three children. It will therefore be seen that the defendant fired but two shots, and that both of them took effect, one of them killing *Patricio O'Bannon*, and the other seriously wounding one of the other children. Now, this tends to show that the defendant, while he may have been intoxicated, was not intoxicated to such an extent that he did not know what he was doing, because he was capable of taking deliberate aim at these children, and accomplishing the death of one of them. It is further shown

by the evidence that he immediately fled. Not only that, but, when found by the officer, he had changed horses, which also tended to show that he knew what he had done, and was endeavoring to escape the consequences thereof. All this evidence was for the consideration of the jury in passing upon the degree of the intoxication of this man, and whether it rendered him incapable of forming a premeditated intention to kill, necessary to a conviction. The jury passed upon this evidence adversely to the defendant, and the court sees no reason for interfering with the determination of the jury upon that point. These circumstances were very damaging to the defense made in this case, for, at the time of the killing, if this man, in firing two shots, was able to make both of them effective, the jury had a right to weigh this evidence, and to determine what it established; and it is not for this court, and we have no disposition, to interfere with the findings of the jury, as we believe the jury were warranted in so finding. This evidence strongly tended to show that the defendant was capable of forming the necessary intent to kill, and knew what he was doing, when he deliberately fired the shots directly at these children; and the evidence certainly tended to show that this killing was "perpetrated by an act greatly dangerous to the lives of others, and indicating a depraved mind, regardless of human life," which is one of the definitions of murder in the first degree. In the formation of the intent to kill it is not necessary that there shall be any great length of time involved between the formation of such intent to kill and the killing. In order to constitute the premeditation required by the statute. All that is necessary is that the intent to kill shall be completely formed in the mind of the defendant, and deliberated upon,—that is, fully determined,—prior to the firing the fatal shot. Even if this intent, completely formed, is entertained but a moment, it will be sufficient. Therefore the third assignment of error is overruled.

The fourth assignment of error is that "the court erred in allowing to go to the jury as an admission of defendant, over his objection, the statement of what Ambrosio Gringás, who was not produced in court, would testify to if present." It is true that the defendant has a right to be confronted by his accusers, and to face the witnesses who testify against him. This is a constitutional provision that defendant has a right to invoke in his defense. But in this case we are of the opinion that this constitutional provision has not been violated, and that the error assigned here does not bring the case within that provision of the constitution so as to render what occurred in the court below, as shown by the record, a reversible error. The record shows that, after the prosecution had rested, and the defense had closed their case, so far as the testimony was concern-

ed, the district attorney announced to the court that there was a witness whose name was indorsed upon the back of the indictment, who had not been called in chief, and whom he desired to produce as a witness in rebuttal; but that the witness was not present, and did not respond when his name was called. There is nothing to show that the district attorney persisted in delaying the case until this witness could be produced in court, but at this juncture the record shows that the following took place: "Ambrosio Gringás, a witness called in rebuttal by the territory, not responding to his name, it is admitted by the defendant that the witness, if present, would testify to the following: 'That this defendant and this man García were there in the saloon of Chavez & Co. for several hours, drinking whisky, beer, brandy, soda, and other drinks, on the day of the killing, and that he saw them going off towards the bridge.' Mr. Medler: This admission is made subject to the objection that, witness not being here, and his name appearing on the back of the indictment, the defendant is entitled to his presence in court." "It is admitted that said witness, if present, would testify to said facts. This statement is interpreted to the jury." From this record it is evident that the defendant was more anxious to have this evidence introduced than the prosecution. The statement here admitted, which it is admitted that the witness, if present, would testify to, is wholly evidence in the interest of the defendant. It is identically similar evidence to that given by the witnesses for the defendant in his own defense, and certainly tended to corroborate the defendant upon the point that he was intoxicated to such a degree that he was incapable of committing the offense charged against him. This evidence, which was admitted, was wholly in favor of the defense, and tended to injure, rather than benefit, the prosecution. The constitutional right of the defendant is to face the witnesses called to testify against him, and such is not the case here. The witness in this case was testifying, so far as this admission is concerned, for the defendant, and certainly the error, if any error was committed at all, would be harmless, and not reversible. It is very plain from this record of what occurred at that time that the defendant, through this admission, succeeded in obtaining evidence for himself, and precluding any evidence that the witness might give that would be against him. He succeeded, in other words, in getting another witness for himself, and at the same time, by the objection, prevented the prosecution from obtaining the evidence of that witness favorable to the prosecution. It is true that Mr. Medler, the attorney for the defendant, stated that he made the admission subject to the objection that, the witness not being present, and his name appearing on the back of the indictment, the defendant is entitled to his presence in court; but the ef-

fect of this objection was simply to prevent the prosecution from attempting to get any more testimony of this witness into the record than the portion that the defendant desired to be introduced, and which he secured by this admission. The language of this objection made by Mr. Medler would indicate that he was anxious to have the testimony of this witness, because one of the reasons for the objection is that the defendant is entitled to the presence of this witness in court, his name appearing on the back of the indictment. We see nothing, in allowing this admission to be interpreted to the jury, that was prejudicial or harmful to the defendant. There is nothing in it tending to show that the witness was testifying against the defendant, but wholly in his favor. The defendant was not deprived of his rights by this admission of testimony in his favor, and he could not, in any event, be prejudiced or injured by this testimony, as it tended very strongly to aid his defense and assist in his acquittal. The error is not well assigned, and will also be overruled.

There is no reversible error disclosed by this record, and the judgment of the lower court, therefore, is affirmed, and the judgment and sentence of the court shall be executed on Friday, June 1, 1900.

MILLS, C. J., and PARKER, J., concur.

FIRST NAT. BANK OF McPHERSON v. BRADLEY.

(Supreme Court of Kansas. June 2, 1900.)

On rehearing. Modified.

For former opinion, see 60 Pac. 322.

PER CURIAM. In a motion for a rehearing, filed by defendant in error, our attention has been called to certain credits which we held in the original opinion should have been allowed to the First National Bank, which we now discover were allowed by the court below on the trial,—a fact which was overlooked. They are as follows: Gilpin note, \$1,241.85; Westman note, \$1,273; McGowan note, \$192.50; Fletcher note, \$500. The amounts of the above notes will not, therefore, be deducted from the total judgment rendered against the plaintiff in error in the district court. The original opinion will be modified in this respect, and the court below will proceed to enter judgment accordingly.

COLEMAN v. PERRY et al.

(Supreme Court of Montana. May 29, 1900.)

APPEAL AND ERROR—APPEAL BOND—SUFFICIENCY—DISMISSAL OF APPEAL.

1. Where appellant appeals from a judgment and from an order denying a new trial, an appeal bond conditioned that it shall be void if ap-

61 P.—9

pellant pays all damages awarded against him on such appeals, without alternative conditions referring to each separately, is insufficient, as the sureties assume no liability unless both appeals are decided against appellant.

2. Under Code Civ. Proc. § 1740, providing that no appeal shall be dismissed for insufficiency of the undertaking, if a sufficient one, approved by a justice of the court, is filed before the motion to dismiss the appeal, where a sufficient undertaking is so filed a motion to dismiss for insufficiency of the bond must be denied.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by Elizabeth Coleman against Oliver N. Perry and others. From a judgment for plaintiff, and an order denying his motion for a new trial, defendant appeals. Motion to dismiss appeal denied.

Hamilton & Thresher, for appellants. Guy L. Reed, Peter Breen, and Robt. McBride, for respondent.

PER CURIAM. This cause was brought into this court upon appeals from the judgment, and an order denying defendant's motion for a new trial. A motion has been submitted by respondent to dismiss the appeals on the ground that the undertaking is void for ambiguity. This instrument is identical in form with that considered in *Baker v. Water Co.*, 24 Mont. —, 60 Pac. 488, 817. It was not held in that case, as respondent contends, that such an undertaking is void, but only that it is merely insufficient or imperfect, in that, though it refers to both appeals, it does not contain alternative conditions referring to each separately, so as to bind the sureties to meet all the contingencies which may arise in the disposition of the case by this court. The appellants having filed with the clerk of this court a good and sufficient undertaking, approved by the chief justice, before the motion to dismiss was heard, the motion must be denied. Code Civ. Proc. § 1740; *Woodman v. Calkins*, 12 Mont. 456, 31 Pac. 63, cited in *Creek v. Waterworks Co.*, 22 Mont. 327, 56 Pac. 362.

Denied.

HUNT, J., being absent, takes no part in the foregoing decision.

RAMSEY v. BURNS, Justice of the Peace, et al.

(Supreme Court of Montana. May 29, 1900.)

APPEAL AND ERROR—TIME FOR APPEALING—SERVICE OF NOTICE—BOND—AMBIGUITY—DISMISSAL OF APPEAL.

1. Under Code Civ. Proc. § 1723, providing that an appeal from a final judgment may be taken within a year after entry; and section 1724, providing that it shall be taken by filing a notice with the clerk, and serving a copy on the adverse party,—an attempted appeal from a judgment will be dismissed where the notice is not served on the respondent, or filed in the office of the clerk of the court, until after one year from the date of the judgment.

2. An undertaking on appeal, where defendant appeals on one record both from the final

judgment entered against him, and from an order refusing a new trial, conditioned that appellant will pay all costs and damages awarded against him on the appeal or on a dismissal thereof, is not void for the reason that it cannot be determined therefrom to which appeal it applies, or is to be referred.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by Cora E. Ramsey against P. H. Burns, as justice of the peace, and others. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendants appeal. Appeal from judgment dismissed. Motion for dismissal of appeal from order denying motion for new trial denied.

John N. Kirk, for appellants. M. J. Cavanaugh, for respondent.

PER CURIAM. This case is now before the court upon the respondent's motion for a dismissal of the appeals taken or attempted to be taken from the judgment and an order refusing a new trial. The motion to dismiss the supposed appeal from the judgment is based upon two grounds: First, that the judgment was entered more than one year prior to the filing and serving of the notice of appeal; and, second, that the undertaking on appeal is so ambiguous as to be void. The motion to dismiss the appeal from the order refusing a new trial is based upon the second ground urged in support of the motion to dismiss the appeal from the judgment. An inspection of the transcript discloses that the judgment was entered on the 23d day of May, 1898, and that the notice of appeal was served on the 24th day of May, 1899, and filed in the office of the clerk of the district court on the 29th day of May, 1899. The attempted appeal from the judgment, not having been taken within one year from its entry, must be dismissed. Sections 1723, 1724, Code Civ. Proc.; *Gallagher v. Cornelius*, 23 Mont. 27, 57 Pac. 447.

The undertaking on appeal recites that, whereas, the defendants having appealed to the supreme court from the judgment entered against them, and also from the order overruling their motion for a new trial: "Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, residents of Silverbow county, Montana, do hereby jointly and severally undertake and promise on the part of the appellants that the said appellants will pay all damages and costs which may be awarded against them on the appeal, or on a dismissal thereof, not to exceed three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound." The respondent insists that the undertaking is void because it cannot be determined therefrom to which appeal it applies or is to be referred. In *Watkins v. Morris*,

14 Mont. 354, 36 Pac. 452, where a similar undertaking had been filed, the same point was made and argued, as appears from the briefs on file, but the court held that the bond was valid. The question raised and determined in that case is the question presented in this case. It was decided on the 23d day of April, 1894, and has never been overruled; nor has the legislative assembly seen fit so to change the statute law as to require a different form of undertaking. Decisions upon mere matters of practice, or interpretations of what may, perhaps, not improperly be called "adjective law," should never be disturbed unless it be apparent that injustice would result from adherence thereto. Parties and their counsel for more than six years past, in perfecting appeals to this court, have presumptively relied upon and been guided by the rule announced in *Watkins v. Morris*, supra. An abrogation of that rule at this time would be an arbitrary infliction of hardship upon litigants who have appeals pending in this court. The doctrine of the *Watkins* Case is not in conflict with anything held in *Grage v. Paulson*, 23 Mont. 337, 59 Pac. 1, or in the cases there cited. It is, on principle, in conflict with *Baker v. Water Co.*, 60 Pac. 817, 818, 24 Mont. —, —. The latter case is, in our opinion, based upon correct reasoning, reaches the proper result, and is approved. In the facts, however, there is a distinction between the *Watkins* Case and the *Baker* Case; for in the *Baker* Case the undertaking on appeal was to the effect that the appellant would pay all costs and damages on the "appeals," while in the *Watkins* Case the word "appeal" is used. The intimation in the *Baker* Case that an undertaking such as the one here attacked is void for ambiguity was by way of argument, and was unnecessary to a decision, for the reason that such an undertaking was not before the court for consideration. The intimation is not to be understood as a holding that in this jurisdiction such undertaking is defective or void, although such is the rule laid down by the supreme court of Idaho in *Kelly v. Leachman*, 51 Pac. 407, referred to in the *Baker* Case. The rule of the *Watkins* Case is, as we have said, an illogical one, and should not be extended in its application so as to apply to undertakings not in the form of the one there approved. If the question now under consideration were before us for the first time, we should hold that the undertaking is void for ambiguity. The importance of having the practice settled and known prevents us from overturning the rule established by the *Watkins* Case. The motion to dismiss the appeal from the judgment is granted. The motion to dismiss the appeal from the order refusing a new trial is denied.

HUNT, J., being absent, takes no part in the foregoing decision.

(24 Mont. 207)

VINCENT v. VINEYARD et al.

(Supreme Court of Montana. May 22, 1900.)

HOMESTEAD—DECLARATION—EXCESS OF VALUE—DOCKETING JUDGMENTS—MORTGAGE OF HOMESTEAD—PRECEDENCE OF MORTGAGE—JUDGMENTS NOT LIENS—ENFORCEMENT—MORTGAGING HOMESTEAD—WAIVER.

1. Civ. Code 1895, § 1670, provides that the homestead consists of the dwelling house in which the claimant resides and the land on which such house is situated. Section 1693 declares that a homestead shall not exceed \$2,500 in value. Section 1701 requires a declaration of homestead to contain a statement that the person making it resides on the premises, with a description, and an estimate of the actual cash value. Section 1703 provides that, where such declaration is filed for record, the premises described constitute a homestead. *Held* that, where a declaration of homestead was filed, the homestead attribute was impressed on all the property described in the declaration, although its value exceeded \$2,500.

2. Code Civ. Proc. 1895, § 1197, provides that a judgment shall be a lien on all realty of the judgment debtor not exempt from the time that it is docketed. Civ. Code 1895, § 1674, declares that a homestead is subject to execution in satisfaction of judgments obtained before the declaration of the homestead is filed which constitute liens on the property, but that no judgment obtained prior to July 1, 1895, shall constitute a lien on such property. *Held*, that a judgment docketed in 1892 was not a lien on the homestead subject to execution under section 1674, whatever its value, hence a mortgage of the homestead given in 1895 took precedence to the 1892 judgment.

3. Civ. Code 1895, § 1693, declares that a homestead shall not exceed \$2,500 in value. Section 1674 provides that a homestead shall be subject to execution in satisfaction of judgment obtained before the declaration of homestead was filed, which constitutes a lien on the property, but that judgments obtained prior to July 1, 1895, shall not constitute such liens. Section 1678 authorizes judgment creditors who have not liens under section 1674 to apply to the district court or a judge thereof for the appointment of appraisers. *Held*, that judgments not constituting liens could be enforced under section 1678, and that, after notice to the claimant, and a report of the appraisers that the value of the homestead exceeds \$2,500, and that the property can be divided without material injury, the execution can be enforced against such excess, but that, if the property cannot be divided, a sale will be ordered, and the execution paid from the excess over \$2,500.

4. Civ. Code 1895, § 3772, provides that one who has a lien on several things on which others have subordinate liens on some, but not all, of the same things, shall resort to payment, where possible, as therein provided. Section 1674 declares that a judgment obtained prior to July 1, 1895, shall not constitute a lien on homestead property. Plaintiff's assignor was given a note and mortgage on homestead property. The property was sold by execution sale under a judgment docketed in 1892, and the creditor was paid excess over the homestead exemption, and the exemption was paid in court. *Held*, in an action by plaintiff to recover of such creditor, that plaintiff would not be required to satisfy his mortgage debt out of the sum paid in court, as the mortgage operated solely as a waiver of the homestead exemption in favor of the mortgagee and his assigns, and did not inure to the benefit of other persons.

Appeal from district court, Deerlodge county; Theo. Brantly, Judge.

Action by Peter Vincent against Gordon C. Vineyard and others to recover as as-

signor of a homestead mortgage. From a judgment in favor of the plaintiff, defendants appeal. Affirmed.

This appeal is from a judgment entered in an action upon a note and mortgage made by the defendants Vineyard to one Carroll, and by him assigned to the plaintiff. The following facts appear: On the 1st day of April, 1892, a judgment for \$2,170 and costs in favor of Dellinger, one of the defendants, against the defendants Vineyard, was docketed in the office of the clerk of the district court of Deerlodge county, so as to constitute it a lien upon the nonexempt real property of the Vineyards. When the judgment was docketed, the Vineyards were, and ever since have been, occupying as a homestead the east half of lot 3 of block 37 in the city of Anaconda in Deerlodge county. The property was never of a value exceeding \$2,000 until after the 13th day of July, 1895, on which date the Vineyards made a mortgage thereon to Carroll to secure the payment of a note for \$2,000. On the 11th day of December, 1895, the Vineyards, who are husband and wife, filed for record in the office of the clerk and recorder of Deerlodge county their declaration selecting and claiming the real estate in question as their homestead. On the 9th day of January, 1896, a writ of execution was issued on the judgment docketed in favor of Dellinger on the 1st day of April, 1892. Upon the application of Dellinger the district judge of the county appointed appraisers to appraise the value of the homestead. They reported that the property could not be divided without material injury, and that the value was \$4,650. The judge thereupon made an order directing the sale of said real estate under execution, and on the 19th day of March, 1896, by virtue of an alias execution, a sale was made to Dellinger for \$5,500, Dellinger paying the money to the sheriff, who paid into court \$2,500 for the Vineyards as representing their homestead exemption, and the remainder to Dellinger. Thereafter, and on the 4th day of April, 1898, the plaintiff, to whom Carroll had assigned the mortgage, commenced the present action; Dellinger and the sheriff who made the sale being joined as defendants. These defendants pleaded the foregoing facts. The court awarded judgment against the Vineyards for \$1,277.14, the amount remaining unpaid of the debt mentioned in the mortgage, together with an attorney's fee and costs, and found that Dellinger was the owner of the real estate, subject to the right of redemption in the Vineyards, and to these parts of the judgment there is no objection. The court further decreed that Dellinger's ownership of the property was subject to the mortgage lien in favor of Vincent, and that Dellinger was entitled to the whole of the surplus arising from the sale of the property above the homestead exemption of \$2,500

and the mortgage lien of \$1,277.14, attorney's fees, and costs. The appellants, who are Dellinger and the sheriff, assert that this part of the judgment is erroneous.

Wm. H. De Witt and E. Scharnikow, for appellants. H. R. Whitehill, for respondent.

PIGOTT, J. (after stating the facts). The error assigned is that the district court adjudged the mortgage of Vincent to be a lien superior to the judgment of Dellinger, whereas the judgment should have been ranked superior to the mortgage and next below the homestead exemption of \$2,500. The single question, therefore, is whether the lien of the docketed judgment attached to the land selected as a homestead for its value over \$2,500, the amount of the homestead exemption. Dellinger contends that the judgment became a lien upon the land on the 1st day of April, 1892, when it was docketed, and remained such lien ever thereafter, subordinate only to \$2,500 worth of the land, and this contention is founded upon section 307 of the first division of the Compiled Statutes of 1887, and section 1197 of the Code of Civil Procedure of 1895, which are, in substance, the same, each providing that "from the time the judgment is docketed it becomes [or "it shall become"] a lien upon all [or "the"] real property of the judgment debtor not exempt from execution in the county, owned by him at the time, or which he may afterwards acquire, until the [or "said"] lien ceases [or "expires"]. The lien continues [or "shall continue"] for six years, unless the judgment be previously satisfied." Prior to July 13, 1895, the value of the homestead did not exceed the amount of the homestead exemption, and counsel on both sides invoke the provisions of the Civil Code of 1895, and agree that the statutory enactments in force in 1892, when the judgment was docketed, are (with the exception of section 307, *supra*) not necessary to be considered. No objection is made to the application of the homestead law of 1895 to the judgment docketed in 1892. We quote the following sections of title 5, pt. 4, div. 2, of the Civil Code of 1895:

"Sec. 1670. The homestead consists of the dwelling house in which the claimant resides, and the land on which the same is situated, selected as in this title provided."

"Sec. 1693. Homesteads may be selected and claimed: (1) Consisting of any quantity of land not exceeding one hundred and sixty acres used for agricultural purposes, and the dwelling house thereon and its appurtenances, and not included in any town plot, city, or village; or, (2) a quantity of land not exceeding in amount one-fourth of an acre, being within a town plot, city, or village, and the dwelling house thereon and its appurtenances. Such homestead, in either case, shall not exceed in value the sum of two thousand five hundred dollars."

"Sec. 1701. The declaration of homestead must contain: * * * (2) A statement that the person making it is residing on the premises and claims them as a homestead. (3) A description of the premises. (4) An estimate of their actual cash value."

"Sec. 1703. From and after the time the declaration is filed for record the premises therein described constitute a homestead. Upon the death of the person whose property was selected as a homestead, it shall go to his or her heirs or devisees, subject to the use of the widow during her life, if the property selected as a homestead, before selection, belonged to the husband; and subject to the use of the husband during his life, if the property selected as a homestead before selection belonged to the wife. And in no case shall the homestead be held liable for the debts of the owner, except as provided in this title."

By subdivision 3 of section 1679 the petition for an appraisal of the homestead levied upon for the enforcement of certain judgments must show that "the value of the homestead exceeds the amount of the homestead exemption." From these sections it is clear that the homestead consists of the real property described in the declaration of homestead, although its value exceeds \$2,500; in other words, the homestead attribute or character is impressed upon all the property described in the declaration. Section 1673 declares that the homestead is exempt from execution or forced sale except as is provided in title 5, pt. 4, div. 2, of the Civil Code. Under what circumstances may it be subjected to sale on execution? Section 1674 provides that the homestead is subject to execution or forced sale in satisfaction of judgments obtained before the declaration of homestead was filed, and which constitute liens upon the property therein described, but that no judgments obtained before July 1, 1895, shall constitute liens upon the property. By this section the homestead may be sold under an execution issued upon a judgment rendered and docketed after July 1, 1895, and before the filing of the declaration of homestead; and the entire proceeds must, if necessary for that purpose, be paid in or towards the satisfaction of the judgment lien. In such case there is no homestead exemption, for the section does not recognize its existence. Express language excludes from the benefit of this section judgments obtained prior to July 1, 1895. Though docketed, they are not liens upon the real property described in the declaration of homestead, whatever its value. This inevitably results from the fact that the property so described is, regardless of its value then or afterwards, the homestead. The homestead is not \$2,500 worth of the realty described in the declaration; on the contrary, it is the realty so described. The only limit is in respect of the area, which must not exceed the statutory size. *Yerrick v. Higgins*, 22

Mont. 502, 57 Pac. 95. The judgment, having been obtained prior to July 1, 1895, was not a lien upon the homestead; consequently the latter is not liable, by virtue of anything contained in section 1674, to execution sale in satisfaction of the former.

Judgments other than those constituting liens upon the homestead may be enforced by a compliance with sections 1678-1689. In these sections the homestead exemption is recognized, and provision made whereby the excess in value of the homestead in fact may be subjected to the demands of creditors. Section 1678 provides: "When an execution for the enforcement of a judgment obtained in a case not within the classes enumerated in section 1674 is levied upon the homestead, the judgment creditor may apply to the district court of the county in which the homestead is situated, or a judge thereof, for the appointment of persons to appraise the value thereof." Upon an application, supported by a verified petition to the district court, or its judge, showing that an execution has been levied upon the homestead, the name of the homestead claimant, and that the value of the homestead exceeds the amount of the homestead exemption, the judge, after proof of notice to the claimant, and of the facts stated in the petition, must appoint appraisers to value the homestead. If from their report it appears that the land can be divided without material injury, the judge must order the appraisers to allot the claimant so much of the homestead as will amount in value to the homestead exemption, and the execution may then be enforced against the remainder of the land. But if it appears that the land exceeds in value the amount of the homestead exemption, and that it cannot be divided, the judge must order its sale under execution, at which sale no bid less than \$2,500 shall be received, and the proceeds to the amount of the exemption must be paid to the claimant, and the remainder applied on the execution. Until the value of the homestead is so ascertained to be in excess of \$2,500, the entire property covered by the declaration of homestead, whatever its worth, remains exempt from sale on execution, and therefore the lien of a docketed judgment cannot attach. The levy of execution initiates the right to maintain proceedings for an appraisal and sale under the statute. The foregoing interpretation is in harmony with that announced in *Barrett v. Sims*, 59 Cal. 615; *Lubbock v. McMann*, 82 Cal. 226, 22 Pac. 1145; and in *Sanders v. Russell*, 86 Cal. 119, 24 Pac. 852. The legislative assembly of Montana adopted sections 1670-1703 of the Civil Code of 1895 from California, in whose Civil Code they appear as sections 1237-1265. *Yerrick v. Higgins*, supra. In transplanting the homestead law of California to Montana, reference to community property was eliminated, the value of the homestead exemption was reduced to \$2,500, and a limit

upon area fixed; and section 1241 of the California Civil Code was changed by the addition of the words, "but no judgment obtained before this Code takes effect shall constitute such lien"; so that section 1674, supra, differs in this respect from the last-named section of the Civil Code of California, of which it is otherwise a copy. In *Barrett v. Sims*, supra, the supreme court of California interpreted the sections under consideration before the adoption of them by this state. That interpretation is conformable to the intent of the statutes. The case of *Macke v. Byrd*, 131 Mo. 682, 33 S. W. 448, 52 Am. St. Rep. 649, is also in point. In that state the lien of a judgment impresses the "lands, tenements, and hereditaments liable to be sold upon execution," and the homestead act declares that real property coming within its protection is exempt from attachment and execution. After deciding that, as between a judgment creditor and his debtor in possession of a homestead within the statutory size and value, the judgment is not a lien on the homestead property, the court inquires whether the lien reaches the surplus in value. The court holds that, if the property claimed as a homestead exceeds in value the homestead exemption, the excess must be ascertained, and the true homestead set apart, before the excess can be subjected to sale on execution; and, therefore, that the lien of a judgment cannot attach to the surplus value of the homestead until ascertained by admeasurement of the homestead exemption. We are aware that the courts of several states have decided that judgment liens impress the value of the homestead in excess of the homestead exemption. Most of the decisions have been upon statutes so different from those contained in the Civil Code of Montana that we do not regard them as persuasive in this jurisdiction.

A suggestion is made that the plaintiff should have been required to satisfy the amount of his mortgage debt out of the \$2,500 paid into court as representing the homestead exemption of the vineyards. A sufficient answer to this suggestion seems to be that the mortgage operated as a waiver of the homestead exemption in favor of the mortgagee and those claiming under him, which waiver did not inure to the benefit of other persons. The mortgagors did not agree that the debt owing to Dellinger might be satisfied out of the exemption. The willingness to secure the payment of Vincent's demand by mortgaging the homestead, and thereby waiving the exemption, cannot be deemed to evince a like disposition in respect of Dellinger. The entire homestead is subject to sale in satisfaction of judgments obtained on debts secured by mortgages on the premises recorded before the filing of the declaration of homestead (subdivision 4, § 1674). The Vincent mortgage is within this statute, but the homestead exemption of \$2,500 is beyond

the reach of such a judgment as Dellinger's. Vincent had the right to release the homestead exemption from the lien of his mortgage, and retain it upon the surplus of the homestead. Had he done so, no right of Dellinger would be invaded, for all Dellinger could have seized by his execution was the remainder of the surplus after the satisfaction of Vincent's mortgage debt. To compel Vincent to resort first to the homestead exemption would be to subject it indirectly to the payment of Dellinger's judgment, and thus, contrary to the intent of the parties to the contract embraced in the mortgage, the waiver would practically be construed as having been made in favor of Dellinger. Section 3772 of the Civil Code does not confer upon Dellinger the right which he asserts. The mortgage of Vincent having been executed and recorded prior to the acquisition by Dellinger of any lien upon the real estate selected as a homestead, it follows from the views expressed that the judgment of the district court must be affirmed, and it is so ordered. Affirmed.

HUNT, J., concurs. BRANTLY, C. J., being disqualified, took no part in the foregoing decision.

MACKIN v. PORTLAND GAS CO.

(Supreme Court of Oregon. May 28, 1900.)

GAS COMPANY — RULES — FAILURE TO PAY
BILLS—DISCONTINUING SERVICE
—MANDAMUS.

1. The defendant gas company was operating under a franchise to supply gas to the inhabitants of a city. Plaintiff, who has signed an order for gas, consenting to a rule of the company that the gas would be shut off in default of payment, refused to pay a bill for gas furnished at a certain place. After he had moved to another place, the company furnished gas for a time, but discontinued his supply on his refusal to pay the former bill. *Held* that mandamus would not lie to compel the company to supply gas to plaintiff till the former bill was paid.

2. A peremptory writ of mandamus to compel a gas company, which has cut off the gas from plaintiff's premises for his failure to pay a former bill, to continue such supply, will not issue by reason of the fact that the alternative writ and answer show that there is a controversy concerning the correctness of such bill, as the right to the writ must be clearly established before it will issue.

Appeal from circuit court, Multnomah county; Alfred F. Sears, Jr., Judge.

Mandamus by Sam Mackin against the Portland Gas Company. From an order granting a peremptory writ, the defendant appeals. Reversed.

This a proceeding by mandamus to compel the defendant company to supply the plaintiff with gas at his place of business, No. 107 Fourth street, in the city of Portland. The alternative writ alleges, in substance, that the defendant is a corporation organized for the purpose of, and is now engaged in, supplying gas to the city of Portland and its

inhabitants, and, under a franchise from the city, has mains laid in the streets for such purpose; that on September 27, 1899, the plaintiff, who was engaged in the business of conducting an oyster eating house and restaurant at No. 107 Fourth street, requested the company to furnish him gas, and upon a deposit by him of seven dollars as security, the company made the proper connections with his premises and supplied gas to him; that on October 27th it presented its bill for gas consumed up to that time, amounting to \$4.95, which the plaintiff paid; that plaintiff used gas from the 27th of October, until the 11th of November, for which he is able, ready, and willing to pay upon the presentation of a bill therefor; that he is solvent, and able to satisfy any judgment that the defendant may procure against him; that on the 11th of November the defendant demanded payment of a delinquent gas bill of \$5.25, which he refused to pay, whereupon it shut off the gas from his premises; that defendant's pretense for this action is that in the month of March, 1897, the plaintiff was engaged in business at No. 284 Morrison street, and was using gas supplied by the company, but that on the 16th of the month he sold out, and notified the company that he no longer desired to be furnished with gas, and would not be responsible for any supplied thereafter, notwithstanding which it presented him a bill of \$5.25, which he then and there and ever since has in good faith disputed and refused to pay; that at the time defendant threatened to discontinue his gas at No. 107 Fourth street he offered to deposit sufficient money in court to answer any judgment that it might obtain against him on such disputed bill, and requested defendant to bring an action for the purpose of testing his liability thereon. The answer of the defendant admits that it severed the connection between its gas main and plaintiff's premises, and shut off the supply of gas therefrom, as alleged in the alternative writ, but denies the other material allegations; and, for an affirmative defense, avers: That on the 26th of March, 1897, plaintiff was indebted to it in the sum of \$12.25 for gas furnished at No. 284 Morrison street, and had on deposit with it as security therefor the sum of \$7, which it applied to the payment of plaintiff's bill, leaving a balance of \$5.25 due, which the plaintiff has refused and neglected to pay. That such gas was furnished in compliance with a written request made by the plaintiff, in words and figures as follows: "Portland, Oregon, Nov. 2, 1896. To the Directors of the Portland Gas Co.—Gentlemen: You will furnish gas to premises No. 284 Morrison street, and I will be responsible for the same, until further notice. And I do further agree to comply with your rules and regulations. Respectfully, [signed] Sam Mackin." That one of defendant's rules at that time was, and still is, that, "in default of the regular payment

of a bill, the company will discontinue the supply of gas until payment is made," which was at the time plaintiff made his application, ever since has been, and now is, well known to him. That, previous to severing the connection between its gas mains and plaintiff's premises, it demanded payment of the delinquent bill for \$5.25, and informed plaintiff that if he paid such bill the gas would not be discontinued. That on November 11, 1899, and ever since, it has been, and now is, ready and willing to make proper connections and turn on the gas at plaintiff's premises upon the payment of such amount, and so informed the plaintiff at the time the gas was shut off. To this answer a demurrer, on the ground that it does not state facts sufficient to constitute a defense, was sustained, and, defendant declining to amend or plead further, a peremptory writ was issued, commanding it to forthwith turn on the gas to the premises of the plaintiff at No. 107 Fourth street. From this judgment the defendant appeals.

John M. Gearin, for appellant. M. L. Pipes, for respondent.

BEAN, J. (after stating the facts). The only question on this appeal is whether the court below erred in sustaining the demurrer to defendant's answer, and ordering a peremptory writ. Briefly, the facts are that in March, 1897, the plaintiff purchased gas of the defendant for use at No. 284 Morrison street, under a contract which provided that, in default of the regular payment of a bill, the company would discontinue the supply until payment should be made. Some time in that month he quit using the gas, and left, as the defendant alleges, an unpaid bill of \$5.25. Thereafter, and in September, 1899, he again applied to the company for gas to be used at No. 107 Fourth street, and it was furnished him up to November 11th, when he was notified by the defendant that unless he paid the old bill it would be discontinued. This he refused to do, and the company cut off the gas. Upon these facts, the inquiry is whether the plaintiff is entitled to a writ of mandamus to compel the defendant to turn on the gas.

The right of a court to compel by mandamus a company engaged in furnishing gas for general consumption to supply all persons along its main or conduits who offer to and do comply with its rules and regulations is undoubted and unquestioned. *Haugen v. Water Co.*, 21 Or. 411, 28 Pac. 244; *State v. Nebraska Tel. Co.*, 17 Neb. 126, 22 N. W. 237; *Crumley v. Water Co.*, 99 Tenn. 420, 41 S. W. 1658; *Shepard v. Light Co.*, 70 Am. Dec. 470, and note; 27 Am. Law Reg. 277. And the authorities are agreed that such a company may adopt and enforce whatever reasonable rules and regulations may be necessary to protect its interests, which would include one providing that the supply of gas may be discontinued if a customer fails or neglects

to pay his bills when due. *American Water-works Co. v. State*, 46 Neb. 194, 64 N. W. 711, 30 L. R. A. 447; *State v. Sedalla Gaslight Co.*, 34 Mo. App. 501; *Tacoma Hotel Co. v. Tacoma Light & Water Co.*, 3 Wash. St. 316, 28 Pac. 516, 14 L. R. A. 669.

The contention for the defendant is that, under its rules in force at the time the contract was made with the plaintiff, and which became a part of the contract, it had a right to discontinue the supply of gas to a customer at one set of premises until payment should be made of a delinquent bill for gas furnished him at another, and in this we think it is supported by the authorities. The cases of *People v. Manhattan Gaslight Co.*, 45 Barb. 136, and *Gas Co. v. Cadieux* [1899] App. Cas. 589, are in point. In the former it appears that the relator commenced taking gas in 1858 at No. 61 Seventh avenue, and was supplied with same until the 28th of December, 1861. He paid his bills up to the 19th of August, 1861, but not thereafter. In May, 1864, he applied for gas at No. 121 West Sixteenth street, which was furnished without objection on account of the former indebtedness until the 9th of February, 1865, when the company shut off the supply, and refused to furnish any more because of his failure to pay the balance due for gas furnished at No. 61 Seventh avenue. A judgment denying an application for a mandamus requiring the defendant to supply gas at No. 121 West Sixteenth street was affirmed. In *Gas Co. v. Cadieux* the statute defining the powers of the gas company provided that "if any person * * * supplied with gas by the company shall neglect to pay any rate, rent, or charge due to the * * * company at any of the times fixed for the payment thereof it shall be lawful for the company * * * on giving twenty-four hours' previous notice to stop the gas from entering the premises, service pipes, or lamps of any such person * * * by cutting off the said service pipe or pipes, or by such other means as the company shall think fit." The respondent was a customer of the company. He had two sets of premises in Montreal,—No. 1125 Notre Dame street, and No. 282 St. Charles Borromée street, where he resided,—and took gas for both. The company cut off the supply from No. 1125 Notre Dame street for nonpayment of the bill for gas furnished to that house. This measure had no effect in producing payment, whereupon the company gave notice that unless the other bill was paid it would cut off the gas at his residence, and, after repeated notices to that effect, carried its threats into execution, and cut off the gas at his residence, as well as at No. 1125 Notre Dame street; whereupon he brought an action to compel it to continue the supply of gas at his residence, and, upon appeal to the privy council, it was held that he was not entitled to the relief demanded. In the opinion it is said: "The only question is a question of fact. Is the respondent, in the words

of the act, a person supplied with gas by the company who has neglected to pay a rate, rent, or charge due to the company at the time fixed for the payment thereof? It cannot be disputed that he is. The occasion, therefore, has arisen which authorizes the company to stop the gas from entering his service pipes. There is nothing in the act to limit the right of the company to the service pipes of the defaulter in a particular building, or connected with a particular meter, in respect to which the default has been committed. There is nothing in the act to throw the rate, rent, or charge for gas upon the premises for which the supply is furnished, or to make it payable out of the premises of the defaulter. The supply is to the consumer, and the default is the consumer's default. His liability to the company is a liability for the whole of the debt which he owes them at the time." This argument seems particularly applicable to the rule of the defendant. There is nothing in it limiting the right of the company to shut off the gas to the particular building in which default has been committed, but the provision, in effect, is that, in default of the regular payment of a bill by a customer of the company, it will not supply gas to him until payment is made. The cases principally relied upon by plaintiff are distinguishable from the one at bar. *Wood v. City of Auburn*, 87 Me. 287, 32 Atl. 906, 29 L. R. A. 376, was a suit to enjoin the defendant from cutting off the supply pending a judicial investigation; and, besides, in that case, and also in *State v. Nebraska Tel. Co.*, supra, there was no rule of the company or stipulation in the contract providing for shutting off the supply in default of payment of bills. In *Gaslight Co. v. Colliday*, 25 Md. 1, the contract provided that gas should be introduced into the premises described, "and that in default of payment for gas consumed in said premises the flow of gas shall be stopped until the bill be paid," etc., and the court very naturally held that under such rule the company could not shut off the supply at one building on account of a default in payment for gas furnished another. *Lloyd v. Gaslight Co.*, 1 Mackey, 831, was also based upon the construction given by the court to the contract between the company and the consumer. If, therefore, we take the allegations of the answer to be true (as we are bound to do on this appeal), the defendant, under its rules and the terms of the contract, had a right to refuse to supply the plaintiff with gas at No. 107 Fourth street, because he had made default in payment for gas previously furnished to him at other premises.

The plaintiff contends, however, that, taking the alternative writ and the answer together, it appears that there is an honest controversy between the company and the plaintiff concerning the bill for gas furnished at No. 284 Morrison street, and the defendant had no right or authority to cut off the supply in order to coerce the payment of the dis-

puted bill. But this is an application for a peremptory writ of mandamus, and to entitle plaintiff to the relief demanded his right must be clear. If he has paid or tendered payment of the rates legally due, he is entitled to the writ; otherwise, not. *People v. Green Island Water Co.*, 56 Hun, 76, 9 N. Y. Supp. 168. It is said to be well settled that a court of equity will, in cases of this character, prevent by injunction the shutting off of the supply pending the determination of a dispute between a customer and the company. 27 Am. Law Reg. 283; *Sickles v. Gaslight Co.*, 64 How. Prac. 33; *Wood v. City of Auburn*, supra. But a mandamus is an affirmative remedy, and before a peremptory writ will issue the plaintiff's right must be clearly established. 2 Spell. Extr. Relief, § 1386; *American Waterworks v. State*, 31 Neb. 445, 48 N. W. 64; *State v. Town Board of Sup'rs of Delafield*, 69 Wis. 264, 34 N. W. 123. We are of the opinion, therefore, that the court below erred in sustaining the demurrer to the answer. The judgment is reversed, and the cause remanded for such further proceedings as may seem proper, not inconsistent with this opinion.

(37 Or. 141)

HENDERSON v. HENDERSON.

(Supreme Court of Oregon. May 28, 1900.)

DIVORCE—MODIFICATION OF DECREE—APPEAL—UNDERTAKING—STIPULATION—EFFECT.

On appeal from an order dismissing a motion for modification of a decree granting divorce and alimony, defendant gave a bond to the effect to satisfy the order appealed from so far as affirmed, which order simply adjudged that the motion be dismissed, with costs. About the same time a stipulation was filed providing that, in consideration that plaintiff would not file any counter bond, as provided by Hill's Ann. Laws, § 540, in order that she might enforce the decree for alimony pending the appeal, the defendant should pay her a certain sum per month until the appeal was determined, to be applied pro tanto in payment of any alimony to which plaintiff would be entitled on the final determination of the suit. Held, that the stipulation did not enlarge the scope of the appeal bond, so as to render the surety liable for alimony which accrued against defendant after the appeal was perfected.

Motion to modify decree. Denied.

For former opinion, see 60 Pac. 597.

Geo. E. Chamberlain, for the motion. Raleigh Stott, opposed.

PER CURIAM. This is a motion to modify the decree rendered in this court in the above-entitled cause, so that it may be entered against the surety on the undertaking for appeal, not only for the costs and damages, but as well for the sum of \$1,800, the amount of alimony which has accrued against the defendant and appellant under the decree of the circuit court since the appeal was perfected.

The facts out of which the controversy arises are substantially as follows: The plaintiff recovered a decree of divorce against the defendant, January 3, 1894, and, as a

part of the same decree, the defendant was directed to pay her \$150 per month alimony. Subsequently the defendant moved for a modification of this decree, so as to relieve him from the payment of \$75 per month of such alimony, which resulted in an order or decree dismissing the motion, and adjudging that the defendant pay the costs attending the same, from which defendant prosecutes his appeal to this court. In perfecting his appeal, defendant gave an undertaking, with Byron Z. Holmes as surety, to the effect that he would satisfy the decree appealed from so far as affirmed. Subsequent to the time when the appeal was perfected, there accrued against the defendant, and in favor of the plaintiff, the sum of \$1,800 alimony under the original decree entered when the divorce was granted; and the purpose of the motion now made is to have the decree of this court entered against the surety upon the appeal bond for this latter sum, as well as for the costs attending the motion for a modification of such original decree.

There was a stipulation filed in the court below about the time the appeal was perfected, which sets forth that "whereas, the undertaking on appeal in said cause provides for a stay of proceedings as well as for an appeal; and whereas, the plaintiff intends, notwithstanding such appeal, to make and execute a counter bond as provided by section 540, Hill's Ann. Laws, in order that, notwithstanding said appeal, she may enforce the original decree for alimony in said cause: Now, therefore, in consideration that the plaintiff will not execute and file any counter bond as provided by said section, it is stipulated and agreed by and between the parties hereto that pending said appeal, and until the final determination thereof, the defendant will pay to the plaintiff the sum of seventy-five dollars (\$75) per month, promptly on the 15th day of each month from and after this date, and that execution may issue to enforce the payment of the same if not so paid; it being understood and agreed, however, that the said sum of seventy-five dollars (\$75) per month is not to be deemed or taken as a waiver of any portion of the alimony that may accrue under the terms of the original decree, and the said sum so received is only to be applied pro tanto in payment of any alimony to which the plaintiff may be entitled upon the final determination of said suit." It is claimed for the respondent that this stipulation, taken in connection with the undertaking, shows that it was the purpose of the undertaking to cover the amount of alimony which should accrue under the decree of the circuit court after the date of the perfecting of the appeal to this court. But in this view we cannot concur. The appeal is from the decree of the circuit court dismissing the motion for a modification of the original decree granting a divorce and alimony. It simply adjudges that the motion be dismissed, and that the plaintiff have and recover of and from the defend-

ant her costs and disbursements therein, which has reference to the costs and disbursements attending the motion for modification. So that the undertaking is not broad enough to comprehend the initial decree of the court granting the divorce and giving alimony to the plaintiff, nor does the stipulation enlarge its scope, the evident purpose of which was to adjust the amount of alimony to be paid while the motion was pending and undecided, not to secure the payment thereof or any part of it. The surety is therefore not bound for the payment of the accrued alimony by the terms of the undertaking, and the motion to modify the decree of this court will be denied.

CLEARWATER SHORT-LINE RY. CO. v. SAN GARDE et al.

(Supreme Court of Idaho. May 11, 1900.)

MINING CLAIM—LOCATION NOTICE.

A location notice of a mining claim which fails to give the direction of the initial point, or permanent monument to which it is attempted to tie the location, from the point of discovery, is void, under the statutes of Idaho. *Brown v. Levan* (Idaho) 46 Pac. 661, affirmed.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; A. E. Mayhew, Judge.

Action by the Clearwater Short-Line Railway Company against Jethro J. T. San Garde and others. From an order refusing to continue an injunction, plaintiff appeals. Reversed.

James E. Babb (William Wallace, Jr., of counsel), for appellant. James W. Reid, for respondents.

HUSTON, C. J. This is an appeal from an order of the district court of Shoshone county refusing to continue until trial an injunction theretofore issued in this action. The facts, in brief, are as follows: The plaintiff is a railway corporation engaged in the construction of a railroad through a portion of Shoshone county. Prior to the 9th day of January, 1899, the plaintiff surveyed the definite line (its proposed) line of railroad over the land in controversy, and on or about the 27th day of January, 1899, filed with the register of the United States land office at Lewiston, in the state of Idaho (that being the land office for the land district where the land in controversy is located), a profile of its said road located over the said land, for the approval of the secretary of interior, in accordance with the rules and regulations of the department of the interior, under the act of congress entitled "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875. Defendants claim that on the 22d day of August, A. D. 1898, they, being citizens of the United States, made a location of a

quartz mining claim upon the land in controversy, under and by virtue of a location notice as follows: "Notice is hereby given that I, the undersigned citizen of the United States of America, conforming to the mining laws thereof and of the state of Idaho, and the local rules, regulations, and customs of miners, have this 22d day of August, 1898, located, and do claim, 1,500 linear feet on this lead, lode, or vein, bearing mineral in place; the same being 750 feet in a southeast direction from the discovery stake, and 750 feet in a northwest direction therefrom, by 600 feet in width; the same being 300 feet on each side of the middle thereof,—together with all dips, spurs, and angles, and all other veins or lodes the top of apex of which lie within said boundaries. This location is named the Butcher Boy quartz claim, lode, or mine, and is situated in (on) the South Fork Clearwater unorganized mining district, Shoshone county, state of Idaho, and is bounded and described as follows: The discovery stake or monument is 600 feet from the mouth of what is known as 'Big Cañon.' Commencing at discovery, running 750 feet southeast to S. E. end center, thence 300 feet south to south cor., thence 1,500 feet to N. west cor., thence 300 feet N. E. to northwest end center, thence 300 feet north to north cor., thence 1,500 feet to east corner, thence 300 feet to south end center, and back to place of beginning. Discovered on the 22nd day of August, A. D. 1898. Located on the — day of —, A. D. 1898. Locators and claimants: Jethro J. T. San Garde. L. M. Tidwell." Subsequently one Mike Curen made a location covering the identical ground covered by defendants' location, and thereafter deeded a right of way over the same to plaintiff. The principal (in fact, the sole) question presented to us is as to the validity of the defendants' location.

It is objected by appellant that the location notice of defendants is fatally defective, in that it does not give the direction for the distance of 600 feet from the discovery monument to the mouth of Big Cañon creek, the natural object to which it was attempted to tie the claim. Section 3101, Rev. St. Idaho, as amended by Laws 1835 (see Laws 1895, p. 26), providing what shall be the requisite of a mining location (i. e. what the location notice shall contain), provides, inter alia, as follows: "Sixth, the distance and direction from the discovery monument to such natural object or permanent monument, if any such there be, as will fix and describe in the notice itself, the location of the claim." The mouth of Big Cañon is the "natural object or permanent monument" to which it is sought or attempted to tie the location; but no direction is given in the notice, no point or place in the mouth of the Big Cañon is designated, and consequently the latitude of the area which might be covered by the locator in surveying or

changing his location from the point of discovery is entirely indefinite. In *Brown v. Levan* (Idaho) 46 Pac. 661, in construing this statute, we held that "permanent monuments may exist before the location, or may be erected for the purpose of tying the claim to them; but then courses and distances from them to discovery stake or corner stakes, or some other object on the ground, must be stated with reasonable accuracy." It does not appear from the record what the width of the mouth of the cañon is. A location 600 feet from the mouth of the cañon, without any indication as to the direction from the point of discovery, would include a swinging privilege, which it is the purpose of the statute to avoid and prevent. We think the rule laid down in *Brown v. Levan* was correct, and we adhere to it. The location in this case was void. The order of the district court is reversed, and the cause remanded to the district court, with directions to continue the restraining order granted by said court during the pendency of this action. Costs to appellant.

SULLIVAN, J., concurs. QUARLES, J., did not sit in the case, and took no part in the decision.

BONNER v. POWELL.

(Supreme Court of Idaho. May 4, 1900.)

APPEAL—VERDICT—CONFLICTING EVIDENCE—AFFIDAVITS ON MOTION FOR A NEW TRIAL.

1. The verdict of the jury will not be disturbed when there is a substantial conflict in the evidence.

2. An affidavit on motion for a new trial must be properly identified as having been used on such motion, or it will not be considered on appeal.

(Syllabus by the Court.)

Appeal from district court, Idaho county; W. G. Piper, Judge.

Action by Robert Bonner against Perry N. Powell. Judgment for defendant, and plaintiff appeals. Affirmed.

James De Haven, for appellant. J. F. Ailshie, for respondent.

SULLIVAN, J. This is an action in trespass, brought to recover damages for the unlawful taking of 2,300 pounds of oats. It arose out of the following transaction: It appears that the appellant and his brother, John Bonner, were working a leased farm together, and that during that time John purchased a horse from defendant at the agreed price of \$50, and gave his promissory note therefor. Part payment was made on the note in grain, which the respondent hauled from the threshing machine during the threshing of the grain raised on the leased farm. It appears that the appellant and brother were in need of more help in threshing said grain, and employed the respondent to assist them,

and he quit hauling grain, and did assist them. There is some conflict in the evidence as to the terms of such employment. The respondent testified as follows: "When they were threshing, some time in October, Robert Bonner [the appellant] told me that they were short of hands, and that if I would stop hauling my grain, and help them thresh the next day, that I could get my grain at any time; that him and his brother John would be there on the place, and, if neither one was there, I could get it at any time. I told Mr. Bonner if that was the case, I would help them thresh the next day. Ed Breen was present at the time." Mr. Breen testified on the trial, and corroborated the testimony of the respondent. The appellant denied that he ever had such conversation. But the fact remains that the respondent was hauling grain taken in payment of said note from the threshing machine, and quit doing so, and helped appellant and brother thresh. There is a substantial conflict in the evidence on several points, and the well-established rule is, in such cases, that the verdict of the jury will not be disturbed.

Exception is taken to the first and fifth instructions given to the jury. We have carefully considered the same, and, on applying them to the evidence, find no prejudicial error in them.

We find in the transcript an affidavit showing that the respondent testified, in a preliminary examination, in regard to the sale of said horse, which testimony is contradictory of his testimony as given on the trial of this case, but said affidavit is not identified as having been used on the hearing of the motion for a new trial, and for that reason we cannot consider it. The judgment of the court below is affirmed.

HUSTON, C. J., concurs. QUARLES, J., did not sit in the case, and took no part in the decision.

On Rehearing.

May 24, 1900.

PER CURIAM. We have examined the petition for a rehearing filed in this case. It presents nothing which has not heretofore been fully considered by the court. We see no cause for granting a rehearing. As to the question of allowing costs for certification of transcript under the rule laid down by this court in *Potter v. Talkington* (Idaho) 49 Pac. 14, Mr. Allshie states that immediately after the hearing of the motion for a new trial he served notice upon James De Haven, Esq., attorney for plaintiff and appellant, that he was no longer attorney for defendant and respondent, and would appear no further in the case, and would no longer represent said defendant, as his employment by him had expired. Any service upon Mr. Allshie thereafter could not entail any liability either upon him or his quondam client.

BRANTLEY v. STATE.

(Supreme Court of Wyoming. May 26, 1900.)

ASSAULT WITH INTENT TO MURDER—INCLUDED OFFENSE—ASSAULT—JURISDICTION—ERROR—FAILURE TO ASK FOR INSTRUCTIONS.

1. Where an indictment charges an assault with intent to commit murder in the first degree, the defendant may be convicted of assault with intent to commit murder in the second degree, as the latter is an included offense.

2. Where, on the trial of one indicted for an assault with intent to murder, the evidence showed that the defendant stabbed the prosecuting witness, and inflicted a dangerous wound, it was not error to refuse to instruct that he might be found guilty of a simple assault.

3. Where, on the trial of a defendant charged with assault with intent to murder, no instructions were asked to the effect that defendant might be convicted of assault and battery, the omission to so instruct was not reversible error.

Error to district court, Carbon county; David H. Craig, Judge.

Matthew G. Brantley was convicted of assault with intent to commit murder in the second degree, and he brings error. Affirmed.

Chatterton & Fishback, for plaintiff in error. J. A. Van Orsdel, Atty. Gen., for the State.

CORN, J. The defendant (plaintiff in error) was tried upon an information charging him with an assault and battery with intent to commit murder in the first degree, and found guilty of an assault with intent to commit murder in the second degree.

1. Plaintiff in error contends that it was error for the court to instruct the jury that, under the charge as set out in the information, they might find the defendant guilty of the principal offense charged, or of an assault with intent to commit murder in the second degree, or of an assault with an intent to commit manslaughter; that the specific intent charged must be proved as laid; and that, when the evidence establishes an intent to commit murder in the second degree or manslaughter, there is a fatal variance, and the prosecution must fail. We think the instruction is sustained by the great weight of authority as well as the better reasoning. *State v. Throckmorton*, 53 Ind. 354; *Beckwith v. People*, 26 Ill. 500; *State v. Gummell*, 22 Minn. 51; *State v. Baldrige*, 105 Mo. 319, 16 S. W. 890; *People v. Odell*, 1 Dak. 199, 46 N. W. 601; *Nelson v. People*, 23 N. Y. 293; *McClain, Cr. Law*, 271. It is unquestionably true that the specific felonious intent must be set out in the information, section 10 of the declaration of rights securing to the defendant the right to demand "the nature and cause of the accusation" against him; and, under the rule that the proof must correspond with the allegation, the prosecution is not sustained by evidence which tends to prove another and different intent from the one charged. But it is evident that in charging an intent to commit murder in the first degree there is necessarily included a charge of in-

tent to commit murder in the second degree and voluntary manslaughter. Under our statute, murder in the first degree, murder in the second degree, and manslaughter each involves a felonious killing. To constitute the first, it must be done with premeditated malice; the second is a killing with malice, but with the element of premeditation omitted; while in voluntary manslaughter there is an intentional killing, but without any element of malice or premeditation. It is therefore evident, we think, that the intent to commit murder in the second degree is specifically and sufficiently charged in the information, and proof of such intent fitted the allegation. And so of intent to commit manslaughter. Proof cannot be made of assault with intent to commit murder in the first degree which does not at the same time furnish appropriate and sufficient evidence to sustain a verdict for the lower or included offenses of assault with intent to commit murder in the second degree and manslaughter. Section 5389, Rev. St. Wyo. 1899, provides that, "upon an indictment for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged, and guilty of any degree inferior thereto." But counsel contend that this is no authority in the premises, for the reason that assault with intent to commit murder in the first degree, murder in the second degree, and manslaughter are not degrees of the same offense, but separate offenses of the same degree, and punishable in the same way. Our statutes upon the subject are taken from Indiana, and the supreme court of that state, construing the section in question, say that "a party indicted for an assault or assault and battery with intent to commit murder in the first degree may, if the evidence justify it, be convicted of the assault or assault and battery with intent to commit murder in the first or second degree or to commit manslaughter, or he may be acquitted of any felonious intent, and found guilty of an assault or assault and battery only." *State v. Throckmorton*, 53 Ind. 356. And it is evident that the construction of the section suggested by counsel is too narrow; for it is also the only express authority in our statutes for a verdict of manslaughter under an indictment for murder in the first degree. And yet manslaughter is no more a degree of murder, under our law, than assault with intent to commit manslaughter is a degree of the crime of assault with intent to commit murder in the first degree. It is not murder at all in any degree. It is simply an included offense, sufficiently charged in charging murder.

But, independent of statute, the rule is the same, and the section referred to is merely a declaration of the common-law rule. 1 Whart. Cr. Law, 384, 617. "The jury may acquit the defendant of part, and find him guilty of the residue. 1 Chit. Cr. Law, 637. Where the accusation includes an offense of an inferior degree, the jury may discharge

the defendant of the higher crime, and convict him of the less atrocious. 2 Hale, 203. This rule applies in all cases where the minor offense is necessarily an elemental part of the greater, and when proof of the greater necessarily establishes the minor." *State v. Waters*, 39 Me. 65; *Swinney v. State*, 8 Smedes & M. 584. And Chitty says: "It is a general rule, which runs through the whole criminal law, that it is sufficient to prove so much of the indictment as shows that the defendant has committed a substantive crime therein specified." 1 Chit. Cr. Law, 250. The decision in *State v. White*, as reported in 41 Iowa, 316, referred to by counsel, is not the law in that state. The case was reargued, and a contrary opinion reached, which was reported in 45 Iowa, 325. The decision in *Morman v. State*, 2 Cushm. 54, is not authority in this case. The defendant was indicted for an assault with a deadly weapon with intent to kill and murder under a section of the statute providing a penalty of 10 years' imprisonment for that offense. He was found guilty of a mere assault with intent to commit manslaughter, and the court held it to be a conviction under a different section of the statute of a separate and distinct offense, for which a penalty of not exceeding five years' imprisonment was prescribed. In the case under consideration the information was filed and the conviction had under a section of our statute providing a penalty of not more than fourteen years for an assault or assault and battery with intent to commit a felony.

2. Upon the trial the defendant requested the court to instruct the jury that he might under the information be found guilty of an assault only, and the refusal of the court to give such instruction is assigned as error. There was no evidence in the case whatever upon which to base such an instruction. The information charged an assault and battery with intent to commit murder in the first degree. The evidence showed conclusively that the defendant stabbed the prosecuting witness with a knife, making a wound six or seven inches long from the middle of the upper lip along the face and neck, cutting through the muscles of the face and the facial artery, and just escaping the jugular vein. If guilty at all, he was guilty of an assault and battery. There was no evidence of a simple assault. The judge of the trial court charged the jury as required by statute, giving such instructions as seemed to him applicable to the facts of the case. They contained correct statements of the law, and substantially covered the evidence. The defendant claimed that the blow was struck in self-defense. Considering the character of the defense, the deadly nature of the weapon used and the wound inflicted, if the defendant desired an instruction upon the theory that his offense, if any, was assault and battery merely, he should have requested it. Not having done so, there is nothing in the record to indicate

that he objected, or preserved any exception, to the omission. So that, if it be admitted that such an instruction would have been proper under the evidence, there is nothing before this court for its action. The judgment will be affirmed. Judgment affirmed.

POTTER, C. J., and KNIGHT, J., concur.

NESBITT et al. v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington. May 24, 1900.)

DEATH—ACTION—PERSONS ENTITLED TO SUE.

2 Hill's Ann. St. & Codes, § 138, providing that, where a person's death is caused by the wrongful act of another, the decedent's heirs or personal representatives may maintain an action against the person liable, does not authorize the maintenance of an action by a mother for the wrongful death of a son who was more than 21 years of age at the time of his death, since the words "heirs or personal representatives" include only the widow and children.

Appeal from superior court, Spokane county; William E. Richardson, Judge.

Action by Lillie M. Nesbitt against the Northern Pacific Railway Company. From a judgment sustaining a demurrer to the complaint, defendant appeals. Affirmed.

Blake & Post, for appellant. Stephens & Bunn, for respondent.

PER CURIAM. The appellant, who was plaintiff below, brought this action against the respondent to recover damages for the death of her son, who was killed while in the performance of his duty as an employé of the respondent. The decedent was over 21 years of age at the time the injury occurred which resulted in his death. A demurrer to the complaint was sustained by the court below, and, on the appellant's electing to stand upon the complaint, judgment for costs and of dismissal against her was entered. It is conceded that the case falls within the rules announced by this court in the cases of Hedrick v. Navigation Co., 4 Wash. 400, 30 Pac. 714, and Noble v. City of Seattle, 19 Wash. 133, 52 Pac. 1013, 40 L. R. A. 822, and that, if these cases are to be adhered to, the judgment of the lower court must be affirmed. We are asked to either modify the former case or overrule the latter, but a careful review of the argument of the learned counsel for the appellant has failed to convince us that either of these cases is so far wrong in principle as to warrant us in changing or modifying the rules announced therein. The judgment is affirmed.

STATE ex rel. STERLING TIMBER CO. v. JENKINS, Secretary of State.

(Supreme Court of Washington. May 18, 1900.)

FOREIGN CORPORATIONS—LICENSE PERIOD—CALENDAR YEAR—MANDAMUS.

Under Laws 1897, p. 135, c. 70, § 5, imposing an annual license fee on foreign corpora-

tions, to be paid on or before July 1st, the period for which such license is granted begins on July 1st, and not at the creation of the corporation or the beginning of the calendar year; and mandamus will not lie to compel issue of such license for a calendar year.

Application by the state of Washington, on the relation of the Sterling Timber Company, for a writ of mandate to compel Will D. Jenkins, secretary of state, to issue a license. Writ denied.

Charles E. Shepard, for relator. Thomas M. Vance, for respondent.

PER CURIAM. This was an original application for a writ of mandate directed to the respondent, as secretary of state, requiring him to issue an annual corporate license to the relator for the calendar year 1899. The case calls for a construction of section 5, c. 70, p. 135, Sess. Laws 1897, which is as follows: "Every corporation incorporated under the laws of this state, and every foreign corporation having its articles of incorporation on file in the office of the secretary of state shall, on or before the first day of July of each and every year, pay to the secretary of state, for the use of the state, the following license fees: Every corporation having a capital stock, ten dollars. Every corporation failing to pay the said annual license fee, on or before the first day of July of each and every year, and desiring to pay the same thereafter, and before the first day of January next following, shall pay to the secretary of state, for the use of the state, in addition to the said license fee, the following further fee, as a penalty for such failure: Every corporation, two dollars and fifty cents. Every corporation failing to pay the said license fees and penalties on or before the thirty-first day of December of any year shall forfeit the sum of five dollars for every day which it shall continue to do business as a corporation, after said date, to be recovered in an action in any court of competent jurisdiction." The point to be decided is, when does the "year" referred to in the section begin? One of three constructions must be given: First, a year beginning on the date when the corporation is created; second, a year beginning on July 1st; third, the calendar year. The practice heretofore prevailing in the department, and the one contended for by the respondent, is that the license runs from the year beginning on July 1st; while the relator's contention is that the license should be for a calendar year. The language of the section is somewhat vague and uncertain, but we are of the opinion that the department has adopted that construction which better comports with the object sought to be attained in the passage of the act, and the public convenience. It will be observed that the section directs that payment shall be made by July 1st, and it is only reasonable to infer therefrom that it was also intended that the period for which the license is granted should begin at that

time. We think the interpretation placed upon it by the department is reasonable, and are not convinced that the construction contended for by the relator is justified by the language of the act. The writ will be denied.

LONG v. PIERCE COUNTY.

(Supreme Court of Washington. April 7, 1900.)

COUNTIES—BUILDING CONTRACT—ESTOPPEL—
AUTHORITY OF COMMISSIONERS—RECORDS—
EVIDENCE—INSTRUCTIONS—EXTRA WORK—
ARCHITECT'S CERTIFICATE.

1. Where plaintiff's contract with defendant county to erect a court house provided that plaintiff should be paid for all extra work done at the request of the architects, if notice of claims therefor was given to the architects within 10 days after beginning such work, parol evidence that at a regular meeting of the board of county commissioners, at which all were present, it was orally agreed between plaintiff and the commissioners that the provisions relative to written notice and requests were abandoned, and that plaintiff should be paid for all extra work and material either at the request of the architects or the county's superintendent, which agreement was not recorded by the commissioners as required by Ballinger's Ann. Codes & St. § 356, was admissible, since such section does not declare such proceedings void if not recorded, and hence their contract might be shown by parol evidence.

2. Where plaintiff sued for extra work and materials under a county contract, evidence that certain provisions had been abandoned by agreement between plaintiff and the county commissioners should not be excluded on the ground that no consideration for such abandonment was shown, since the original consideration attached to and supported the modified contract.

3. Where plaintiff had a contract for the erection of a court house, which provided that the building should be completed on a certain date, or plaintiff should forfeit \$75 a day for each day thereafter until completion, and the county should furnish plaintiff the lines and levels for the foundation before a certain date, which was prior to the date of the contract, and the county failed to do so for eight days after such date, the provision as to the penalty was inoperative, since plaintiff, on entering on the work after a breach of the condition precedent, only obligated himself to finish the building within a reasonable time.

4. Where a building contract provided that, in event of any doubt or question arising respecting the true meaning of the specifications, reference should be had to the architects, whose decision thereon, "being just and impartial," should be final and conclusive, it was error, in a suit by the contractor for extra work and materials, to charge that the architect's decision as to the value of extra work was final and conclusive.

5. Where plaintiff's contract to erect a court house authorized the county to make such alterations in the plans as it might desire, as the work progressed, and provided that the architect should place a valuation on the work added or omitted, but that, if the contractor did not agree to such valuation, he should proceed with the work on a written order of the architects, and the question of the plan be submitted to arbitrators, such an order was not a prerequisite to plaintiff's recovery for extra work not called for in the specifications, but required by the detailed plans subsequently furnished by the architects.

6. Where a building contract provided that, in case of any doubt as to the meaning of the plans or specifications, the questions should be

submitted to the architects, whose decision, "being just and impartial," should be final and conclusive, and plaintiff claimed a quantity of work done to have been extra work, in that it was required by the detailed plans, the question whether the architects' decisions on such question were just and impartial was for the jury.

7. Where a contract for a building provided that the contractor should make claim in writing to the architects for any extra work or materials furnished, it was error to refuse to admit in evidence, in a suit by the contractor for extra work, letters written by him to the architects, claiming certain work as extra, where the letters were sufficiently specific to inform them that the work, as claimed by the contractor, was to be extra.

8. Where plaintiff, having a contract to build a court house, notified the architects that the building was ready for occupancy, and they refused to give the final certificate of completion on the ground that the building had not been completed according to the plans, and the contractor claimed for extra work, and an agreement was executed whereby the county was to go into occupancy of the building, and the county and the contractor were to submit a statement of their respective claims within eight days, which agreement provided that the county occupied such building subject to its right to claim damages for any work done or materials used in said building not in accordance with the specifications, and any other claims for nonperformance set forth in the statement to be furnished, the county was not confined to defects not set forth in the architect's statement.

9. Where, on completion of a court house, the county contended it was not finished in accordance with the plans, and an agreement was made that the county should occupy the building without waiver of such claims, the agreement did not waive the county's right to insist that the contractor could not recover for extra work without showing that he had made an agreement in writing with the architects therefor within 10 days of the beginning of such work, as required by the contract.

10. Where a building contract provided that, in case of any doubt or question as to the plans and specifications, the decision of the architects, being just and impartial, should be conclusive, and prior to the commencement of the work the architects delivered to the county a bond that they would keep the cost of the building below a certain figure, if the contractor did not know of the bond at the time of making the contract the provisions as to the conclusiveness of the architects' decision would be of no effect.

11. Where a building contract provided that all the walls of the building should be of Wilkeson stone, and the contractor claimed damages by reason of the fact that the architects had refused to allow him to procure stone from any quarry save a certain one, and it appeared that the quarry was the only one open at the time the contract was made, it was error to charge that the county had a right to restrict the contractor to procuring stone from the single quarry open at the time the contract was entered into, since he had a right to procure the stone from wherever a suitable quality was to be found.

12. Where the board of county commissioners wrote a contractor that they were willing to settle with him for the construction of the court house on the basis of a sum stated in the letter, the letter should have been admitted in evidence; it not appearing on its face to have been an offer of compromise.

Appeal from superior court, Pierce county; Thomas Carroll, Judge.

Action by John T. Long against Pierce county. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Sullivan & Christian, for appellant.
George H. Walker, Walker & Fitch, and John
A. Shackelford, for respondent.

FULLERTON, J. On the 19th day of September, 1890, the appellant and respondent entered into a written contract, by the terms of which the appellant agreed to furnish all the necessary materials, and erect and finish for the respondent a court house and jail, for the consideration of \$270,000. The contract provided that the work should be performed under the direction and to the satisfaction of Proctor & Dennis, architects, acting as agents of the respondent, who should, "as the work proceeds," furnish estimates of the value of the work done and material furnished, upon which the contractor was to be paid 85 per cent. of the value of same; and, upon the completion of the building to the satisfaction of the architects, they were to so certify, and final payment was thereupon to be made to the contractor. The contract contained the following clauses: "(2) Should it appear that the work hereby intended to be done, or any of the matters relative thereto, are not sufficiently detailed or explained on the said drawings or in the said specifications, the contractor shall apply to the architects for such further drawings or explanations as may be necessary, and shall conform to the same, as part of this contract, so far as they may be consistent with the original drawings; and, in event of any doubt or question arising respecting the true meaning of the drawings or specifications, reference shall be made to the architects, whose decision thereon, being just and impartial, shall be final and conclusive. It is mutually understood and agreed that all drawings, plans, and specifications are and remain the property of the architects. (3) Should any alterations be required in the work shown or described by the drawings or specifications, a fair and reasonable valuation of the work added or omitted shall be made by the architects, and the sum herein agreed to be paid for the work according to the original specification shall be increased or diminished as the case may be. In case such valuation is not agreed to, the contractor shall proceed with the alteration, upon the written order of the architects, and the valuation of the work added or omitted shall be referred to three (3) arbitrators, no one of whom shall have been personally connected with the work to which these presents refer, to be appointed as follows: One by each of the parties to this contract, and the third by the two thus chosen,—the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expense of such reference. (4) The contractor shall, within twenty-four hours after receiving written notice from the architects to that effect, proceed to remove from the grounds or building all materials condemned by them, whether worked or unworked, or

take down all portions of the work which the architects shall condemn as unsound or improper, or as in any way failing to conform to the drawings and specifications, and to the conditions of this contract. The contractor shall cover, protect, and exercise due diligence to secure the work from injury, and all damage happening to the same by his neglect shall be made good by him." "(6) The contractor shall and will proceed with the said work, and every part and detail thereof, in a prompt and diligent manner, and shall and will wholly finish the said work according to the said drawings and specifications and this contract on or before the fifteenth day of September in the year one thousand eight hundred and ninety-two: provided, that possession of the premises be given the contractor, and lines and levels of the building furnished him, on or before the 15th day of September in the year one thousand eight hundred and ninety; and in default thereof the contractor shall pay to the owner seventy-five dollars for every day thereafter that the said work shall remain unfinished, as and for liquidated damages. (7) Should the contractor be obstructed or delayed in the prosecution or completion of the work by the neglect, delay, or default of any other contractor, or by any alteration which may be required in the said work, or by any damage which may happen thereto by fire, or by the unusual action of the elements or otherwise, or by the abandonment of the work by the employees through no default of the contractor, then there shall be an allowance of additional time beyond the date set for the completion of the said work; but no such allowance shall be made unless a claim is presented in writing at the time of such obstruction or delay. The architects shall award and certify the amount of additional time to be allowed, in which case the contractor shall be released from the payment of the stipulated damages for the additional time so certified, and no more. The contractor may appeal from such award to arbitrators constituted as provided in article 3 of this contract." "(14) It is further mutually agreed between the parties hereto that no certificate given or payment made under this contract, except the final certificate or final payment, shall be conclusive evidence of the performance of this contract, either wholly or in part, against any claim of the owner, and no payment shall be construed to be an acceptance of any defective work."

On entering into the contract the appellant proceeded with the work, and on the 8th day of May, 1893, notified the architects that the building was ready for their acceptance. The architects refused, on the ground that the building had not been completed in accordance with the contract, to issue the final certificate. After some controversy, and for the purpose of settling their differences, the appellant and respondent entered into a supplemental agreement, dated the 21st day of

June, 1893, which recited that the appellant claimed that he had fully completed his contract; that some question had arisen between the parties as to the construction and interpretation of the plans and specifications, and as to whether or not the building had been completed in accordance therewith; that, notwithstanding the conflicting claims between the parties, the building was in a situation for occupancy and at least partial use by the respondent; "that it is desired by all parties hereto to expedite the settlement of all court-house matters, and lessen the expense of all parties to such settlement, and establish the claims of the first party for damages for non-performance, and those of the second party for extras, and all other claims that may justly arise on behalf of either of said parties under said contract and matters pertaining thereto,"—and proceeds in part as follows: "Now, therefore, it is agreed by all parties hereto that the party of the first part shall have the right to use and occupy any and all portions of said court house; that such occupation and use by said party of the first part shall not prevent the party of the second part from completing or finishing any parts or portion of said court house that may be ascertained to be incomplete, and the second party desires to complete. It is further distinctly understood and agreed by all parties hereto that such possession and use shall not in any way be an acceptance of such court house, or any part or portion thereof, as being constructed and completed in accordance with the conditions of said contract and the plans and specifications belonging thereto, nor shall the delivery thereof be construed to be a waiver on behalf of the party of the second part of any rights or claims for compensation under said contract or for extras added thereto, but that all matters in dispute between the parties hereto as to the completion or construction in accordance with the contract, and the damages for the failure to so construct, and all manner of claims by the party of the first part for nonperformance of said contract, or any claims for extra compensation, or any claims that the party of the second part may have under said contract, shall in no way be affected by such occupation and use, but shall be left for further and final settlement hereafter: provided that, for the further expediting the final settlement of all matters, it is agreed that each of the parties hereto furnish the other, within eight days from the date hereof, a full and complete statement of all their claims under said contract, or connected therewith, to wit: The party of the first part shall, through its architects, furnish the party of the second part a full statement of those matters in connection with the said court house claimed by them to be incomplete, or not in accordance with the contract, plans, and specifications, the particulars thereof, and the damages resulting therefrom, with all other claims on behalf of said first party for nonperformance

of said contract, together with such extras as are admitted to be allowed by the party of the first part. The party of the second part shall furnish to the party of the first part an itemized statement of his claim for extras under said contract, the value thereof, with the authority for performing or furnishing such extras, together with any other claims that he may have under said contract. It is further agreed that if, within thirteen days after the above statements have been furnished to the respective parties hereto, no amicable settlement has been arrived at by said parties, that either of said parties shall have the right to apply to the courts for an adjudication thereof. * * * And, if said statement is filed as aforesaid by the said party of the first part within said time, then such statement made by said architect shall be considered as a final certificate by them that the building is completed to their satisfaction, except as to those matters enumerated in their said statement furnished as aforesaid; and then, if the parties hereto do not reach an amicable adjustment within the said thirteen days, the party of the second part shall have the right to have the said matters in dispute adjudicated in the courts without further certificate from said architects, provided party of the second part shall have filed his said statement; the party of the first part herein, filing the said statement as aforesaid, being considered to have accepted the said building subject to its rights to claim damages for any work done or materials used in said building claimed by them not to be in accordance with the original plans and specifications, and any other claims for non-performance set forth in such statement. It is also expressly agreed that all demurrage claimed by the party of the first part against the party of the second part because of the delay in the completion of said building is waived from time of signing this contract and entering into possession thereunder. And the said party of the second part shall not be concluded from showing that he was entitled to an extension of time in which to complete the said building beyond the time prescribed in the said original contract because of the fact that the architect has not awarded and certified the amount of additional time which might be allowed under said contract as to any extension of time claimed by the said party of the second part, and he shall have the right to adjudicate such matters in court, the same as if there was no provision in said contract for an appeal from the architects on such questions to arbitrators, as provided in article 3 of the original contract."

Within the time limited in the supplemental agreement, each of the parties thereto made out and served upon the other their claims required by its terms; and after endeavoring to reach a settlement, and failing therein, the appellant instituted the present action. In his complaint the appellant al-

leged the execution of the foregoing contracts, and his compliance therewith; that the building was not completed until about the 29th day of May, 1893, because of various delays, which he enumerated; that at the request of the respondent, and under the direction of the architects, he furnished a large amount of extra materials and performed extra work to the value of \$73,147.75; that the respondent waived orally and in writing that part of the original contract which required him to make a claim for additional or extra work within 10 days of the beginning of such work, and also those provisions of the contract which required appellant to furnish in writing a claim for such additional work and extras; that the architects were, and that each of them was, peculiarly interested in the result of the contract, for the reason that they had, as principals, with others as sureties, prior to the commencement of said work, executed a bond to the respondent in the sum of \$25,000, conditioned that the building, completed, should not cost respondent to exceed \$300,000, and that he had no knowledge of the execution of said bond at the time he entered into the original contract with the respondent, agreeing to submit matters of differences that might arise between them to the decision of the architects; that the architects unjustly, arbitrarily, and wrongfully refused to allow him reasonable, fair, or just compensation for his extra work and materials; and that he demanded arbitration upon all of said matters, as provided in the contract, but that said architects, for and with the intention of defrauding and injuring him, refused to submit any of such matters to arbitrators. He further alleged that he was required by the respondent and its architects to procure the Wilkeson stone, required by the plans and specifications to be used in the construction of said building, from one firm, and that the respondent refused for a long time to allow him to get Wilkeson stone from any other firm, although the Wilkeson stone which he offered and was ready to furnish was equal to, and of the same quality as, the Wilkeson stone the architects had already permitted appellant to use in the construction of the building, and that by reason of these acts on the part of respondent he was damaged, because of delay in the construction of the court house, and the extra expense he was put to, in the sum of \$20,000. He alleged that the respondent awarded other parties contracts in connection with the construction of the building which he was entitled to perform, as alterations and additions, by the terms of the original contract, whereby he was deprived of profits which he would reasonably have made in the sum of \$542.82. He also alleged a balance due upon the original contract price of \$25,706.59, making a total sued for of \$119,397.16. The respondent answered, putting in issue the material allegations of the complaint; admitting, how-

ever, the execution of the contracts, and the execution of the bond by the architects, Proctor & Dennis, and alleging that the appellant had knowledge of the execution of such bond prior to the execution of his contract. It alleged affirmatively that it had paid the appellant upon the original contract \$250,631.90; that, in compliance with the terms of said contract and supplemental contract, the respondent caused to be made by the architects, Proctor & Dennis, and furnished to appellant, a statement of the matters in connection with the court house claimed by the architects to be incomplete, so far as it was able to obtain at that time, and the damages resulting therefrom. It set forth a copy of the architects' statement, which showed the total amount of extras which they had allowed to be of the value of \$3,157.70, and a total of omissions of \$5,690.23, leaving a balance due the county for omissions, over extras, of \$2,532.53. The report further showed that the contractor had made changes and had performed work which the architects claimed were not in accordance with the plans and specifications, for which there should be deducted \$12,843.33. The architect Proctor claimed for demurrage \$6,750, leaving a balance due the contractor of \$18,067.07. The report was not concurred in by the other architect, Dennis, as to the amount charged for demurrage. He claimed that \$16,350 should be charged therefor, leaving a balance due the contractor of \$8,467.07. The respondent further alleged that the architects had given an erroneous legal construction to the contract, as to what time should be extended the appellant to complete the building, and for omissions and extras, and alleged that certain other items should be allowed as credits to it for omissions which it enumerated, making a total of \$7,754.28, and that it was entitled to demurrage for the noncompletion of the building for the specified time from the 15th day of September to the 6th day of June, 1893, less eight days only, which it credited because it was not "able to give to plaintiff [appellant] the lines and levels for the foundation of said building for a period of eight days after it should have done" by the terms of the original contract; the amount claimed for demurrage being \$19,125. It also set out a new list of extras, giving the appellant credit for \$3,830.33, and, in its final summary, alleged a balance to be owing from appellant to respondent of \$3,337.41. No judgment over was asked for this sum. The appellant replied, putting in issue the new matter alleged in the answer. He admitted that the lines and levels were not furnished to him by the respondent until eight days after they ought to have been furnished, and affirmatively pleaded that the respondent did not deliver to the appellant possession of said premises at the time agreed upon, nor before the 1st day of November, 1890, and that respondent was es-

topped to claim demurrage because of these facts. On the issues made a trial was had, resulting in a verdict and judgment for the appellant in the sum of \$233.43 and costs. From that judgment this appeal is taken.

1. It was shown that the detail or working drawings for the building were prepared by the architects after appellant's bid had been accepted and the contract entered into, and that the appellant made the estimates upon which his bid was based from the plans and specifications which alone were submitted to him. The appellant contended, and his evidence tended to prove, that these detail drawings were much more elaborate in design than were the original drawings, plans, and specifications; requiring, not only a higher and more expensive class of labor, but also a more expensive and better quality of material, and necessitating a longer time in which to do the work. The larger part of appellant's demand for extras is based upon this claimed difference between the detail drawings and the plans and specifications. When the appellant offered evidence to substantiate his claim, the respondent objected to its admission unless it be first shown that the work was done in pursuance of a written order from the architects, and that a notice of the claim had been made to the architects, in writing, within 10 days of the beginning of such work. The trial court, conceiving it not within his power to direct the order of proof, admitted the testimony after counsel for the appellant had promised to show either that a written notice of the claim was made, or that such notice was waived by the respondent. In pursuance of his promise to show a waiver on the part of the county, the appellant offered oral proofs tending to show that at a regular meeting of the board of county commissioners, held shortly after the commencement of the work, all the members being present, it was orally agreed between respondent and the appellant that the provisions of the original contract, requiring the contractor to give notice in writing of all claims for extra work within 10 days of the beginning of such work, and all other provisions relating to notices in writing, should be, and were, waived and abandoned, and that appellant should be paid for all extra materials furnished, and extra labor performed by him, whether furnished or performed at the request of the architects, or of one William Box, whom the respondent had appointed to superintend the construction of the building, and whether written notices of such claims were or were not given. It was conceded by both parties that the records of the board of county commissioners, required by statute to be kept, contained no reference to any such agreement or understanding; and, on this concession being made, the court rejected the proffered evidence on the ground that oral evidence was not admissible to prove the acts and proceedings of the board of county com-

missioners. This ruling of the court is assigned as error.

The question presented was before this court in the case of *Robertson v. King Co.*, 20 Wash. 259, 55 Pac. 52, and was decided adversely to the conclusion reached by the lower court. In that case Robertson brought an action to recover for labor performed upon a county road, which he alleged was authorized by the board of county commissioners. No written contract was entered into between the claimant and the county for the performance of the work, nor did the records kept by the board of county commissioners contain any reference thereto. It was objected there, as here, that the contract could not be proved by oral evidence. Passing upon this objection, we said: "It is not the fault of those who perform services for the county that the county keeps no record of the authorization, and it would be unjust to hold such persons responsible for the negligence of the commissioners, or their failure for any reason to keep such record; and what was in fact done may be shown, by evidence allunde the record, to have been done." The decision in that case was announced after the trial of the present case in court below, and the principle announced was not, for that reason, followed by the trial court. The learned counsel for the respondent, however, earnestly insisted that the case ought not to be accepted as settled law. With out attempting a review of their argument, or of the many authorities cited, a re-examination of the question has convinced us that the conclusion reached therein is correct in principle, and is supported by the great weight of authority. The rule is general that officers of municipal or quasi municipal corporations, having power to contract on behalf of their municipalities, unless restricted by statute, may contract with reference to municipal business in any manner lawful for individuals to contract, and such contracts may be either written or oral. It is only when the statute prescribes a particular mode of contracting that the municipality is confined to any particular mode. *Arnott v. City of Spokane*, 6 Wash. 442, 33 Pac. 1063; *Montgomery Co. v. Barber*, 45 Ala. 237; *McCabe v. Board*, 46 Ind. 380; *Baker v. Johnson Co.*, 33 Iowa, 151; *Gillett v. Commissioners*, 18 Kan. 410. Our statute is silent as to the mode of contracting by boards of county commissioners, and equally so as to the manner of proving their contracts. While the statute requires such boards to keep a record of "all their proceedings and determinations touching all matters properly cognizable before them" (section 356, Ballinger's Ann. Codes & St.), it nowhere declares their proceedings void if not recorded, nor does it make their record the only evidence of their proceedings. No power or authority is given any one contracting with the county through its board, or furnishing it with supplies or performing services for it on the order of its

board, to advise or direct what shall or what shall not be entered in its records; nor is there any means provided by which the records may be corrected. Manifestly, it would be a perversion of justice to permit a county to avoid its contracts, lawful when entered into, by showing a willful or negligent omission on the part of its officers to perform a duty which the law enjoins solely on them; and especially so where the law gives to the other contracting party no power to coerce the performance of the duty. Neither does the case fall within the rule that oral evidence cannot be substituted for a record which the law requires to be in writing. This rule is applicable only where the existence of the record is a part of the fact necessary to be proved, and has no application where the record is merely a collateral or subsequent memorial of such fact. In the latter class of cases evidence has always been held admissible to prove the actual fact. 1 Greenl. Ev. § 86. In the well-considered case of *Gillett v. Commissioners*, 18 Kan. 410, it was said: "The defendant also objected to the introduction of any parol evidence tending to show any contract on the part of the county commissioners authorizing the plaintiff to attend to said suits. This objection was sustained, and in this we think the court below erred. This evidence did not tend to contradict anything stated in the county commissioners' records, but simply to show facts which had actually occurred, but had not been entered in the proper record book of the commissioners' proceedings. Ordinarily the records of the county commissioners furnish the best evidence of the acts and proceedings of such commissioners; but when such acts and proceedings amount in law to a contract, and this contract is for services or property or something of value to be furnished by the other party, and such contract has been executed by the other party, and the county has received the benefit of such services or property or thing of value, it would certainly not be proper to allow the county commissioners to then defeat an action for such services or property or thing of value merely because the county commissioners and their clerk had failed to do their duty, by making their records show all their acts and proceedings. This has virtually been so decided in the case of *Butler v. Commissioners*, 15 Kan. 178. But we would now have to decide otherwise if we should now hold that the plaintiff in this action could not prove his said contract by any other evidence than by the county commissioners' records. We think he had a right to prove the same by parol evidence. While the statute (Gen. St. p. 263, § 44) requires that the county clerk shall record all the acts and proceedings of the county board, yet there is no statute that renders such acts or proceedings void if not recorded, and no statute that makes the records of the county board the only evidence of their acts and proceedings." So, in *Jordan*

v. Osceola Co., 59 Iowa, 388, 13 N. W. 344, it was said: "A party contracting with the supervisors has no authority or power to cause the contract to be noted in the record. This rests alone with the county officers. The law will not permit prejudice and loss to the party contracting with the supervisors, by reason of the negligent or intentional omission of the supervisors or the county officers to enter the fact of the contract upon the proper record." See, also, 1 Dill. Mun. Corp. § 301; Tied. Mun. Corp. § 108; *Rock Creek Tp. v. Coddling*, 42 Kan. 649, 22 Pac. 41; *Athearn v. Independent Dist. of Millersberg*, 33 Iowa, 105; *Morgan v. Wilfley*, 71 Iowa, 212, 32 N. W. 285; *Taymouth v. Koehler*, 35 Mich. 22; *School Dist. v. Clark*, 90 Mich. 435, 51 N. W. 529; *German Ins. Co. of Freeport v. Independent School Dist. of Milford*, 25 C. C. A. 492, 80 Fed. 366; *Board v. Stone (Wyo.)* 51 Pac. 605; *Bigelow v. City of Perth Amboy*, 25 N. J. Law, 297; *Hutchinson v. Pratt*, 11 Vt. 402; *Road Co. v. Hutchinson*, 4 Colo. 50; *Reynolds v. Schweinefuss*, 27 Ohio St. 311; *Stout v. Yamhill Co.*, 31 Or. 314, 51 Pac. 442.

It is further insisted that the proffered testimony was properly rejected for the reason that no offer was made to show a consideration for the modification of the original agreement, or reciprocal advantage accruing to the county by reason thereof, and that the record contains nothing upon which a consideration can be inferred. But no express or independent consideration was necessary. "The contract, when modified by the subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract." *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683; *Brown v. Everhard*, 52 Wis. 205, 8 N. W. 725; *Badders v. Davis*, 88 Ala. 367, 6 South. 834.

2. In the answer of the respondent it was averred that the lines and levels for the foundation of the building were not furnished the appellant until eight days after the time they should have been furnished by the terms of the contract, and that, in computing the number of days for which the respondent was entitled to claim liquidated damages, "there should be deducted * * * said eight days." At the conclusion of the testimony the appellant requested the court to instruct the jury that the condition of the sixth clause of the contract, relating to liquidated damages, by reason of these facts, was inoperative and not binding upon the appellant, and that the jury were not warranted in finding the respondent entitled to any credit for or on account of liquidated damages. The court refused to give to the jury the requested instruction, and instructed them to the effect that the respondent was entitled to a credit of \$75 per day for each day's delay after the 15th day of September, 1892, up to the 6th day of June, 1893, less the eight days the re-

spondent had admitted it delayed in furnishing the appellant with the lines and levels, and less such delays as the jury might find from certain other causes specially enumerated, not necessary here to be mentioned. In refusing to give the requested instruction, and in permitting the jury to find liquidated damages, we think the trial court erred. By the terms of the sixth clause of the contract as written, possession of the premises was to be given the contractor, and the lines and levels for the building were to be furnished him, on or before the 15th day of September, 1890. This date, it will be noticed, is prior to the date the contract bears, and obviously renders this requirement of the contract incapable of fulfillment according to its terms. The trial court did not, however, base its ruling upon this ground, nor do the parties make any contention here based thereon; the appellant's contention being that the failure of the respondent to comply with this clause renders nugatory the obligation assumed by him to complete the building on or before the date named in the contract, while the respondent contends that its failure to give possession and furnish the lines and levels on or before the prescribed time was merely a cause for an extension of time, which the appellant had waived by failing to make a claim therefor in writing at the proper time. The trial court adopted the view of the respondent, and allowed an extension of eight days solely because of the averment in the answer that eight days should be deducted. But whether the promise on the part of the contractor to complete the building on or before the date named in the contract was rendered nugatory by the insertion of this impossible condition, or whether it should be construed as a contract to give possession and furnish the lines and levels within a reasonable time after the execution of the contract, we have not found it necessary to determine. Either view is necessarily fatal to respondent's claim for liquidated damages. If it be construed as an agreement with which performance within a reasonable time would be a compliance, it is none the less a condition precedent, which must be strictly performed by the respondent before it can exact of the appellant a performance of the dependent conditions; and we have the positive admission, made in the form of a direct allegation in its answer, that the respondent did not perform within the required time. The appellant, by entering upon the work after the failure of the respondent to comply with this precedent condition, obligated himself to complete the building within a reasonable time, and, if he failed so to do, is liable to the respondent for all actual damages suffered by it because of such failure. More than this the respondent cannot insist upon. The case of *Reichenbach v. Sage*, 13 Wash. 364, 45 Pac. 354, is cited by respondent

as authoritative here. In that case we held it lawful for the parties to a building contract to agree upon a fixed sum per day to be paid as liquidated damages for the time the building shall remain incomplete after a fixed date, where the amount of damages so agreed upon is not excessive or unreasonable, and where the damages, while certain to accrue, may not be readily susceptible of proof under the ordinary rules of evidence; but the present case presents a further question. The promise of the appellant to complete the building within a fixed time, or pay a certain sum per day for each day's delay thereafter, as liquidated damages, was in the nature of an agreement for a forfeiture; and the question is, will a forfeiture be enforced when, by the very terms of the agreement creating it, it is made to depend upon a condition precedent to be performed by the party seeking to enforce it, which such party solemnly admits was not performed? Clearly, it will not. Forfeitures are not favored in law, and always receive a strict construction against those for whose benefit they are introduced. *Livingston v. Stickle*, 7 Hill, 253. This question was before the St. Louis court of appeals in the case of *Eldridge v. Fuhr*, 59 Mo. App. 46. There, as here, it was contended that the owner was entitled to liquidated damages, notwithstanding he had not complied with his agreement to deliver possession of the premises to the contractor at the time agreed upon. Passing upon this contention, the court said: "The second count in the petition was for damages for failure to deliver the house within the time prescribed in the contract. The court, by its instruction, directed a verdict for the defendants on this count. In this we think the court was right. This claim for damages is based on the following section of the contract: 'The contractor shall and will proceed with the said work, * * * and shall and will wholly finish the said work * * * on or before the thirteenth day of June, 1892; provided, that the possession of the premises be given the contractor, and lines and levels furnished him, on or before the ninth day of April in the year one thousand eight hundred and ninety-two; and in default thereof the contractor shall pay to the owner two dollars and fifty cents (\$2.50) for every day thereafter that the said work shall remain unfinished, as and for liquidated damages.' The plaintiff admitted that he did not deliver possession of the premises to Fuhr until April 20th. This admission defeated the claim." In *Gaslight Co. v. Wood*, 9 C. C. A. 362, 61 Fed. 74,—an action on a contract, where Wood had agreed to construct for the gas company a certain structure, and complete it, "by Nov. 15th, 1891, under penalty of \$100 per day: provided, you have foundation ready by June 15th," it was held that the failure of the gas company to have the foundation ready

by the required time prevented it from claiming liquidated damages for Wood's delay in completion of the structure; the court saying: "The promise to complete on November 15th, and to pay \$100 for each day's default thereafter, expressly hinged upon the gas company's completion of its part of the work by June 15th. When the condition upon which the promise depended was unperformed through the default of the gas company, the promise to complete by a certain day was no longer obligatory; but, if the contractors entered upon the work, they were under an obligation to finish within a reasonable time. The gas company had, by its default, waived or abandoned the right to call upon the contractors for strict performance as to time, who, if they entered forthwith upon the work, had the right to a reasonable time for performance." See, also, *Starr v. Mining Co.*, 6 Mont. 485, 13 Pac. 195; *King Iron Bridge & Mfg. Co. v. City of St. Louis (C. C.)* 43 Fed. 768, 10 L. R. A. 826; *Ortmann v. Bank*, 49 Mich. 56, 12 N. W. 907; *Dannat v. Fuller*, 120 N. Y. 564, 24 N. E. 815; *Mansfield v. Railroad Co.*, 102 N. Y. 205, 6 N. E. 386.

3. At the conclusion of appellant's case in chief, the court withdrew from the consideration of the jury all of his testimony relating to extra material and labor alleged to have been furnished, except such as the answer admitted, and afterwards gave to the jury upon that subject the following instructions: "The court further instructs you that, by the terms of said original contract, plaintiff [appellant] would not be entitled to any claim for extra work not accepted by said architects, unless the same was done in pursuance of a written order of said architects, Proctor & Dennis, and a notice in writing of said claim to said architects within ten days from beginning said extra work, unless the same was admitted to have been done as extra work by the defendant," and "that in this case there is no evidence that said architects ordered any extra work done, as provided by the terms of said contract, except" those items specifically admitted in the answer of respondent to be extras. "And you are further instructed, as a matter of law, that, upon all questions as to the true meaning of drawings and specifications, the amount to be allowed plaintiff for extras or alterations made, that the decisions of the architects, Proctor & Dennis, is final and conclusive, unless it shall be shown that said decision is unjust and partial. And if you believe from the evidence that said architects considered all claims made to them in writing for extras, and that their decision upon such claims is just and impartial, your verdict upon these claims should be for the defendant. * * * And you are further instructed that the finding and decision of said Proctor & Dennis upon all matters referred to them during the construction of said building, and with reference thereto, are presumed

to be just and impartial until the contrary is shown, and that the burden of proof that any decision of said architects is unjust or partial is upon the party assailing such decision or alleging it to be unjust or partial, and that unless you believe from the evidence such party has, by a fair preponderance of evidence upon that matter, established that such decision was unjust or partial, your verdict thereon should be in support of such decision." In charging the jury that the decisions of the architects, being just and impartial, were final and conclusive as to the amount to be allowed the architects for extras and alterations, the trial court misconstrued the contract. The second clause of the contract contains the only provision on the subject of the finality and conclusiveness of the decisions of the architects, and it relates solely to questions arising concerning the meaning of the drawings and specifications. The language is, "In event of any doubt or question arising respecting the true meaning of the drawings or specifications, reference shall be made to the architects, whose decision thereon, being just and impartial, shall be final and conclusive." This does not refer to the question of values of extras or alterations. Much less does it warrant the charge that the architects' decision as to such values was final and conclusive. It was equally erroneous to charge the jury that the contractor could not claim for extra work not accepted by the architects, unless it was done in pursuance of a written order of the architects. The provision relating to written orders is found in the third clause of the contract. By this clause the county was empowered to make, from time to time, as the work progressed, such alterations in the plan of the work as it might desire. When such changes were ordered made, it became the duty of the architects to place a valuation upon the work added or omitted, when, if the contractor agreed to the valuation, the original contract price was to be increased or diminished in accordance therewith as the case might require; but, if the contractor did not agree to such valuation, he was required to proceed with the work on the written order of the architects, when the question of value was to be submitted to arbitrators, whose award was to stand in the place of the architects' valuation. A written order was thus the contractors' authority for making the desired alteration, where the value of the same was not agreed to, and such an order was neither authorized nor necessary where the cost of the change was agreed to in advance of the work. It is evident, also, that this clause of the contract applied solely to conceded alterations (that is to say, to such alterations in the work as both parties agreed to be alterations), and had no reference to work required of the contractor by the detail drawings which he claimed to be in addition to the work required by the original drawings and specifications, and which

the architects and the county claimed to be in accordance therewith.

It follows, from what we have said concerning the right of the appellant to show by parol a waiver by the respondent of the conditions of the ninth clause of the contract, that the trial court erred in withdrawing from the consideration of the jury all the evidence of appellant relating to extras claimed by him, other than such as were admitted by the answer. This evidence, under the rule we have announced, should have been submitted to the jury along with the evidence of the waiver, under an instruction to the effect that, if the jury found a waiver, they were entitled to consider the other evidence, and make such findings thereon as, in their judgment, the facts warranted. But, aside from this, we think the ruling was erroneous. As we have said, the larger part of the appellant's demand for extras arose out of what he claimed to be a difference between the original drawings and specifications and the subsequent detail or working drawings prepared by the architects, which the county required him to follow. While the question was one respecting the true meaning of the drawings and specifications, on which the decisions of the architects, being just and impartial, were final and conclusive, yet the appellant had the right to have submitted to the jury, under the allegations of his complaint, the question whether or not the architects' decisions thereon were just and impartial, provided he had not waived his right to claim an extra for any additional work occasioned thereby, by failing to comply with the condition contained in the ninth clause of the contract, which required him to give notice in writing to the architects of all claims for additional work within 10 days of the beginning of such work. The record convinces us that there was a substantial compliance with this requirement,—at least, so far as a considerable part of his claim was concerned. It was shown that these differences became early a subject of complaint by the contractor. He first sought to have the question adjusted by agreement, and, failing in this, demanded that it be arbitrated under the third clause of the contract, claiming it to be "in the shape of extra work not shown on the scale drawings, or specified in specifications," which also was refused him. Subsequent to that time he repeatedly communicated to the architects by letter; stating wherein he considered the detail drawings different from the original plans and specifications, and notifying them that he would claim an extra for performing the work according to the details. The trial judge excluded these letters, together with others on the same subject leading up to, and properly explanatory of, them, on the ground that they were hearsay and self-serving declarations. But why they are so, the record offers no explanation; nor does the brief of counsel give any reason for that conclusion.

By the very terms of the contract the contractor was required to make known his claims for extra or additional work in this particular way, and certainly that character of evidence cannot be hearsay or self-serving, which the terms of the agreement calling for the evidence require. It is insisted here, however, that the letters were rightly rejected, because too general in statement to sufficiently inform the county of the nature of the claims of the contractor. But to this it is a sufficient answer to say that the contract did not call for a particular or minute statement of the elements constituting the claim. The object of this clause of the contract was that the county might be kept informed of such work as the contractor claimed to be extra or additional to that required of him by his contract; and while it was the privilege of the county, after receiving such notice, to act upon the information received or to ignore it, if they chose the latter course they cannot now be heard to complain of the generality of the notices, unless, of course, they were so indefinite as not to inform them of the nature of the claim, or put them on inquiry as to its nature. These notices were not thus indefinite, and they should have been submitted to the jury.

In this connection the appellant argues that by the supplemental agreement the respondent waived its right to claim damages for any defect of construction not contained in the architects' statement of defects filed in pursuance thereof. We think differently. By taking possession, in the language of the supplemental agreement, the respondent "accepted the said building subject to its right to claim damages for any work done or materials used in said building claimed by them [it] not to be in accordance with the original plans and specifications, and any other claims for nonperformance set forth in such statement." This did not confine the county to defects pointed out in the architects' statement. On the contrary, it expressly reserved the right to insist upon every defect. By this agreement only three things were waived, viz. the final certificate of the architects, the right of the county to claim demurrage after a certain date, and its right to insist that the contractor was concluded from showing that he was entitled to an extension of time in which to complete the building, because the architects had not awarded and certified the amount of such additional time, and it was not a waiver of the right of the county to insist that the contractor show that he had made a claim in writing to the architects for extra work within 10 days of the beginning of such work, as a prerequisite to his right to recover therefor.

The court gave this further instruction: "You are further instructed that the plaintiff in this case claims that the said architects, Proctor & Dennis, who had been selected by plaintiff and defendant to have the direction and supervision of the construction of said

building, and to whom all matters of difference should be referred, and whose decision thereon, if just and impartial, should be final and conclusive, were prejudiced and biased against plaintiff and in favor of defendant, and that said architects were so prejudiced and biased by reason of their having executed and delivered to the county of Pierce, the defendant herein, prior to the commencement of said work, a bond in the sum of \$25,000, conditioned that they, the said architects, would keep the cost of the building below the sum of \$300,000. You are instructed upon this matter that the giving of a bond of the kind and character referred to would not be evidence of bias or prejudice upon the part of said architects; but you are at liberty to consider the giving of said bond as a circumstance in weighing the testimony of said architects as witnesses, or in arriving at your decision touching any matter referred to them." This was error. If the fact that such a bond had been given was unknown to the contractor at the time he entered into the contract, then the proviso for referring disputed matters to the arbitration of the architects was annulled, so far as he was concerned. It is an ancient maxim, applicable to arbitrators as well as judges of courts, that no man ought to be a judge in his own cause. The cause of the county became, by reason of this bond, the cause of the architects, and the liability assumed by them made it to their interest to decide every question affecting the cost of the building against the claim of the contractor. Bias and prejudice will always be implied where such conditions exist, and it was not necessary for the contractor to show that the architects' decisions were unjust or partial, in order to relieve himself of their conclusive effect, if it be a fact that he had no knowledge of the bond at the time he entered into the agreement making them so. The respondent's counsel argue that this question is not material, because, they say, the overwhelming weight of the evidence was to the effect that the contractor knew of the giving of the bond prior to the time the contract was entered into. An examination of the record, however, convinces us that there was a substantial dispute on this point. In such cases it is always a question for the jury, and never for the court, to determine on which side the preponderance lies.

4. The clause in the specifications relating to the kind of stone to be used in the construction of the building is as follows: "The exterior walls of the entire building to be of stone, as shown on the plans. All the trimmings, dressings, carved and molded work, to be of the best, selected Tenino bluestone; all other stone to be of the best, selected Wilkeson stone, free from all defects, laid up

in coursed range work. No imperfect stone will be allowed in the building." The appellant alleged in his complaint, and offered evidence tending to prove, that he had been greatly delayed in the construction of the building because the county, through its architects, had refused for a long time to permit him to use Wilkeson stone procured from any other quarry than the one owned by Mitchell & Smith, and that by reason thereof he was damaged in the sum of \$20,000. It developed as the trial progressed that at the time the contract was entered into only the Mitchell & Smith quarry was opened, that contained stone known as "Wilkeson stone," and the trial court thereupon refused to permit the appellant to make further proof of this allegation of the complaint, and in his instructions to the jury withdrew from their consideration all the evidence upon this subject; instructing them, in effect, that the county had a right to restrict the contractor to procuring stone from the single quarry open at the time the contract was entered into. This was error. The specifications quoted described a quality and grade of stone, and not a particular quarry. The contractor therefore had the right to procure Wilkeson stone from any place where such stone could be found, and if, as a matter of fact, he was damaged by the action of the county in denying him the right so to do, he should be permitted to recover his damages in this action.

5. The trial court should have admitted in evidence the letter from the county commissioners to the contractor, dated July 12, 1893. It is true, the letter recites "that the board of county commissioners are ready to settle with you for the construction of the new Pierce county court house upon the basis of" the sum named therein; but this recital does not bear upon its face conclusive evidence that the offer of the sum mentioned was made solely for the purpose of effecting a compromise, nor does it preclude the contention of the appellant that it was an admission that the sum named was due him. While the general rule is that no offer made by one party by way of compromise can be given in evidence by the other as an admission of liability, yet whether the offer was made on the faith of a compromise is usually one of fact for the jury. The same rule governs the court in determining this that governs him in determining any other question of fact. There must be no substantial dispute as to what the facts are.

The other questions raised require no separate consideration. The judgment of the lower court is reversed, and the cause is remanded for a new trial in accordance with this opinion.

GORDON, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

TRADERS' NAT. BANK v. WASHINGTON WATER-POWER CO.

(Supreme Court of Washington. May 17, 1900.)

CONTRACTS—INDEMNITY—PAROL EVIDENCE VARYING TERMS.

Where defendant agreed in writing that, for a certain number of shares of corporate stock, it would guaranty and save harmless the parties delivering such stock from all obligations of the corporation, evidenced by the records of the company at the date of the contract, such contract was a plain and unambiguous covenant of indemnity in favor of the parties to whom the promise was made, and was not made for the benefit of creditors of the corporation; and hence a creditor, not a party to the contract, in an action to recover of defendant for notes given by the corporation cannot introduce evidence that the contract was made for benefit of creditors, as such evidence would vary the terms of the contract.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action on notes by the Traders' National Bank against the Washington Water-Power Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Graves, Wolf & Graves, for appellant. Thomas C. Griffiths, for respondent.

ANDERS, J. This action was brought by the Traders' National Bank against the Washington Water-Power Company on two promissory notes which had been executed to the bank by the Ross Park Street-Railway Company, the theory of the plaintiff being that the defendant was liable for the indebtedness evidenced by said notes by reason of a certain written agreement entered into between the defendant and certain individuals holding a majority of the stock of the Ross Park Street-Railway Company. It is claimed by the plaintiff that the defendant, by said contract, agreed to assume and pay the existing indebtedness of the Ross Park Street-Railway Company; that the contract was made for the benefit of the plaintiff and other creditors; and that by reason thereof the plaintiff, though not a party thereto or mentioned therein, has a right to maintain this action against the water-power company. The agreement upon which plaintiff's action is based, omitting signatures, is as follows: "This agreement, made and entered into this the 3rd day of February, 1892, by and between W. S. Norman, of Spokane, Spokane county, Washington, party of the first part, and Horatio N. Belt, Cyrus R. Burns, Sylvester Heath, R. W. Forrest, A. P. Wolverton, E. J. Webster, I. S. Kaufman, and Thomas P. Conlan, all of said county and state, witnesseth, that for and in consideration of the sum of one dollar (\$1.00) to each and every of them in hand paid by the party of the first part, the receipt whereof is hereby by each and every of them duly acknowledged, and the covenants and agreements hereinafter entered into by the party of the first part, hereby agree to and with the said party of the

first part to deliver or cause to be delivered to the said party of the first part five hundred and thirty-four shares of stock of the Ross Park Street-Railway Company, a corporation duly organized under the laws of Washington, of the par value of one hundred dollars (\$100), and duly indorsed to the party of the first part or his order. And the said party of the first part, for and in consideration of the covenants hereinbefore entered into by the said parties of the second part, and the receipt of the stock hereinbefore mentioned, agrees to and with the said parties of the second part: (1) That, when said five hundred and thirty-four shares of said stock shall have been delivered as aforesaid, then the said party of the first part will guaranty and save harmless the said parties of the second part, and each of them, from any and all indebtedness and obligations of the said Ross Park Street-Railway Company which are of evidence in the records of the company at the date hereof, and will undertake the maintenance and operation of said Ross Park Street-Railway Company as now constructed, except on Front and Main streets, which said railway shall be operated by said party of the first part for the term of five years from the date hereof in a first-class and substantial manner, and shall give at least twenty-minute service over said road during said period, and to make the fare over any and all portions of said road, both built and to be built as hereinafter mentioned, including extension hereinafter mentioned to Minnehaha Park, not more than five cents for a continuous passage one way. (2) That said party of the first part will build, equip, and put in operation on or before the first day of May, 1892, an extension to said road, running from its present terminus to Minnehaha Park, which said extension shall be built and equipped in a first-class and substantial manner, and subject to the provisions of this agreement hereinbefore mentioned as to condition of operation. (3) That said party of the first part will build, equip, and put in operation in one year from the date hereof, if the property owners composing the so-called Ross Park Syndicate so demand, an extension of said road to the Southeast addition to Ross Park, under the terms of an agreement entered into between the said Ross Park Street Railway and the said Ross Park Syndicate. But, should said Ross Park Syndicate not demand that said extension be built within a year from the date hereof, then said party of the first part agrees to build and equip said extension within two years from the date hereof; said extension to be built and equipped in a first-class and substantial manner, and subject to the provisions of this agreement hereinbefore mentioned as to the condition of operation and service. But, should said party of the first part so elect, then it is especially agreed by and between the parties hereto that said extension to the Southeast addition to Ross Park shall be

made from a point, to be selected by the said party of the first part, on Sprague street, on the line of the Spokane Street Railway, over and across section 16, township 25, range 43, to the Southeast addition to Ross Park, which said extension shall enter said Southeast addition to Ross Park not further east than K street, and shall run north and northeast as far as Capitol street; and said extension, as hereinbefore last described, shall be accepted by said Ross Park Syndicate as a fulfillment of said hereinbefore mentioned contract. (4) That said party of the first part will furnish to said parties of the second part, and to each of them, or their order, two annual passes over the lines of said Ross Park Street Railway, and extensions thereof, as hereinbefore mentioned, which said passes shall be issued as aforesaid during each and every year during the life of this agreement. (5) That said party of the first part will give to said parties of the second part a good and sufficient bond, in the sum of \$30,000, with the Washington Water-Power Company as surety thereon. In witness whereof, the said parties hereto have caused these presents to be signed and sealed this — day of February, 1892."

It is claimed by plaintiff that W. S. Norman entered into this agreement as the agent of the defendant, and that the defendant was known as the principal in the transaction; and, for the purposes of this case, such may be conceded to be the fact. In order to connect itself with this agreement, as one of the beneficiaries thereunder, the plaintiff sought to introduce extrinsic evidence, on the ground that the agreement itself was ambiguous, and that such ambiguity necessitated explanation. After allowing the introduction of some of plaintiff's evidence of surrounding circumstances in explanation of the agreement, and rejecting other evidence offered, the trial court reached the conclusion, in interpreting the contract, that it was plain and unambiguous, and that plaintiff's evidence in explanation thereof was calculated to vary and add to its terms. As the agreement itself, in the view of the trial court, established no liability of defendant to plaintiff, and as there was no competent and relevant testimony in evidence showing the assumption by the defendant of the indebtedness of the Ross Park Street-Railway Company, the court took the case from the jury and dismissed the action, or, in other words, granted a nonsuit. From this judgment the plaintiff appeals; assigning, among others, a number of errors upon the action of the court in refusing to admit testimony. But, in the view we take of the case, a discussion of the action of the court as to these matters is unnecessary here. The real question to be determined, and which arises at the very threshold of the case, is whether the lower court erred in ruling that the contract for the purchase of the Ross Park Street-Railway Company's stock was plain and unambiguous,

and that its terms could not be explained by extrinsic evidence. In the interpretation of this contract, we are constrained to yield our assent to the view of it taken by the court below. The particular covenant upon which plaintiff bases its right of action is in the following words: "That, when the said five hundred and thirty-four shares of said stock shall have been delivered as aforesaid, then the said party of the first part will guaranty and save harmless the said parties of the second part, and each of them, from any and all indebtedness and obligations of the said Ross Park Street-Railway Company which are of evidence in the records of the company at the date hereof." It seems to us that this sets forth in very clear terms a covenant of indemnity in favor of the parties to whom the promise was made against any liability on their part arising out of the obligations or indebtedness of the Ross Park Street-Railway Company, in which they were shareholders. The covenant is made to them as individuals, respecting obligations upon which they are only secondarily, if at all, liable, and which they may in fact never be called upon to pay. The covenant was not made to the corporation itself, and it does not seem reasonable to interpret the agreement as made for the benefit of its creditors. The learned counsel for plaintiff have made a very elaborate and ingenious argument to demonstrate that this contract is ambiguous, because the phrase "guaranty and save harmless" is capable of different constructions, and it is urged in support of this contention that the word "guaranty" imports an absolute undertaking to pay the indebtedness mentioned, and that the words "and save harmless" may be rejected. But we do not think we would be warranted, in law, in eliminating a portion of the phrase, and then giving it a meaning different from that imported by the words actually used by the parties to the contract. It seems to us that the effect of the explanatory evidence offered by the defendant would be to create a liability where it clearly appears that none existed before. The evidence offered by plaintiff, and excluded by the court, had for its object the establishing of defendant's liability to pay all the indebtedness of the Ross Park Company, although defendant had acquired, under its contract with individual shareholders, only about 70 per cent. of the capital stock of that company. The wisdom of the rule forbidding the introduction of parol or extrinsic evidence to vary, add to, or detract from the terms of a written agreement into which the prior negotiations of the parties have been merged is apparent in this case. This contract on its face clearly shows that it covenants to indemnify and save harmless the individual shareholders who were parting with their stock from the existing corporate indebtedness. Third parties (that is, those who are not connected with the contract) ought not to be permitted to introduce evidence to change its import, on

the suggestion of latent ambiguity, unless it is very apparent that the contract falls within the recognized exception to the rule against the introduction of extrinsic evidence. The expression "guaranty and save harmless" is commonly, if not universally, used in covenants of indemnity. The phrase is tautological, and, taken as a whole, has the same meaning as the words "save harmless" would have if used alone. We are of the opinion that the judgment of the superior court is correct, and it is therefore affirmed.

GORDON, C. J., and FULLERTON, REAVIS, and DUNBAR, JJ., concur.

**RANSBERRY v. NORTH AMERICAN
TRANSPORTATION & TRADING CO.**

(Supreme Court of Washington. May 17, 1900.)

SHIPPING—JURISDICTION OF STATE COURTS—
CARRIERS—PASSENGERS—DAMAGES—
—BREACH OF CONTRACT.

1. The state courts have jurisdiction of an action against a resident steamboat company for breach of a contract of carriage which was to be performed on the high seas, and without the state.

2. Where a carrier fails to perform its contract of carriage, it is liable in damages for what the passenger necessarily expended in completing the trip from the place where he was abandoned, together with compensation for time lost, beyond the reasonable length of time which it would have taken defendant to carry plaintiff to his destination, the value of which is to be computed by the reasonable value of plaintiff's services in his usual occupation at the place of destination.

3. In determining the value of plaintiff's services, the jury should take into consideration the question of whether or not plaintiff would have procured employment, had he been at his place of destination during the time he was delayed.

Appeal from superior court, King county; E. D. Benson, Judge.

Action by George Ransberry against the North American Transportation & Trading Company to recover damages for breach of a contract to transport plaintiff from Seattle to Dawson City, Canada. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Bausman, Kelleher & Emory, for appellant. Osborn & Steele, for respondent.

REAVIS, J. Plaintiff (respondent) was a passenger on the steamship *Cleveland*, owned by defendant, and operated by it between the city of Seattle and St. Michael, Alaska. In August, 1897, defendant sold plaintiff a ticket entitling him to passage from Seattle to Dawson City, in the dominion of Canada. Defendant at the time of the sale represented that the steamer would make close connections with steamboats owned and operated on the Yukon river by the defendant, and that within a reasonable time thereafter plaintiff would be safely carried

to Dawson City. Defendant agreed to furnish plaintiff's transportation and subsistence, and carry for him baggage to the amount of 150 pounds weight. In pursuance of the contract, plaintiff was carried to Ft. Yukon, about 400 miles below Dawson City, and there abandoned by defendant. Plaintiff thereafter traveled to Dawson City from Ft. Yukon by dog sled, with team of dogs. Plaintiff alleged that he was compelled to make an expenditure of \$900 for the necessary means and facilities in traveling between Ft. Yukon and Dawson City, and also alleges that he lost 90 days of time, which was reasonably worth the sum of \$12.50 per day. The whole damages for breach of the contract of carriage were laid at \$1,975. The jury returned a verdict of \$1,500.

Defendant assigns three errors: First, refusal to give the following instruction: "I instruct you that there is no evidence here upon which you can allow plaintiff anything as damages for loss of time, and that you are to allow him nothing in this respect,"—and error in the instruction given by the court, upon which a right of recovery for loss of time was based; second, refusal to grant a new trial on the ground that the verdict was excessive; and, third, overruling the demurrer to the jurisdiction of the court to try the action.

1. The demurrer to the jurisdiction is founded upon the claim that the contract of carriage was a maritime one, and therefore not cognizable in the state court. The case of *The Moses Taylor*, 4 Wall. 411, 18 L. Ed. 397, is cited upon the demurrer; but in that case a seizure was made of the ship for breach of a contract of carriage under a California statute directing such seizure. It was an action in rem, and it was there observed: "A proceeding in rem, as used in the admiralty court, is not a remedy afforded by the common law. It is a proceeding under the civil law. When used in the common-law courts, it is given by statute." The ninth section of the federal judiciary act of 1789 saves to suitors "the right of a common-law remedy where the common law is competent to give it." The case at bar is a common-law action against the person of the defendant, and such actions have been frequently maintained. *Crawford v. Roberts*, 50 Cal. 235; *The E. P. Dorr v. Waldron*, 62 Ill. 221.

2. The evidence is sufficient to sustain the verdict if the plaintiff was entitled to recover for loss of time. The rule for damages in this class of cases insisted upon by counsel for appellant is that announced in *Hadley v. Baxendale*, 9 Exch. 341, as follows: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally (i. e. according to the

usual course of things) from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Accepting the rule as stated thus far, "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered, * * * arising naturally (i. e. according to the usual course of things) from such breach of contract," there is yet much difficulty left in the application to the varying facts of breaches of contract as they arise. As said by the supreme court of Minnesota in *Serwe v. Railroad Co.*, 48 Minn. 78, 50 N. W. 1021: "The important question, after all, is whether the injury was the direct and proximate, or only the remote, consequence of the wrongful expulsion." That loss of time may be a usual and natural result of the breach of contract of carriage has been recognized by this court in *Turner v. Railway Co.*, 15 Wash. 213, 46 Pac. 243, where it was determined that a failure to fulfill the contract of carriage of a passenger to a certain destination subjected the carrier to the expense thereby incurred, including the cost of conveyance by other means, and also that incident to the delay. It was there said of the plaintiff, a lawyer: "Now, it is evident that, if the plaintiff was delayed in reaching his destination by the fault of the defendant, he was damaged, on account of lost time, to an amount exactly equal to that which he would have earned by the practice of his profession." The trial court in that case instructed the jury that plaintiff was entitled to recover such sum as his time at home for the period he was delayed by reason of defendant's failure to transport him was reasonably and fairly worth in his profession or business, and such instruction was approved here; and *Yonge v. Steamship Co.*, 1 Cal. 353, 3 Suth. Dam. (2d Ed.) § 936, and 2 Sedg. Dam. (8th Ed.) § 863, were cited with reference to the evidence tending to establish damage for loss of time. The case of *Yonge v. Steamship Co.*, supra, was an action against a common carrier upon a contract to carry the plaintiff from New Orleans to San Francisco. There the trial court instructed the jury "that, it being shown in evidence that the plaintiff was a good bookkeeper, * * * the measure of damages would be the wages at the then rate in San Francisco of a good bookkeeper," during the period of detention on the way. The supreme court say of this instruction: " * * * An improper rule was prescribed by the district judge as the measure of damages. It may be, and probably was, proper to admit evidence that the plaintiff was a good bookkeeper; but it should

have been left to the jury to weigh the probabilities of his procuring employment at San Francisco immediately upon his arrival, and of such employment being continued during the entire period covered by the charge of the court." Substantial evidence in the case at bar tended to show that the wages of a common laborer at Dawson City were from \$1 to \$1.50 by the hour; that such labor was in continuous demand; that the plaintiff had been a laborer nearly all his life, and was able to earn the common wages at Dawson. The evidence also tended to show that plaintiff lost about 90 days of time; that the labor of travel which plaintiff performed was equal to the hardship of labor at any mentioned work in Dawson. The superior court instructed the jury, upon the measure of damages, that the plaintiff was entitled to recover such sum as would compensate him for any loss in money he had necessarily sustained in completing his journey from Ft. Yukon to Dawson City, together with such other sum as would fairly compensate him for the time he necessarily lost in completing his journey. The court also instructed that the plaintiff was entitled to pay for such time as he necessarily lost, over and beyond the reasonable length of time for defendant to carry plaintiff to his destination at Dawson City; that the rate of compensation for such time was what an ordinary laboring man might or could have procured at Dawson City; and that the jury should determine from the testimony whether the plaintiff could have procured such employment, and, if so, for what length of time, and at what compensation. The jury was further instructed that it should take into consideration, in considering the question of wages, the amount which it would have cost the plaintiff to live during the period for which he was allowed for loss of time, and such cost of living should be deducted. It will thus be seen that the rule assumed in *Turner v. Railway Co.*, supra, was followed by the superior court in its instructions. The appellant agreed to carry plaintiff to Dawson City in a reasonable time. It abandoned him at the commencement of winter, and left him to complete his journey as best he could. Certainly loss of time was a natural result of the breach of contract. It would also seem that the evidence of damage for such loss was competent, and from it the jury, in its sound discretion, could assess the amount. Much of the argument in the brief of appellant could be properly addressed to the jury upon the evidence before it, but it is not applicable to the case here. We cannot say that the damages are so excessive as to require a remission, and, no error of law occurring, the judgment is affirmed.

GORDON, C. J., and DUNBAR and FULLERTON, JJ., concur.

HALE v. STENGER et al.

(Supreme Court of Washington. May 25, 1900.)

BUILDING AND LOAN ASSOCIATIONS—NATURE OF CONTRACT—STATUTES—RETRO-ACTIVE OPERATION.

1. Ballinger's Ann. Codes & St. §§ 4460, 4402, requiring a building association doing business in the state to deposit with the state auditor, in trust for all its members and creditors, all mortgages received by it, do not apply to mortgages taken prior to their enactment.

2. Where a borrower subscribes for shares of a loan association merely to obtain a loan, and makes monthly payments on the shares under a contract whereby the maturity of the shares extinguishes the debt and cancels the stock, the contract is one of loan, on which he is entitled to have credited all payments made, whether as premiums, fines, or otherwise.

Appeal from superior court, King county; H. E. Hadley, Judge.

Action by William D. Hale, as receiver of the American Savings & Loan Association, against Leonard U. Stenger and others. From a judgment for defendants, plaintiff appeals. Reversed.

Clise & King, for appellant. Fairchild & Bruce and Newman & Howard, for respondents.

GORDON, C. J. The appellant is the receiver of the American Savings & Loan Association, a corporation incorporated under the laws of the state of Minnesota, and was appointed by an order of the district court of Hennepin county, in that state. The action is to foreclose a mortgage given to secure the sum of \$1,850 loaned by the association to the defendant Stenger in December, 1892. Accompanying the mortgage was an assignment to the association of 37 shares of stock of said association, of the par value of \$100 per share. The loan was made upon the usual terms and conditions common to loans by building associations to their subscribers. The defendants duly and regularly made their monthly payments from the date of their stock subscription until August, 1894, the aggregate amount of such payments being \$1,554, and in addition thereto they paid the interest on the loan calculated at the rate of 6 per cent. per annum (that being the contract rate) until August, 1894, the sums so paid as interest aggregating \$518. The court found that in August, 1894, the defendants offered to surrender their stock, "and notified the said corporation that they so desired to surrender and cancel the stock, and to have its value credited upon the said loan and mortgage, and that they were ready and willing to pay the balance that might be due on the said loan, and at such time demanded that the said plaintiff corporation furnish them a statement of the amount so due, after allowing the credits aforesaid; that the said plaintiff corporation accepted the said notice as an offer to withdraw, and waived all

objections to the form of such notice, and demanded from the defendants, as the balance due after crediting the defendants with what it alleged was the value of their shares, the sum of \$1,790." The court also found that at the time demand was made "the plaintiff corporation was entitled to demand and receive from the defendants the sum of \$196.27 and no more"; also that "the defendants were ready, able, and willing to pay the said sum, and ever since have been ready, able, and willing to pay the sum of \$196.28; * * * that the defendants had no knowledge of the proper amount to tender or bring into court for the plaintiff until an accounting was had, and the plaintiff neglected to make such accounting, and was not made any accounting other than this demand." The court also found that the plaintiff had paid taxes on the mortgaged premises for the years 1896 and 1897, amounting to \$119.80, but concluded that the plaintiff was not the legal owner and holder of the obligation sued on, and not entitled to maintain and prosecute the action. Respondents seek an affirmance upon the ground that the plaintiff is not entitled to any relief because of a failure of the association to deposit the mortgage in question with the auditor of state, as required by sections 4400, 4402, Ballinger's Ann. Codes & St., which sections require every building and loan association doing business in the state to deposit and keep with the state auditor, or with a duly-chartered trust company approved by the auditor, in trust for all of its members and creditors, all mortgages or other securities received by it in the usual course of business.

The mortgage in question was executed prior to the enactment of the statute just referred to, and the record does not disclose whether since its passage the corporation has done business in this state. But, conceding that it is lawful for the legislature to specify the terms and conditions upon which a foreign corporation may do business in the state, the enactment under consideration could not affect mortgages or other contracts theretofore lawfully entered into. This mortgage was lawful when made, and the act is not to be regarded as applying to mortgages and securities taken prior to its passage. To hold otherwise would be to violate the constitutional provision against the impairment of contracts. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Bank of Augusta v. Earle*, 13 Pet. 519, 10 L. Ed. 274; *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793; *Seibert v. Lewis*, 122 U. S. 244, 7 Sup. Ct. 1190, 30 L. Ed. 1161.

This necessitates a reversal of the judgment, and it becomes important to determine the amount for which the plaintiff is entitled to judgment and decree of foreclosure. The current of authority is not uniform as to the application to be made of sums paid by a borrower under similar con-

tracts with such corporations, but we think the tendency of modern authority is in the direction of holding that all such payments, under whatever name made, whether as premlums, dues, fines, or otherwise, are payments upon the loan. In equity the mortgagor is entitled to have them credited accordingly. *Association v. Cairns*, 16 Wash. 215, 47 Pac. 509; *Stevens v. Association (Idaho)* 51 Pac. 986; *Association v. Shea (Idaho)* 55 Pac. 1022; *Association v. Buck (Id.)* 1 Atl. 561; *Randall v. Union (Neb.)* 60 N. W. 1019, 29 L. R. A. 133; *Id.*, 62 N. W. 252; *Association v. Tinsley (Va.)* 31 S. E. 507; *Watkins v. Association*, 97 Pa. St. 514; *Harris' Appeal (Pa.)* 3 Atl. 776; *Pryse v. Association (Ky.)* 41 S. W. 574; *Rowland v. Association (N. C.)* 18 S. E. 965; *Strauss v. Association (N. C.)* 23 S. E. 450, 30 L. R. A. 693; *Bulst v. Bryan (S. C.)* 21 S. E. 537, 29 L. R. A. 127; *Sawtelle v. Building Co. (Utah)* 48 Pac. 211; *Association v. Fowble (Utah)* 53 Pac. 999; *Barker v. Bigelow*, 15 Gray, 130. There is much authority to the contrary. We think, however, considering the nature and character of the contract, that the true rule applicable to its adjustment is expressed in the Idaho case (*Association v. Shea*, supra), where it is said: "We construe the entire contract to be one of loan; that it was entered into for the purpose solely of borrowing money by one of the parties, and lending by the other; that the relation of corporation and stockholders exists, not in fact, but purely in fiction; and that the object of the plaintiff in entering into the contract was purely for the purpose of increasing its capital by obtaining large returns for the use of its money. In no case where the two relations are blended together as in this case, and the stock and debt are both contemporaneously extinguished by monthly payments upon the debt or upon the so-called stock, will the contract be treated by this court other than a contract of loan." And we think the authorities above cited abundantly support the doctrine of that case. We conclude that the judgment of dismissal must be reversed, and that the plaintiff is entitled to judgment for the sum remaining unpaid as found by the trial court, and also the taxes paid by plaintiff, with interest thereon from the date of payment, and to a decree of foreclosure.

DUNBAR, FULLERTON, and REAVIS, JJ., concur.

CHEZUM et al. v. CLAYPOOL et al.
(Supreme Court of Washington. May 21, 1900.)

JUDGMENT—VACATING—RES JUDICATA.

An order, unappealed from, denying an application to vacate a judgment under Ballinger's Ann. Codes & St. §§ 5153-5162, providing for vacating judgments after term, and prescribing the proceeding therefor, being the exclusive rem-

edy, is a bar to any subsequent proceeding to cancel the judgment.

Appeal from superior court, Pierce county; Thomas Carroll, Judge.

Action by F. O. Chezum and another against C. E. Claypool and others to cancel a judgment. From a judgment for complainants, defendants appeal. Reversed.

E. E. Cushman, for appellants. G. L. McKay and Ira A. Town, for respondents.

GORDON, C. J. In December, 1894, the superior court of Pierce county rendered judgment in favor of Caroline Boken and against the State Insurance Company for the sum of \$600 and costs. An appeal was taken to this court, and the judgment affirmed. 14 Wash. 39, 44 Pac. 110. In the order of remittitur to the lower court, the costs of the trial court were, by inadvertence, omitted. On March 31, 1896, the superior court, upon motion of counsel for Boken, proceeded to enter judgment in conformity with the remittitur of this court, and included therein the costs arising in the trial of the action. Subsequently, and during the years 1896, 1897, and 1898, various writs of garnishment and execution were issued, based upon that judgment, and certain proceedings supplemental to execution were had and taken; and in October, 1898, the respondents in this case, who were sureties upon the appeal bond, and against whom judgment went, moved to vacate and set aside the judgment of March 31, 1896, upon various grounds. This motion was supported by affidavit, and, after hearing, was denied by the court. No appeal was taken therefrom. Subsequently this action was brought to cancel the judgment. A demurrer to the complaint was overruled, and the appeal in the present instance is from a judgment in plaintiffs' favor, directing the cancellation of the judgment.

We think that plaintiffs have mistaken their remedy, and that the decision upon the application to vacate the judgment was a bar to any subsequent proceeding. It is fundamental that equity will not interfere where there is a full and adequate remedy at law, and our statute (Ballinger's Ann. Codes & St. §§ 5153-5162, inclusive) provides such a remedy. It is not pretended that the plaintiffs in the present action were not aware of the existence of the judgment. On the contrary, although knowing its terms and provisions, and the repeated efforts to enforce it, they took no steps to have it modified or vacated for upwards of two years, when they proceeded to move against it. The record does not advise us of the grounds upon which the decision went against them, and it is not material to the present inquiry what the real ground of decision was. It is enough to know that the proceeding afforded by the statute for vacating or modifying judgments is not a summary one, that its provisions are ample to enable justice to be done, and that

an appeal is allowed to this court from the order entered therein. *Railroad Co. v. Black*, 3 Wash. St. 327, 28 Pac. 538; *Railway Co. v. Johnson*, 7 Wash. 97, 34 Pac. 567. As already said, the statute affords a full, complete, and adequate remedy. Such being the case, it must be regarded as exclusive; and, having unsuccessfully sought to obtain a decision in their favor by resorting to that proceeding, plaintiffs are bound by such decision, and cannot avoid the effect of it by an action like the present. The judgment will be reversed, and the cause remanded, with directions to the superior court to dismiss.

DUNBAR, FULLERTON, and REAVIS,
JJ., concur.

STATE ex rel. GILLETTE v. SUPERIOR COURT OF SPOKANE COUNTY et al.

(Supreme Court of Washington. May 19, 1900.)

BILL OF REVIEW—JURISDICTION—AMOUNT IN CONTROVERSY.

The supreme court has no jurisdiction by writ of review to review a decision of a superior court in a civil action, where the original amount in controversy or the value of the property does not exceed \$200, and the legality of a tax, impost, assessment, toll, municipal fine, or validity of a statute is not involved, since Const. art. 4, § 4, provides that the appellate jurisdiction of the supreme court shall not extend to such cases, and a party litigant cannot by indirection obtain review of a cause which could not be considered directly on appeal.

Application by the state, on the relation of W. W. Gillette, for a writ of review to the superior court of Spokane county and others. Writ denied.

James Hopkins, for relator.

PER CURIAM. This is an application for writ of review. The petition shows that judgment for the sum of \$81.94, in favor of the petitioner, was rendered against one F. N. Muzzy in a justice court in Spokane county on the 14th day of August, 1899; that on the same day a purported notice of appeal was served on the petitioner, and on the 23d day of October, 1899, the case came up for hearing on appeal before the superior court of Spokane county, when a motion was made by the petitioner to dismiss the appeal for the reason that the notice of appeal had not been filed by the justice of the peace who tried the cause, and that therefore the court had no jurisdiction to try the case. The motion to dismiss was overruled, and the cause was tried to a jury, which returned a verdict in favor of the defendant and against the petitioner for the sum of \$100 damages and \$39 costs. The petitioner bases his claim to the writ on the ground that there is no appeal or other adequate remedy at law. The constitution provides that, except in certain cases specifically mentioned, the appellate jurisdiction of this court shall not extend to cases where the original amount in

controversy or the value of the property does not exceed the sum of \$200, and we have frequently decided that a party litigant cannot by indirection obtain a review of his cause which he cannot obtain directly by appeal. It was evidently the intention of the constitution makers that the superior court should have exclusive jurisdiction in actions where the original amount in controversy did not exceed \$200. The writ will therefore be denied.

FIDELITY TRUST CO. v. PALMER.

(Supreme Court of Washington. May 17, 1900.)

CITY WARRANT—INNOCENT PURCHASER—TITLE—DIRECTING VERDICT—FINDINGS.

1. Where defendant in good faith purchased a city warrant from an attorney in ignorance of the fact it had merely been intrusted to him to be used in evidence, and the warrant itself gave no intimation of a third party's ownership, the owner could not recover the value thereof from defendant.

2. The court, in directing a verdict and entering judgment in accordance with its decision, as authorized by 2 Ballinger's Ann. Codes & St. § 4994, is not required to make and file findings of fact and conclusions of law.

Appeal from superior court, Pierce county; Thomas Carroll, Judge.

Action by the Fidelity Trust Company, administrator of the estate of Samuel W. Perkins, deceased, against John R. Palmer. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Campbell & Powell, for appellant. Bates & Murray and John H. McDaniels, for respondent.

GORDON, C. J. Plaintiff sued to recover the value of a city warrant of the city of Tacoma. It appears that the warrant was originally issued to the Fox Island Clay Works, and thereafter indorsed to the Washington Fire-Clay Company, and that company indorsed it in blank. Plaintiff's intestate, S. N. Perkins, became the owner thereof, and subsequently intrusted it to his attorney, D. K. Stevens, at the latter's request, to enable him to use the same in evidence in a case then pending in the superior court. Stevens, instead of returning the same to his principal, sold it to the defendant, who paid par value therefor. At the conclusion of the evidence for plaintiff, the trial court, upon defendant's motion, discharged the jury, and entered judgment in defendant's favor, dismissing the action, and for costs, pursuant to section 4994, 2 Ballinger's Ann. Codes & St. At the trial the defendant was examined as a witness for plaintiff. The purpose of his examination was to show that he knew at the time of his purchase of the warrant that plaintiff's intestate was the owner of it. We have examined his testimony very carefully, and it seems perfectly clear that he was not acquainted with Mr. Perkins, or knew of his existence, until after he purchased the war-

rant; that he believed and understood that Stevens owned it; and a reading of his testimony we think admits of no other conclusion than that he purchased it in good faith, without any actual knowledge of Perkins' ownership, or of any fact or circumstance which would be sufficient to put a prudent person upon inquiry. As already observed, the warrant itself afforded no notice or intimation of Perkins' ownership, and, if the rule that is applicable to negotiable paper can be invoked in respondent's favor, the judgment of the trial court was unquestionably correct. Appellant contends that such a warrant is not a negotiable instrument, but is intended as a mere voucher of the city treasurer when paid. The great weight of authority is that a county or city warrant possesses all of the qualities of negotiable paper but one, viz. that it is open to any defense which might have been made to the claim upon which it is founded. For all purposes involving its title, it must be treated as negotiable. *Bank v. Gelbach*, 8 Wash. 497, 36 Pac. 487; *District of Columbia v. Cornell*, 130 U. S. 655, 9 Sup. Ct. 694, 32 L. Ed. 1041; *Ferguson v. Staples*, 82 Me. 159, 19 Atl. 158; *Garvin v. Wiswell*, 83 Ill. 215; *Crawford Co. v. Wilson*, 7 Ark. 214. Such being its character, the case is not affected by the fact that Stevens had no authority to sell the warrant. *Young Men's Christian Ass'n Gymnasium Co. v. Rockford Nat. Bank* (Ill. Sup.) 54 N. E. 297; *Garrett v. Campbell* (Ind. T.) 51 S. W. 956; *Welrick v. Bank*, 16 Ohio St. 296. The procedure of the trial court was in accord with the statute (2 Ballinger's Ann. Codes & St. § 4904), and the court was not required to make findings of fact and conclusions of law. *Barkley v. Barton*, 15 Wash. 33, 45 Pac. 654; *Thorne v. Joy*, 15 Wash. 83, 45 Pac. 642; *Noyes v. King Co.*, 18 Wash. 417, 51 Pac. 1052. The judgment and order appealed from will be affirmed.

DUNBAR, FULLERTON, and REAVIS,
JJ., concur.

HOWARD v. HIBBS.

(Supreme Court of Washington. May 24, 1900.)
PUBLIC LANDS—RAILROAD GRANTS—PRE-EMPTION—PRIORITY—INTERIOR DEPARTMENT—CONTEST—ESTOPPEL—ANSWER—SUFFICIENCY—APPEAL.

1. Under Act Cong. July 2, 1864, granting to the Northern Pacific Railway Company alternate sections of land on each side of the railroad as it might adopt, not otherwise disposed of, free from pre-emption or other claim, at the time the road should be definitely fixed and a plat thereof filed, and providing that whenever, prior to such time, any of said sections should be pre-empted or otherwise disposed of, other sections should be selected in lieu thereof, where defendant entered the land in controversy in 1879, and lived on it until 1884, and after a contest before the interior department between him and the railway company, extending from 1884 to 1896, a patent was granted defendant, and the railway had made no actual selection of the land appropriated to it, the defendant was entitled to the land in preference to a grantee of

the railway company, since the lands allotted the railway company were not withdrawn from settlement until the sections appropriated were actually selected by the company.

2. Where defendant was awarded a patent to public land in a contest with plaintiff's grantor, extending from 1884 to 1896, before the interior department, and a relinquishment alleged to have been executed by the defendant in November, 1884, was not introduced in evidence in that contest by the plaintiff's grantor, plaintiff is estopped from asserting the relinquishment.

3. Where no objections were interposed in the lower court, by motion or demurrer to the sufficiency of the denials in the answer, until all of the evidence was in, when attention was called to it by a request for findings, such objections will not be entertained on appeal.

Appeal from superior court, Whitman county; William McDonald, Judge.

Action by Dollie Howard against R. H. Hibbs. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Trimble & Pattison and Stephens & Bunn, for appellant. Wm. A. Inman and Chadwick & Bryant, for respondent.

PER CURIAM. Plaintiff in this action is the grantee of the Northern Pacific Railroad Company. The action is brought to quiet title, the contention being that the lands were patented to the respondent through a mistake of fact and misconstruction of the law on the part of the department of the interior. The premises are situated within the limits of the Northern Pacific indemnity grant. In October, 1878, respondent made homestead entry for the W. ½ of the N. W. ¼ of section 20, township 15 N., of range 44 E., and made final proof thereon in November, 1883. Prior to making his final proof he made application to enter the premises in controversy, which adjoined the land embraced in his homestead filing, under the additional homestead act of March 3, 1879. In his application he alleged settlement in October, 1878. Various applications were made by the railroad company to select the premises, all of which were canceled and held for naught by the interior department. The first attempt was made on March 20, 1884; the second, October 25, 1887; and the last on August 20, 1892. Respondent continued to live on his homestead until the fall of 1884. A portion of the premises in controversy was and had been inclosed by him for a number of years prior thereto. The question of to whom the land should be allotted, whether to the respondent or to the railroad company, was continuously before the interior department from 1884 to 1896, when the land was patented to respondent. The contention of the appellant is that the land was withdrawn from sale, homestead, or pre-emption by the terms of the act of congress of July 2, 1864, granting lands to the railroad company; that it remained so withdrawn from that date until the filing of the map of general route in February, 1872; and that the indemnity lands were appropriated without selection by reason of the deficiency in the place limits. That

contention was squarely passed upon by this court in *Moore v. Cormode*, 20 Wash. 305, 35 Pac. 217, in which it was held that the grant as to lands in the indemnity limit did not take effect until actually selected by the company, and that prior thereto such lands were open to settlement.

It is also urged by the appellant that the respondent abandoned the tract after making his filing, and that he made and executed a formal relinquishment thereof to the United States, and delivered the same to one Oliver, who became the purchaser by deed from the respondent of the lands embraced in his original homestead, located in section 20. In the trial of this cause in the lower court the purported relinquishment was introduced in evidence. It bears date the 5th of November, 1884, and is sufficient in form. Respondent denies that he ever executed the same, and upon that question the evidence is squarely in conflict, so much so that we are unable to say that its execution is established by the evidence. In any event, while it purports to have been executed in 1884, it was never filed in the land office, or with the department, and, although we think abundant opportunity was afforded appellant's grantor, the railroad company, to produce it, and the fact of its existence and production was material to the controversy being waged before the department, no suggestion of its existence appears to have been made during the pendency of the controversy before the department. The department is invested by law with jurisdiction to determine the facts pertaining to adverse claims made to government land, and where, as in this case, an opportunity is afforded a party to establish material facts, and he neglects to avail himself of such opportunity, we think he can have no standing in a court of law to re-enter upon an investigation of such facts.

Objection is also made to the sufficiency of the denials in the respondent's answer. It does not appear that in the lower court any motion or demurrer was interposed which called for a ruling. On the contrary, issue was joined by the filing of a reply. The parties proceeded to trial without objection to the form of the answer, and the evidence was all in, when, for the first time, the attention of the court appears to have been called to the pleading by a request for findings. The objections were not seasonably made, and cannot be entertained. The decree must respond to the evidence introduced at the trial. The judgment and decree will be affirmed.

RITCHIEY et al. v. CEDAR MILL CO. et al.
(Supreme Court of Washington. May 22, 1900.)

APPEAL BOND—AMOUNT—INSUFFICIENCY—
DISMISSAL—VOID JUDGMENT.

Where it is conceded that the amount of an appeal bond, which is also a stay bond, is not twice the amount of the judgment and costs and

\$200, as required by statute, the appeal will be dismissed, even where the judgment appealed from is void.

Appeal from superior court, Snohomish county; Frank T. Reid, Judge.

Action by D. E. Ritchey and others against the Cedar Mill Company and others. From a judgment in favor of plaintiffs, defendants appeal. Appeal dismissed.

W. P. Bell and J. A. Coleman, for appellants. M. J. McGuinness and Bausman, Kelleher & Emory, for respondents.

PER CURIAM. Motion to dismiss appeal for want of sufficiency of the bond. The appeal bond was conditioned, also, as a stay bond. It is conceded that the amount of the bond is not twice the amount of the judgment and costs and \$200, the statutory requirement for an appeal bond. This brings the case within the rule announced in *Pierce v. Willeby*, 20 Wash. 129, 54 Pac. 999; *Town of Sumner v. Rogers* (Wash.) 58 Pac. 214; *Galloway v. Tjossem* (Wash.) 60 Pac. 129; and *Beezley v. Sessions* (Wash.) 60 Pac. 130. The appellants have filed a very earnest brief, in which the court is adjured, in view of the results which they conceive may follow the rulings in the cases above referred to, to overrule said cases. But, after giving due consideration to appellants' arguments, we are constrained to sustain the rule therein established, and which has since been announced from the bench in various cases in which no opinions have been rendered. We have frequently had under consideration the act cited by appellants, viz. section 1, c. 49, Laws 1879, but do not think the provision has reference to the amount of the bond. It is also claimed by the appellants that this case does not fall within the rule announced in *Pierce v. Willeby*, supra, and the following cases, inasmuch as it is asserted that a portion of the judgment, viz. \$100, allowed as attorney's fees, was void for the reason that there is no provision in the statute for the allowance of attorney's fees in cases of this kind, which is the foreclosure of a lien under the Laws of 1897 (Sess. Laws 1897, p. 55); and an exceedingly interesting brief is filed in support of this view, on the question of jurisdiction. But conceding, without deciding, that there is no statutory provision for an attorney's fee in this character of cases, and that the judgment in that respect is absolutely void, and conceding the further contention of the appellants, that a void judgment is unenforceable and can be attacked collaterally, yet, if an appeal is sought from such judgment, the party desiring to appeal must comply with the law regulating appeals, exactly as though the judgment were not void. It is for the very purpose of determining the question of whether or not the judgment is void that this appeal is brought. The right of appeal is statutory, and the statute must be complied with. No

distinction is made by the statute between appeals from illegal judgments and those from void judgments. If appellants' theory is correct, and the claim was that the entire judgment was void, the result of their contention would be that no appeal bond whatever would be required. This contention cannot be sustained. The appeal will therefore be dismissed.

ASHCRAFT v. POWERS et al.

(Supreme Court of Washington. May 14, 1900.)

COMMENCEMENT OF ACTION—SUMMONS AND COMPLAINT—FILING—JUDGMENT—ATTORNEY AT LAW—ACCEPTANCE OF SERVICE—JUDGMENT—APPEAL.

1. Under Ballinger's Ann. Codes & St. § 4972, providing that all pleadings shall be filed on or before the day when the case is called for trial or the day when any application for an order is made; and section 4886, providing that after appearance a defendant is entitled to notice of all subsequent proceedings,—it is error to enter judgment in an action, commenced by service of summons and complaint, on the answer of a defendant, without requiring such summons and complaint to be filed, and notice to the adverse parties of the application for such judgment.

2. Under Ballinger's Ann. Codes & St. § 4883, providing that a voluntary appearance of a defendant is equivalent to a personal service of summons, a judgment rendered against a defendant upon an acceptance of service of a summons and complaint by the attorney of such defendant, in the absence of special authority disclosed by the record on appeal from such judgment, will be held erroneous for want of jurisdiction.

Appeal from superior court, Skagit county; J. P. Houser, Judge.

Foreclosure by Frank Ashcraft against N. Powers, Russell & Co., and others. From a judgment on an answer of defendant Powers, defendants Russell & Co. appeal. Reversed.

James Wickersham, for appellants. J. C. Waugh, for respondent.

PER CURIAM. On March 3, 1898, the appellants, Russell & Co., caused to be filed in the superior court of Skagit county an affidavit which recited that Frank Quinby, for and on behalf of Frank Ashcraft, did, on the 15th of April, 1893, make and verify a pretended complaint, wherein Frank Ashcraft was plaintiff, and Russell & Co. and others named therein were defendants, purporting to be the commencement of an action for the foreclosure of a mechanic's lien; that more than two years had elapsed since said time; that the complaint had not been filed in the court in which it was entitled; and "that affiant is informed that Quinby claims to have delivered copies of the complaint to the various defendants at the time of the date thereof." The affidavit was accompanied by a motion asking that the action be dismissed for want of prosecution. On the following day the respondent, N. Powers, caused to be filed what is denomi-

nated an "answer and cross complaint." This was entitled "Frank Ashcraft, Plaintiff, vs. J. A. J. Moore et al., Defendants," and contained paragraphs purporting to admit certain parts and denying other parts of the "plaintiff's complaint," followed by a cross complaint setting up and asking a foreclosure of a lien filed by Powers upon certain buildings erected by the Moore Shingle & Manufacturing Company on certain lands leased by William Hensley to that company. This pleading was verified on May 4, 1895, and has indorsed thereon, as of the same date, an admission of service made by one C. K. Bonestill, purporting to act as attorney for the appellants, Russell & Co. Whether the complaint referred to in this answer is the complaint in the action which Russell & Co. sought to have dismissed for want of prosecution does not appear from the record. The inference, however, would be the other way, as the affidavit filed in support of the motion to dismiss, while it purports to name all of the parties, does not name Powers as one of them. On December 1, 1898, Russell & Co. made a special appearance, and moved to quash the acceptance of service made by Bonestill, on the ground that he had no authority to appear for or represent them in that action. This motion was overruled on February 27, 1899. On March 13, 1899, and without further notice to any of the parties, judgment upon the cross complaint foreclosing the lien of Powers was entered. Russell & Co. thereupon moved to vacate and set aside the judgment, which motion being overruled, they prosecute this appeal.

If it was true that an action had been begun by Ashcraft against the appellants and respondent by the service of a summons and complaint, and that the answer filed by Powers was an answer to the complaint in that action, the trial court erred in entering judgment on the answer without requiring such summons and complaint to be filed (Ballinger's Ann. Codes & St. § 4972), and without requiring notice to be given to the adverse parties of the application for judgment (Id. § 4886). If, on the other hand, the answer was intended for an original pleading,—for a complaint,—the judgment was void for want of service of process on the adverse parties. "It is no part of the duty of an attorney, nor is it within his power as an attorney, to admit service for his client of an original process by which the court obtains jurisdiction for the first time of his person. To exercise such a power and bind his client, he would require a special authority, and in the performance of the duty he would act as an attorney in fact, and not as an attorney of the court." *Masterson v. Le Claire*, 4 Minn. 163 (Gil. 108): "The principle upon which these authorities rest is that it is no part of the duty of an attorney, nor within the scope of his authority, to admit of service for his client

of the original process by which the jurisdiction of the court over the person of the client is first established; for, until that be done, the relation of client and attorney cannot begin, nor can it be created by the act of the attorney alone. To exercise such a power would be to act rather as an agent or attorney in fact than as an attorney of the court, and to give effect to it, therefore, there must needs be a special authority for it." *Starr v. Hall*, 87 N. C. 381; *Segars v. Segars*, 76 Me. 96; 3 Am. & Eng. Enc. Law (2d Ed.) p. 323. Inasmuch as the statute (*Ballinger's Ann. Codes & St. § 4883*) makes a voluntary appearance of a defendant in an action equivalent to personal service of a summons upon him, it will be presumed that a voluntary appearance made by an attorney on behalf of a party in the manner pointed out by the statute (*Id. § 4886*) is authorized until the contrary appears, and a judgment entered thereon will not be set aside except upon clear and convincing proof that the attorney did not have authority to appear. *McEachern v. Brackett*, 8 Wash. 652, 36 Pac. 690. But the statute does not authorize an attorney to accept service of an original process for his client, and no presumption in favor of the regularity of such an acceptance of service arises. Hence, unless the record discloses a special authority for it, a judgment entered upon an acceptance of service of an original process by an attorney for a defendant will be held erroneous on the appeal of the defendant from such judgment. *Reversed.*

SIBSON et al. v. HAMILTON & ROURKE CO. et al.

(Supreme Court of Washington. May 14, 1900.)

PRINCIPAL AND AGENT — AGENCY — MISMANAGEMENT — EVIDENCE — WEIGHT — WRITTEN CONTRACT — PAROL EVIDENCE.

1. A corporation engaged in warehousing, after it had become largely indebted to plaintiffs, for a portion of which it had executed mortgages, agreed to put them in possession as mortgagees, and to give them absolute control, in accordance with which the plaintiffs took possession, and hired R., a member of the corporation, as manager, and later formed a new corporation, the stock in which was held by plaintiffs and another creditor, and one of the plaintiffs was president and the other vice president. R. was continued as manager, and under his mismanagement a large debt was incurred, for which the plaintiffs claimed the old corporation was responsible, on the ground of a tacit understanding that R. was to be manager and that the old corporation was to be responsible for his conduct of the business. *Held*, that R. was the agent of the plaintiffs, and that they were responsible for his mismanagement.

2. Parol testimony of a tacit understanding between the parties is incompetent to change a controlling feature of a contemporaneous written agreement, where the party asserting such understanding refused to incorporate it in the writing because it might interfere with his legal rights as shown by the written agreement.

Appeal from superior court, Whitman county; William McDonald, Judge.

Bill by William S. Sibson and another against the Hamilton & Rourke Company and others to foreclose a mortgage and for an accounting. From a judgment in favor of defendants, plaintiffs appeal. *Reversed.*

Williams, Wood & Linthicum and H. W. Canfield, for appellants. Wyman & Neill and Douglas W. Bailey, for respondents.

DUNBAR, J. The following is a very brief and condensed statement of the material facts in this case: Some time prior to 1894 Charles Hamilton and Thomas F. Rourke, residents of Pendleton, Or., had been conducting a wheat warehouse business in a partnership capacity under the firm name of Hamilton & Rourke. In connection with the warehouse business they also bought wheat of the farmers and sold to the exporters. In February, 1896, the partnership was dissolved and a corporation was formed called the Hamilton & Rourke Company. The capital stock of this company was \$150,000, divided into 1,500 shares. Of these shares Rourke and Hamilton each took 747, D. W. Bailey 3, G. A. Hartman 2, J. W. Furnish 1.—Rourke and Hamilton, as it will be seen, owning all but 6 shares,—and, while Bailey, Hartman, and Furnish acted as directors with Rourke and Hamilton, Rourke and Hamilton really controlled the corporation and managed the business. The corporation, during all the time it was doing business, dealt largely with the appellants Sibson & Kerr. The partnership had become indebted during its existence, its debts were assumed by the corporation, and, on May 18, 1894, it gave to A. L. Mills, of the Security Savings & Trust Company of Portland, Or., as trustee, a first mortgage on all its working plant and appurtenances, to secure the creditors Ames & Harris and the Omaha Bag Company. After that the appellants supplied the company with sacks, and made advances to it on the shipping receipts of wheat consigned to them by the company. A running account was kept between the appellants and the defendant company until the corporation owed the appellants about \$30,000, and on December 13, 1895, to secure \$30,000 of this amount the company gave a second mortgage on all its warehouses, appurtenances, and assets. The remainder of the indebtedness,—\$20,000,—for reasons which it is not necessary to comment upon, was left unsecured. In the spring of 1896, the company being hopelessly in debt, and being pressed for the payment of the first mortgage, at its suggestion Sibson & Kerr bought up the first mortgage and undertook to finance the company, agreeing to withhold any proceedings against it for at least a year, and thereafter to proceed only on six months' notice, and to continue Rourke and Hamilton in the conduct of the business, pro-

vided they were put in possession and control of the property as mortgagees in possession. In accordance with this agreement, in April, 1896, Sibson & Kerr bought for themselves one-half, and in trust for the Portland Flouring-Mills Company (T. B. Wilcox, manager) one-half, the first or Mills mortgage, for its then face value, the amount actually paid for the mortgage being \$24,500. The arrangement above noted was entered into in accordance with a resolution adopted April 1, 1896, by the defendant company, which, with some amendments and changes which we will hereafter note, was accepted by appellants Sibson & Kerr and finally ratified by the defendant company April 21, 1896. Rourke was then appointed manager of the business at a salary of \$300 per month. Nothing of importance intervened until the 21st of the following July, when a new corporation was formed called the Hamilton & Rourke Warehouse System, which for convenience we will hereafter denominate the "System." The shares of this new corporation were all owned by Sibson & Kerr and T. B. Wilcox, who represented the Portland Flouring-Mills Company, in proportion to the amount owed to these concerns by the Hamilton & Rourke Company, and its stock was paid by selling to the corporation the second mortgage. Of this new corporation Sibson was president, Kerr vice president, and T. Brooke White, an employé of Sibson & Kerr, and T. B. Wilcox were its directors. After the organization of the System, Rourke was continued as manager. The System continued to do business until February 27, 1898, when Rourke, in response to a request of Sibson & Kerr for statement of the standing of the concern, furnished the same, showing that it was hopelessly insolvent, and at the same time tendered his resignation as manager. The remainder of the history, as is aptly said in appellants' brief, "has simply to do with clearing up the wreckage," and its recital in detail is not material to the investigation of the questions at issue. It may be said generally, however, to preserve chronological order, that, after a floundering existence until the 19th day of July, 1898, the System was abandoned, and its stockholders caused to be organized another corporation, viz. the Western Warehouse Company. The mortgaged property is now in possession of that corporation, and is being operated and conducted by it. After the disintegration of the System, the appellants, Sibson & Kerr, brought this action to foreclose the second mortgage mentioned above for \$30,000, with interest, together with money advanced, amounting in all to \$106,638.40. Judgment for this amount is asked jointly and severally against the Hamilton & Rourke Company and the Hamilton & Rourke Warehouse System, together with general relief.

The complaint, of course, is based upon the theory and the alleged fact that the manager, Rourke, was the agent of the Hamilton

& Rourke Company. This allegation is denied by the answer, which avers that Rourke was appointed manager and conducted the System as the agent of the appellants only, and that it (the Hamilton & Rourke Company) did not at any time have any management or control of the business of the System; and it denies all indebtedness to the appellants. For an affirmative defense it alleges that the appellants violated their trust, as expressed in their written agreement, by wrongfully and without authority turning over the mortgaged property to the System; and, in short, it is alleged that by reason of the gross mismanagement of the System by Sibson & Kerr, and by the wrongful use of the System for their benefit, defendants were deprived of the profits of the business; that the plaintiffs made fraudulent charges against the System and overcharges for services rendered; that, if an accounting had been made by the appellants and the business had been properly conducted by them, the original indebtedness would have been secured in favor of defendants; and they pray for a cancellation and satisfaction of the mortgages, for a restoration of the possession of the property mortgaged, for a general accounting, for judgment for such amount as may be found due them on such accounting, and for general relief. The cause was referred to S. J. Chadwick to take the testimony and make findings of fact and conclusions of law. After a long and tedious trial, involving several months' time, the referee reported voluminous findings of fact, which it would not be profitable or practicable to review in detail, but he found substantially that the appellants were conducting the business of the System, and were responsible for it, and that Rourke was the agent of the appellants, and not of respondent, the Hamilton & Rourke Company. As conclusions of law from all the various and manifold findings of fact, the referee found: First, that the appellants were entitled to judgment against the defendants the Hamilton & Rourke Company and the Hamilton & Rourke Warehouse System for the sum of \$30,000, with interest from the 13th day of December, 1895, at the rate of 8 per cent. per annum; for the sum of \$20,000, with interest thereon from July 21, 1896, at the rate of 2 per cent. per annum; and for the sum of \$91,776.58, money advanced as found in the findings of fact (from which last mentioned sums, however, should be deducted the sum of \$95,820.66, due the Hamilton & Rourke Company, as found in the findings of fact). Second, that the court should decree a sale of the mortgaged premises in Whitman county, Wash. Third, that the proceeds of such sale should be applied, after the payment of the expenses thereof, (1) to the payment of said mortgaged indebtedness, together with the sum of \$1,500 attorney's fees; (2) to the payment of the balance due plaintiffs; and the surplus, if any, should be paid over to

the defendant the Hamilton & Rourke Company. Fourth, that defendants J. W. Furnish and C. W. Brownfield should have judgment against plaintiffs for their costs herein expended. Both plaintiffs and defendants excepted to the report of the referee, and, upon a trial by the court, the report of the referee was reversed, and the court, as conclusions of law, found that the mortgage indebtedness alleged in plaintiffs' complaint was fully paid and satisfied, that the defendant company was entitled to a decree canceling and discharging all of said mortgages of record, and that the defendant company was entitled to a judgment directing the immediate return of the property described in plaintiffs' complaint, and to a judgment for the sum of \$46,570.15; and a decree was entered in accordance with such conclusions.

From this synopsis it will be apparent that the first question to be determined is, who was in control of and responsible for the management of the System? or, in other words, was Rourke the agent of the appellants or of the respondent company? If of the company, the solution is simple,—the appellants would be entitled to judgment for the original indebtedness and for advances made since. But if he was the agent of Sibson & Kerr, an accounting becomes necessary. The determination of this question involves no contested legal principles. Many cases are cited by both appellants and respondent, but we do not find it necessary to discuss them. The cases elucidate general principles, and the principles announced are well settled. Our duty here is to make an application of the facts to the conceded law; and, applying the facts of this case to the law as we understand it, we are forced to the conclusion that Rourke was the agent of Sibson & Kerr, and that, under the terms of the agreement, Sibson & Kerr were in control of the System and responsible for its management. That being true, having taken possession of the property and business of the respondent company, they must be responsible to the said company for any losses it has sustained by their mismanagement of such business. The agreement upon which this business was turned over to Sibson & Kerr, and which was the basis of the organization of the System, is too lengthy to be reproduced here, but all through it is evidence of the fact that Sibson & Kerr were to be clothed with absolute authority and control. For instance, after reciting the history of prior proceedings, it provides as follows: "Said Hamilton & Rourke Company agrees to put said Sibson & Kerr, or whoever they may designate, in full possession and control of all the warehouses, elevators, platforms, and appurtenances. * * * The said Sibson & Kerr or their assigns are to take and retain possession of said properties, and each of them, as mortgagees, and manage and operate said properties and all of the warehouses and elevator business of said Hamilton & Rourke Company, as mortgagees in possession, with

complete and absolute authority in all respects, and according to their own judgment and discretion, and subject only to the following condition: that after paying all of the current expenses, including a reasonable compensation to said Sibson & Kerr for their management and operation of said properties," etc. (Here follows an agreement in relation to application of the profits.) It would be difficult for an agreement to clothe a person with authority, responsibility, and absolute control if this agreement does not clothe Sibson & Kerr with an absolute control over this business. The grant of power is clear and manifest, and the language employed is plain, specific, and not susceptible of construction, for it must necessarily follow that control of the property described carries with it the control of the business carried on through the medium of the property. And, if this conclusion did not necessarily follow, it is made certain by the further provision for the application of the proceeds of the business by Sibson & Kerr, and especially by the third clause of such conditions, which is as follows: "To hold in trust and pay over to the Hamilton & Rourke Company any surplus arising out of the operation of said business after all the foregoing charges and debts shall have been paid, and to render an annual account to said Hamilton & Rourke Company of their management and conduct of said business, showing the expenditures, receipts, liabilities, and balances." This was most unfortunate language for Sibson & Kerr to subscribe to if they did not intend to be responsible for the conduct and management of the business. The following significant clause was incorporated in the agreement: "Any losses accruing from the regular and legitimate management of said business shall be chargeable to the Hamilton & Rourke Company." The only logical inference is that losses from the illegitimate management of the business should be borne by Sibson & Kerr, and Sibson & Kerr would scarcely subscribe to a responsibility for illegitimate and irregular management unless they could absolutely control the management, and the Hamilton & Rourke Company could not escape such responsibility if appellants' theory of their position could be maintained. The court will not presume that this provision of the agreement did not mean anything, and, if we attribute any meaning to it at all, it relieves the respondent company from the responsibility sought by the appellants to be placed upon it. Many other provisions of the agreement are equally conclusive. As still further showing the tenacious purpose of the appellants to absolutely control the business, and keep its management free from the power of the respondent company and from Rourke, it will be noted that on the 6th of April, 1896, the respondent company passed a resolution agreeing to turn its property over to the appellants, providing they would agree to employ its secretary, T. F. Rourke, as manager of the new business.

The appellants refused to accept the property and the management of the business on such terms, and afterwards, on April 8th, the respondent, at a meeting of the directors, adopted a resolution with the objectionable feature in regard to the employment of Rourke eliminated, and agreeing to give appellants full possession and control of all its property with complete and absolute power of management. The trust agreement was duly executed in conformity with such resolution, and, on the 21st of April, after the resolution had been ratified and spread upon the corporate minutes of the respondent, the appellants, by transfer from the respondent, took full possession and control of the property and of the business. But, even if it could possibly be thought that this agreement was susceptible of construction, one of the most common aids to construction is the manifest interpretation placed upon the agreement or contract by the parties thereto, as shown by their subsequent actions in relation to, and in their treatment of, the contract,—as shown in this case by the assumption of authority on the part of the appellants on the one hand, and the acquiescence in such acts of authority by the respondent on the other hand. As soon as the appellants had assumed control, they indicted the following letter to Rourke: "April 21, 1896. Thomas F. Rourke, Esq.: Possession of the business theretofore conducted by the Hamilton & Rourke Company having been this day transferred to us, in accordance with the resolution and agreement duly passed and executed, under the terms of which we are given full and absolute control of all the warehouses, etc., to operate the same as mortgagees in possession, and we by our agent and representative having taken and assumed such possession, you are now appointed as manager of the business for us at a salary of three hundred dollars per month."

We have not overlooked the testimony in relation to an alleged private understanding that Rourke should be the manager in any event, but do not think that such testimony, including testimony of Mr. Sibson, found in the statement of facts, where he undertakes to make a distinction between legal powers and tacit understandings, in any way tends to show want of control or responsibility or trust power on the part of the appellants. Indeed, it rather accentuates the determination of the appellants to maintain undivided and absolute control of the business. If such tacit understanding with Rourke as is undertaken to be proven could be established, it could not possibly bind the company under the testimony in this case, even if it were competent as a legal proposition to attempt to alter the terms of a written instrument by parol; and whatever exceptions or modifications there may be to the general rule that the written agreement which parties enter into is presumed to express the ultimate conclusion of the parties, and to extinguish all other parol understandings, prior or contemporaneous,

there is no authority in law which will warrant the attempt made in this case by the appellants to ingraft upon the written agreement by parol testimony a controlling feature, which they admit they refused to have incorporated into the written agreement because they thought it would interfere with their legal rights. An excerpt from the testimony of Mr. Sibson explains his theory of the tacit understanding of the powers of Mr. Rourke, of which he was then testifying: "Q. by Referee. As I understand this thing, Mr. Sibson, it is like this: The contract says the management shall be with you people, the mortgagees? A. With us or our assigns. Q. Yes; but you have said there was a tacit understanding that Mr. Rourke should be the manager? A. Yes. Q. And that Mr. Hamilton had notice and knowledge of these things, and practically, in effect, that it was the Hamilton & Rourke Co.? A. That is what I mean. Q. Now, Mr. Wyman's question, as I understand it, is to this effect: When was that tacit understanding had with reference to the written agreement? A. The tacit understanding was had in the negotiations leading up to the contract. Q. by Mr. Wyman. What I want to get at is, when was it understood, or when was it agreed, that the person who occupied the position of manager of the System, to wit, during the time in these pleadings, Mr. Rourke, that that person should be responsible for its management,—that Mr. Rourke should be responsible for its management in a different sense or degree than Mr. Noonan is at this time? A. There was no special agreement on that subject, because it spoke for itself. Q. Well, whether I was to understand there was an agreement of that sort, or whether it simply resulted from the conditions as we find them in the record,—whether, irrespective of the oral understanding or agreement, there was any writing? A. No, sir; it was understood that, instead of foreclosing these mortgages at that time, they would give us peaceable possession as mortgagees in possession; that we or our assigns could run the business. That was the legal status of it. Then there was the understanding between Mr. Rourke and the directors of the Hamilton & Rourke Company, so far as that goes, that Mr. Rourke should be that manager. Q. There was such an understanding as that, was there? A. Why, of course, it spoke for itself in the pro forma agreement which they drew up; and I think it speaks for itself in the resolution of the Hamilton-Rourke Warehouse System appointing Mr. Rourke as manager. That was in conformity with the general understanding. There was no particular writing about it, because we could not—supposed we could not—qualify the position we were in, legally, by having another contract on the outside; but that was the understanding. We had to maintain our legal right." The resolution spoken of was the resolution first submitted, which provided for the appoint-

ment of Rourke as manager as one of the conditions of turning over the property to appellants, which condition was objected to by the appellants, and at their instance eliminated by the respondent. The logic of Mr. Sibson's testimony is that the understanding which culminated in the resolution was rejected, and not incorporated into the written agreement, because it would prevent absolute control and responsibility on the part of the appellants, but that it can now be proven to avoid control and responsibility on the part of the appellants. Further comment on the position would seem to be unnecessary. Another circumstance showing the interpretation placed upon this agreement by the appellants, so far as Rourke's responsibility is concerned, was the appointment of White as a sort of overseer or vice principal. Rourke's checks were not even honored unless they were indorsed or countersigned by White, and it is evident that White was the trusted and confidential agent of the appellants, and that Rourke's acts were under his surveillance, at least until Rourke moved to Portland, after which Sibson personally gave him more minute directions. But it is useless to further specify. The whole record is convincing that Rourke was nothing more than manager of the System, appointed by the officers of the System, controlled by them, the tenure of his employment depending upon their will, and, in every way, their agent. This being true, his mismanagement was in legal effect their mismanagement, for which they are responsible. This view of the case has made it incumbent upon the court to investigate the management of the business; and, in view of the fact that the findings and conclusions of the court differ so widely from the findings and conclusions of the referee, we have examined in detail the record, consisting of many thousand pages. It would be impracticable and useless to undertake in this opinion to give expression to an analysis of the voluminous testimony. It is sufficient to say that an investigation thereof convinces us that substantial justice was done by the judgment of the referee. In one instance, however, we think he made a mistake in calculation. In finding No. 21 the total amount claimed by appellants and the Portland Flouring-Mills Company is stated to be \$89,537.99, but his segregation of this amount is as follows: Sibson & Kerr, \$54,902.62; Portland Flouring-Mills Company, \$37,073.96. This would make a total of \$91,976.58, which is \$2,438.59 too much, as the Portland Flouring-Mills Company account, as shown by its own testimony, is \$34,635.37, which, added to the Sibson & Kerr account of \$54,902.62, makes \$89,537.99. This error is carried forward in finding No. 30, and is included in the final calculation. However, in the conclusions of law which follow the findings of fact, the sum total stated is \$91,776.58, instead of \$91,976.58, as set forth in the findings of fact, thus in effect correcting the miscalculation in

the findings of fact to the extent of \$200. We have not overlooked the other claims of error made by the respondents and appellants, both as to calculations made by the referee and his view of the law and facts in the case, but we do not think they are justified by the whole testimony. The judgment will be reversed, with instructions to enter judgment in accordance with the report of the referee, after deducting the amount of \$2,238.59, the error just above noticed.

GORDON, C. J., and FULLERTON and REAVIS, JJ., concur.

LAWRENCE v. TIMES PRINTING CO. et al.
(Supreme Court of Washington. May 17, 1900.)

FRANCHISES—TRANSFER—MORTGAGES—TERM FRANCHISES—INDEFINITE DESCRIPTIONS—NEWSPAPER—GOOD WILL—NAME—INJUNCTION—REMEDY AT LAW—CONVERSION.

1. Under Laws 1897, p. 96, providing a method for the sale of franchises, the word, as used in a chattel mortgage on a newspaper of its plant, circulation, franchises, and good will, does not come within the purview of the statute.

2. Where a newspaper, its plant, circulation, and franchises were sold by the sheriff under a chattel mortgage, which contained no explanation of what "franchises" included, and the "franchises" were purchased for five dollars, and assigned by the purchaser to the plaintiff, the description in the chattel mortgage was too indefinite for the plaintiff to assert a right, under the certificate of sale and the sheriff's return, to a contract the newspaper had with the Associated Press for the delivery of news, as one of the franchises covered by the mortgage.

3. Where a newspaper, its plant, circulation, franchises, and good will, were purchased under a mortgage executed in 1895 by the Seattle Press-Times Company, and the defendant the Times Printing Company was incorporated in 1897, and purchased such newspaper two years prior to the foreclosure, and changed the name from the Seattle Press-Times to Seattle Daily Times, the plaintiff, as assignee of the purchaser under the foreclosure of the mortgage, cannot enjoin the defendant company from publishing the Seattle Daily Times on the ground that it has usurped the good will of the old company, since for whatever injury he has suffered thereby he has a remedy at law for conversion.

4. Where the Seattle Press-Times Company executed a mortgage on its newspaper plant, circulation, franchises, and good will in 1895, and in 1897 the Times Printing Company was incorporated, and purchased the paper, and published it under the name of the Seattle Daily Times for two years before a sale was made under the mortgage, the plaintiff, as assignee of the purchaser under the foreclosure, cannot enjoin the defendant from using the name Press-Times, or any kindred name, since he has a remedy at law.

Appeal from superior court, King county; William Hickman Moore, Judge.

Action by George G. Lawrence against the Times Printing Company and others. From a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Ballinger, Ronald & Battle and Donworth & Howe, for appellant. Bausman, Kelleher & Emory and Pratt & Riddle, for respondents.

REAVIS, J. The complaint states substantially the following facts: That the defendant the Times Printing Company was incorporated in March, 1897; that the defendant the Associated Press was at all times mentioned a corporation created under the laws of Illinois and authorized to transact business in this state; that in May, 1886, in the city of Seattle, a daily and weekly newspaper was established, named the Seattle Press, and at the same time there was published in said city another daily and weekly newspaper called Seattle Times; that the two papers were published and circulated in Seattle, under separate managements, from the time of their establishment until February, 1891, when the proprietors of the Seattle Press purchased the Seattle Times, and they were consolidated into one newspaper of daily and weekly circulation by the name of Seattle Press-Times; that in February, 1895, the Seattle Press-Times Company was incorporated under the laws of the state, and became the owner and publisher of the Seattle Press-Times, and such company also became the owner of the entire plant, machinery, and materials used in the publication of the Seattle Press-Times, including the good will, patronage, and circulation of the newspaper, and all the news franchises and privileges belonging to the same; that in June, 1895, the name of the Seattle Press-Times Company was amended in its articles of incorporation to the Times Company; that the publication of the Seattle Press-Times was continued in the same general style of type and appearance until May, 1895, when the name of the paper was altered by omitting the word "Press," and using therefor the name the Seattle Times; that the subscription list and circulation remained the same, except so far as it had been increased or modified in the ordinary course of business, and that it was in fact the same paper; that the Seattle Press-Times Company was organized in pursuance of an agreement with Collins, owner of the Seattle Press-Times plant and newspaper, together with one Woolery and wife, and Collins agreed to sell to such corporation, when formed, the Press-Times plant and newspaper, the corporation to pay therefor \$12,000, which was evidenced by three notes; that a chattel mortgage to secure the purchase price was duly executed on the 9th day of March, 1895, and the chattel mortgage is annexed to the complaint; that the mortgage describes certain personal property situated at a particular place in Seattle, describing by schedule the press, type, and all the corporeal property used in the publication of the Press-Times plant, and adds, "together with said paper—Press-Times—plant, circulation, franchises, and good will thereof," for the sum of \$12,000; that at the time the chattel mortgage was executed the Seattle Press-Times had a valuable circulation and business; that it enjoyed a valuable news franchise with the defendant the Associated Press, under a

contract with said defendant; that the Associated Press is a news bureau or association which furnishes telegraphic news to certain newspapers located in various cities and towns in the United States, and is the only service for such news; that among the stipulations in its contract was that it might be transferred with the Seattle Press-Times newspaper, provided the new proprietor should enter into a new contract with the defendant Associated Press; that under such contract the newspaper was entitled to the exclusive use of the news reports; that it is indispensable to the life and successful operation of the newspaper to maintain and continue the privileges of the news franchise service with the defendant the Associated Press; that the right to receive such daily news reports of the news bureau or association is generally known and designated by the term "franchise"; that the Times Company on June 4, 1895, entered into a substituted franchise contract with the Associated Press, which was in all essential matters of the same tenor, substance, and effect as the former contract used by the company in the publication of the Seattle Press-Times, except that the substituted contract designated the name of the newspaper as the Seattle Times, instead of the Seattle Press-Times, the name of the paper having been changed in May, 1895; that the rights, privileges, and franchises of the Associated Press were included in the chattel mortgage to Collins; that the defendant the Times Printing Company, incorporated in March, 1897, was organized for the purpose of diverting the news franchise with the defendant the Associated Press to itself, and of freeing the same from the lien of the chattel mortgage, and diverting to itself the patronage, name, circulation, and good will of the newspaper the Seattle Press-Times or the Seattle Times, and freeing the same from the operation of the mortgage lien; that the Times Printing Company purchased all the property used in connection with and belonging to the newspaper plant from the Times Company; that thereafter the chattel mortgage was duly foreclosed, and, after sale upon due notice, the property of the Times Company was sold by the sheriff of King county. The decree in foreclosure is also annexed to the complaint, as well as the order of sale and the sheriff's return of the sale. The decree, order of sale, and writ of execution follow the description of the mortgaged property as contained in the mortgage. The sheriff's return of the writ exhibits what was sold, and how it was sold, and recites that it was offered for sale as follows: The corporeal property scheduled, for the sum of \$936; that the paper—Press-Times—plant, circulation, franchises, and good will thereof were sold for \$89; that is to say, the sum of \$15 was bid for the paper, the sum of \$50 for the Press-Times plant, the sum of \$5 for said circulation, the sum of \$5 for said franchises, and the sum of \$5 for

said good will thereof; the bill of sale executed by the sheriff contains the same description of the personal property sold by him under the writ; that the plaintiff, through mesne conveyance, was the purchaser, and that he has demanded the franchise from the defendant the Associated Press, and the circulation, name, and good will of the newspaper the Press-Times, and its continuous publication under altered names, from the defendant the Times Printing Company; that at the time of the foreclosure of the chattel mortgage all the property was in the possession, control, and management of the Times Printing Company; that plaintiff has demanded from the Associated Press a new and substituted contract for the report of its news, and from the Times Printing Company a transfer of its contract with the Associated Press, so that a new or substituted contract can be issued to plaintiff; that the Times Printing Company is publishing a paper, the Seattle Daily Times. The value of the franchise from the Associated Press is stated at \$10,000. The value of the newspaper Seattle Press-Times and good will is stated at \$5,000. Plaintiff asks for equitable relief; that the Times Printing Company be restrained from further using the name of the Seattle Press-Times, Seattle Times, or any kindred name which may infringe plaintiff's rights; and that the defendant the Associated Press enter into its usual contract with plaintiff to furnish its news reports. The usual contract between the defendant the Associated Press and a newspaper for its news reports is set out, in which it is stated that the rights of the parties thereto are controlled and governed by the by-laws of the Associated Press in force during the life of the contract, one of which is: "No membership contract shall be finally executed or binding upon the association until it shall have been approved or ratified by the executive committee or a majority of the members of the board of directors. It is agreed that the Associated Press will not furnish any news report to any other paper in the territory described in the contract without the consent of the contracting newspaper, and the contracting newspaper agrees to furnish the Associated Press the news in the territory described in the contract in accordance with the provisions of the by-laws of the Associated Press. It is also agreed between the parties that the franchise or privilege granted by the contract to the newspaper may be transferred with the newspaper, provided the new proprietor enters into a new contract with the Associated Press, similar to the existing contract." The defendants each appeared separately, and filed a general demurrer to the complaint, which was sustained.

1. The principal object sought is to compel the defendant the Associated Press to furnish its news reports to the plaintiff. It does not appear that plaintiff assumes that he is now, or has been, the publisher of a

newspaper in Seattle. Indeed, he complains that he cannot publish a newspaper without the news reports. The observations of the court in *Metropolitan Nat. Bank v. St. Louis Dispatch Co.* (C. C.) 36 Fed. 722, would seem to be pertinent here: "It is evident that the stock in question (the Western Associated Press membership) is not property of an ordinary character, such as may be transferred at will by the owner. The bill shows that it is only vendible to persons or corporations who are engaged in publishing a newspaper or other periodical, and that no other persons or corporations are eligible to membership in the association. * * *

From the statements contained in the bill with respect to the character and functions of the organization known as the 'Western Associated Press,' it appears to me clear that a purchaser at a foreclosure sale of the share or stock or membership now in question, even if the court should order such a sale, would not acquire the privileges of membership in the association, unless it should see fit to accord him such privileges. Consent on the part of the corporation to the admission of a member appears to be essential to constitute a person a member." It is maintained by counsel for the defendants that the contract with the Associated Press is such a peculiar personal right that it is not subject to sale under mortgage foreclosure; that it is in the nature of a personal contract for services, and not transferable without the mutual consent of the parties. Apparently, it seems, there are elements of personal service entering into the contract. The Associated Press furnishes its news reports. The proprietor of the newspaper so furnished under the contract must furnish to the Associated Press the news in the territory described. It appears here clearly, however, that the peculiar value of the contract in controversy between the plaintiff and the Times Printing Company is based upon the allegation that the right to receive the news reports is exclusively given or conveyed to one newspaper proprietor. If the contract be in the nature of one for personal services, as suggested, but not here determined, it could not reasonably be said to be the subject of a mortgage or sale; and the court does not look favorably upon the contention that it is an exclusive contract. Contracts in restraint of commerce and trade have always been obnoxious to the law, and fair reasoning and correct legal analogies would seem to imply that in so important a field as news and intelligence to the general public an agreement to restrict or monopolize the agencies of dissemination of such news and intelligence should not be upheld.

2. Plaintiff shows as his right to maintain this action the sheriff's certificate of sale of certain scheduled corporeal property, together with a newspaper, good will, and franchises thereof. The contract with the Associated Press is assumed by plaintiff to be

included within the word "franchises" named in the certificate of sale. It is apparent that the term "franchises" is not used in the mortgage or certificate of sale in the legal sense, or in its ordinary, popular sense. The term, in a legal sense, contains the element of a grant or immunity, privilege, or exemption by public or quasi public authority. It may sometimes be used in a popular sense as a privilege. Our statutes (Laws 1897, p. 96) provide a method for the sale of franchises, but we cannot agree with counsel for defendants that the franchise mentioned in the chattel mortgage comes within the terms of the statute. It is stated, however, in the complaint, that within the term "franchises" is included the contract that existed between the Times Company and Associated Press for the report of the news. The term, then, as used, must be assumed to have a particular trade meaning, and not be taken in its ordinary and accepted signification. It seems at the sale made by the sheriff there was offered to bidders the "franchises" of the Press-Times paper, and it was offered separately, the amount bid therefor being \$5. There was no specification of what this term meant. We do not suppose the general public knew what it meant. It was not even specified how many franchises were offered, or what they were as belonging to the paper. In *Electric Co. v. Wightman* (Sup.) 39 N. Y. Supp. 420, it was adjudged that a sale of "choses in action" under foreclosure of a mortgage passes no title unless they are described in the judgment, notice of sale, and conveyance with sufficient particularity to be identified. In that case it was said: "To hold that choses in action pass under general words, in judgments and conveyances, would cause confusion and uncertainty in respect to the property which the purchasers under foreclosure sales acquire. Judicial sales must describe with reasonable certainty the property sold." In *Dean v. Biggs*, 25 Hun, 122, it was adjudged that a balance unpaid on a subscription to the stock of a corporation was not covered by a mortgage purporting to convey the right of way of the railroad and its other property, chattels, and things pertaining thereto, its chartered rights, privileges, and franchises, and all the estate, right, title, interest, property, and possession, claims, and awards whatsoever of the railroad of, in, and to the same; and the decision was affirmed in 93 N. Y. 662. In *Milwaukee & M. R. Co. v. Milwaukee & W. R. Co.*, 20 Wis. 183, it was held that a right to enforce a contract for the payment of an obligation due would not pass by a mortgage sale unless a more definite description of the same were given in the notice of sale than in the mortgage, which was "all and singular the stock, railroad, or other bonds, bills of exchange, promissory notes, accounts, causes of actions, demands, and choses in action of whatsoever nature." The court observed: "It is averred,

to be sure, that the trustee sold at public auction all the property, rights, privileges, franchises, things in action, and other things described in the mortgage. Is it permissible that choses in action, instruments in writing, should thus be exposed for sale, and swept away in this loose and uncertain manner? What purchaser could bid understandingly when property is thus offered for sale, without any designation or description? Obviously, a bidder would not know, and would have no means of ascertaining, whether the choses in action were worth a thousand, a hundred thousand, or a million of dollars. * * * No person, therefore, attending the sale could know what price to bid, or how to regulate his judgment, if there was no specific and certain designation of the property offered for sale." The observations of the supreme court of Wisconsin would seem to be pertinent here, as it seems the purchaser of the franchises as returned by the sheriff paid \$5 at the sale for a contract which is now asserted to be worth \$10,000. See, also, *Smith v. McCullough*, 104 U. S. 25, 26 L. Ed. 637. It is frequently true that general descriptions of property in a mortgage may be aided by external facts and evidence, and it is not necessary to determine that, with the meaning attached to the term "franchises" in the chattel mortgage under consideration, the particular privileges or contracts included in the word might not be identified and defined as between the parties. But there must be something more specific at a judicial sale. It is concluded, therefore, that plaintiff, under his certificate of sale and the sheriff's return, does not show that he holds any rights under the contract, if such existed, between the Times Printing Company and the Associated Press.

3. In the case of *Metropolitan Bank v. St. Louis Dispatch Co.*, 149 U. S. 436, 13 Sup. Ct. 944, 37 L. Ed. 799, there are presented many features similar to those in the case at bar. There it was observed, in reference to the good will of a newspaper: "Undoubtedly, good will is in many cases a valuable thing, although there is difficulty in deciding accurately what is included under the term. It is tangible only as an incident, as connected with a going concern or business having locality or name, and is not susceptible of being disposed of independently. * * * As applied to a newspaper, the good will usually attaches to its name, rather than to the place of publication. The probability of the title continuing to attract custom in the way of circulation and advertising patronage gives a value which may be protected and disposed of, and constitutes property." In that case the St. Louis Dispatch Company ceased business as the publisher of a newspaper, and on the same day another newspaper was published under the name of the Post-Dispatch, and it was observed by the court: "Moreover, the good will of the Dispatch Publishing Company was from the

first different from the good will named in the mortgage. * * * And if the Dispatch Publishing Company acquired on the 10th day of December, 1878, the good will belonging to the St. Louis Dispatch, for which it should have accounted, but refused to account, then it would be only liable as for a conversion." At the time of the sheriff's sale, and for some two years theretofore, the Times Company, the mortgagor, was not publishing the Press-Times, or any other newspaper, in its place, but the Times Printing Company, the defendant, was publishing a paper of a somewhat variant name. There were modifying and changing conditions occurring in the good will and circulation of the continuing publication. Without particularly noticing the separate sale of the good will by the sheriff, it is quite plain that the good will of the going concern, the Press-Times newspaper, as such, distinctively, was only an incident after the newspaper plant passed from the Times Company to the Times Printing Company, and, whatever the injury that occurred to the mortgagee, it must be compensated in damages for conversion of the good will of the Press-Times. It does not appear that a case is presented requiring injunctive relief against the use of the name Press-Times, or a kindred name. The judgment is affirmed.

FULLERTON, J., concurs in the result.

GORDON, C. J. I concur in the judgment of affirmance, but not in what is said concerning the effect to be given the contract referred to in the opinion as the Associated Press contract. If, as is suggested in the opinion, its character is one "in the nature of a personal contract for services," then it does not fall within that class of contracts which are obnoxious to the law because made in restraint of trade and commerce.

DUNBAR, J. I concur in the affirmance of the judgment for the reason that the description of the franchise sold is not sufficiently definite.

BAKER et al. v. SINCLAIRE et al.

(Supreme Court of Washington. May 14, 1900.)

MECHANIC'S LIEN—LAND—CONTRACT OF SALE—PURCHASER'S INTEREST—PROPERTY SUBJECT TO LIEN.

S. conveyed land to defendant under a written agreement to pay the price, that all improvements placed on the property should remain, and that defendant should pay all taxes and assessments, and, in case of his failure to make payment, the contract was to be void, and all rights to the property should revert to S. A building being erected, plaintiff filed a mechanic's lien, and sought to foreclose the same against the entire property. *Held*, that since the contract between defendant and S. created the relation of debtor and creditor, their relation to the property was that of mortgagor and mortgagee, and, defendant having less than a fee in the

land, only his interest could be subjected to the lien under Ballinger's Ann. Codes & St. § 5901, providing that where a person owns less than a fee in land, his interest only is subject to a mechanic's lien.

Appeal from superior court, King county; William Hickman Moore, Judge.

Action by Richard D. Baker and another against Henry P. Sinclair and others to enforce a mechanic's lien. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Preston, Carr & Gilman, for appellants. Allen & Allen, for respondents.

FULLERTON, J. In the summer of 1897 the defendant Charles Watson and one C. J. Smith, being desirous of purchasing certain real property situated in the city of Seattle, applied through Watson to the appellant Henry P. Sinclair, who is a resident of the state of New York, to advance them the money for that purpose. The negotiations resulted in the purchase of the property at the cost of \$4,000. Sinclair took the title in his own name, and entered into a contract with Watson and Smith, by which he agreed to convey the property to them on the payment to him of the purchase price, with interest at 6 per cent. per annum. Watson and Smith divided the property between themselves, Smith taking the easterly portion, agreeing to pay of the purchase price \$2,500, and Watson the remainder at \$1,500. Sinclair acquiesced in this arrangement, and when Smith paid to Watson for him the purchase price of Smith's portion of the property he executed a deed to Smith for that portion. On December 4, 1897, and prior to the time Smith had made the payment, Watson wrote to Sinclair, saying: "Mr. C. J. Smith will pay me on January 1st, 1898, \$2,500 and interest, and he is very anxious to commence building at once. Of course, it would be an advantage to build with him, as he can get material at very low figures. I am not ready, however, with the money to build, and unless you are willing to loan me the \$2,500 (when Smith pays it in) at the same rate of interest as we have been paying, I will wait until later. I would hardly ask you to do this, for I know ordinarily no man would loan so much on one piece of property. It will save me money to build with Smith, but, if you do not think it best, will wait until later. * * * Write me just what you think about this matter of building, as I will be guided by what you write. My idea is to build for twenty-five hundred dollars." The record does not disclose Sinclair's answer to this letter, but it appears that he agreed that Watson might retain the money paid by Smith, and that on the 31st day of December, 1897, he entered into a new contract with Watson by which he agreed to convey to Watson what remained of the property on condition that Watson would pay him the

sum of \$4,000 on September 1, 1902, with interest at 6 per cent. per annum, payable semiannually. The contract was in writing, and contained a promise on the part of Watson to pay to Sinclair the sum named at the time mentioned. It also provided that all improvements placed upon the premises should remain thereon, should be kept insured against fire in such sum as Sinclair should specify, that Watson should punctually pay all taxes and assessments that should lawfully be imposed on the property, and, in case of failure on the part of Watson to make the payments as in the contract specified, the contract should become null and void, and the right of possession and all equitable and legal rights in the premises, together with all the improvements and appurtenances, should revert to Sinclair. Watson thereafter entered into a contract in his own name with the defendant C. L. Cornwell for the erection of a dwelling house upon the real property at the agreed price of \$1,932. Cornwell proceeded with the erection of the building, and in course thereof purchased of the respondents Baker & Richards certain materials, for which he failed to pay. Baker & Richards presented the bill to Watson, who paid a part thereof, but refused to pay the remainder. They then filed a lien upon the building and lot, and brought the present action to foreclose the same. The trial court adjudged that the lien attached to the interests of both Watson and Sinclair in the property, and entered judgment accordingly.

This court has uniformly held that where a person causes the erection of a building upon lands in which he holds less than a fee-simple title only his interests in the lands can be subjected to the liens of persons performing labor upon, or furnishing materials to be used in the construction of, such building. *Lumber Co. v. Bolton*, 5 Wash. 763, 32 Pac. 787; *Mentzer v. Peters*, 6 Wash. 540, 33 Pac. 1078; *Iliff v. Forssell*, 7 Wash. 225, 34 Pac. 928; *Miles Co. v. Gordon*, 8 Wash. 442, 36 Pac. 265; *Masow v. Fife*, 10 Wash. 528, 39 Pac. 140. This is also the rule of the statute. *Ballinger's Ann. Codes & St.* § 5901. It seems clear that the defendant Watson was the person who caused the building to be constructed which gives rise to the present action, and under the rule of these cases, as well as the statute, only his interests in the real property could be subjected to the lien of the respondents. The statute further provides that the liens created by the chapter giving mechanics and material men liens upon real property are preferred only "to any lien, mortgage, or other incumbrance which may attach subsequently to the time of the commencement of the performance of the labor or the furnishing of the materials for which the right of lien is given" by that chapter, or to such liens, mortgages, or other incum-

brances which may have attached previously to that time, but which are not filed or recorded so as to create constructive notice, and of which the lien claimant had no notice. *Id.* § 5903. The contract above mentioned created the relation of debtor and creditor between Watson and Sinclair. Their relation to the real property was in the nature of that of mortgagor and mortgagee. They stood in the same relation to it as they would have stood had Sinclair conveyed the property outright to Watson, and taken a mortgage back as security for the purchase price. "There can be no sensible distinction between the case of a legal title conveyed to secure the payment of a debt and a legal title retained to secure payment." *Jones, Llen*, § 1108. See, further, *Shelton v. Jones*, 4 Wash. 692, 30 Pac. 1061; *Lumber Co. v. Bolton*, *supra*. This being the relation of the parties, the provisions of the statute subordinates the lien of the respondents to the interests of the Sinclaires in the property. The cases of *Kremer v. Walton*, 11 Wash. 120, 39 Pac. 374; *Id.*, 16 Wash. 139, 47 Pac. 238; and *Bell v. Groves* (Wash.) 56 Pac. 401,—are relied upon by respondent as sustaining the judgment of the trial court. The distinction between the rule announced in those cases and the rule announced in the cases above cited within which the present case falls is clearly pointed out in *Mill Co. v. Brown* (Wash.) 59 Pac. 507, and it is unnecessary to repeat the argument here. The judgment is reversed, and the cause remanded, with instructions to so modify the judgment as to subordinate the lien of the respondents to the interests of the appellants.

GORDON, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

MERRITT v. COREY et al.

(Supreme Court of Washington. May 14, 1900.)

PLEADING — AMENDMENT OF COMPLAINT — MATTERS ARISING SUBSEQUENT TO COMMENCEMENT OF ACTION — STATUTES — CONSTITUTIONAL LAW — TITLE OF ACT.

1. Under *Ballinger's Ann. Codes & St.* § 5678, providing that no action shall be instituted for the recovery of property sold for taxes unless plaintiff shall first pay or tender to the officer entitled to receive the same all taxes, penalties, interest, and costs due and unpaid from such person on the property sought to be recovered; and section 5679, providing that the complaint in such an action against a person in possession under a tax sale shall state that the said sums have been paid or tendered,—it is error, in an action of ejectment against one in possession of land under a tax deed, where the former owner attacks the validity of the proceedings under which the sale was had, but not the validity of the tax, to permit plaintiff, after the commencement of the action, to amend his pleadings to show a subsequent tender of the taxes.

2. Act Feb. 2, 1888, entitled "An act concerning actions to enforce collection of taxes and actions for recovery of property sold for

taxes," is not unconstitutional as embracing more than one object in its title.

Appeal from superior court, King county; William Hickman Moore, Judge.

Ejectment by Cornelia E. Merritt against J. D. Corey and another to recover possession of certain real property. From a judgment in favor of plaintiff, defendants appeal. Reversed.

Robinson & Rowell, for appellants. Balinger, Ronald & Battle, for respondent.

FULLERTON, J. This is an action of ejectment brought by the respondent against the appellants to recover possession of certain real property. The respondent alleged, in substance, that she was the owner and entitled to the possession of the property, and that the same was wrongfully withheld by the appellants; following the usual form of complaint for the recovery of real property in actions of ejectment in this state. The appellants answered, denying the allegations of the complaint, and pleading as a further and separate defense that the lands in question had been duly assessed and sold for taxes, and that they were the owners, in possession, and entitled to possession, thereof, by virtue of a sale for such taxes, and that a tax deed had been issued to one J. L. Dana, and the property subsequently conveyed by Dana and wife to themselves. The respondent replied admitting the execution of the deed, and pleading affirmatively matters tending to show the invalidity of the title of appellants attempted to be created by the proceedings leading up to and resulting in the tax deed. On the issues thus formed a trial was had, by the consent of both parties, before the court without a jury, resulting in a judgment in favor of the respondent.

After the respondent had introduced her evidence of title and rested her case, the appellants moved to dismiss the action because it was not alleged in the complaint, nor shown by the evidence, that the respondent had paid or tendered to the appellants the taxes, penalties, interest, and costs paid by the appellants and their grantor in procuring the tax deed. Before the court ruled upon the motion, the respondent, as recited in the court's finding, "asked and was allowed to amend her pleadings, over the objection of the defendants, setting up and tendering the said sum of \$75, which plaintiff alleged she believed to be ample to cover the amount paid by defendants, and offered and consented and expressed her readiness and willingness, in the event that said sum should be found or proven to be inadequate, to pay defendants such other sum as should be necessary; and, upon proof by the defendant Corey of his having paid the sum of \$455, * * * promptly tendered said amount in open court, with the avowal of her readiness and willingness to pay such

further sum as may be taxed as interest;" whereupon the court overruled the motion. This ruling is assigned as error. The motion should have prevailed. By section 5678, Ballinger's Ann. Codes & St., it is provided that no action shall be instituted for the recovery of property sold for taxes unless the person desiring to commence such action shall first pay or tender to the officer entitled to receive the same all taxes, penalties, interest, and costs justly due and unpaid from such person on the property sought to be recovered. By section 5679 it is provided that the complainant shall state in his complaint, when the action is for the recovery of land sold for taxes against the person in possession thereof, that all taxes, penalties, interest, and costs paid by the purchaser at the tax sale, his assignees or grantees, have been fully paid or tendered, and the payment refused; and, by section 5680, that the sections cited "shall be construed as imposing additional conditions upon * * * the complainant in actions for the recovery of property sold for taxes." By these provisions of the statute, a payment of the taxes, penalties, interest, and costs paid by a purchaser, or his assignor or grantor, for lands sold for taxes, or a tender of such payment, is made a condition precedent to the right to institute an action for the recovery of land so sold. It is doubtless true that if the tax itself were vicious, if it were a special and arbitrary exaction, which the state was without power to make, so that the legislature could not have validated it retrospectively by direct enactment, this could be shown in excuse of payment or tender; but where, as it appears here, the tax was a just charge against the land, and the sale is sought to be set aside because of fatalities in the proceedings leading up to the sale, it is an equitable rule, and within the power of the legislature to require the amount paid to the state to be repaid or tendered to the purchaser as a prerequisite to the right to maintain the action. Nor can the failure to so pay or tender be cured by tender and amendment at the trial. It is a familiar rule that all the facts necessary to constitute a cause of action must exist at the time of the commencement of the action. If these be imperfectly pleaded, an amendment to correct the imperfection is generally properly allowed at any stage of the proceedings. But, when the facts necessary to constitute a cause of action do not exist at its commencement, facts arising subsequent to that time, although affording in themselves or with the facts previously existing a cause of action, cannot be inserted in the pleadings by amendment, and be made to relate back to the time the action was originally commenced. The question presented here is analogous to the question presented in that class of actions where a demand is a necessary prerequisite to the right to maintain the action. In such actions it is nowhere held

that a demand can be made after action begun, and inserted in the pleading by amendment, so as to be made to relate back to the time of the commencement of the action.

It is contended by the respondent that these sections of the statute have no application to an action of ejectment. She argues that she could not be presumed to know upon what the appellants in possession based their right until informed thereof by their answer, and that she was in time when she met the contention after the answer set up the tax deed as a defense. It would seem, however, a sufficient answer to this to say that the statute cannot be avoided by the form of the action adopted to recover the land. The statute applies to every case, and to every form of action, for the recovery of land sold for taxes, and it can make no difference to the plaintiff's right of action that the defendant in possession may rely on other defenses than that of the tax sale. Further, this point was expressly ruled against the respondent's contention by this court in *Ward v. Huggins*, 16 Wash. 530, 48 Pac. 240. In that case, speaking through Anders, J., the court said: "The statute last above referred to [the statute in question] is just and equitable, and was designed to meet precisely such cases as this. It is argued, however, by counsel for appellant, that it is not applicable in cases of ejectment; but in this we think counsel are in error. Although in form ejectment, this is, in substance and in fact, an action to recover land sold for taxes." The sections of the statute cited comprise the act of the territorial legislature of February 2, 1888. This act does not embrace more than one object, and is not in violation of the organic act of the territory of Washington. *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520; *McMaster v. Thresher Co.*, 10 Wash. 147, 38 Pac. 700; *Lancey v. King Co.*, 15 Wash. 9, 45 Pac. 645, 34 L. R. A. 817; *Bogue v. City of Seattle*, 19 Wash. 396, 53 Pac. 548. The judgment of the lower court is reversed, and the cause remanded, with instructions to dismiss the action.

GORDON, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

GREENWOOD et al. v. HASSETT et al.
(S. F. 1567.)

(Supreme Court of California. May 14, 1900.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ACTION ON ASSESSMENT—PLEADING—NOTICE OF INTENTION—POSTING.

1. A complaint in an action to foreclose a street assessment lien is sufficient though it fails to set forth the specifications attached to and forming a part of the contract for the work.

2. Street Improvement Act, § 3, requires that the notice of the passage of the resolution of intention to make street improvements shall be posted along the line of work, after it has been posted for two days on the door of the council chamber. *Held*, that the posting of such notice

on the council chamber door on the 6th day of the month was completed on the 7th, and hence a posting thereof along the line of work on the 8th was proper.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by one Greenwood and others against one Hassett and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

James F. Tevlin, for appellants Hassett & Grant. T. Z. Blakeman, for appellant Moran. F. M. Purcells, for respondents.

PER CURIAM. Action to foreclose the lien of a street assessment. The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The court overruled the demurrer, and, the defendants having answered, the cause was tried by the court, and judgment rendered in favor of the plaintiffs. The defendants have appealed.

The demurrer to the complaint was properly overruled by the court.

1. It was not necessary to set forth in the complaint the specifications attached to the contract, and which formed a part thereof. *Improvement Co. v. Reynolds*, 123 Cal. 88, 55 Pac. 802.

2. The objection that there is no sufficient allegation of a demand upon the lot has been obviated by the stipulation filed herein correcting the transcript as originally printed.

3. The notice of the passage of the resolution of intention was properly posted by the superintendent of streets. The complaint alleges that the clerk of the board of supervisors on the 6th day of December, 1893, posted the resolution of intention, and kept the same so posted for two days, and that on the 8th day of December, 1893, the superintendent of streets caused notices of the passage of said resolution to be conspicuously posted along the line of the work. The provision of section 12, Code Civ. Proc., is not applicable. Section 3 of the street improvement act does not prescribe the time "in which" the posting is to be made, but declares the time at which the superintendent is to make the posting; i. e. after the posting by the clerk. In the present case, the posting for "two days" by the clerk was completed at the close of December 7th. In *Society v. Thompson*, 32 Cal. 347, where the statute required the publication of a summons for three months, and the first publication was made on the 10th of January, it was held that a publication for three months was completed at the close of April 9th. In *Himmelman v. Cahn*, 49 Cal. 285, it was held that the statute requiring the notice of award to be posted for five days was satisfied by including both the first and last day of its posting. See, also, *Willson v. His Creditors*, 55 Cal. 476; *Dean v. Grimes*, 72 Cal. 442, 14 Pac. 178.

4. The evidence sufficiently showed that the engineer's certificate had been properly recorded. *Perine v. Lewis* (Cal.) 60 Pac. 772. The judgment is affirmed.

123 Cal. 581

CHRISTOPHER et al. v. CONDOGEORGE.
(L. A. 711.)

(Supreme Court of California. May 14, 1900.)

INJUNCTION — VERIFIED COMPLAINT — POSITIVE ANSWER—VERIFICATION ON INFORMATION AND BELIEF—SUFFICIENCY—MODIFYING INJUNCTION—APPEAL—PLEADING—CONSIDERING MERITS—DISCRETION OF COURT.

1. Where an answer to a verified complaint for an injunction stated no facts on information and belief, a verification of the answer, under Code Civ. Proc. § 446, that the contents were true, except as to the matters and things stated to be on information and belief, was a positive affirmation of the truth of the allegations in the answer, entitling the answer to be read and considered the same as the verified complaint.

2. Where defendant moved to dissolve a preliminary ex parte injunction, and plaintiff, after the hearing, asked for a rehearing on the motion to dissolve, and an order modifying the injunction was granted, and defendant does not appeal, no facts bearing on the refusal to dissolve the injunction will be considered on plaintiff's appeal, when on defendant's motion to dissolve there was nothing before the court but the complaint, the writ, the answer, and an affidavit of plaintiff's attorney; it not appearing that the defendant's amended answer and affidavits submitted on the motion for rehearing were considered.

3. It was no abuse of discretion to modify a preliminary ex parte injunction restraining defendant from removing a soda fountain and fixtures from a certain county so as to prevent removal from the state, where defendant in his answer denied all the material averments of plaintiff's complaint that defendant had leased the property on a rental, part of which had been paid, that defendant was to conduct an ice-cream parlor in a certain place, and to handle ice cream manufactured by plaintiffs only during the lease, and that he threatened to remove the property to the Hawaiian Islands.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action for an injunction by L. J. Christopher and another against Nicholas Condo-george restraining defendant from removing certain property from the town of Santa Monica. From an order of the court modifying a preliminary injunction restraining defendant from removing the property from Los Angeles county, so as to restrain defendant from removing it from the state, plaintiffs appeal. Affirmed.

M. K. Young, for appellants. Tanner & Taft, for respondent.

CHIPMAN, C. Appeal from an order modifying an injunction. Plaintiffs, doing business as co-partners in Los Angeles, being the owners of certain personal property, consisting of various articles, including a soda fountain, used in outfitting a shop in which to sell confections, ice cream, soda, etc., leased the property to defendant by a written instrument dated August 31, 1898.

On November 23, 1898, plaintiffs filed their verified complaint, alleging the execution of the lease, possession of defendant under the same, and that "defendant agreed to conduct with the use of said property an ice-cream parlor and soda fountain in the town of Santa Monica, and to handle and serve ice cream manufactured by said plaintiffs, and no other, for the period mentioned in said lease." The lease set out in the complaint makes no mention of such agreement, and is silent as to any restriction as to the place where the property may be taken and used. It provided for a rental of \$725 for the whole term, which expired August 1, 1899, of which \$350 had been paid, and no more; payments were to be made by installments, to wit, \$25 cash in hand, \$325 60 days from date of lease, and \$375 August 1, 1899, and upon the last payment being made, and upon the further payment of \$1, the lessee was to become the owner of the property. The complaint alleged that defendant threatened to remove said property to the Hawaiian Islands; that injury to the soda fountain would thus ensue by the corrosion of its parts through the action of salt air; that waste and irreparable injury would follow; that defendant had refused to further conduct the business in Santa Monica, and was insolvent; and that defendant paid \$350 on account of said lease and no more. As a further cause of action, it is alleged that defendant threatens to store the said property in a warehouse for eight months, paying no storage thereon, and that such expense will fall as a charge upon plaintiffs in order to get possession; that such treatment of the property, by storage, will produce waste and irreparable injury of the same by keeping the soda fountain out of use. The prayer is for an injunction restraining defendant from removing said goods from the town of Santa Monica; also restraining the storage of the same, and requiring defendant to return the property to plaintiffs, and for general relief. The court, upon issuance of summons on the day complaint was filed, made its preliminary ex parte order restraining defendant from removing the property from Los Angeles county. On November 26, 1898, defendant filed his verified answer, denying specifically most of the allegations of the complaint, and denying that he made any agreements other than such as appear in the written lease; admits that he has packed the goods and shipped the same to San Francisco, where he intends to use said goods for the purposes for which they are intended; denies insolvency, and alleges ability to meet all his obligations as they become due; denies any intention to remove the goods out of the state. The complaint alleged that the goods had been delivered to a transportation company for shipment. The answer admits the delivery for shipment, but avers that defendant's intention is to ship the

goods to San Francisco and not elsewhere; denies that he threatens to store the goods as alleged; denies that any ocean voyage will injure the property; alleges that plaintiffs have a speedy and adequate remedy at law; that defendant is being greatly injured financially by the injunction, and prays for its dissolution; admits, by not denying the allegation of the complaint, that he has paid but \$350. Notice of motion to dissolve the injunction was duly served on plaintiffs, and the court ordered the hearing for November 28, 1898, on which day the motion was heard on the complaint, writ, answer, and the affidavit of one of plaintiffs' attorneys that he had on November 12, 1898, received a certain letter from defendant which is made part of the affidavit. This letter was an appeal to the attorney to try and do something for him. He states that he had offered to plaintiffs to make a loss of \$50 in the transaction, and give up the fixtures, or that he be allowed to take them to Honolulu, but plaintiffs refused to do the one or the other. He says he is making no money, and is really running at a loss, and is sure he cannot make enough to meet the payments yet to be made on the lease. Just what bearing the letter has in the matter is not plain to see, except as very slightly tending to show an intention to remove the property to Honolulu, and as in some slight degree tending to show inability to pay for the property. The motion was argued and submitted for decision on the day of the hearing. On November 29, 1898, the next day, and before the court had rendered its decision, plaintiffs' counsel served and filed notice of a motion to reopen the hearing on the motion to dissolve the injunction, supported by an affidavit of plaintiffs' counsel which stated that counsel was prevented by pressure of business to present at the hearing affidavits in reply to defendant's answer, and on the ground that counsel had procured an affidavit showing that it is defendant's intention to ship the property to Seattle, in the state of Washington. The same counsel also made affidavit of sundry facts tending to show the intention of defendant, and also tending to show that it was not feasible for counsel to have taken out a writ of replevin. This motion to reopen the hearing came on to be heard December 5, 1898, and on that day an amended complaint was served and filed, and the hearing on the motion to reopen the hearing, then under submission to the court, was continued to December 12th, at which time it was heard on the amended complaint and the affidavits which were used at the former hearing,—i. e. the hearing on the motion to dissolve,—and on that day the court made an order modifying the injunction by restraining the defendant from removing the property out of the state. The motion to reopen the hearing seems not to have been distinctly passed upon. The appeal is by plaintiffs from the order

Cal.Rep. 60-62 P.—19

modifying the injunction. It might, perhaps, be held that in making the order modifying the injunction the court, in effect, denied the motion to reopen the hearing. However this may be, the appeal does not reach any error of the court in thus dealing with the motion to reopen the hearing. The motion on which the order was made was heard on the original complaint, and not on the amended complaint, as appears from the bill of exceptions. Appellants claim that, although the answer is direct and positive in its denials, it is to be considered as having been made on information and belief, because the verification is in form on information and belief. The claim is that, if the answer is to be regarded as an affidavit, this must be so, and that section 446, Code Civ. Proc., relates only to the verification of pleadings on information and belief. The form of verification prescribed by this section of the Code is a declaration of the affiant that he knows the contents of the pleading, and that it is true of his own knowledge, "except as to the matters and things therein stated on his information and belief," etc. In the body of the answer no fact is stated on information and belief, and therefore the verification is a positive affirmation of the truth of the allegations of the answer. The verified answer is entitled to be read and considered the same as is the verified complaint.

Respondent urges that we should look to the merits of the action as set forth in the complaint in determining whether the facts set forth therein justified an injunction at all, and, if not, the order should be sustained for that reason. Respondent does not appeal from the order. We cannot, therefore, consider any fact bearing upon the refusal of the court to dissolve the injunction. To consider the merits of the action now, as the pleadings stand, would be to forestall the lower court in advance of the final hearing. When the motion to dissolve the injunction was heard and submitted, there was nothing before the court except the original complaint, the writ, answer, and the letter of defendant attached to the affidavit of Mr. Young, plaintiffs' attorney. If it was true that the amended answer and the affidavits submitted with it on the motion to reopen the hearing of defendant's motion were considered by the court in deciding the motion that was then under submission, that fact should have been made clearly to appear. It not so appearing, we must confine ourselves to the matter as it appeared when the defendant's motion was submitted for decision. The modification of a preliminary injunction is a matter in the sound discretion of the trial court, and unless this discretion appears to have been abused this court will not interfere. *Marks v. Weinstein, Lubin & Co.*, 121 Cal. 53, 53 Pac. 862, and cases there cited.

The material averments of the complaint

were denied; substantially all of its equities were denied; the averment that there was any agreement other than as expressed in the written lease was denied; and it was alleged in the answer that there was no other agreement than the written instrument set forth in the complaint. In view of the facts as we have them, we do not think the court abused its discretion in modifying the injunction, and it is therefore advised that the order be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

128 Cal. 572

BARNHART v. EDWARDS et al. (Sac. 469.)
(Supreme Court of California. May 12, 1900.)

JUDGMENTS — INTEREST — MODIFICATION ON APPEAL — COMPUTATION BY CLERK — JUDICIAL SALE — PENDING APPEAL — JUDGMENT CREDITOR'S APPEAL — STAYING EFFECT OF JUDGMENT.

1. Code Civ. Proc. § 1035, provides that the clerk shall include in the judgment entered any interest on the verdict or decision of the court from the time it was rendered. The supreme court directed that findings of a superior court should be corrected and a reduction made in the amount of a judgment entered thereon. The superior court, over two years after its former judgment had been entered, made an order correcting its findings and reducing its judgment as directed, and a finding that the corrected amount was "the amount now due for principal and interest on the said debt, with interest from the date of this decree." *Held*, that the action of the trial court correcting its original findings was not its "decision" on the issues, but related to the time when the findings were originally made, and that the clerk should have computed interest on such corrected amount from the date of the original judgment.

2. Code Civ. Proc. § 957, provides that when a judgment is reversed or modified the appellate court may make restitution of all property "lost" by the erroneous judgment, so far as such restitution is consistent with the protection of a purchaser of property at a sale ordered by the judgment. The supreme court directed a superior court to correct certain of its findings and reduce the amount of its judgment based thereon, and that thereupon the order denying a new trial should be affirmed. On such direction, the superior court set aside a sale of lands made under the judgment pending appeal. No undertaking to stay proceedings during appeal had been given. Defendant did not tender the amount of corrected judgment, or make any showing that the sale was unfair, or that a resale would bring a larger amount. *Held*, that the order of the supreme court did not set aside or reverse the judgment of the trial court, but simply reduced the amount of it, and that the defendant "lost" no property, within the meaning of such section 957, and hence it was error to set aside the sale.

3. After a superior court has entered an order correcting a judgment in accordance with the directions of the supreme court, and the judgment creditor has appealed from such order, the superior court cannot set aside a sale of land made prior to the correction of the judgment, and stay proceedings until the judgment creditor accounts for the rents and profits to the judgment debtor, as the appeal of the judgment creditor deprives the judgment of all effect as

the basis of any action of the court dependent thereon.

In bank. Appeal from superior court, San Joaquin county.

Action by H. Barnhart against R. L. Edwards, administrator, etc., and others. From an order correcting certain findings and a judgment based thereon in favor of plaintiff, and setting aside a sale made thereunder, plaintiff appeals. Order correcting judgment and setting aside sale reversed. Order correcting findings affirmed.

J. A. Louttit and Minor & Ashley, for appellant. P. J. Hazen and Nicol & Orr, for respondents.

VAN DYKE, J. After further consideration of this case, we have come to the same conclusion arrived at in department 1, and adopt the opinion therein filed July 3, 1899, as the opinion of the court in bank, as follows:

1. Upon the trial of this cause the court found that the plaintiff was entitled to judgment in his favor in the sum of \$7,668.12, and that the same was a lien upon the lands described in the complaint, and directed a sale thereof. The findings of fact were filed March 16, 1895, and judgment thereon entered March 18, 1895. An appeal from the judgment was dismissed by this court March 6, 1896 (111 Cal. 428, 44 Pac. 160), and the remittitur thereon filed in the superior court, April 22, 1896. Upon an appeal from the order denying a new trial, this court made an order, December 28, 1896, directing the superior court to deduct certain items from the amount which it found due to the plaintiff, with whatever interest had been allowed for those items, and to make a corresponding amendment of its conclusions of law, and added: "The order denying a new trial will thereupon be affirmed. Judgment will then be entered in accordance with the findings thus corrected." After receiving the remittitur containing this direction, the superior court, upon motion of the respondent herein, made an order, September 13, 1897, correcting its finding of fact by deducting therefrom the sum of \$2,109.43,—the amount of said items and interest thereon,—and amended its conclusion of law to read as follows, viz.: "That plaintiff is entitled to judgment against defendant R. L. Edwards, as administrator of the estate of E. C. Vancil, deceased, in the sum of \$5,558.69; that said sum is a valid, existing lien upon the lands and premises in plaintiff's complaint described, and is secured by the mortgage mentioned in said complaint." On the same day the court caused to be entered a "corrected judgment and decree," reciting therein that, having "corrected its findings and amended its conclusions of law" as directed by this court, it "proceeds to enter judgment in accordance with the findings as thus corrected," and thereupon ordered and decreed a sale of the

mortgaged premises, and that out of the proceeds of said sale the sheriff pay to the plaintiff the sum of \$5,558.69, "the amount now due for principal and interest upon the said debt and mortgage in the complaint and findings mentioned, with interest thereon at the rate of seven per cent. per annum from the date of this decree." From the judgment thus entered an appeal was taken by the plaintiff September 15, 1897. The direction of this court for the entry of judgment in accordance with the findings as corrected had reference to the ultimate act to be performed by the superior court, but did not prescribe the judgment which it should enter. The form of the judgment, including its various provisions, was left to the judgment of that court, to be exercised with due regard to preserving and protecting the rights of the several parties thereto under appropriate and established principles of equity. If any change in the relation of the parties to the judgment or to the property involved therein had supervened pending the appeal, and was brought to the notice of the court, it was proper for it to adapt its judgment to such change so far as would be consistent with the rights of others and with recognized rules of procedure. Section 1035, Code Civ. Proc., requires the clerk to include in the judgment entered up by him "any interest on the verdict or decision of the court from the time it was rendered or made." The "decision" of the superior court in the present case was made March 16, 1895, the day on which it filed its findings of fact. There was no subsequent trial of the issues before the court, nor did it make or file any new findings of fact. Its action in correcting its original findings was not its "decision" upon the issues, but was an act performed under the direction of this court, and the correction of the findings, as well as the judgment to be entered thereon, would relate to the time when the findings were originally filed. Under the findings as thus corrected there was due to the plaintiff, March 16, 1895, upon the obligation secured by the mortgage, the sum of \$5,558.69, and he was entitled to receive this amount with interest thereon from that date at the rate of 7 per cent. per annum. See *Clark v. Dunnam*, 46 Cal. 205. The recital in the judgment appealed from that the sum of \$5,558.69 is "now due" upon the obligation—i. e. September 3, 1897, the date of its entry—is not in accordance with the findings, and the direction that the plaintiff shall receive interest on that sum from that date only is in contravention of the provisions of section 1035, Code Civ. Proc. The provisions of this section create a right to such interest in the party in whose favor the decision is made, and he is not to be deprived of that right because the court formulates the judgment to be entered by the clerk. Instead of leaving it to the action of the clerk alone.

2. Upon the above-named appeal from the

61 P.—12

judgment of March 18, 1895, the appellant gave no undertaking to stay proceedings, and on December 14, 1895, the plaintiff caused the mortgaged lands to be sold in accordance with the judgment, and in June, 1896, after the time for redemption had expired, received a deed of conveyance therefor from the sheriff. October 13, 1897, the superior court made an order upon the motion of the respondent herein—to whom, prior to the commencement of the action, the original mortgagor had conveyed the lands subject to the mortgage—vacating and setting aside the sale by the sheriff, and directing that he be restored to the possession of the premises so sold; and, further, that the plaintiff within 10 days thereafter account for the rents, issues, and profits received by him during the possession of the premises, the same to be applied in and credited to the judgment in his favor, and that until such accounting was had the execution of the judgment should be stayed. From this order the plaintiff has also appealed. No argument has been made or authority cited in support of the latter portion of this order, and we are not aware of any principle of law by which it can be sustained. The judgment under which the sale was made had never been vacated or set aside, and the dismissal of the appeal therefrom had the effect to affirm the judgment. *Id.* § 955. The direction by this court upon the appeal from the order denying a new trial, to deduct certain items from the amount found due to the plaintiff, rendered it incumbent upon the superior court to make its judgment correspond with such correction, and the further direction for the entry of judgment in accordance with such correction had the same effect. This was evidently the understanding of the respondent, since he stated in his notice of motion for an order modifying the judgment that by the judgment of this court the judgment of the superior court was "modified and directed to be modified." This court made no order setting aside or reversing the judgment appealed from, but its order was limited to a modification of the judgment in accordance with certain specific directions. The rule is well settled in this state that upon the reversal of a judgment a sale to the plaintiff of the defendant's property for the satisfaction of the judgment in whole or in part will be set aside. The reason for this rule is that, as the plaintiff's claim to have the property sold depends upon the judgment, the reversal of the judgment destroys this claim, and takes away all right to retain the defendant's property. The reason for the rule ceases, however, when a judgment directing the sale of specific property, as in the case of the foreclosure of a mortgage to satisfy a lien thereon, is afterwards modified on appeal by merely reducing the amount of the lien without changing that portion which directs a sale of the property. In such a case, unless the defendant tenders to the plaintiff the

amount which the judgment as modified declares he is entitled to receive from the sale of the lands, together with the costs incurred upon the original sale, it should be made to appear that there was some unfairness in the sale, or that the property would upon a resale bring a larger amount than at the first sale, before he could claim a right to have the sale set aside. *Freem. Ex'ns*, § 347; *Jesup v. Bank*, 15 Wis. 604. Section 957, Code Civ. Proc., authorizes the appellate court upon its modification of a judgment to make restitution of all property "lost" by the erroneous judgment, "so far as such restitution is consistent with protection of a purchaser of property at a sale ordered by the judgment." But, if the judgment directing a sale of property to satisfy a lien is modified by merely reducing the amount of the lien, it cannot be said from that fact alone that the appellant has "lost" any property so as to authorize the sale to be set aside. See *Yndart v. Den* (Cal.) 57 Pac. 761. The superior court was not authorized to make the order appealed from by reason of its action in causing the judgment of September, 1897, to be entered. The plaintiff had appealed from that judgment, and from the order directing its entry prior to the making of this order, and thereby deprived the judgment of all effect as the basis of any action of the court dependent thereon. Moreover, the court would not have been authorized to stay the enforcement of this judgment upon a motion of the respondents by reason of anything that had occurred prior to its entry, and which could have been considered by the court before it was entered. The action of the court in entering the judgment of September 3, 1897, and its order of October 13, 1897, are reversed. The order for the correction of the findings is affirmed.

We concur: HARRISON, J.; McFARLAND, J.; GAROUTTE, J.

128 Cal. 589

GERMANIA TRUST CO. v. CITY AND
COUNTY OF SAN FRANCISCO.
(S. F. 2,031.)

(Supreme Court of California. May 16, 1900.)
TAXATION—RAILROAD BONDS—CONSTITUTIONAL LAW—DOUBLE TAXATION.

1. Bonds of a railroad company, secured by mortgage, are not obligations by which a debt is secured, within Const. art. 13, § 4, cl. 1, declaring that a mortgage, deed of trust, or other obligation by which a debt is secured shall be deemed an interest in the property affected thereby for the purpose of taxation, but such bonds are within the exception to such section taxing the property of railroad and quasi public corporations; and as the bonds, with the mortgage securing them, constitute the obligation affecting the property, and as such property is taxed at its full value, the bonds are not liable to taxation.

2. Const. art. 13, § 1, provides that bonds in proportion to value to be ascertained, as provided by law, shall be subject to taxation. Section 4 declares that a mortgage for the purpose of

taxation shall be deemed an interest in the property affected thereby, except as to railroads and other quasi public corporations, the value of the property of which, less the value of security for debts, shall be taxed to the owner of the property, and the value of such security shall be taxed to the owner thereof in the county in which the property affected thereby is situated. Section 10 provides that the property of railroads operated in more than one county shall be assessed by the state board of equalization at their actual value. A railroad running through several counties was assessed for taxation at its full cash value, without deduction of debts secured by mortgage thereon. *Held*, that the bonds of such railroad are not assessable for taxation to the owner, as the mortgage security therefor is assessed as an interest in the property, and the effect of such assessment would be to tax the same property twice.

3. Under Const. art. 13, § 4, providing that the value of the property of railroads, less the value of the security of debts, shall be taxed to the owner of the property, and the value of such security shall be taxed to the owner thereof in the county in which the property affected thereby is situated, the taxation of bonds secured by a mortgage on such property, where the full value of the property is also assessed to the owner of the property, is double taxation, and therefore illegal, though the owner of the bonds is himself taxed only once.

Van Dyke, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco.

Action by the Germania Trust Company against the city and county of San Francisco to recover money paid for taxes on an illegal assessment. From a judgment sustaining a demurrer, plaintiff appeals. Reversed.

Garber, Creswell & Garber and Smith & Pringle, for appellant. Tirey L. Ford, Atty. Gen., Wm. M. Abbott, Dep. Atty. Gen., and Franklin K. Lane, for respondent.

BRITT, C. In this cause the court below held on demurrer to the plaintiff's complaint that the same failed to state facts sufficient to constitute a cause of action. Plaintiff declining to amend, there was final judgment for defendant. The purpose of the action, as disclosed by the complaint, is to recover money paid by plaintiff under protest to the assessor of the city and county as taxes for the fiscal year to end June 30, 1900, upon several bonds owned by plaintiff, of the par value of \$1,000 each, issued by the North Pacific Coast Railroad Company, a corporation owning and operating a railroad wholly within this state, but in more than one county, which bonds are secured by mortgage or deed of trust of and upon all the real and personal property of said railroad company. The property mortgaged for the payment of the bonds has been, or will be, assessed for purposes of taxation to the railroad company at its full cash value without deduction of the debt secured thereon. The question for decision is whether such bonds are assessable for purposes of taxation to the owner of them. If they are thus taxable, the judgment of the court below is right; otherwise, it is erroneous.

Article 13 of the constitution of this state has for its subject "Revenue and Taxation." By section 1 thereof, "bonds," without any descriptive qualification, are named among the several species of property subject to taxation "in proportion to its value, to be ascertained as provided by law." Section 4 of said article, so far as necessary to be stated, is as follows: "A mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city or district in which the property affected thereby is situate." By section 10 of the same article it is provided that "the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in more than one county in this state shall be assessed by the state board of equalization, at their actual value. * * *" Railroad property not specified in section 10 is assessed for taxation by the local assessor of the county, town, or other taxing district where it is situated. *City and County of San Francisco v. Central Pac. R. Co.*, 63 Cal. 467. There seems to be no serious contention that the bonds in question here are not obligations by which a debt is secured within the meaning of the first clause of said section 4 of article 13; nor could that position be maintained successfully. It is true that a railroad bond in the usual form is not identical with the mortgage by which its payment is secured; but the bond and the mortgage concur to constitute an obligation affecting the incumbered property. Each bond issued carries with it in the hands of the holder a corresponding equitable interest in the mortgage. The mortgage alone, although it be formally executed and recorded, yet of itself evidences no debt and creates no lien until the bonds, or some of them, to which it relates, are sold, pledged, or otherwise used, when it may, in a proper case, operate retrospectively as of the date of its execution or record. These propositions are elementary. See *Short, Ry. Bonds*, pp. 43-46; *Jones, Corp. Bonds*, § 181; *Wade v. Brewing Co.*, 10 Wash. 284, 38 Pac. 1009; *People v. Eastman*, 25 Cal. 601, 603.

The history of the plan for the taxation of secured credits in the present constitution is well known. The constitution of 1849 was understood and interpreted to be prohibitive of the taxation of all credits, including those secured by mortgage of property, on grounds which need not be now investigated nor here rehearsed further than to say that the taxing of credits was considered to be double taxation, and contrary to the constitutional re-

quirement that taxation should be equal and uniform. *People v. Bank*, 51 Cal. 243; *Bank v. Chalfant*, Id. 369. The constitution of 1879 was designed to change the rule existing at the time of its adoption. It makes taxable, in the manner prescribed by its own terms, all credits secured by mortgage. The understanding, however, has always been that double taxation is no part of the means by which this result is to be accomplished. In a decision rendered little more than a year after the instrument took effect, and thus valuable as contemporaneous exposition, it was said that: "Not only does the language of the constitution neither require nor permit double taxation, but we think it may be safely said that neither the framers of the instrument nor those who ratified it ever supposed that under its provisions there could be any such thing; for both in the debates on the floor of the convention which framed it, and in the arguments of those who advocated its adoption before the people, are to be found repeated disclaimers of any such intention." *People v. Badlam*, 57 Cal. 594, per Mr. Justice Ross. And to similar effect are *City and County of San Francisco v. Anderson*, 103 Cal. 69, 36 Pac. 1034, and several other cases. We are, therefore, in the present case to understand the provisions of the constitution as directed to the purpose of securing to the state a revenue from such bonds equal to that derived from any other property of the same value, and at the same time avoiding the double taxation of any property. Holding in view both these intents, the scheme and plan of the constitution seems to be easy of apprehension: "A mortgage, deed of trust, contract or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby." This declaration is comprehensive. No class of secured obligations is excepted from it. Such obligations being made an interest in the affected property for the purposes stated, necessarily the property affected includes, for the same purposes, the obligations which affect it, as well as the remaining interest of the debtor. The form which credits secured by mortgage should take for the purposes of taxation being thus fixed as an interest in the affected property, it remained to determine from whom payment of the tax on the aggregate of values comprised in the property should be exacted. As to credits secured on the property of individuals and strictly private corporations, the burden is divided and adjusted by assessing the interests separately; the owner of the secured credit being taxed on its value, and the owner of the incumbered property being taxed on the value thereof remaining after deducting the amount assessed to the secured creditor. But in the case of credits secured on the property of "railroad and other quasi public corporations" no deduction from the value of the property is allowed on account of the indebtedness.

The whole of the property—precisely commensurate with the interests of both debtor and creditor—is assessed to such corporation; and thus, as an interest in the affected property (which it is declared to be for this purpose by the first clause of section 4), the secured obligation is assessed, and the tax is paid by the debtor corporation. It necessarily follows that to assess and tax the obligation again to the holder thereof, as if it were an unsecured credit, would be to tax the same property twice, which, in this instance at least, is made impossible by the terms of the constitution; for, since the secured obligation is, for purposes of assessment and taxation, to be deemed and treated as an interest in the property affected, it cannot be taxed except as such interest.

It is no answer to say that, if the bonds are assessed to the holder, and he pays the tax on them, he is taxed only once; for double taxation may consist in requiring a double contribution to the same tax on account of the same property, even though the assessments are to different persons. *Cooley, Tax'n* (2d Ed.) p. 225; *City and County of San Francisco v. Fry*, 63 Cal. 472. This is illustrated in *People v. Badlam*, 57 Cal. 594, where it was held that, when all of the property of a corporation is assessed for taxation, the shares of its stock, which merely represent interests in the corporate property, are not themselves taxable to the stockholder; and that, when moneys deposited in a savings bank are assessed to the bank, they cannot be also assessed to the depositors. Compare *McHenry v. Downer*, 116 Cal. 20, 47 Pac. 779. So, in the case before us, the bonds being made, for the purpose of taxation, an interest in the property on which they are secured, when this is taxed at its actual value, without deduction of the value of the security, the bonds are taxed in the only way the constitution allows them to be taxed. This view of the case receives some corroboration from the practice of the revenue officers of the state. So far as we are advised, bonds such as those here involved have not, from the time the constitution went into effect until now,—some 20 years,—been assessed to the holders thereof. The legislature has been of the same opinion. By the amendment of section 3617, Pol. Code (St. 1895, p. 310), the bonds of railroad and other quasi public corporations are, as such, excepted from the definition of property liable to taxation. Counsel have assailed this enactment as unconstitutional, but, in our opinion, for the reasons already indicated, it would have been at variance with the constitution if it had provided otherwise. There may have been various reasons why no independent taxation of credits secured on the property of railroad corporations was provided for. At the time the constitution was framed and adopted it was supposed that the property of such corporations was commonly mortgaged to an amount equal to or

greater than its value. The difficulty or impossibility of reaching their mortgage bonds when held, as is frequently the case, in the hands of numerous owners dispersed over the world, may have made it seem politic and convenient to fix them as an interest in the property. By taxing the property without the deduction (on account of the debt) allowed to natural persons the state could lose no revenue, nor could railroad property in any wise escape taxation,—both of which contingencies were doubtless designed to be avoided. The plan also was not open to the imputation of an attempt at double taxation. See the argument of counsel for the state in *California v. Railroad Co.*, 127 U. S. 18, 8 Sup. Ct. 1073, 32 L. Ed. 150. The decision in *Mackay v. City and County of San Francisco*, 113 Cal. 392, 45 Pac. 696, in no way conflicts with what is held here. That case related to bonds of a railroad corporation of Arizona secured on property situated in that territory, which bonds were owned in this state. It was held that they were taxable here. No argument is required to show that securities which affect only property without this state are not the subject of our laws relating to the taxation of securities which are a lien on and an interest in property within the state. A dictum from the opinion in the case of *Central Pac. R. Co. v. State Board of Equalization*, 60 Cal. 59, is pressed upon our attention. In that case it was in controversy, among other things, whether the railroad company was entitled to have deducted from the assessment of its property for local taxation the amount of a first mortgage imposed by the laws of the United States. That matter is covered by the terms of the constitution excepting railroad corporations from the provision for deduction allowed to other mortgagors, and the question for decision was merely whether this exception was violative of the fourteenth amendment to the constitution of the United States. It was held that the exception was not in conflict with said amendment, but the learned justice delivering the opinion, having referred to section 4 of article 13 of the state constitution, remarked thereon: "Reading the whole section together, it seems very plain that, as to mortgages, deeds of trust, contracts, or other obligations secured upon the property of railroad and quasi public corporations, they should not be deemed and treated as an interest in the property affected by them 'for the purposes of taxation.'" The remark was wholly unnecessary to the decision, but was correct enough in the sense its author probably designed it to convey, and as it applied to the facts of that case. It was true that for the purpose of reducing the assessment to the railroad company the mortgage could not be regarded as an interest in its property, and in the very next sentence the court enlarged upon that conception, saying that "under the constitution of this state the prop-

erty of such corporation is subject to assessment and taxation without deduction of the amount of any mortgage or like lien thereon." The state was without power, even if it had attempted the exercise thereof, to make the mortgage existing in favor of the United States an interest in the property for the purpose of imposing a tax on such interest. We cannot allow to any such casual observation the effect of setting aside what the constitution, without any exception, affirms, viz. that for purposes of assessment and taxation an obligation by which a debt is secured shall be deemed and treated as an interest in the affected property. The judgment should be reversed, with directions to the court below to overrule the demurrer to the complaint.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to the court below to overrule the demurrer to the complaint.

GAROUTTE, J. I concur in the views and conclusion of the court promulgated through Mr. Commissioner BRITT. I more willingly concur in that conclusion in view of the fact that a contrary judgment would absolutely deprive all residents of this state of the opportunity of buying bonds of the character here involved. Nonresidents could well afford to pay an added sum for them to the amount of the tax. And for this reason it would necessarily result that all of these various classes of bonds would be purchased and held in London, Frankfurt, and other foreign money centers, and the state thereby deprived of the circulation of a great sum of money, which, if passing and repassing in business channels here, would add greatly to our prosperity.

VAN DYKE, J. I dissent. Prior to the constitutional convention of 1878-79 it had become a custom for the lenders of money on mortgages to exact a stipulation that the borrower should pay all the taxes that might be levied on the mortgage or debt secured thereby. A vast amount of litigation grew out of this custom, and the tax was stoutly resisted. "As a consequence of various decisions of the supreme court in this litigation, all money loaned upon mortgage security escaped taxation, and the owner of the land mortgaged was compelled to pay more than his share of the expenses of government." *Hewitt v. Dean*, 91 Cal. 12, 27 Pac. 425. One of the controlling purposes of the people of this state in calling that convention, and by the adoption of the constitution framed by such convention, was to compel the creditor class to bear a fair share of the burdens of taxation; and at the same time to relieve, as far as possible, the debtor class from bearing more than its share of such

burdens. This is manifest, not only from the debates in the convention, but by public discussions, both by speech and in the press, before, at the time, and after the holding of such convention. The scheme of revenue and taxation in the present constitution carries out such intention of the people perhaps as well as can be done. No plan, however, that may be devised will, in practice, operate entirely equal and uniform. This fact was realized by members of the convention, as the debates will show. Hence the clause in the constitution of 1849 declaring that "taxation shall be equal and uniform throughout the state" was omitted from the present constitution; and section 1 of the article on revenue and taxation, as first reported by the committee, declaring that "all taxes shall be uniform upon the same class of subjects," was, after debate, stricken out. The reason for this action by the convention is stated by Judge Campbell as follows: "I think this debate, so far as it has gone, has pretty clearly demonstrated the necessity for striking out this first section entirely, and leaving no substitute for it. All the trouble we have had in this state in regard to taxation has arisen out of the construction of these words, 'equal and uniform taxation,' in the old constitution, by the supreme court." 2 Debates, p. 840. The whole argument in support of the exemption from taxation of bonds secured by mortgage on railroads and other quasi public corporations is that the property on which the security exists is assessed and taxed without deducting the amount of the security, as provided in case of real property other than that owned by such corporations; and it is claimed that this would not be equal and uniform taxation. However desirable it may be that taxation should be absolutely equal and uniform, such a result, in practice, is generally unattainable, and the present constitution, therefore, does not exact this rigid condition in the levying of taxes. That the constitution does not allow a rebate or deduction of the secured debt of railroads and other quasi public corporations, as in other cases, is quite clear; and the reason for making this distinction is rather from necessity than a disposition to make an unjust discrimination against such corporations. Delegate Edgerton, chairman of the committee on revenue and taxation, in the course of debate remarked: "I have been asked by three or four gentlemen since the convention took a recess what was the meaning of this exception, 'except as to railroads and other quasi public corporations.' Why are these corporations exempted? It was made to appear to the committee on revenue and taxation that the railroads are in debt in very large sums in the form of bonds, and that those bonds were held in Europe, New York, and other places outside of this state. Now, sir, under a decision of the supreme court of the United States—the decision referred to by the gentleman from

Los Angeles—it has been held that these bonds are not within the jurisdiction of the state, and cannot be taxed. So, unless this exception is made, the railroads will have a good thing of it. When the assessor comes to assess them they will deduct the amount of these bonds from the value of their property here, and, the bonds being out of the reach of the state, the state would get very little tax." 2 Debates, p. 908. Further on in the debate on this subject other delegates gave similar reasons for the distinction as made. The whole purpose of the scheme allowing a rebate was to relieve the borrower from paying taxes on more than the value of his interest in the property covered by the security, wherever that could be done without exempting the creditor from paying taxes on his property, to wit, the credit or chose in action secured. And it was thought to allow such rebate to railroad and other quasi public corporations, under the circumstances, would be to deprive the state of a large amount of revenue, for the reasons stated that generally such creditors are beyond the reach of taxation in this state.

The first section of the article on revenue and taxation, as adopted, declares that all property in the state shall be taxed in proportion to its value, and then defines the word "property," which includes credits, bonds, dues, and other matters and things, real, personal, and mixed, capable of private ownership. And nothing can be found in the constitution or in the debates even intimating a purpose of exempting from taxation credits, whether evidenced by note or bond, secured or unsecured. Because railroads and other quasi public corporations are required to pay taxes on the whole value of their property, without deduction, as in other cases, it does not affect or concern the creditor or holder of the security. He has no ground for complaint whatever, although the debtor might have. Holders of bonds of such corporations within this state are subject to taxation the same as the holder of a promissory note. Where a party purchasing property of a given value pays half the purchase price with money borrowed on his unsecured note, he in fact holds but a half interest. Still he is required to pay taxes upon the full value of the property, which represents the money of both borrower and lender. The creditor in such case would have just as much reason for being exempted from paying taxes on his credit which had thus been assessed and taxed in the property as the holder of the bonds under consideration. But the state has the right to make distinctions, even arbitrarily, in the mode and manner of taxation, although in this case there appeared good reason for the distinction. In *McCulloch v. Maryland*, 4 Wheat. 428, 4 L. Ed. 607, Chief Justice Marshall, speaking for the court, says: "It is admitted that the power of taxing the people and their property is essential to the very existence of the

government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the government itself." And in *Case of State Tax on Foreign-Held Bonds*, 15 Wall. 300, it is said: "Unless restrained by the provisions of the federal constitution, the power of the state as to the mode, form, and extent of taxation is unlimited where the subjects to which it applies are within her jurisdiction." And in *Kirkland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 538, the supreme court of the United States say: "It may, therefore, be regarded as established doctrine of this court that so long as the state, by its laws prescribing the mode and subject of taxation, does not entrench upon the legitimate authority of the Union, or violate any right recognized or secured by the constitution of the United States, this court, as between the state and its citizens, can afford him no relief against state taxation, however unjust, oppressive, or onerous." Many cases might be cited where discrimination is made in the imposition of taxes, and whether such discrimination is in all cases proper is a question of policy with which the court has no right to interfere. When the constitution was adopted it was thought advisable to exempt growing crops from taxation. By subsequent amendment, fruit and nut bearing trees under the age of four years from the time of planting in orchard form, and grape vines under the age of three years from the time of planting in vineyard form, as well as some other species of property, have been added to the list of exempted articles. It goes without saying that, the more subjects exempted from taxation, the greater must be the rate of taxation as to those taxable. Where, therefore, a vast amount of capital invested in notes, bonds, and other securities is exempted from or escapes taxation, the more onerous becomes the burden of taxation to those who are not so fortunate as to be creditors, but who may own other species of property. The extent to which the exemption of various forms of credits had been carried under the decisions of the court, as already stated, had become a crying evil, and it was the fixed purpose of the people of this state, as declared in the present constitution, to reach and tax every species of credits, whether secured or unsecured. If it were necessary—which it is not—to resort to the Debates for the purpose of construing the language of the constitution in this particular, such purpose would become most manifest. Whether, however, the scheme adopted has worked as satisfactorily as its friends anticipated, may well be doubted; but this does not change the fact that the purpose to tax credits of every kind is firmly fixed in the constitution, and the people of the state had the right and power to put it there. The case of *Kirkland v. Hotchkiss*, *supra*, in-

volved the taxation of credits, and the court say: "The question does not seem to us to be very difficult of solution. The creditor, it is conceded, is a permanent resident within the jurisdiction of the state imposing the tax. The debt is property in his hands, constituting a portion of his wealth, from which he is under the highest obligation, in common with his fellow citizens of the same state, to contribute to the support of the government whose protection he enjoys. This debt, although a species of intangible property, may, for the purposes of taxation, if not for all others, be regarded as situated at the domicile of the creditor. It is none the less property because its amount and maturity are set forth in a bond. That bond, wherever actually held or deposited, is only evidence of the debt, and, if destroyed, the debt—the right to demand payment of the money loaned, with the stipulated interest—remains. * * * The debt, then, having its situs at the creditor's residence, both it and he are, for the purposes of taxation, within the jurisdiction of the state. It is, consequently, for the state to determine, consistently with its own fundamental law, whether such property owned by one of its residents shall contribute, by way of taxation, to maintain its government. Its discretion in that regard cannot be supervised or controlled by any department of the federal government, for the reason, too obvious to require argument in its support, that such taxation violates no provision of the federal constitution." The railroad cases passed upon by Justice Field and Judge Sawyer in the United States circuit court (Railroad Tax Cases [C. C.] 13 Fed. 722, and Santa Clara Co. v. Southern Pac. R. Co. [C. C.] 18 Fed. 385), did not determine the question under consideration here. They were brought by the railroads, and not by the bondholders, and the grievance, on the part of the complainants, was not only as to the amount assessed against their property, but also as to the mode and manner of making such assessment. In the later cases of Reinhart v. McDonald (C. C.) 76 Fed. 405, the judge of the United States circuit court, in speaking of the provision of our state constitution under consideration, says: "These provisions seem to need no interpretation. The first section is so comprehensive that it can only be defined in terms of itself, and it certainly embraces—as it exactly and carefully says it embraces—all matters and things 'capable of private ownership.'" And in McCoppin v. McCartney, 60 Cal. 371, this court says: "The plain intent of the new constitution is to subject to taxation classes of property previously exempt. That one of the new classes consists of credits, secured or unsecured, no more violates any contract or vested right of the creditor than would a provision by which for the first time the owner of any tangible property should be taxed upon its value." In Central Pac. R. Co. v. State Board of Equalization, 60 Cal. 35, this

court, speaking through Mr. Justice McKinstry, after quoting the section in the constitution in question, says: "Reading the whole section it seems very plain that, as to mortgages, deeds of trust, contracts, or other obligations, secured upon the property of railroads and other quasi public corporations, they should not be deemed and treated as an interest in the property affected by them for the 'purposes of taxation.'" Referring to the mode of assessing and taxing railroads and other quasi public corporations, the court says: "The claim is that thus to impose upon railroad corporations operated in more than one county a tax upon the full value of their property, while upon owners of other property is imposed a tax only upon the full value of their property after deducting the amount of mortgage and other like liens, is to deny to such corporations the 'equal protection of the laws,' and, therefore, violative of the fourteenth amendment of the constitution of the United States." But, after reviewing a number of cases decided by the supreme court of the United States in reference to the power of states over the subject of taxation, this court held that the objections to the plan of assessment and taxation prescribed in our constitution were not well founded. It is intimated, however, that the portion of the opinion declaring that railroad securities were not to be treated as an interest in the property affected by them for the purposes of taxation was not called for in deciding the case, and is, therefore, mere dictum. However, at that time no other justice seems to have questioned the correctness of this portion of the opinion, nor has it been questioned since. It is not an unusual thing that statements and propositions contained in an opinion, not absolutely necessary to the determination of the case, are, nevertheless, sound law. In Mackay v. City and County of San Francisco, 118 Cal. 392, 45 Pac. 696, referring to the article on revenue and taxation in the constitution, it is said: "Section 4 of said article provides that 'a mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby.' Railroads and other quasi public corporations are exempt from the above provision. The constitution not only provides that all 'property' shall be taxed, but defines the word 'property,' and expressly includes bonds in that definition; thus placing it beyond the power of the legislature or the courts to say that bonds are not property within the meaning and intention of the constitution." The constitution not only defines in explicit terms what constitutes property, but also declares that all property, with certain exceptions therein enumerated, shall be taxed; and railroad bonds are not among the enumerated exceptions. The general rule, therefore, is to tax all property, and in such cases it requires

plain and explicit terms—not mere inference—to transfer any property from the general to the excepted class. Such terms cannot be found in the constitution in reference to the class of property under consideration. The legislature attempted, by an amendment to section 3617 of the Political Code, passed at the session of 1895, to exempt this class of bonds from taxation. St. 1895, p. 310. The amendment in question inserts, in parentheses, after the word "bonds," in that portion of the section defining what constitutes property, the following words: "Except of railroad or quasi public corporations," so as to read: "The term 'property' includes moneys, credits, bonds (except of railroad or quasi public corporations), stocks, dues, franchises and all other matters and things, real, personal and mixed, capable of private ownership," etc. It is hardly necessary to say that the constitution cannot be amended by any such summary legislative process. In adopting the constitution the people themselves declared how it might be amended, and it is beyond the power of the legislature to amend or alter it in the least without the consent of the people. This attempt to do so, however, shows that it is generally conceded that bonds of the character under consideration are taxable as the constitution now stands. To exempt these bonds would also be to exempt the bonds of all street-railroad companies in the state; also the bonds of irrigation and drainage districts, and of such water companies and lighting companies as possess public franchises and deal with public utilities. The amount of capital invested in securities of such companies or corporations held by residents of this state must be very great, and the withdrawal of all this vast amount of property from taxation is, of course, to transfer an equal sum to other property that is taxed; for a given amount of revenue must be raised in order to keep the state and local governments running. History teaches that the tendency is, and always has been, for the more favored to shift the burden of governmental support from their own shoulders to the shoulders of those less favored and less able to bear such burden. Doubtless this tendency comes in part from the inexorable law that "the borrower is servant of the lender." Still this tendency should not be favored, but rather repressed where possible. In the course of debate in the convention on the revenue system Judge Wynans remarked: "I believe that the owners of mortgages will find a way of evading the payment of taxes in any form. I believe that there will be methods found, and a way invented, to circumvent its objects; but it is our duty to prevent it if we can. I hope the Johnson amendment will be adopted, and that, in addition, there will be other means devised to compel the mortgagee to pay the tax; something that will afford them no means of evasion." 2 Debates, p. 910. What was thus said in jest, or by

way of sarcasm, perhaps, in view of the success that had attended money lenders in escaping taxation under the old constitution as already alluded to, it appears has proven to be a veritable forecast of what has taken place. Nothing is more calculated to produce dissatisfaction and unrest, and justly so, than laws the operation of which favor, or even seem to favor, the few, or a class, as against the great body of the people. It should require the most direct and imperative command of the constitution to justify a decision of this court tending to such results, and none such exists here.

128 Cal. 607

In re FAIR'S ESTATE. (S. F. 2017.)

(Supreme Court of California. May 16, 1900.)

TAXATION—DOMESTIC CORPORATIONS—BONDS—DEED OF TRUST—FOREIGN CORPORATIONS—RESIDENT BONDHOLDERS—SITUS FOR TAXATION.

1. Under Const. art. 13, § 4, providing that for the purpose of taxation a mortgage or other obligation by which a debt is secured shall be deemed an interest in the property affected thereby, except as to railroads and other quasi public corporations, in case of debts so secured the value of the property affected by such mortgage, less the value of such security, shall be assessed to the owner thereof in the county, city, or district in which the property affected thereby is situate, the bonds of domestic corporations, neither railroads nor quasi public corporations secured by deed of trust, are not subject to taxation, as the security for such bonds is assessed as an interest in the property affected thereby.

2. Under Const. art. 13, § 1, providing that "all property in the state shall be taxed," the bonds of a foreign railroad company operating a railroad entirely without the state, held by a resident of the state, are taxable to the owner, though the bonds themselves are kept without the state.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco.

Petition by the assessor of the city and county of San Francisco against the estate of James G. Fair, deceased, to recover for taxes on personal property. From an order allowing the demand, the executors appeal. Reversed.

Pierson & Mitchell, Geo. E. Crothers, and Garrett McEnerney, for appellants. F. K. Lane, City and County Atty., for respondent Dodge, assessor of city and county of San Francisco.

BRITT, C. James G. Fair at the time of his death was a resident of the city and county of San Francisco, in this state, and his estate is in course of administration in the superior court of said city and county. Section 3820 of the Political Code (amended by St. 1895, p. 335) provides for the collection of taxes on personal property by the assessor when in his opinion such taxes are not a lien upon real property sufficient to secure payment of the same. Personal property of the estate of Fair to a large amount in value was assessed for purposes of taxation for

the fiscal year 1899-1900 by the assessor of said city and county. Afterwards the assessor filed a petition in said superior court praying an order directing the executors of the last will of said deceased to pay the taxes on the personalty assessed as aforesaid, which taxes amounted to \$98,812. The executors answered the petition, and for defense alleged, among other things, that they had tendered to the assessor the amount of the taxes on all the personal property of said estate liable to taxation in said city and county, and that he refused to receive the same; that the residue of the property assessed consists of the bonds of various corporations secured by mortgage on the property of the obligors, respectively, which bonds, the executors claimed, are not subject to taxation in said city and county. The court sustained a demurrer to the answer, and made an order requiring the executors to pay the sum demanded by the assessor, from which order they have appealed. The bonds mentioned in the answer of the executors constitute the great bulk of the property assessed as stated. They are separable into three general classes, each requiring distinct consideration.

1. The first class consists of bonds of the South Pacific Coast Railway Company, and bonds of the Northern Railway Company of California, each of which railroad companies is a corporation organized under the laws of this state, and engaged in operating a railroad wholly within the state. The bonds are secured by mortgage on all the property of the respective mortgagors. The valuation thereof in the assessment aforesaid amounts to above \$4,500,000. The question of the liability to taxation of bonds such as these is fully treated in the opinion rendered in *Germania Trust Co. v. City and County of San Francisco* (S. F. No. 2,031, this day filed) 61 Pac. 178, and for the reasons therein stated the assessment of the bonds of this class is void.

2. The assessment includes bonds of certain domestic corporations not "railroad or quasi public," which bonds are secured by deed of trust of real property. The principal item of this class consists of bonds of the Pacific Rolling-Mills Company valued at \$73,000. Section 4 of article 13 of the constitution of this state is as follows: "A mortgage, deed of trust, contract or other obligation by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi public corporations, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city or district in which the property affect-

ed thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; provided, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy for the preceding year." Referring to the provisions of this section, it is remarked in the brief of counsel for the assessor: "This needs no interpretation. The mortgage bonds are assessable to the owners thereof. The property affected thereby, less the bonded indebtedness, is to be assessed to the owner thereof." It may be admitted that mortgage bonds such as those of the Pacific Rolling-Mills Company are assessable to the holders of them, or, if the names of the holders are not ascertainable, then to unknown owners, although the exigencies of this case do not require a decision of that question; but to whomsoever they are assessed and taxed it is perfectly plain that the mode adopted must be that prescribed by said section 4,—that is to say, they must be assessed as an interest in the property incumbered for their payment. Since they are secured by deed of trust of real estate belonging to the obligor, they are by express requirement of said section to be deemed and treated, for purposes of assessment and taxation, as an interest in such property. That property being real estate, the bonds can in no event be assessed as mere personal debts or credits. When properly assessed, the tax on them is to be collected by the tax collector, and not by the assessor, under section 3820, Pol. Code. No one has ever supposed that under the law of this state as it now stands a promissory note secured by mortgage of lands can be dissociated from the mortgage, and assessed as an unsecured credit of the holder. The bonds of the Pacific Rolling-Mills Company are secured by deed of trust instead of a mortgage, but that is a wholly immaterial difference. The assessment of them in the manner disclosed by the record here was void.

3. The bonds remaining to be considered are those of certain railroad corporations organized under the laws of the state of West Virginia, and engaged in operating their respective roads in that state and elsewhere than in the state of California. The assessment of this class of bonds amounts to something over \$713,000. These bonds are not, and never have been, physically present in the said city and county of San Francisco, or within this state, but have been and are

kept in the city of New York or elsewhere at the East. The executors contend that the state of California has not provided by law for the exercise of the right which it admittedly possesses to tax choses in action owned by a resident of the state, the paper evidences whereof are without the geographic confines of the state. They cite the provision of section 1 of article 13 of the constitution, that "all property in the state shall be taxed," etc., as declarative of the policy that only property corporeally present in the state is to be taxed; to which the assessor replies that the bonds in contemplation of law are within the state, because of the principle that intangible personal property has no situs apart from the domicile of the owner.

As to corporeal chattels, such as live animals, manufactured goods, and the like, it is doubtless the rule that they are taxable in the state where they have local situation, though the owner may reside elsewhere. The executors argue that the bonds here in question have been assimilated to the species of property just mentioned, and "have acquired the character of tangible, visible property with reference to taxation." We cannot accede to this proposition in its generality. There is a great difference between such bonds and tangible goods. If a domestic animal perishes, or if a ship is lost, that much property has ceased to exist, and the owner is poorer by the value of the same. If, however, the bond evidencing a debt is destroyed, the debt is not affected; the owner may still collect both principal and interest thereof. Not the paper writing, but the obligation to pay expressed by it, is the thing of value, and, in the nature of things, this can have no actual locality. The general rule is that debts attend the person of the creditor, and are taxable at his domicile. A number of cases involving the principle have arisen in this court. "When credits are made the subject of taxation, it is appropriate that their locality should be referred to the residence of the owner." *City and County of San Francisco v. Lux*, 64 Cal. 481, 483, 2 Pac. 255; *Mackay v. City and County of San Francisco*, 113 Cal. 398, 399, 45 Pac. 696; *People v. Park*, 23 Cal. 138. "The property to be assessed in such cases is money at interest or debts. The money at interest, debt, or obligation is the principal thing, and the mortgage is only a security,—a mere incident to the debt or obligation. The mortgage has no existence independent of the thing secured by it, and payment of the debt discharges the mortgage. The thing secured is intangible, and has no situs distinct and apart from the residence of the holder. It pertains to and follows the person." *People v. Eastman*, 25 Cal. 601, 603.

The executors urge that those cases (other than *Mackay v. City and County of San Francisco*) related to the situs of credits for purposes of taxation only as between different counties of this state, and that here

the question is the wider one of the jurisdiction of different states; also that those cases concern nonnegotiable choses in action, while the bonds assessed in the present case are negotiable in form; and it is contended that these differences in fact are sufficient to distinguish the law of the present case from those referred to. The negotiable character of the bonds of the West Virginia railroad corporations does not appear from the record; but in our opinion, if it were so apparent, neither that circumstance, nor the mere fact that they are kept out of the state, can affect the rule that they have locality for purposes of taxation at the place where they are held,—that is, owned. The principle on which the cases above mentioned were decided does not depend on the presence in the state of the evidences of the debt, nor whether they are negotiable or nonnegotiable in form, although it may be allowed that cases might arise where these considerations, co-operating with other circumstances, would affect or modify, or possibly forbid, the application of the principle. The present is not such a case. A negotiable railroad bond deposited without the state is no more the debt or credit which it represents than is a nonnegotiable bond kept within the state. In neither instance is the paper the only evidence by which the debt or credit might be proved. If it were destroyed, the thing it represents would still exist, and in contemplation of law have its locality at the residence of the owner. At that place, therefore, it should be held to be taxable; and to this effect are far the more numerous authorities and those more consonant with legal reason. *Cooley, Tax'n* (2d Ed.) 79, 372; *Hunter v. Board*, 33 Iowa, 376; *Board v. Cutter*, 3 Colo. 349; *De Vignier v. City of New Orleans* (C. C.) 16 Fed. 11, 12; *Myers v. Seaberger*, 45 Ohio St. 232, 233, 12 N. E. 793; *Thomas v. County Court*, 4 Bush, 135; *State v. Earl*, 1 Nev. 394; *Foresman v. Byrns*, 68 Ind. 247; *City Council of Augusta v. Dunbar*, 50 Ga. 387; *Hayne v. Delleasseline*, 3 McCord, 374; *Boyd v. City of Selma*, 96 Ala. 144, 11 South. 393, 16 L. R. A. 729; *Ferris v. Kimble*, 75 Tex. 476, 12 S. W. 689; *State Tax on Foreign-Field Bonds*, 15 Wall. 300, 21 L. Ed. 179; *Kirtland v. Hotchkiss*, 100 U. S. 491, 25 L. Ed. 558. For further enunciations of the rule and citations of authority, see *City of New Albany v. Meekin* (Ind.) 56 Am. Dec. 522, 529, note; 25 Am. & Eng. Enc. Law, 126, 127; *Cooley, Tax'n* (2d Ed.) 56. There is an exception which has obtained extensive recognition. Where the paper evidences of debt are in the possession and control of an agent of the owner in a state foreign to the domicile of the latter, and are held by the agent for management in the course of the permanent business of the owner, as, for example, to collect the money to become due thereon and to reinvest it, the securities are deemed to be taxable at the domicile of such agent. *Catlin v. Hull*, 21 Vt. 152, seems to

be the leading case holding this doctrine. *People v. Smith*, 88 N. Y. 576, *Finch v. York Co.*, 19 Neb. 50, 26 N. W. 589, and *Goldgart v. People*, 106 Ill. 25, are further illustrations. We are not at present concerned with the validity of such exception, for the bonds owned by the estate of Fair are not shown to be within the conditions to which the exception relates.

The executors lay stress on the decision in *People v. Home Ins. Co.*, 29 Cal. 533. In that case certain bonds of the state of California owned by a nonresident insurance company, but deposited in bank here pursuant to the requirement of a statute making such deposit a condition of the right of the company to carry on business in this state, were held to be rightly taxable here; from which it would seem to follow that they could not be rightly taxed at the domicile of the owner. That case is dependent on so many special conditions that it affords no precedent for the case at bar. The bonds there in question were held to be separated from the owner and his domicile, and in the hands of an agent or trustee in this state, for purposes indispensable to the business of the owner here. The decision evidently took color from the principle of *Catlin v. Hull*, supra, and other cases of like impression, which are not authority in the present case. Again, the court regarded the bonds, in consequence of the requirement of the statute (St. 1864, p. 131), as really part of the capital stock of the company, and in this aspect to be taxed like any other property similarly employed; and it may also be observed that said statute required the deposit of public stocks of this state "not exempt from taxation,"—a provision which also seems to have influenced the result reached by the court. 29 Cal. 549. The court below was right in holding that the answer of the executors showed no defense to the demand for taxes on the bonds of the foreign railroad corporations; but, since it appeared from the answer that the taxes on the other bonds assessed were not authorized by law, it was error to sustain the demurrer to the answer as a whole. The order appealed from should be reversed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

CANNON et al. v. SERREL.

(Court of Appeals of Colorado. May 14, 1900.)

BILLS AND NOTES—UNAUTHORIZED SIGNATURE—ASSIGNOR—LIABILITY.

Gen. St. § 107, provides that an assignor of a note shall be liable to an assignee if the latter, with due diligence, has brought and prosecuted the proper suit, and failed to collect the money due, provided that suit need not be brought if it would be unavailing, and the as-

signor may be sued in the first instance. Held that, where one of the signatures to a note was made without authority, an assignor was liable to the holder before suit brought, since such suit would be unavailing, within the statute.

Appeal from Arapahoe county court.

Action by Eliza H. Serrel against H. B. Cannon and another. From a judgment affirming a justice's judgment in favor of plaintiff, defendants appeal. Affirmed.

Cass. E. Herrington and Fred Herrington, for appellants. John A. Dewesse, and Morrison & De Soto, for appellee.

THOMSON, J. The appellee brought this suit before a justice of the peace against the appellants, as indorsers of a paper purporting to be the promissory note of F. D. Sargent and T. E. McNulty for \$152.65. The note was assigned by the defendants to the plaintiff on the day it was made, as part of the consideration of a dairy sold by her to them. The name of F. D. Sargent was signed to the note by McNulty. No suit upon the note was ever brought against Sargent and McNulty, or either of them. The judgment of the justice was for the plaintiff, and the defendants appealed to the county court. In that court the plaintiff again had judgment, and the defendants have brought the case here.

The evidence tended to show that McNulty had no authority to sign the name of Sargent to the paper, and the judgment of the court is conclusive upon us that he had none. It was therefore not the note of Sargent, and was not the instrument it purported to be. By our statute, every assignor of a note becomes liable to the assignee, if the latter, by the use of due diligence in the institution and prosecution of the proper suit, has failed to collect the money due, provided that, if the suit would be unavailing, it need not be brought, and the assignor may be sued in the first instance. Gen. St. § 107. By his contract the indorser of a note warrants the genuineness of the instrument in every respect, and engages that it may be recovered upon and collected in accordance with its terms. See 1 Daniel, Neg. Inst. §§ 669, 672. According to its terms, this note was the joint promise of two persons, and as such it was sold to and received by the plaintiff. The defendants by their indorsement contracted that both those persons were liable upon it, and the plaintiff took it in reliance upon their contract. But one of the signatures was not genuine, and the instrument was not the note of Sargent. There could therefore be no recovery upon the note according to its terms, and a suit having for its object such recovery would be unavailing. We do not think that, in order to fall back upon the indorsers, the holder of a note is obliged to seek a recovery outside of its terms. We think the suit contemplated by the statute is a suit upon the note as it is written, and that, if a recovery in accordance with its terms is impossible, the suit would

be unavailing, within the meaning of the law. The contract into which the defendants entered by their indorsement was broken as soon as it was made, and, in our opinion, the statute affords them no protection. Let the judgment be affirmed. Affirmed.

DOTY v. IRWIN-PHILLIPS CO.

(Court of Appeals of Colorado. May 14, 1900.)

PARTNERSHIP NOTES—EXECUTION AND DELIVERY—PLEADING—ACTION AGAINST SURVIVING PARTNER—PARTNERSHIP ESTATE—ALLOWANCE—EFFECT.

1. A complaint on notes which alleges their execution and delivery to plaintiff is good against demurrer, though it fails to also allege that plaintiff is the owner or in possession of the notes, since, having been invested with ownership and possession when the notes were made, the legal presumption, which it was unnecessary to plead, is that he continued therein.

2. Though Code, § 14, authorizes a joint action on partnership debts against the firm by its firm name, and the rendition of a judgment binding only the joint property of the associates, partnership notes are not merged in a judgment of the probate court allowing them as claims against the partnership estate in process of administration after the death of one partner, so as to bar the holder's action against the surviving partner on his individual liability, since this section of the Code applies only to the case of living partners.

Error to Boulder county court.

Action on partnership notes by the Irwin-Phillips Company against John J. Doty as surviving partner. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Chas. M. Campbell, for plaintiff in error.
Lewis S. Young, for defendant in error.

THOMSON, J. The Irwin-Phillips Company was the holder of three notes executed to it by the firm of Doty & Doty on the 21st day of March, 1896, one for \$306.35, and the others for \$400 each; the first payable 60 days, the second 90 days, and the third 4 months after date. The firm was composed of John J. Doty and John R. Doty. On the 26th day of October, 1896, John R. died, and letters of administration upon the partnership estate were issued to the surviving partner, John J. These notes were duly presented to the probate court, and by it allowed against the estate. By order of the court, payments on the notes were, from time to time, made by the administrator, and these payments were indorsed upon them. The indorsements show that the first note was paid in full, and that the amount due on the second was considerably reduced. The company brought this suit against John J. Doty, as surviving partner, to recover a judgment for the balance due on the notes, after deducting the credits to which they were entitled. The complaint was demurred to for the reason that, while it alleged the execution and delivery to the plaintiff by the firm of Doty & Doty of the notes

sued on, it did not allege that the plaintiff was the owner or in possession of the notes. The demurrer was overruled.

The complaint set forth the execution and delivery of the notes with sufficient clearness. The plaintiff having been invested with the ownership and possession of the instruments when they were made, the legal presumption is that such ownership and possession continued in it, and it was unnecessary to embody the presumption in a statement. There was nothing in the demurrer.

But the principal point made in behalf of the defendant, as we understand it, is that when the plaintiff had its claim allowed by the probate court its cause of action became merged in the judgment, and cannot be made the subject of another suit. Each member of a partnership is personally liable for the debts of the firm, and suit may be brought and judgment recovered against them jointly on account of partnership liabilities; although by section 14 of the Code, in the case of a claim against a partnership, the members may be sued by their firm name, but the judgment will bind only the joint property of the associates and the separate property of the party served. In such case the judgment should be against the partnership, and a judgment not against the partnership, but against the member served as for an individual debt of his own, would be erroneous, because it would deprive him of the right to have the partnership property made liable for the debt, and to turn that property out for the satisfaction of the judgment. *Craig v. Smith*, 10 Colo. 220, 15 Pac. 337; *Dessauer v. Kopplin*, 3 Colo. App. 115, 32 Pac. 182. See, also, appendix to same volume (page 582). But this law is applicable only while all the partners are alive. When the partnership is dissolved by the death of one of its members, the partnership assets can be reached only in a proceeding against the estate. There can be no joint action at law against the surviving partners and the estate, because the judgment which may be rendered against the former and that which may be rendered against the latter are not of the same nature. *Mattison v. Childs*, 5 Colo. 78; *Metz v. People*, 6 Colo. App. 57, 40 Pac. 51. A creditor of the firm is entitled to his remedy against both the partnership and its individual members. He had the right to enforce his claim against the partnership assets, and also to personal judgment against the individuals composing the firm; and, if the partnership effects are in the hands of an administrator, as the creditor is then unable to join the surviving partners and the administrator in one action, he must proceed against them separately, and a judgment against one would be no bar to a suit against the other. He is entitled to the same remedies that he had while the partnership existed; but, owing to the changed situation, they are not avail-

able to him in the same action. Therefore his claim is not merged in a judgment against one in such manner as to deprive him of his remedy against the other. This principle is well illustrated in *Fitzgerald v. Burke*, 14 Colo. 559, 23 Pac. 993, where it is said by the supreme court that, in the case of a joint and several contract, all the parties may be sued jointly, or each severally, for the whole amount due, and a recovery against one without satisfaction would be no bar to a suit against the others. See, also, *Armstrong v. Prewitt*, 5 Mo. 476. We are not aware that there is anywhere any dissent from this doctrine. Applying it to this case, the estate was liable for the debt, and so was the defendant. The plaintiff procured an allowance of his claim in the probate court, and then brought suit against the surviving partner. He was entitled to judgment against each. Because he could not sue them jointly, he was compelled to sue them separately; and the judgment against the estate is no bar to this action, unless it has been satisfied, as, admittedly, it has not been. The defense is devoid of merit, and the judgment is affirmed. Affirmed.

ULLERY et al. v. KOKOTT.

(Court of Appeals of Colorado. May 14, 1900.)
APPEAL—ACTION ON BOND—TRIAL—PROOF—ESTOPPEL.

1. No recovery can be had on an appeal bond conditioned for the payment of a judgment unless it is shown that the judgment is unsatisfied.

2. Where a party gives an appeal bond, on which the opposite party relies, and the appeal is dismissed, and the collection of the judgment delayed, the obligor is thereby estopped to question his obligation on the ground that an attorney signed the bond as surety.

Appeal from district court, Arapahoe county.

Action by P. W. Kokott against Alonzo B. Ullery and another. From a judgment for plaintiff, defendants appeal. Reversed.

Wm. Young, for appellants. Ewing Robinson, for appellee.

BISSELL, P. J. Kokott had judgment in a suit before Myers, a justice of the peace, for \$36 in June, 1896. Therein Lotz was garnished, and judgment entered against him, wherefrom he prosecuted a review by filing an application for a writ of certiorari to take the case into the county court. In this application Lotz filed a bond with Ullery as surety, reciting the recovery of the judgment, and the appeal, which he undertook to prosecute with effect, and promised to pay whatever judgment might be rendered. The writ was subsequently quashed, the petition for certiorari was dismissed, and the present action was brought on the preceding undertaking in the county court of Arapahoe county. In that suit the plaintiff had judgment.

Therefrom he prosecuted an appeal to the district court, wherein the plaintiff, on the trial de novo, offered such evidence as he deemed necessary. The proceedings before the justice and in the county court were sufficiently established, and the plaintiff produced one witness to the point that he had demanded payment of the bond of Lotz and Ullery. There was no other attempt to establish a breach of any condition in the undertaking. It sufficiently appears that the amount the parties were entitled to recover was \$53 and the accrued costs, and the records showing these amounts were produced without objection. The plaintiff did not otherwise show any breach, nor that the original judgment had not been paid and satisfied by the judgment creditor, nor that he had acquired, by the failure of the judgment debtor to pay, the right to maintain a suit on the undertaking. Notwithstanding this fact, judgment was entered for the plaintiff, and this appeal is prosecuted.

There is only one question in the case, and that respects the failure of the plaintiff to prove nonpayment by the judgment defendant. It has been argued that this matter of payment is an affirmative plea, which the defendant must interpose and prove in order to bar recovery. As this court has already decided in two cases, the rule respecting a plea of payment is wholly inapplicable in an action brought on a bond, where the liability is a conditional one. There it is incumbent on the plaintiff to prove a breach of the undertaking, in order to maintain his action. In two analogous and almost exactly similar cases we have announced this rule, and decided that it is for the plaintiff to show that his judgment has not been satisfied, if he would recover against the sureties on the undertaking. Since this is true, the case must be reversed and sent back for further hearing. It is unfortunate, because, doubtless, the proof could have been easily made. *Wilson v. Welch*, 8 Colo. App. 210, 46 Pac. 106; *Gallup v. Wortmann*, 11 Colo. App. 308, 53 Pac. 247.

There is probably one other question which it would be well to advert to, though, as we look at it, it is of little significance or consequence. This is the plea that Ullery was an attorney at the time he signed the bond. We do not need to decide whether this defense is open to him, following the theory which has been established by both appellate courts, that where a surety gives a bond, on which the other party relies, and the appeal is successfully prosecuted, and the collection of the judgment delayed, the obligor is thereby estopped to question his obligation, because, as appears from the record, the court granted the attorney leave to sign the security. This is enough to render him liable, and he cannot afterwards suggest his incapacity as a defense to the suit. The judgment must necessarily be reversed and sent back for a new trial, which is accordingly done. Reversed.

CITY OF DENVER v. BALDASARI.

(Court of Appeals of Colorado. May 14, 1900.)

MUNICIPAL CORPORATIONS — STREETS — VIADUCT — DEFECT — COMPLAINT — SUFFICIENCY — PERMANENT INJURIES — PROOF — VARIANCE — INSTRUCTIONS AS TO VIADUCT — CITY'S DUTY — REASONABLY SAFE CONDITION.

1. Where plaintiff was injured by being thrown from a wagon while crossing a viaduct, by reason of the horse's foot catching in a hole, objections first raised on appeal, that the complaint failed to clearly state a cause of action, in that it did not allege that the accident resulted from the horse's foot catching in a hole in the viaduct, will not be considered, when the evidence introduced without objection established the accident, and a verdict for plaintiff was not unreasonable in amount.

2. Where plaintiff's complaint alleged that he was injured by being thrown from a wagon, caused by his horse's foot catching in a hole while crossing a viaduct, and such viaduct had a double plank flooring, in an action to recover for the injuries received, proof that there was a hole in the upper plank, and that the break did not run through the lower layer of plank, did not constitute a fatal variance between the proof and the defect charged.

3. It is the duty of a city to keep a viaduct over the tracks of a railroad, constructed for the convenience of public travel, in a reasonably safe condition.

Appeal from district court, Arapahoe county.

Action by Alberto Baldasari against the city of Denver for damages for injuries received while crossing a viaduct. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

George C. Norris and Emerson J. Short, for appellant. C. M. Kendall, T. E. Waters, and Win Wylie, for appellee.

BISSELL, P. J. The failure of the city of Denver to maintain in a reasonably safe condition for the purposes of public travel the Sixteenth Street Viaduct occasioned the accident which is the subject-matter of the present suit. There is no controversy respecting the character of the street, and it is conceded that the viaduct was lawfully constructed by the city, and maintained as a part of the highway. It ran over the Platte, and over the tracks with which the bottoms bordering on that river are filled. This, with others, furnished, practically, the only safe mode of crossing between Denver and Highlands, and over the great network of tracks. The viaduct is several hundred feet long, resting on pillars and a framework of wood and iron; and the roadway was made of two layers of planking of varying thickness, laid on stringers. Sixteenth street is one of the most widely-traveled streets in the city; and, according to the record and our own observation, this viaduct is one of the principal traveled ways between these two parts of Denver. In May, 1896, Baldasari, who was a peddler, was driving a single horse and wagon over the way to the city, in the transaction of his ordinary business. He was rightfully there, and properly pursuing his even way. At some point on the viaduct,

which cannot be distinctly designated by words, his horse stepped into a hole in the viaduct, caught one of his hind feet, lunged as a horse naturally would when his foot was caught, jumped towards the sidewalk, overturned the buggy, threw Baldasari out, started to run, dragged him a short way, and he was thereby severely hurt. It would be idle to state the nature of his injuries or their extent. It is enough to say they were regularly and sufficiently alleged, and he laid his *ad damnum* at \$10,100. The case went to trial, was submitted to a jury, and he had a verdict for \$900. Judgment was entered, and therefrom the city prosecutes an appeal. The case was not argued by the counsel who tried it, nor by those who prepared the briefs. Because of various political changes, different counsel represent the city; and we are quite at liberty to disregard the major portion of the printed argument, and simply respond to the suggestions made by the present representatives on the oral argument. They somewhat follow along the same lines, but the greater weight was put by the counsel on certain propositions which we shall consider. The case is so signally free from error that we need do little more than dispose of one or two propositions, to determine the whole case.

The principal stress is laid on the point that the complaint fails to state a cause of action, in that it did not directly, or otherwise than by inference, allege that the accident resulted from the catching of the horse's foot in a hole in the viaduct. The city's representative has built up a strong argument on several cases which hold it necessary to directly charge that the injury came from an accident which was occasioned by the defect complained of. We are quite ready to concede this to be the law and the rule of pleading, and, had the complaint been demurred to, it would possibly have been error not to sustain the demurrer and compel an amendment. However this may be, we do not believe the complaint is so radically defective that we are at liberty to regard it as wholly failing to state a cause of action, and apply the rule which permits this suggestion for the first time in the appellate tribunal. The case was tried, without objection, on issue joined, and the evidence proving the accident was introduced without objection; and since the plaintiff was permitted to prove his case, and we can see that what was charged in the complaint was really the accident which was established by his proof, we do not believe the case should be reversed because of the inartificiality of the pleading. The pleading was not wholly bad, nor did it entirely fail to state a cause of action. It states enough to permit the inference that the accident resulted from a defect in the viaduct, and when, without objection, this was followed by proof on which a verdict was rendered, we are not at liberty to disturb the judgment.

The next proposition on which the city seems to rely is the alleged variance between the proof and the defect charged. In the complaint it was averred there was a hole in the viaduct, in which the horse caught his foot, which occasioned the runaway and caused the injury. The proof shows that it was probably true, in one sense, that there was no hole in the viaduct. At any rate, it was not proven that there was a hole through both series of planks. It clearly enough appears there was a hole in the upper one, in which the horse caught his foot, but it is quite possible the break did not run through the lower layer of plank. Counsel argues that this was not a hole, in the sense in which that term is usually understood. We are quite indifferent to the discussion, nor do we regard it material whether this was literally true or not. In the general acceptance of the term, it was a hole in the flooring of greater or less depth. Where the planking on a bridge is four inches thick, there might be a hole three inches deep, which would catch a horse's foot; and yet it might not be a hole, in the sense of a hole in a grindstone, to put a crank through to turn it. We can conceive of a hole open at one end, and with a bottom to it. We regard the criticism as entirely hypercritical, when it follows a trial and a verdict. The supreme court so treated it in the case of *Railroad Co. v. Conway*, 8 Colo. 1, 5 Pac. 142. In that case it was charged that the fire was occasioned by reason of a defective flue. It was proven that there was no flue at all; that there was simply a hole in the roof, through which the pipe ran, which set fire to the roof because there was no flue, nor a thimble which corresponds to a flue. The supreme court did not regard that as a fatal variance, and it ought not to be regarded as fatal in this case, because the city made no objection on that ground, did not seek to take advantage of it, and compel an amendment of the pleading and a continuance because of the difference between the accident as charged in the complaint and as proven by the witnesses.

The next proposition we shall not attempt to wholly state, because it would unduly extend the opinion to recite all the various instructions of which the city complains. The chief basis for their argument is that the court charged the jury it was the city's duty to keep the viaduct in a reasonably safe condition. It is true, as counsel contends, that the city is only bound to use reasonable care to keep its streets in safe condition. We concede the law, and it was so given to the jury at the city's request; and the jury was therefore not unadvised respecting the rule, as the city now contends it to be. We do not believe the court erred in giving the instruction in the form in which it did. A similar instruction has been approved by both of the appellate courts. In a case against the city, the supreme court approved an instruction which charged the jury that it

was the duty of the city to maintain the whole of the sidewalk, at a point where the accident happened, in a reasonably safe condition for public travel, and that the public had a right to use the whole of the walk, and the right to assume that the whole of it was reasonably safe for public travel. *City of Denver v. Stein*, 25 Colo. 125, 53 Pac. 283; *City of Denver v. Aaron*, 6 Colo. App. 232, 40 Pac. 587. Even if we concede it would have been wiser to leave it out, yet, when the supreme court says it is not error to give a charge of that sort in regard to a sidewalk, we are not at liberty to hold it error to give it. Even if the rule had not been upheld by the supreme court, it so fully accords with our judgment of the duty of the city under the present circumstances, that we should have ultimately declared it, if we had had no precedent for the purpose. It must be remembered this is not a highway in one sense, while in another it is. The accident happened on a viaduct, which is a structure in the air, on supports, which may run over a draw, gulch, river, or an arroyo, and for the convenience of public travel in communicating between two points. While it is a part of the highway, it is an independent structure, put there for convenience and safety, and for the use of the people. Where a city builds a viaduct for such purposes, it assumes the same obligation that it does when it constructs a bridge and maintains it for public travel. It is bound to keep the bridge in a reasonably safe condition for the use of the public. It is bound to keep the floor of it in that condition from end to end, and when a man drives onto one end of it, to go to the other, he has a right to assume that the whole way, whether over the bridge or over the viaduct, is in a reasonably safe condition for his use and travel. It clearly appears that this was a much-traveled way, used by a large number of people, and it was quite competent and legitimate for the plaintiff to show the general condition of the structure, that therefrom the jury might determine whether it was kept in the condition required by the law, and whether, presumably, the city had notice of defects in it, if there was no proof that the city had knowledge of this defect, or of the particular hole into which the plaintiff's horse fell, or in which he caught his foot. The evidence seems to have gone in without objection, and, so far as we can see, was entirely legitimate and proper.

Another point on which the city relies regards the permanent injury sustained by the plaintiff, to which he testified. We do not conclude the point to be well taken, because, even though the complaint did not aptly charge it, it does substantially aver a permanent injury, and the sufficiency of the complaint in that respect was not challenged by demurrer, but the proof was received without objection; and, when it is followed by a verdict in a sum which is evidently not un-

reasonable, we do not think the judgment ought to be disturbed.

We have considered the various points which were urged at the argument, and the principal ones suggested in the briefs; and having disposed of all those errors, which could in any event be regarded as material, adversely to the city's contention, we must necessarily affirm the judgment, which is accordingly done. Affirmed.

WITCHER v. GIBSON et al.

(Court of Appeals of Colorado. May 14, 1900.)

AUTHORITY OF AGENT—ACQUIESCENCE OF PRINCIPAL—ACCEPTANCE OF BENEFITS—EVIDENCE—OBJECTIONS WAIVED.

1. Defendant owned a lumber yard, and placed an agent in charge thereof, with general instructions to sell the lumber. The agent purchased lumber on credit for over a year, and defendant knew of such purchases, but did not object thereto. The plaintiff sold lumber to the agent at various times for a number of months, the early bills being paid. *Held*, that the defendant was liable for the lumber so purchased by the agent.

2. Where an agent purchased lumber of plaintiff on credit, and his principal included the lumber so received in a mortgage made to a third person to secure certain indebtedness, and the lumber was sold under the mortgage, and the surplus over the indebtedness was received by the principal, he cannot defeat the claim of plaintiff on the ground that the agent was not authorized to purchase the lumber.

3. An owner placed an agent in charge of a lumber business, with general instructions to sell the lumber, and nothing was said about buying. The agent bought lumber on credit, and opened up a set of books, to which the principal had access, showing such purchases, and from time to time gave correct reports of the business, showing the credit purchases. The business continued for 18 months. There was conflicting testimony to the effect that the principal at one time ordered the agent to stop buying on time, but such purchases were continued with his knowledge, and without objection. *Held* sufficient to show that the agent was authorized to bind his principal for lumber purchased on time.

4. A party cannot object that there was not sufficient proof to warrant the submission of a question to the jury, when he had requested submission of such question.

Appeal from district court, Fremont county.

Action by D. E. Gibson and another against John R. Witcher to recover for lumber sold and delivered to an agent of defendant. From a judgment in favor of plaintiffs, and an order overruling a motion for a new trial, defendant appeals. Affirmed.

A somewhat full and accurate statement of the proof, given both as a naked statement and as an argumentative narration of what was done by the parties, will partially serve to decide the case, and leave only a brief discussion of the law necessary, to fully determine it: In the spring of 1895 the appellant, Witcher, as owner, was running some sawmills and carrying on a lumber business in Cripple Creek. In May the management

of the Cripple Creek business was changed, and one Lefler was put in charge. From that date he had the sole and exclusive management of the business, handling the lumber which was sawed, and buying other material, in the shape of Mexican and Eastern lumber and manufactured products, which was necessary to the conduct of a lumber business. None of the stuff, other than the native lumber, was manufactured by Witcher. The business became quite extensive. From a few hundred dollars a month, it developed until at one time the yard transactions amounted to \$20,000 a month. Since the defense was the want of authority to buy the material sued for, we must state the terms of the appointment, and the subsequent history of the business. When Lefler was hired, he was sent down with only these instructions: "To go down there and run that yard, sell lumber, and get money." This was all that Witcher said to him, according to Lefler's testimony, and respecting it there was no substantial dispute. He concedes that Lefler was put in charge without definite instructions, save, as he says, that he was instructed not to buy on credit. This Lefler denies, and the circumstances very thoroughly support Lefler's version of the appointment and his conduct of the business. When he went there, there was less than \$30 in cash on hand, some \$1,400 worth of stock, and about that amount of excess of bills receivable over bills payable. Lefler commenced in June. From that time on until the sale, in October, 1898, he ran the concern without interference or any apparent direction from Witcher. During these 18 months he bought large quantities of Eastern and Mexican lumber and manufactured material. He bought it not only of men doing business in Cripple Creek, and running similar yards, but from many wholesale dealers in Denver and other points in Colorado. It rarely happened that he bought the materials for cash. In fact, such was not the custom of lumber dealers, but all raw material and manufactured products were sold by the wholesalers on time, with monthly settlements, as the parties might agree. This was and is the usual course of the trade. Lefler opened a set of books. They showed the cash received and paid out, the material bought and sold, and the debits and credits. What the concern owed different parties for lumber on products, and what different persons owed them on purchases, fully appeared. The books were open to Witcher, and the evidence shows (at least, there is enough proof from which the jury might rightfully and reasonably conclude) that Witcher was thereby advised of Lefler's course and methods. From time to time statements were taken from the books, furnished to Witcher, showing the condition of affairs, and, presumably (and the evidence warrants the inference), the profit and loss

account. Every 6 months a full statement after inventory was prepared and given to Witcher. These statements showed stock on hand, bills payable and receivable, and the net result of the business. It is therefore assumed, and the proof demonstrates it, that Witcher had full knowledge of the way in which the business was done, and of the fact that all or nearly all of the purchases were made on credit, and settled either monthly or otherwise. To these proceedings and to this conduct Witcher made no objection, unless, as we concede, as he says, he did at one time in 1896, when he borrowed \$1,300, and at another some \$2,700 and furnished it to Lefler to enable him to pay for stock which he had bought. The note went to the bank, and thereon Lefler paid interest. Whether he ultimately paid the note, or Witcher paid it, we do not know. The order to Lefler to buy no more on credit is disputed. What the jury found, otherwise than from the circumstance that they rendered a general verdict for the plaintiffs, we cannot ascertain. We conclude the fact was not established, because thereafter the business continued and purchases were made on credit and charged on the books, to the knowledge of Witcher, who subsequently made no protest, and in no manner sought to change this method. During all this time the lumber and manufactured products which were purchased were paid for by checks drawn on the bank in the name of the J. R. Witcher Lumber Company, per Lefler, or per L., as the case might be; and the check book was produced, showing an account was kept in the bank separate from Witcher's personal account, and it appears that he drew checks in the name of the lumber company. For some 9 or 10 months prior to the sale the Gibson Lumber Company had considerable dealings with the Witcher Lumber Company. Stocks of particular sizes or sorts of lumber would need replenishment, and it was the custom of the dealers to buy and sell from each other, either to fill up stock, or to enable them to fill orders. The custom seems to have been to order one from the other, and at the end of the month furnish a statement, and the debtor in the mutual transactions would settle by check. This went on for that period between these parties, and each month they had transactions of purchase and sale, though they were treated like similar transactions between persons not in the business, save as to the question of price. The J. R. Witcher Lumber Company was generally indebted to the Gibson Lumber Company, and gave them 9 or 10 checks in the settlement of monthly accounts. In October the Gibson Company sold the Witcher Company some \$427.24 worth of lumber. It seemed to be inconvenient to settle at the usual time, and it was agreed between Gibson and Lefler that the lumber should be paid for on the 1st of Jan-

uary following, and he accepted a draft for the money, payable at that date. Intermediate to the date of the sale and the maturity of the debt the Witcher Lumber Company became embarrassed. There was a descent on him by some of his Denver creditors, the Chicago Lumber Company having become apparently the owner of various claims by assignment of divers of his creditors; and that company attempted to force a settlement with Witcher about the middle of December, 1896. Realizing his inability to pay, and seeking to comply with their demands, and get out of his troubles the best he could, he gave that concern a mortgage for upward of \$12,000 on his yard and stock, some \$20,000 worth of bills receivable, and possibly on a very considerable amount of sawed and native lumber at some or all of his various mills. That company went into possession, remained in possession for three or four months through Bardwell, the mortgagee, and representative of the Chicago Lumber Company, who liquidated the claims which he had secured, and then turned back to Witcher some \$20,000 worth of bills receivable and \$6,000 or \$7,000 worth of stock. At the time of the mortgage there was some dispute as to what accounts should be secured. Bardwell, an indifferent person, testified that Witcher insisted that various accounts, other than those of which he was the assignee, should be included, and among them the Gibson account. Bardwell testified that Witcher admitted he owed that claim, and wanted to pay it, and intended to pay it, but did not have the money, as he needed what he had to pay his teamsters. This acknowledgment of the debt and promise to pay is measurably disputed by Witcher, but the preponderance of the testimony undoubtedly is that he admitted the debt, and agreed to pay it, and conceded it was a just claim. At all events, the jury so concluded. This was the only evidence of ratification. There was no evidence that Witcher made his statement with exact and full knowledge of the situation, otherwise than as he was advised by his own books, and the possession of the knowledge it may be assumed he had from the admission that the debt was due, and his request that it should be included in the security which he gave the Chicago Lumber Company. It may be well to note that some of the sales to Lefler by the Chicago Lumber Company were made when Witcher was present. This simply goes to show that Witcher must have had knowledge of the course of business, and of what Lefler did. When the claim was not paid, the Gibsons insisted on payment, and sent a note for him to sign. Witcher did not object to the claim, nor did he dispute the debt, or assert that Lefler had no right to contract it. On this testimony the case went to the jury, who promptly found a verdict for the plaintiff for the amount claimed,

with interest from the proper date. After a motion for new trial was overruled, Witcher prosecuted this appeal from the judgment.

Waldo & Dawson, for appellant. Samuel P. Dale, for appellees.

BISSELL, P. J. (after stating the facts). On this basis of fact the appellant has constructed a virile and persuasive argument to support his contention that, where one would hold a principal for the acts of an alleged agent, he must either show an express authority delegated to the representative, or a course of conduct, pursued along the lines of the due course of the particular business carried on, to the knowledge and with the real or apparent consent of the principal, which will estop him to deny an original grant of power. If this case is to be brought within the latter principle, he who thus deals with an agent is as much bound as in the first case to inquire about the agent's authority; and if he thereby learns, or by such investigation might have found out, the actual limits of the agent's power, he may not insist that the authority was apparently possessed, and on that theory hold the principal for what the agent has done, when in fact he had no real right to act. I agree in the main with this law, and concede that he whose cause of action grows out of an agent's acts must either prove an actual power delegated, or one which may be legitimately inferred from what was done, and that the plaintiff may not sit idly by, make no inquiry, and then hold the principal, on the theory of an estoppel, without proof of a course of dealing with himself so long continued as to beget a legitimate reliance on the apparent possession of authority. To one or the other end must the case be worked out, if the plaintiff is to recover. The trouble with the present case is, the proof does not wholly bring it within the principle of equitable estoppel, nor yet fully establish an actual original grant of power. Yet, taken altogether, the evidence fairly establishes, not only a power given when the agency was created, but one subsequently granted, or which may be fairly and legitimately inferred as granted from what the principal afterwards did, or knowingly permitted the agent to do, in the conduct of the business. The many transactions between the Gibson Lumber Company and the J. R. Witcher Lumber Company, even without the inquiries ordinarily requisite, permit the application of this principle of estoppel, and permit the plaintiff to insist that Witcher may not deny the agency, though the Gibson Company may have been negligent and careless in failing to ascertain whether the agent had authority when they begun their dealings. This comes from the culpable negligence of Witcher in the conduct of his business,—a negligence so marked that it far exceeds the culpa levissima which may appear, and yet the principal be excused

because the plaintiff's negligence proximately contributed to the loss. On either theory, the verdict is supported by the proof, as we shall attempt to demonstrate. We do not believe the appellant can insist that the negligence of the Gibson Lumber Company proximately contributed to the loss. It is the absence of this proof which prevents the application of the doctrine of the Alabama case on which counsel so much rely. *Wheeler v. McGuire*, 86 Ala. 398, 5 South. 190, 2 L. R. A. 808. The theory is right. Under the law of agency, it is, and it has always been, true that a principal who so negligently conducts his affairs as to lead third persons to reasonably suppose the agent has authority may not dispute the possession of the power. As an incidental part of this principle, it is undoubtedly likewise true, as has already been suggested, that the person who deals with the agent, and would rely on the agent's apparent authority, must not act negligently, and must use reasonable means to ascertain whether the power is possessed. The trouble with the application of that principle or of the modification of it in the present suit is that, although the Gibson Lumber Company may have been negligent in not inquiring in the first instance, the long course of dealing which the parties had, one with the other, extending over a period of months, culminating in the particular sale which is the cause of action, forbids the use of the doctrine. It is quite possible that, had the sale been the first and only transaction between the parties, it might well have been said that the plaintiffs were negligent in failing to find out, before they sold goods on credit to Lefler, that he had authority to buy. The trouble is, not only did he buy once, but for months they sold him on credit, with Witcher's probable actual knowledge. In any event, he is charged with knowledge, from the appearance of the transaction on the books, and his failure to object. Permitting this course of dealing, it begot a confidence in the Gibson Lumber Company, and they had a right to rely on this apparent authority, and Witcher cannot escape the obligation. It is always incumbent on a plaintiff to conduct his business with care. He is not bound to watch his agent, nor bound to be constantly on the lookout to see that he is not cheated. But he is certainly obligated to keep himself advised of the course of his business, and to know whether his agent is using the specific authority which is granted him, and, if he is not, to advise the parties with whom he is dealing to no longer transact such business with him. It is a general principle that the principal is bound to know what his agent does, when the transactions are entered on his books, open to his inspection, exhibited to him by statements furnished by the agent, especially where the profits go into his pocket. The law of notice is broad, and slight evidence, under such circumstances, is enough to charge him. *The Little Pittsburg Con. Min.*

Co. v. Little Chief Con. Min. Co., 11 Colo. 236, 17 Pac. 760; *Helms v. Bank*, 9 Colo. App. 31, 47 Pac. 403. It is equally true, as this court has many times decided, that a principal may not attack the provisions of a contract, and reject in part and at his pleasure what the agent has done, when he has received an unquestioned benefit. Ordinary business principles and common honesty forbid a principal to keep the product and refuse to pay, even if the agent had no authority to buy. This is, and always has been, the law, and there is enough in this case to warrant its application. *Drug Co. v. Lyneman*, 10 Colo. App. 249, 50 Pac. 736; *Sartwell v. Frost*, 122 Mass. 184; *McDowell v. McKenzie*, 65 Ga. 630; *Bice v. Hover*, 2 Colo. App. 172, 29 Pac. 1042; *Johnson v. Railway Co.*, 116 N. C. 926, 21 S. E. 28. The case seems to us to be brought clearly within this principle, which will be taken as a modification of the first, or as a part of it, and an exception to it, and serves to determine the rights of the parties. In this case the lumber was sold by the Gibson Lumber Company to Witcher through Lefler, who was carrying on the business as his agent. He got the lumber. It was there when he mortgaged the stock in trade and bills receivable to pay his debts. Bardwell got it, as mortgagee. It was used for Witcher's benefit, as whatever of the stock was not sold, or whatever bills were not collected and necessary to the liquidation of these consolidated claims, went back to him. He never attempted to alter the Gibsons' status, return the goods, or in any manner alter their situation; seeming to rely wholly on the theory that the agent had no authority to buy. He put the proceeds in his pocket, and relied on the want of power. Under the circumstances, we do not deem it right.

Regardless, however, of all this discussion, and of these principles which we have examined and stated more to answer the argument of counsel, and for their satisfaction, and not because it is vital to the decision, we believe, on the record, that the evidence conclusively shows that Lefler had actual authority from Witcher to buy on credit. It is quite immaterial whether we believe Witcher, who stated that he told Lefler originally that he must buy only for cash, and immaterial whether we believe him when he further states that subsequently, and in 1896, he told him not to buy on credit. It remains true that an actual authority to buy on credit is the only legitimate inference which may be drawn from the testimony. We must hold, on the proof, that Witcher did give Lefler this authority. If he instructed him otherwise at the commencement, that instruction was withdrawn, and we must assume from the subsequent course of business that Lefler was given actual authority, as an agent, to buy goods on credit. From the time Lefler took charge of the business up to the date of sale, in October, 1896, he continually bought goods, lumber of all descrip-

tions, and manufactured products, from various dealers on credit, debited the lumber company with the accounts, and, of course, credited the company with the payments when they were made. All these transactions were entered on Witcher's books. From time to time statements were furnished him, showing the history of the business, the debts and liabilities of the company, and its assets, consisting of stock on hand, bills payable, etc. These books and these statements thoroughly and fully advised him of what Lefler had done and was doing. He made no protest, permitted the agent to continue, and, even though he may have said when he borrowed the \$2,700 that Lefler must no longer do a credit business, it still appears there was no variation in the course of business, but from thenceforward, as before, the agent constantly bought goods on credit, to Witcher's knowledge. We therefore conclude that the preponderance of evidence is with the appellees, and Witcher was unable to establish to the satisfaction of the jury that he originally gave the instruction, or, if he subsequently gave it, that he had withdrawn it. From this course of business, so long continued, so universal, to which there were no exceptions, the law will attach, as against Witcher, a conclusive presumption of a subsequent grant of authority to the agent to buy on credit, whatever may have been his original instructions, or whatever may have been his original delegation of power. We therefore conclude, notwithstanding the argument of the appellant, that the appellees maintained the burden which the law put on them. They proved facts which established an agency, with full authority to buy on credit. They likewise proved facts and a course of dealing between the parties, and such negligence on the part of Witcher, that he is now, as against them, estopped to deny that Lefler had authority to buy on credit. He must therefore pay the debt which his agent contracted under an authority legally presumed to have been granted, on an apparent authority exercised in the usual course of that particular business, to the knowledge of the Gibsons, and on which they had a right to rely. On this branch of the case, therefore, we conclude that judgment was properly entered.

There is another point insisted on by counsel for the appellant, which they claim is enough to compel us to reverse the judgment. The point is that there was no sufficient proof of the ratification of Lefler's acts as agent to warrant the submission of the question to the jury, whether, as a matter of fact, Witcher had ratified the purchase. We are quite ready to concede the force and the difficulty of the position. It is common law that the ratification of an agent's acts is as effectual to bind the principal as though the act had been done under an authority duly granted, whether in writing or by parol.

It is likewise true, as a general proposition, that it is the duty of the principal to repudiate a transaction if he does not acquiesce in it. Counsel place great reliance on the statement of the supreme court that, "if he fail to do so within a reasonable time after notice, the jury may draw an inference of ratification, but no estoppel is created if the unauthorized transaction is complete before knowledge of it reaches the alleged principal, and the status of the parties would not be changed by the failure to approve or disapprove within a reasonable time." *Breed v. Bank*, 4 Colo. 507. The principle is not applicable. The transaction was not complete when Witcher was first charged with knowledge of it. The goods were bought in October. They were charged on the books against the Witcher Lumber Company, payable on the 1st of January following. The goods were delivered, and remained in the yard until the middle of December. Presumably, all this was with his knowledge; and, having this knowledge, he was bound to repudiate it, if he would set up the want of authority. The transaction was not complete when the law presumes he knew it, although it was complete at the time of the asserted ratification. The evidence of this ratification is found wholly within the statements made by Bardwell and Lefler, or at the time the mortgage was given. At that time Witcher insisted, as these witnesses assert, that the Gibson claim should be secured by the mortgage. He admitted that the amount was due, and also that he intended to pay it, but said that he needed all his immediate money to pay his teamsters. The appellant has constructed an argument on this basis of fact: That there must be knowledge of all material facts and circumstances, as an essential element of a ratification. If this knowledge be not apparent, the principal will not be bound. On the other hand, if he had given his assent in ignorance of the facts, he may, on being advised, disavow. We have no dispute with this law. The authorities are clear on it. It is only a question of argumentative determination whether the case is brought within their purview. We do not intend to enter this disputed field, nor attempt by analysis and statement of facts to determine whether a case has been made by the proof which will bring it exactly within these general doctrines. It is wholly unnecessary. An instruction which the court gave furnishes the only basis of the appellant's argument. It is insisted that the court ought not to have given the instruction, because there was no evidence to justify it. It is insisted that, the case being wanting in proof essential to show a ratification, the court erred in leaving that question to the jury; contending, therefore, that an instruction given without evidence to warrant it is liable to mislead the jury, and works harm. Even though we concede all these principles to the fullest ex-

tent claimed, we still should not be permitted to reverse the case. The trouble is that the appellant is in no condition to insist that it was error to give that instruction. This is not true, because he failed to take an exception which he preserved. It is not because his proposition is without basis. It is not because it is doubtful whether the court ought to have given it, under the proof. The whole difficulty proceeds from the circumstance that the appellant himself asked it. It is always true that, where an appellant asks an instruction which the court gives, he may not thereafter insist that the court erred. As we look at this record, the appellant is in that precise situation. It is quite true that the court did not give the instructions as the appellant asked them. The instructions which the appellant asked were all refused, and yet the court gave instructions upon that precise proposition, and in the language used by the appellant in the instructions which he requested. In other words, the appellant asked an instruction (and we omit all that preceded the clause) to the effect that Witcher could in no manner be held liable unless the agent had authority to buy, unless the jury believed from the evidence that since the date of the sale he had by some means ratified the purchase; and, before he can be held to have ratified the act, it must be shown by the evidence that he was familiar with all the circumstances surrounding the act at the time of the ratification claimed. This was what the appellant asked. The court almost literally followed that language in instructing the jury. While it left out the antecedent part of the instruction, some of which was right, and some of which was wrong, yet on this proposition it heeded the appellant's request. We are wholly unable to see any distinction between a case of this sort and one where a court gives an entire instruction requested by the appellant, and he afterwards seeks, when reviewing the case, to have it declared error for the court to do what he asked. The reason why this principle is so clearly applicable in the present case is that it is only on this question of ratification that the instructions are attacked. The force and effect of the instruction on this subject is in no wise modified or changed by being made a part of an instruction on another proposition. The court instructed the jury that if they believed that Lefler had no authority to buy on credit, and the plaintiffs had no reason to believe he had, they should find for the defendant, unless they found that he had ratified the transaction under the legal principle which the appellant had requested him to state. This request was followed, and we believe that the appellant cannot now complain of this statement of the law, nor can he be permitted to insist that the evidence did not warrant a statement of the law of ratification to the jury.

There are a number of minor errors urged

in the briefs, but none of sufficient consequence to require a discussion, nor, if found to be well based, of sufficient gravity and importance, under the statute, to warrant a reversal of the judgment. The case was correctly tried, and properly submitted to the jury. The verdict being against the appellant, the judgment entered thereon is manifestly correct, and will accordingly be affirmed. Affirmed.

HARKER v. SCUDDER.

(Court of Appeals of Colorado. May 14, 1900.)

TRUST DEED—UNAUTHORIZED RELEASE BY TRUSTEE—APPARENT AUTHORITY OF AGENT—LACHES—SUFFICIENCY OF FACT—RETROACTIVE STATUTE.

1. Where the trustee named in a trust deed, which only authorized him to execute a release on the payment of the loan, executed a release of a portion of the property, before the loan was paid, to enable the owner to procure an additional loan from one who knew the facts, such release will be set aside at the suit of the beneficiary.

2. Where a trustee in a deed of trust, which defined his powers, was agent for the beneficiary only for the purpose of making and collecting the loan secured thereby, a finding that she had not clothed him with such an apparent authority to act as her agent that he could execute a valid release contrary to the terms of the trust deed will be sustained.

3. Where one who relied on a release executed by the trustee named in a trust deed did so under the powers expressed in the deed, and not on any apparent authority given by the beneficiary, he cannot claim that the beneficiary was estopped from denying the trustee's right to execute such release.

4. The beneficiary in a trust deed was 80 years old when she learned that the trustee had executed an unauthorized release of property held under a trust deed. She informed a person who, knowing the facts, had made a loan on the property included in the release, that she claimed under her deed. The trustee told her the matter would be arranged, and suit to set the release aside was not brought for 18 months, but no one was harmed by such delay. *Held*, that the plaintiff was not guilty of laches.

5. *Sess. Laws 1893, p. 473, § 1 (3 Mills' Ann. St. § 460a)*, provides that recitals of payment in a release of a trust deed, when executed before the maturity of the secured note, shall be conclusive evidence of such payment. *Sess. Laws 1893, p. 473, § 2 (Mills' Ann. St. § 469b)*, provides that such recitals now made or hereafter made shall be valid, whether made to the original maker of the deed, or to a subsequent purchaser. *Held*, that evidence that recitals of payment in a trust-deed release executed before the statutes were passed were false was admissible, as such statutes are only retroactive in making such recitals as valid when made to a subsequent purchaser as when made to the grantor of the trust deed.

Appeal from district court, Arapahoe county.

Suit by Harriet N. Scudder against Mary J. Harker to set aside a release of a trust deed. From a decree in favor of plaintiff, defendant appeals. Affirmed.

Teller, Orahood & Morgan and Clayton C. Dorsey, for appellant. James J. Charlton, for appellee.

WILSON, J. In December, 1890, William Gorringer borrowed from Mrs. Harriet N. Scudder, plaintiff herein, \$1,500; executing his promissory note therefor, of date December 29th, payable one year after date, and with interest payable quarterly. Contemporaneously with this, and to secure the payment of the note, Gorringer executed a deed of trust conveying to Alonzo Rice, trustee, one-half of a block of ground in Sunnyside addition to the city of Denver, comprising 10½ lots. Rice was a loan broker, who conducted the business on the part of Mrs. Scudder; preparing the deed of trust, and inserting his name as trustee. In about three months thereafter, Rice informed Mrs. Scudder, who was then visiting in Iowa, that Gorringer desired to borrow \$2,000 additional, securing it by a second deed of trust upon the same property. Mrs. Scudder sent the money to Rice, who thereupon loaned it to Gorringer; taking his note therefor, of date April 1, 1891, payable one year after date, to the order of Mrs. Scudder, with interest payable quarterly. To secure this, the second deed of trust was executed on the same date to Rice, as trustee. Both deeds of trust were recorded in due time, and were in the usual form; providing that upon the failure of Gorringer to pay the principal of the notes at maturity, or interest as provided, the trustee might proceed to sell, etc. In about two months thereafter, Gorringer, desiring to borrow a still further sum, negotiated a loan with the defendant, Mrs. Harker, for \$2,000. The business in connection with this loan, on the part of Mrs. Harker, was conducted by O. A. Whittemore. It appears that, in investigating the title, Mrs. Harker, or her agents, discovered the prior incumbrances in favor of Mrs. Scudder, and were unwilling to make the loan unless some portion, at least, of the property was released from these incumbrances, so that on this part Mrs. Harker might have a first lien. Thereupon Rice—whether at the request of Whittemore or of Gorringer, or of his own volition, it does not clearly appear—executed to Gorringer a deed releasing four of the lots from the operation of the two deeds of trust given to secure payment of the notes of Mrs. Scudder. The release deed recited as a consideration that Gorringer had paid a part of the note, together with all interest and charges thereon, and that it was executed at the request of Mrs. Scudder. This deed was acknowledged before Mr. Whittemore, the agent of Mrs. Harker, who was a notary public. Thereupon, on the same day, Mrs. Harker loaned \$2,000 to Gorringer; taking his note therefor, and a deed of trust upon the four lots released by Rice. Both the release deed and this deed of trust were placed on record at the same time. It is undisputed that, at the time of the execution of the release deed, Gorringer had never paid any part of

the principal of said notes, or either of them, and that Mrs. Scudder had not requested Rice to execute the release; both of these recitals in the deed being untrue. Thereafter, for several years, Gorringer continued regularly to pay interest on the Scudder notes; payment being made through Rice. Some time in 1895—the precise date not being definitely fixed—Mrs. Scudder first discovered that Rice had executed this release deed. In November, 1896, she thereupon commenced this suit, the only objects of which, with which we have any concern on this appeal, were to cancel, annul, and set aside the release deed executed by Rice, and to obtain a decree declaring the two deeds of trust executed to secure the payment of the notes given to her to be a first lien on the entire real estate described in them. The decree was rendered as prayed by plaintiff, and from this Mrs. Harker appeals.

The contentions of defendant for a reversal of the judgment are substantially embraced in and covered by three general propositions: (1) That Mrs. Harker was an innocent, bona fide incumbrancer, without notice, and that as between the two innocent parties the superior equity is with her. (2) That the release by Rice was his act as Mrs. Scudder's agent, clearly within the scope of the apparent authority with which he was clothed, both by the terms of the trust deeds and by the course of dealings between them. (3) That Mrs. Scudder was guilty of such laches in asserting her rights as to defeat her claim to equitable relief. Both counsel, in exhaustive briefs, have discussed with much ability the legal questions underlying and involved in these propositions, and in support of their respective arguments have cited us to a very large number of authorities. We are relieved of any necessity of discussing these various cases, and pointing out the nice distinctions upon which many of them turn. Whatever may be the rule in other states, and whatever may be the conflict of authority, the rule with reference to the pivotal and decisive question in this case has been positively settled in this jurisdiction by harmonious decisions in both appellate courts. This rule, as laid down in *Kenney v. Bank*, 12 Colo. App. 33, 54 Pac. 404, is: "It is undoubtedly true (and in this all the authorities agree) that a trustee by written instrument is clothed with no powers save those which are expressed in the writing; and, if his authority to act is in any wise or at all dependent upon matters in pais, the parties dealing with the trustee are bound in the one case to see that the authority is expressly given by the instrument, and in the other that those facts exist which authorize the trustee to act." In a later case this was quoted approvingly by our supreme court. *Improvement Co. v. Whitehead*, 25 Colo. 358, 54 Pac. 1024. In this case the supreme court also says: "The powers of a trustee depend en-

tirely upon the terms of the instrument appointing him, and no power is conferred unless expressed in the writing." In *Bank v. Miner*, 9 Colo. App. 367, 48 Pac. 839, the court said: "Without authority from the party for whose benefit the trust deed was given, the act of the trustee in releasing it was void." Applying this rule to the case at bar, it being undisputed that Mrs. Scudder did not authorize Rice to execute the release deed, it is clear that the deed was not effectual to discharge the incumbrance. It is true that, strictly and technically speaking, the execution of the release deed was not in the exercise of a power expressly vested in the trustee by the deed of trust. The power specially given was to sell in default of payment of the debt by the debtor, and this power could only be extinguished by payment. The authority to execute a release deed is, however, a necessary incident to, and dependent upon, this power. That which would destroy or defeat the power to sell would create the right or authority to release, which is simply a reconveyance by the trustee to the grantor of the title to the property after the fulfillment of the trust. It is only, however, after the trust is carried out, and the power to sell extinguished by payment, that it is possible for the trustee to reconvey the title discharged of the incumbrance. Whatever restrictions or limitations there are upon the expressed power, it logically follows, attach to all incidents of it. Moreover, considering the case purely upon equitable grounds, Mrs. Harker was not an innocent incumbrancer. She knew from the records, or should have known, that the sole power with which Rice, as trustee, was invested, was to sell the property in case of default by Gorringer in payment of the principal of the notes when due, or of the interest, according to its terms. Under the provisions of the instrument, Rice acquired no power whatever, either express or implied, either by the terms of the trust deed or by operation of law, to execute a release deed before the maturity of the debt. Much less did he have any authority to release a part of the property from the operation of the deeds of trust. These were powers which he could exercise only by the express authority of Mrs. Scudder, the owner and holder of the notes, and also of the deeds of trust. This was amply sufficient to have put Mrs. Harker upon her guard. She knew that the notes were executed to Mrs. Scudder, and it was her duty, in order to have protected herself, to have made some investigation or inquiry of Mrs. Scudder, in order to have ascertained whether this power, which was absolutely essential and necessary in order to validate the deed of release, had been given by her. This she did not do, but relied solely upon the recitals in the release deed.

It is contended, however, that the acts of Mrs. Scudder were such as to clothe Rice with apparent authority, as her agent, to do what

he did, and that she is therefore estopped to deny it. This is largely a matter of fact, and the finding of the trial court was to the contrary. We think the evidence fully supports the finding. It does not appear that Rice had anything to do with either of the transactions, other than what is usually done by a loan broker, namely, to prepare the papers, and to collect the interest as it became due, paying it over to the principal. Neither was there any evidence that Rice had any business relations with Mrs. Scudder outside of these two transactions, except at one other time, long previous, when he made a loan for her. Further, there is not the slightest evidence to show that Mrs. Harker relied upon the agency of Rice. On the contrary, it appears that she relied wholly upon the execution of the release deed by the trustee, who was the proper and only party to execute it, when it was permissible to be executed at all, and on the recitals therein. We find nothing whatever in an examination of the entire record upon which to base the claim that Rice was the agent of Mrs. Scudder, except to prepare the notes and deeds of trust, and possibly to collect interest when due. Moreover, if there had been acts from which an agency might be implied, it was limited in this case by the writing itself, which constituted him an express agent for the express purpose only of enforcing the deed of trust by sale, in case of default by the payor of the notes. For a discussion of this question of agency in cases similar in principle to this, we refer to *Lester v. Snyder*, 12 Colo. App. 352, 55 Pac. 613.

It is said, however, that the plaintiff was guilty of such laches in asserting her rights that she should not be entitled to the equitable relief prayed for. Mrs. Scudder was somewhat uncertain about the exact time when she first learned that Rice had executed the release deed, but feels quite sure that it was about June, 1893. This uncertainty of memory is probably accounted for from the fact, as we find it in the record, that she was a woman 80 years of age,—a consideration which should certainly have some weight in a court of equity, when equitable principles of estoppel are invoked. The delay in the institution of the suit may be accounted for by the fact that Mr. Rice, as appears from the evidence, realizing that he had exceeded his powers, told her to the effect that in a short time he felt that he could certainly arrange matters so that she would get all of her money. Further, it does not appear that Mrs. Harker suffered any loss by reason of delay in bringing the suit. Mrs. Scudder, however, so far as Mrs. Harker was concerned, did assert her rights, according to the evidence, by telling her, soon after she discovered that the release deed had been wrongfully executed, in effect, that Mr. Rice had no right to make it, and that her deeds of trust still covered the four lots in question. Mrs. Harker, therefore, had actual notice of Mrs. Scudder's intention

to claim that all of the property specified in the two deeds of trust was still subject to them. Under the circumstances of this case, we do not think that a delay of 16 months in bringing suit, after Mrs. Scudder first learned that the release deed had been executed, was so unreasonable as to deprive her of the relief to which she would have been otherwise entitled. It was long within the statutory period of limitations, and there is nothing to show that Mrs. Harker had been misled thereby to her prejudice, and there were no intervening rights of third parties. The case in this respect, as we think, comes within the principles laid down by our supreme court in *Dunne v. Stotesbury*, 16 Colo. 89, 26 Pac. 333, and by this court in *Du Bois v. Clark*, 12 Colo. App. 231, 55 Pac. 750.

It is further contended by the defendant that the recitals in the release of the trust deed in controversy were conclusive, and that evidence contradicting those recitals was improperly received at the trial. In support of this they rely upon a statute adopted in 1893, which reads as follows:

"Section 1. The recital in any release or partial release of any deed of trust affecting the title to real estate in this state, of the payment or partial payment of the indebtedness secured by such deed of trust so released, when such release deed shall be executed before the maturity of the note or indebtedness so secured, shall be evidence of such payment, so as to give full effect to such release, if duly and legally executed by the proper trustee, according to the purport thereof, as to subsequent purchasers or incumbrancers of the property mentioned in such released deed, and of all such property or real estate, the title to which may be affected or sought to be affected by such release deed, to the same extent and with the same force as the release of any trust deed or deed of trust when executed after the maturity of the note or indebtedness thereby intended to be released.

"Sec. 2. All releases of deeds of trust or trust deeds heretofore or hereafter made in this state shall be good and valid as to the recitals therein, whether made to the original maker of said deed or to a subsequent purchaser of the premises in such release deed described." Sess. Laws 1893, p. 473 (3 Mills' Ann. St. §§ 469a, 469b).

It will be observed that the release deed in question was executed, and whatever rights Mrs. Scudder might have to set it aside and cancel it arose, long prior to the adoption of this statute. It is not necessary, however, for us to determine to what extent the act was or is valid and effectual so far as it is retroactive and retrospective in its nature. However this may be, it is a fundamental principle of statutory construction that before a statute can be construed to be retroactive, even when permissible at all, the legislative intent to make it so must clearly appear from the express terms of the act. This is not the case

in this instance, so far as applied to the facts before us. The first section of the act is the only one which provides that the recitals of a release deed shall be evidence of the payment of the debt secured by the trust deed, and it will be observed that it does not refer to or embrace release deeds executed before the enactment of the statute. It is the second section only which refers to the recitals in release deeds theretofore executed, and the manifest and evident purpose of this section is simply to provide that these recitals shall be as good and valid in a case where the release runs to a subsequent purchaser of the premises included in the deed of trust as they would be had the release deed been executed to the original maker of, and grantor in, the deed of trust. The contention of defendant, therefore, in this respect, is not tenable. For the reasons given, we think the judgment was correct, and should be affirmed. Such will be the order. Affirmed.

**AMERICAN NAT. BANK OF DENVER v.
BARNARD et al.**

(Court of Appeals of Colorado. May 14, 1900.)
JUDGMENT—CLAIM UNDER CONTRACT—MECHANIC'S LIEN—ESTOPPEL—GARNISHMENT—SUPERIOR CLAIM—RECORD—NOTICE.

1. E. sold brick to B. under a contract entitling him to conveyance of premises from B., free from an incumbrance held by A., unless the amount thereof was paid to him at the time of the conveyance. B. conveyed subject to A.'s incumbrance. Thereafter E. claimed a lien on the premises, and obtained judgment therefor. *Held*, in an action by E. for a surplus arising from the sale of the premises under A.'s incumbrance, that the foundation of his claim was the contract with B., under which he became entitled to the property from which the surplus arose, and his remedy under the contract was not affected by taking the additional security of the lien, or judgment against B. in the lien suit.

2. Where claim to a surplus arising from sale of property under deed of trust was based on a contract calling for a conveyance of the land, which was recorded prior to the bringing of a suit in which such surplus was garnished, the record of such contract was notice of any right in the land acquired thereunder, and such claim was superior to that acquired by the garnishment.

Appeal from district court, Arapahoe county.

Action by H. M. Schlesinger against William H. Barnard and others to settle a controversy over a surplus arising from sale under deed of trust. From a judgment in favor of defendant H. J. Rodolf, defendant the American National Bank of Denver, assignee of Howard Evans, appeals. Reversed.

T. J. O'Donnell and Milton Smith, for appellant. Henry Howard, Jr., for appellees.

THOMSON, J. H. M. Schlesinger brought his complaint against William H. Barnard, Mary Kerr, R. Kerr, trustee, Howard Evans, and Joseph Arnold, alleging the execution,

on the 31st day of December, 1890, by the defendant Barnard, of a trust deed to the defendant R. Kerr of certain real estate in Alkire Bros.' addition to Broadway Terrace, to secure the payment of his two promissory notes to the defendant Mary Kerr for the sum of \$1,100 each in one and two years from date; alleging that the first of these notes was duly paid, but that, default having been made in the payment of the second, the trustee, R. Kerr, proceeded to foreclose the trust deed in accordance with its terms; and alleging the purchase by the complainant of the property at the trustee's sale, which took place on the 18th day of May, 1893, for the sum of \$2,150, which was considerably in excess of the amount due upon the note. The complaint further alleged that at the sale the defendant Evans notified the complainant that he was entitled to whatever might be left after payment of the note; that immediately afterwards, at the suit of the defendant Arnold, he was garnished for the same surplus; and that, being uncertain to whom the amount was justly and lawfully payable, he brought the entire money into court, and prayed that the claimants be ordered to interplead, and that the controversy be settled by the proper decree. Summons was issued and served, and the parties appeared. Defendant Evans filed an answer in the nature of a complaint, in which he alleged that on the 20th day of May, 1892, he was doing business in the name of the University Brick Company, and that on that day, and by that name, he entered into a written contract with the defendant Barnard, by the terms of which he agreed to furnish to Barnard 462,500 brick within six months from that date, the stipulated value of the brick being \$5,000; and Barnard agreed, in consideration of the furnishing of the brick, to convey to him or his nominee the real estate described in the trust deed, free and clear of all liens and incumbrances; provided that the conveyance might be made subject to any balance due upon the indebtedness secured by the trust deed, if Barnard should, at the time of the conveyance, pay such balance to him or his nominee. Evans further averred that he delivered the brick pursuant to the agreement, and demanded of Barnard a deed of the premises free from the incumbrance, or a deed subject to the incumbrance, together with the payment to him of the balance due on the indebtedness secured; but Barnard failed to comply with the demand. He also stated that he caused the agreement to be duly recorded on the 20th day of February, 1893. He prayed judgment for the residue which might remain after payment of the note, and the expenses of the trust. The defendant Arnold answered the pleading of Evans, denying, as to its material allegations, knowledge or information sufficient to form a belief. But his answer showed that

his action in which the garnishment was issued was commenced on the 27th day of February, 1893, and that he had assigned the judgment which he had recovered in the suit to Mary J. Barnard. Mary J. Barnard thereupon entered her appearance and answered. Her answer repeated the averments contained in the answer of Arnold, and alleged further that on the 20th day of February, 1893, Evans filed in the office of the recorder of Arapahoe county his statement that William H. Barnard was indebted to him in the sum of \$6,700 for brick furnished and delivered by him to Barnard for the construction of a building upon certain lots in Hunt's addition to the city of Denver, and that he claimed a lien upon those premises for that sum; that afterwards Bingham and others instituted their suit against Barnard, making Evans a party defendant; that Evans interposed in that action his cross complaint, setting forth the indebtedness mentioned in his lien statement, and claiming a lien upon the premises for the amount; that judgment was rendered in his favor upon his cross complaint for \$3,485; and that the brick mentioned in the lien statement and the cross complaint were the identical brick mentioned in his answer in this suit. The answer of the defendant William H. Barnard, after denying most of Evans' statements, contained the following affirmative allegations: First, that the number of brick delivered to him under the contract with the University Brick Company was 290,702, and no more, and that Evans failed and refused to deliver any other, further, or greater number; second, that on the 21st day of September, 1892, Evans demanded of him a conveyance of the premises described in the contract, which he thereupon executed and delivered to Evans. H. J. Rodolf, to whom Mary J. Barnard assigned the Arnold judgment after she had filed her answer, was substituted for her as a defendant, and adopted that answer. The American National Bank of Denver, upon a showing that it had succeeded to the rights of the defendant Evans, was made defendant in his place. The defendant Rodolf then moved for judgment on the pleadings on the ground that it appeared that the defendant Evans had obtained a judgment upon the same cause of action sued for in this proceeding, and against the same premises described in his answer in the suit of Bingham and others against Barnard and others. The motion was sustained, and judgment rendered accordingly. The bank appeals.

So far as this litigation is concerned, Evans, although he was brought into court by Schlesinger, and his pleading was denominated an answer, was, as to the other defendants, in reality a plaintiff, and their pleadings were answers to his complaint. Except as to the answer of Mary J. Barnard, he did not make reply, and, while the abstract fur-

nishes us no information upon the subject, it is to be supposed that the court, in passing upon the motion, accepted the answers as true. The decision is inexplicable otherwise. Neither does the abstract advise us of the grounds upon which the decision was based, and we can only conjecture what they were from the contents of the motion. The reason it assigns is that Evans had previously obtained a judgment upon the identical cause of action stated in Evans' complaint, and upon the identical premises it described. The assumption in the motion that the two causes of action were the same, and that the property involved in both was the same, has no support in the record, upon which alone a motion of that kind could be predicated. The suit for which Evans' judgment was obtained, as set forth in the answer of Mary J. Barnard, was brought for the foreclosure of a mechanic's lien upon lots in Hunt's addition to the city of Denver on account of brick furnished for the construction of a building upon those lots. But the present proceeding of Evans is for a decree that he is entitled to the money realized from the trustee's sale remaining after the discharge of the indebtedness secured; and the foundation of his claim is the contract between himself and Barnard, the conditions of which he says he performed, and therefore became entitled to the property it described, of which the money in litigation is part of the proceeds. The recital in the motion that the property involved in both suits was the same is contradicted by the record. The answer of Mary J. Barnard shows that the judgment in the mechanic's lien suit was recovered on account of the same brick in consideration of which Barnard agreed to convey the land. But, conceding the allegation to be true, it does not follow that the causes of action were identical. Whether, in the foreclosure suit, there was a personal judgment in favor of Evans and against Barnard, the pleadings do not show, although, from the language of the motion, it might be inferred that there was not. Yet we shall assume that there was, and the motion is still groundless. Evans agreed to deliver a certain quantity of brick in consideration of the conveyance to him of an unincumbered title to a piece of land. There was a trust deed on the land, which Barnard agreed should be discharged. He promised either to satisfy it himself, or give Evans the money with which to satisfy it. In either case Evans would obtain a clear title. Evans says that he delivered the brick according to his agreement, but that Barnard failed either to pay the balance due on the indebtedness secured by the trust deed, or give him the money with which to pay it. If his statement was true, by taking a deed subject to that balance he would suffer loss. Such being the situation, he had the undoubted right to endeavor to protect himself by taking additional security; and his remedy upon the contract was not in the

least affected by the fact that he sought to obtain and enforce a mechanic's lien against the property into which the brick went. The judgment obtained in the lien suit would be only an additional security, and, unless it was paid, would be no bar to the proceeding upon the contract. Evans was entitled to only one satisfaction; but to obtain that he was not confined to one remedy, and by reason of Barnard's failure to perform his agreement the remedy upon the contract would not make him whole. If, as counsel claims, but as the abstract does not show, Evans failed to establish his lien, and got nothing but a personal judgment against Barnard, the situation is the same. In a suit to enforce a mechanic's lien the statute authorizes a judgment against the person. Such judgment is a judgment obtained in the foreclosure proceeding, and the personal judgment against Barnard could no more injuriously affect the rights of Evans under the contract than the supposed lien of the attempted enforcement of which the judgment was the consequence. It was the outcome of the alleged lien, and amounted only to what that was intended to be,—an additional security. Barnard alleged that he had conveyed the property to Evans. If he had, the title which the latter received was not clear, because the incumbrance was undischarged. But it is immaterial whether he had or not. Whether Evans' interest was evidenced by a deed or contract, the surplus in the hands of the trustee belonged to him as part of the proceeds of property to which he was entitled, unless, by some act of his own, his right was waived, or unless, having nothing but the contract on which to base his claim, he himself failed in the performance of its conditions, as the other party to it alleged that he did. The contract was placed on record some days before the suit was begun in which the writ of garnishment was issued. Arnold therefore had notice of the rights in the land which Evans acquired under that contract, and, if nothing had occurred to extinguish those rights, the claim of Evans to the money in the hands of the trustee was superior to that of Arnold. Justice cannot be done between the parties to this controversy without a trial. Important facts are in issue, the questions concerning which can be determined only upon evidence. The summary judgment by which the district court disposed of the case is unjustified by the record, and must be reversed. Reversed.

(15 Colo. A. 131)

LEMMON v. SIBERT.

(Court of Appeals of Colorado. May 14, 1900.)

CONTRACTS—ACTION FOR BREACH—EVIDENCE—APPEAL—VERDICT—CONCLUSIVENESS.

1. Where, after sheep are counted and delivered under a parol lease, a written lease is executed, its recital as to the number delivered may be varied by proof.

2. A lessee of sheep assigned all his interest in the lease to the lessor, the lessee to receive the amount due under the terms of the lease up to the time of the assignment. *Held*, in an action to recover such amount, that evidence as to the lessor's management of the sheep after the delivery by the lessee was immaterial.

3. After the lessee had surrendered all his interest to the lessor, admission of evidence as to agreement after the surrender between the lessor and a co-lessee as to the management of the sheep is harmless; the lessee's rights being determinable by the condition existing when the lease was abandoned.

4. Where a party consents to the submission of an issue to the jury, and fails to object to the testimony on it, he cannot complain of its submission to the jury.

5. Where a party by his pleading construes an agreement in controversy, and permits evidence to be introduced, and the court to instruct the jury, concerning it, without objection, he cannot contend that there was no such agreement.

6. The surrender to a lessor, for his benefit, of a lease of sheep, by a lessee, who, by agreement with his co-lessee, was to receive a compensation for care of the leased property, is a sufficient consideration for the lessor's agreement to pay the compensation.

7. Where the evidence is conflicting, and there is nothing indicating that the verdict resulted from bias, it will not be disturbed.

Appeal from district court, Morgan county.

Action by Richard B. Sibert against E. F. Lemmon. From a judgment for plaintiff, defendant appeals. Affirmed.

James E. Garrigues, for appellant. W. A. Hill, for appellee.

BISSELL, P. J. A protracted and attentive examination of this record brings to our attention no error which would justify a reversal. We were left in doubt about the justness of the verdict by the first perusal of the evidence, and re-read it, and were then, and are still, uncertain about the basis on which it rests. But the jury are such complete masters of this matter that we are not at liberty, when there is a conflict in the testimony, to put our judgment against their conclusion. The fabric constructed by the appellant is not only bottomed on the theory that the verdict is unsupported by the evidence, but every story of it is constructed out of some argument deducible from the facts. We shall therefore do little more than suggest our conclusions, believing that we are under no obligation to support or to attempt to sustain the verdict by a discussion of the evidence. It is enough that the verdict was rendered against the appellant, and to state that there is testimony to be found in the record on which it could be based. We shall make no attempt to follow the counsel in his discussion of the appeal. He has subdivided his argument into several propositions, which he treats as a separate discussion of divers particular causes of action which he claims are set up in the complaint. With this we do not agree. Though the complaint is apparently thus constructed, and the items of Sibert's damage are apparently assigned to va-

rious breaches, and result in a statement analogous to a plea of different causes of action upon independent statements of fact, we remain of the conviction that its true construction will assign it the character of a complaint alleging the plaintiff's right to recover on the breach of a single contract.

In October, 1896, Lemmon owned a lot of sheep then running in one of the northern counties. About that time he made an agreement with Madden and Sibert, the substantial effect of which was to lease the herd to these two parties jointly. By the terms of the lease, they were to be run in Morgan county, and were subsequently delivered to them. The agreement was originally in parol, and the sheep were delivered prior to the execution of the writing. It was subsequently written out and signed by the parties. According to its terms, Lemmon delivered to Madden and Sibert some 2,528 head of sheep, of certain specified ages and descriptions. The parties are agreed that the lease did not recite the exact number of lambs delivered under the lease, but it was understood that the sheep were received as delivered, according to the terms of the agreement. Under the arrangement between Lemmon and these parties, Madden and Sibert were to herd and run the sheep and care for them for two years, and receive as their compensation all the wool of the lambs, half the wool of the aged sheep, and one-half of the increase. There was an independent arrangement between Madden and Sibert that Sibert should act as the herder of the sheep, and care for them according to the duties ordinarily placed on herders; and for this the lessees agreed between themselves that Sibert should receive \$15 per month (being half wages), to be paid by Madden, probably out of his presumed or expected profits. As stated, the sheep were turned over and remained in Sibert's possession as herder until the 3d of June, 1896. The lessees did not agree; each insisting that the other had failed to observe his agreement, and disagreeing, also, with respect to some acts of Madden with respect to the herd. We deem it unnecessary to refer to the exact grounds of the disagreement, or to Lemmon's theory. At all events, matters continued until the 3d of June, 1896, when the sheep were turned over by Sibert to Lemmon, who took them under an agreement which they made, substantially, that Sibert transferred and assigned to Lemmon all interest he had in the sheep leased to Madden and himself, and agreed to let him run the sheep without any interference, and for the best interests of all parties. Lemmon agreed to care for the sheep to the best of his ability, and return to the lessees their just dues, according to the tenor of the lease. He also agreed to see that Sibert received out of Madden's share in the lease the amount due him for his wages; the settlement to be made by October 1, 1896. It will be observed that the

lease was practically ended, so far as concerns Sibert's management or control of the herd and its further disposition. Lemmon thereupon took the sheep, turned them over to another party, in Nebraska, who ran them until October, had the sheep sheared, sold all the wool, and kept all the increase of the herd, which amounted to about 1,000 lambs. According to the agreement, Madden and Sibert were entitled to half of those lambs, and half the value of the wool, subject to one deduction. By the terms of the original agreement, Madden and Sibert undertook the care of the herd, and agreed to return the whole number of sheep received; becoming, by the terms of their contract, absolute guarantors against loss. This is the proposition about which the parties are in hopeless conflict,—one insisting on the loss of more than 400, and the other on the loss of a much less number; one side insisting that many were lost, and the other contending that there was no loss except the natural and inevitable loss which was the ordinary percentage of diminution from a herd of that size. The parties disagree about the number of sheep delivered,—one side contending that the exact number specified in the lease was sent, and the other that there was a less number actually delivered. We do not regard this as a matter of error, because originally the contract was a verbal one, and the sheep were delivered and received prior to the time the written agreement was entered into; and, although it may recite a particular number, yet if, in point of fact, a less number was delivered, we see no reason in the law why the lessees would not be permitted to show it. Ordinarily they could not offer such testimony, and it is, of course, very persuasive, and almost controlling, with respect to the matter of number, and casts more than the usual burden on the plaintiff to show the mistake. When, however, it transpires that they originally agreed by parol that the sheep were counted and delivered before the agreement was executed, we do not believe that its recital is of necessity absolutely controlling, and cannot be varied by proof.

During the progress of the trial the defendant offered some testimony regarding the management and control of the sheep after June 3, 1896, when they had been redelivered to him, and after Sibert had assigned and transferred all of his interests in the lease. The court not only excluded the testimony, but stated in the presence of the jury that it was a matter of no consequence what was done with the sheep after the 3d of June, 1896. The appellant insists that this was error. To the proposition we cannot assent. As we read the agreement, it was a transfer by Sibert of all his interests in the lease, and he thereafter had no interest in the herd, or in its management or control, and was entitled to no compensation regarding it, but was simply to receive 25 per cent.

of the value of the increase, 25 per cent. of the value of the wool of the aged part of the flock, and 50 per cent. of the wool of the lambs, subject to whatever deduction Lemmon was entitled because of the losses against which the lessees had contracted. It seems to us that by the terms of the assignment he transferred all his interests in the lease, and thereafter had no concern about it or in it. The remark of the court was entirely in harmony with our views of the proper construction of the agreement, and the appellant was not prejudiced thereby.

We see no force in the point urged by the appellant, that the court ought not to have sustained the objection to the testimony about an agreement with Madden by which the sheep were taken to Nebraska. The lease was terminated, and, whether the testimony was or was not admissible, it worked no harm to the appellant, because Sibert's rights were to be measured and determined by the conditions existing when the transfer was made and the lease abandoned.

Some argument is based on the contention that there was no legal contract which would bind Lemmon to pay Sibert, out of Madden's share or interest in the lease, the wages due him under the agreement between the lessees. The jury were instructed that, if they found that there was anything coming to Madden, Lemmon was bound to pay it, and could not refuse to pay because Madden, in some other and independent contract, owed him some money. This the appellant contends was error. The answer to the proposition is that the court instructed the jury on this hypothesis without objection. By his consent the issue was submitted to the jury, and, failing to object or to except to the instruction or to the testimony about it, he cannot be heard to complain. Aside from this consideration, there is another proposition springing from the pleading, wherein the defendant, by his answer, construed the contract according to the plaintiff's contention. It being a matter of debate what the proper construction of it was, it might well be said that, when the defendant tenders an issue on the subject,—alleges a construction in accordance with his view,—he cannot afterwards be heard to contend that there was no issue concerning it, and no evidence ought to have been introduced about it. The defendant denied that he unconditionally guaranteed the wages, but he averred that he agreed to pay them out of any amount coming to Madden from his interest in the lease on final settlement. He then alleged that there was nothing coming to Madden, and draws a legal conclusion that therefore he was under no legal liability. When he avers that this is the true construction of the agreement, we are quite inclined to accept his construction and his plea; and

when he permits evidence to be introduced, and the court to instruct the jury, concerning it, without objection, he cannot complain. This was the evident purpose and object of the assignment. The surrender of the lease by Sibert, and the abandonment of his rights to the herd, for Lemmon's benefit, seem to us to furnish a sufficient consideration for his agreement to pay, and he must respond, providing there is evidence to show that on settlement of the herd account there was anything coming to Madden, out of which Sibert's wages could be paid. This was submitted to the jury.

We discover no other assignment of error, or position taken in the argument, to which reference need be made, save the last, which is really the burden of the whole of them,—that the verdict is against the weight of the evidence. The appellant's counsel seeks to escape the force of the general rule, which gives the verdict of the jury obligatory force in this court, on the theory that it was the result of bias, mistake, or misapprehension. He proceeds to recite all the exceptions to the rule which in the various opinions of the two appellate courts have been stated. Giving to all of them due weight and due consideration, we are very frank to say that we are unable to see that this case is brought within any of these well-supported exceptions. Frankly, as we read the testimony we doubt whether we should have rendered the same verdict, providing it impressed us when delivered by the witnesses as it impresses us now when we read it in type. We are equally frank to say that it would be a matter of exceeding difficulty for us to spell out a verdict, and determine what damages Sibert has sustained, or the sum to which he is entitled, computed on the basis of the increase, and on his share of the wool clipped, after deducting from the total the loss for which he was bound. We must, however, insist that there is evidence in the record on which the jury had a right to conclude that he was entitled to recover the sum for which they rendered a verdict. The whole matter is hopelessly in conflict, it is uncertain, it is doubtful, but we see nothing to indicate that the verdict resulted from prejudice or bias; and, under these circumstances, we do not feel at liberty to set aside the judgment entered thereon.

We have undoubtedly gone further and said more than, perhaps, was our legal duty; but we have done it in deference to the earnestness and apparent honesty of counsel, and more to demonstrate the hypothesis on which we refuse to accept his conclusions, than to attempt to support the verdict by an argument on the testimony. Since we are wholly unable to discover a legal error which would permit us to reverse the judgment, we must affirm it. Affirmed.

(10 N.M. 151)

REYMOND v. NEWCOMB.

(Supreme Court of New Mexico. May 3, 1900.)

STATUTES—CONSTRUCTION—LIMITATIONS—ADMISSION OF DEBT.

1. The clause in section 2926, Comp. Laws 1897, reciting that one of the modes in which a cause of action shall be revived is "by an admission that the debt is unpaid," being identical with the provision in the Iowa statute, in construction thereof consideration will be given the fact that the statute was adopted from a sister state, together with the construction put upon it by the courts of that state at the time of its adoption. *Bullard v. Lopez*, 37 Pac. 1103, 7 N. M. 563, followed.

2. A person, having executed a chattel mortgage to secure a certain indebtedness, wrote to his debtor, the mortgagee, as follows: "I shall sell our cattle the first chance. I am tired of the business, and want to pay off that mortgage." Held sufficiently clear and unqualified to constitute an admission that the debt secured by the mortgage is unpaid, and to operate to remove the bar of the statute of limitations.

(Syllabus by the Court.)

Error to district court, Doña Ana county; before Justice Frank W. Parker.

Action by Numa Reymond against Simon Newcomb. Judgment for defendant, and plaintiff brings error. Reversed.

Wade & Llewellyn, for plaintiff in error. J. F. Bonham and A. B. Fall, for defendant in error.

CRUMPACKER, J. On the 12th of April, 1899, the plaintiff in error, Numa Reymond, filed his complaint against the defendant in error, Simon B. Newcomb, in the Third judicial district court for the county of Doña Ana. Afterwards an amended complaint was filed in the cause, and this was afterwards still further amended by the filing of a second amended complaint. To this second amended complaint the defendant filed a demurrer, which was sustained by the court, and, the plaintiff in error electing to stand upon his second amended complaint, the cause of action was thereupon, by the judgment of the court, dismissed. For a review of this ruling of the court below, the plaintiff in error has brought the cause into this court, assigning the following errors: "(1) The court erred in and by its judgment in holding the complaint insufficient and dismissing the action; (2) in determining that the several payments made by the defendant upon the note did not take the case out of the operation of the statute of limitations; (3) in determining that the writing set forth in the complaint was not a sufficient admission, coupled with the other allegations of the complaint, to revive the cause of action." The facts admitted by the demurrer are substantially as follows: That on December 5, 1890, defendant made and delivered to the plaintiff, in this territory, his promissory note in writing for the sum of \$6,624.03, which became due and payable one year after date; that at various times during the period of time intervening between

the maturity of the note and the filing of the complaint in the district court the defendant made various payments on the note to the plaintiff, which were duly credited thereon, the last of such payments being within six years prior to the bringing of the action, and the total payments amounting to \$1,956.72; that at the time of the execution of the note the defendant executed and delivered to the plaintiff his mortgage on certain property therein described, to secure the payment of the note; that afterwards, to wit, on February 1, 1897, the defendant delivered to the plaintiff a writing as follows: "Las Cruces, N. M., Feb. 1, 1897. Dear Reymond: I shall sell out cattle at the first chance. I am tired of the business, and want to pay off that mortgage. [Signed] Simon B. Newcomb;" and that the mortgage mentioned in said writing is the mortgage given by the defendant to secure the payment of the note sued upon in the complaint. The grounds of demurrer were that the note and original contract are barred by the statute of limitations; that the payments set up did not constitute such a new promise or admission of the indebtedness as would renew the contract; that the writing set up in the complaint did not constitute a new promise to pay the original debt; and that the petition stated no cause of action, etc.

The two questions presented and argued in the briefs are: First, is the writing set forth in the complaint a sufficient admission that the debt is unpaid, and to revive the cause of action founded upon the contract? and, second, does a part payment of principal or interest on a promissory note within the period of the statute of limitations toll the statute? A determination of the first question disposes of the case. Our statute (section 2926, Comp. Laws 1897) provides that "causes of action founded upon contract shall be revived by an admission that the debt is unpaid, as well as by a new promise to pay the same, but such admission or new promise must be in writing, signed by the party to be charged thereby." We find no case decided by the supreme court of this territory in which the statute has been construed with reference to what shall be deemed a sufficient admission that the debt is unpaid, but observe that in the case of *Bullard v. Lopez*, 7 N. M. 563, 37 Pac. 1103, where it was contended that it was apparent from the similarity of the language employed in the Iowa and our statute that we adopted the Iowa statute with the construction placed upon it up to the time of such adoption, this court held that some consideration in construction should be given to that fact when we incorporate into our law a statute of this kind from a sister state; and under the authority of *Armijo v. Armijo*, 4 N. M. (Gild.) 65, 13 Pac. 92, there recognized this principle by adopting the construction of the statute upon the question there in controversy placed upon it by the Iowa courts. The language used in the Iowa act and that

used in our act, as to one of the modes in which the cause of action may be revived, being "by an admission that the debt is unpaid," and identical, we shall, in recognizing the principle which controlled the court in *Bullard v. Lopez*, supra, view the alleged admission in this case, upon the question of its sufficiency to revive the cause of action, in the light of the Iowa decisions, and give consideration to the construction given similar admissions by that court. The Iowa supreme court has, under the statute of that state, held the following to be unqualified and sufficient admission of indebtedness, either in words or in legal effect: A statement in the mortgage that the premises thereby incumbered were "already subject to a mortgage" in the hands of persons named held a sufficient admission that the debt secured by a paramount mortgage is unpaid. *Palmer v. Butler*, 36 Iowa, 581. "How will it suit you to make three notes of the amount due you?" describing the proposed notes, was held a sufficient admission of the indebtedness to the amount of the notes specified to revive the debt. *Wise v. Adair*, 50 Iowa, 104. "I am sorry I cannot pay you now. I had expected to pay you this fall, but, owing to scarcity of money, I cannot. It is a long weary time I have been paying those debts, and am not through yet. I hope to live to pay you, and hope to do so next spring, but I have provided, in case I die before you are paid, my wife will pay you out of an insurance on my life." Held sufficient. *Bayliss v. Street*, 51 Iowa, 627, 2 N. W. 437. "On Saturday I paid S. S. Wilcox interest on \$9,000, which you have received probably by this time, part of which was not due. Mr. Wilcox figured the interest out that was not due, saying he did not know how you would like it. If that does not meet with your approval, we will fix it some other way. I had the money, and thought you could use it, and probably it would not make any difference, as I had to get exchange on New York, to get it all at one time. The small note I did not pay, as I shall be at considerable expense this summer on my last purchase of Deforest." *Miller v. Beardsley*, 81 Iowa, 721, 45 N. W. 756. It will be seen, therefore, that the rule laid down by the Iowa court prior and subsequent to our adoption of the statute is that it is not essential to a revival of a cause of action that the admission be couched in precise and direct terms, but it is sufficient if it show with reasonable certainty that the debt is unpaid. *Nelson v. Hanson* (Iowa) 60 N. W. 656; *Penley v. Waterhouse*, 3 Iowa, 441; *Palmer v. Butler*, supra; *Mahon v. Cooley*, 36 Iowa, 483; *Wise v. Adair*, supra. Does the writing relied upon in this case to remove the bar of the statute of limitation show with reasonable certainty that the debt is unpaid? "Dear Raymond: I shall sell out cattle the first chance. I am tired of the business, and want to pay off that mortgage." Counsel

for defendant in error contends that this statement is an admission that there was a mortgage, a hope expressed to pay it off, and to apply the proceeds derived from a sale of the cattle thereon; that it was not an admission of the debt as a personal obligation, and was not such an admission from which the law will imply a promise to pay,—relying upon the case of *Shepherd v. Thompson*, 122 U. S. 232, 7 Sup. Ct. 1229, 30 L. Ed. 1156, where the supreme court of the United States held that a mere acknowledgment of a debt is not sufficient, but that there must be a distinct and unequivocal acknowledgment of the debt as still subsisting as a personal obligation of the debtor. In that case, however, the supreme court of the United States was considering a statute in force in the District of Columbia, which is the statute of Maryland, and is quite different from the Iowa and New Mexico statutes, and the case is not in point here. As said in the case of *Mahon v. Cooley*, supra, the admission alone is sufficient. It is not regarded as a contract, but is simply a written declaration that the debt is unpaid. The case of *Palmer v. Butler*, supra, is exactly in point, the admission that the premises were already subject to a mortgage being held sufficient to remove the bar. The construction we place upon the writing is, in view of the facts confessed as true by the pleadings, that the mortgage therein referred to is the identical mortgage given as security for the indebtedness alleged to be due; and, thus identified, the expression of a desire "to pay off that mortgage" leaves but little room for further judicial construction. "That mortgage" was a conveyance of certain personal property to secure the debt of the mortgagor (defendant in error), which, being conditional at the time, would become absolute if at a fixed time the property was not redeemed. "To pay off that mortgage" it would be necessary to pay the debt which the mortgage secured; and the debt which it secured is, as we have seen, the debt in suit; and a desire to pay off a debt, if expressed in the formality required by the statute, is, in legal effect, an admission that the debt is unpaid. We find no reason to sustain the contention of counsel for defendant in error that the expression, "I shall sell out cattle first chance," as used in the writing, conveys the meaning that defendant in error wanted to pay off the mortgage only to the extent that the application of the proceeds derived from a sale of the cattle would admit, though the expression quoted would seem to warrant the inference that the proceeds of such sale would be applied to the payment of the indebtedness. Admissions couched in less precise and direct terms than the one here in controversy have been held sufficient under the much less explicit statutes of various states. *Railroad Co. v. Prosser* (Cal.) 55 Pac. 145; *Manchester v. Braender* (N. Y.) 14 N. E. 405. We conclude

that the admission that the debt is unpaid, relied upon in this case, is unconditional, unlimited, and reasonably certain, and is, therefore, sufficient, and operated to revive the cause of action founded upon the contract set out in the complaint. The judgment of the court below in sustaining the demurrer and dismissing the complaint was, for the reasons stated, erroneous, and is reversed, and the cause should be remanded, with directions to the court below to reinstate the cause, and to proceed in conformity with law.

MILLS, C. J., and McFIE, J., concur.

(10 N.M. 43)

GARCIA, Auditor, v. TERRITORY ex rel. BURSUM.

(Supreme Court of New Mexico. May 2, 1900.)

FISCAL YEAR—MANDAMUS—TRANSPORTING CONVICTS.

1. As relating to territorial finances, December, 1897, and January and February, 1898, fell within the forty-eighth fiscal year.

2. The territorial auditor is not compellable, by mandamus, to draw his warrant for services incurred in transporting convicts to the territorial penitentiary, and rendered during the forty-eighth fiscal year, by the sheriff of Socorro county, against the particular fund appropriated for like services during the forty-ninth fiscal year.

(Syllabus by the Court.)

Error to district court, Socorro county; before Justice Charles A. Leland.

Application by the territory, on the relation of H. O. Bursum, for a writ of mandamus against Marcelino Garcia, territorial auditor. Judgment for plaintiff, and defendant brings error. Reversed.

E. L. Bartlett, for plaintiff in error. Silas Alexander and H. M. Dougherty, for defendant in error.

CRUMPACKER, J. By mandamus it was sought in this proceeding to compel the territorial auditor to draw his warrant in favor of relator, H. O. Bursum, for the sum of \$1,330, against the appropriation of the forty-ninth fiscal year for transportation of convicts. The relator in his petition alleged that as the duly-qualified and acting sheriff of Socorro county, N. M., he performed the service, as required by law, of transporting convicts from the county of Socorro to the territorial penitentiary; that on the 7th day of March, 1898, for such service he presented to the auditor his account; that the said auditor allowed thereon said sum on said date, the said date being alleged to be within and during the forty-ninth fiscal year. Relator further alleged that the auditor had funds in hand out of which said account was payable; that it was the duty of the auditor to issue his warrant for said sum in favor of relator out of appropriation for the forty-ninth fiscal year; that, after request and demand, said auditor neglected, refus-

ed, and still does neglect and refuse, to draw said warrant, etc. Wherefore he prayed the issuance of the writ of mandamus, etc. For answer to the alternative writ, the respondent admitted that said relator was, during the forty-eighth fiscal year, entitled to receive from the territory, out of the fund for the transportation of convicts, the sum of \$1,330, for transporting convicts to the territorial penitentiary during the months of December, 1897, and January and February, 1898, had there been any money in said fund, appropriated for the forty-eighth fiscal year, with which to pay the same at the time of presentation of the account, but showed that at such a time a deficiency already existed in said fund. Wherefore respondent denied that under the law it was his duty to draw his warrant for said sum, in relator's favor, out of the appropriation for the forty-ninth fiscal year, for the reason that all of said services were rendered by relator during the forty-eighth fiscal year, which, it was alleged, closed on the 6th day of March, 1898. The sworn answer of respondent contains, also, a statement of the accounts filed against, and payments made out of, the transportation of convicts fund for the forty-eighth fiscal year, and an exhibit of relator's account, which are in accordance with the substance of respondent's answer. The cause was heard on the alternative writ and answer, and the writ was ordered to be made peremptory, which peremptory writ commanded the auditor to draw his warrant in favor of the relator, H. O. Bursum, for said sum, on the territorial treasurer, out of the appropriation for the forty-ninth fiscal year for the transportation of convicts, to which writ the respondent made return that in compliance therewith he had so drawn the warrant, but protested that the same was drawn solely upon the order of court, and not voluntarily. Respondent sued out from the supreme court a writ of error, and this cause is before us for review upon the record alone.

It being conceded that the services upon which the claim of relator is based were rendered by him during the forty-eighth fiscal year, that the money in the fund so appropriated for said year was exhausted, and that the claims filed against said fund exceed the appropriation for said year at the time of the presenting of relator's account, the only question to be decided is whether or not the territorial auditor could lawfully draw his warrant in relator's favor, in payment of said account, against the specific appropriation for services of a similar character for the forty-ninth fiscal year. For many years in this territory, section 2597, Comp. Laws 1897, has been a general limitation upon the authority of the auditor, under which he may audit only such accounts as have been expressly allowed by acts passed by the legislative assembly; and by section

2508 thereof he was required to report claims not so allowed to the next legislative assembly, for its action thereon. By section 4015 of said laws (Laws 1889, p. 81) the legislative assembly of the territory established fiscal years, beginning on the first Monday of March of each year, and by the same act provided certain particular funds of the territory, out of which, only, should claims against the territory be paid, and also provided in said act (section 2604, Comp. Laws 1897) that the auditor shall in no case draw any warrant upon any fund for a greater sum than that of the money subject to draft in that fund, less the amount of any outstanding and unrepresented warrants against that fund, and attached severe penalties for any violation of the provisions of the act. By section 2610, Comp. Laws 1897 (Laws 1891, p. 232), it was provided that "if the auditor of the territory shall draw any warrant on the treasurer of the territory, when there is no money in the treasury in the particular fund for which the warrant is drawn, he shall be liable to a fine of not less than one thousand dollars, and imprisonment for not less than one year, and shall be summarily removed from office by the governor." By section 4177, Comp. Laws 1897 (Laws 1897, p. 154), the territorial assembly made the specific appropriation for the forty-eighth fiscal year for "transportation of convicts to the penitentiary and executing death warrants, of five thousand dollars"; and by section 4178 thereof (Laws 1897, p. 157) a like appropriation was made for the forty-ninth fiscal year. Whether or not the relator's account might not have been paid, under the provisions of section 4180, Comp. Laws 1897, out of any surplus remaining in any fund, except the interest fund, of the appropriations for the forty-eighth fiscal year, is a question not raised in this case. From the mere recital of the above statutes, it is plain, beyond argument, under the facts in this case, that the months of December, 1897, and January and February, 1898, covering the period during which the services for which the charge is made against the territory were rendered by the relator, in their relation to territorial finances, fell within the forty-eighth fiscal year, and that it was therefore not the duty of the territorial auditor to draw his warrant in payment of relator's account against the fund appropriated for the forty-ninth fiscal year; the territorial assembly having limited the authority of the auditor to audit, and having expressly prohibited him from auditing, on the pain of severe penalties, any accounts against said fund so appropriated for the forty-ninth fiscal year, except such accounts for transportation of convicts to the penitentiary and executing death warrants as are rendered for services performed for said fiscal year. We believe it to be true that the legislative assembly has always promptly made provision for the

payment of all deficiencies, as reported to it by the auditor, in fees and salaries of officers, and that it was the duty of the relator to abide such action by that body upon this account. The court below erred in granting the writ of mandamus, and the judgment of the court below is reversed, and the cause remanded, with direction to the district court to dismiss relator's petition.

MILLS, C. J., and PARKER and McFIE, JJ., concur.

(10 N.M. 269)

TERRITORY v. MCGINNIS.

(Supreme Court of New Mexico. May 3, 1900.)

JURY—SELECTION OF TALESMEN—REPEAL OF STATUTE — MURDER — INDICTMENT — EVIDENCE — INSTRUCTIONS — ARREST WITHOUT WARRANT.

1. Section 9, c. 66, Laws 1899, prescribes the manner in which talesmen shall be selected, and repeals section 941 of the Compiled Laws of 1897.

2. One who upon the evidence is found to be guilty of murder, as a principal in the second degree, may be convicted under an indictment charging him as principal.

3. An indictment sufficiently charging murder in the first degree will support a conviction of murder in the second degree.

4. Where there is a question whether an act was done by any person, any fact which supplies a motive for such an act is deemed to be relevant, and this is true although it may tend to show the accused guilty of another offense than the one charged.

5. Where, upon a trial for murder, it appeared that the defendant, when the crime was committed, was in company with other persons, and the evidence left in doubt whether the fatal shot was fired by the defendant or by any one of his companions, the testimony for the prosecution tending to prove, however, that the defendant participated with his companions in the resistance of arrest which resulted in the homicide; and where there was evidence tending to prove that the defendant and the other persons had, prior to the time of the homicide, acted in concert as conspirators in the commission of a felonious assault upon, and robbery of, a railroad train, and had thereafter been for several days associated in a common endeavor to escape apprehension by flight,—*held*, that instructions by the court to the effect that if the jury believed the defendant to be a party to a conspiracy or common design to make violent opposition to arrest, and that in the carrying out of such conspiracy or common design the homicide in question was perpetrated by one of his co-conspirators, they might then hold the defendant guilty, as if he himself had fired the fatal shot, and that, if the jury believed the evidence as to the train robbery, they were to consider it as a fact tending to show that a felony had been committed, and that there was probable cause to believe that the defendant had taken part in such felony, and as evidence tending to show the motives of the different parties at the time of the crime was committed, were proper and unobjectionable.

6. An instruction that an "assault upon a railroad train (that is, what is known as 'holding up' such train)" is a felony, under the laws of the territory, *held*, under the circumstances of this case, to be correct and unobjectionable.

7. The arrest of a felon may be justified, by any person, without warrant, if a felony has in fact been committed, and an instruction lay-

ing down a contrary rule of law was properly refused.

8. One who is about to arrest a felon need give only such notice of his intention as could be expected, under all the circumstances of the case, of one governed by reason, good faith, and honest purpose. The question whether this rule of conduct was observed in any particular instance is a mixed question of law and fact, to be determined ultimately by the jury, under proper instructions from the court.

9. One who is a party to a criminal conspiracy, the direct result of which is a murder perpetrated by one of his co-conspirators, and who is actually present, assisting to the extent of his ability in the accomplishment of a common design, is himself guilty of murder, as principal, in the second degree; the extent and effectiveness of the assistance rendered by him being immaterial.

10. An instruction defining murder in the second degree, though omitting therefrom any reference to the element of malice, is not erroneous, where the court in its charge had theretofore specifically instructed the jury that all murder was the unlawful killing of a human being, with malice aforethought, either express or implied.

11. Remarks by the court to the jury that, if they should not find a verdict by 8 o'clock in the morning of the next day (Sunday), they would have to remain in their jury room until Monday morning (the court expecting to be absent from 8 o'clock Sunday morning until Monday morning), were not a coercion of the jury or prejudicial to the defendant, in view of the state of the testimony, and the length of the time the jury deliberated in this case.

(Syllabus by the Court.)

Appeal from district court, Colfax county; before Chief Justice William J. Mills.

William H. McGinnis was convicted of murder in the second degree, and appeals. Affirmed.

Edwin B. Franks and Andrieus A. Jones, for appellant. Edward L. Bartlett, Sol. Gen., for the Territory.

CRUMPACKER, J. On September 19, 1899, in the district court of the Fourth judicial district of the territory of New Mexico, within and for the county of Colfax, the defendant, William H. McGinnis, was indicted for the murder of one Edward Farr. On September 21, 1899, the defendant was arraigned, and pleaded not guilty. The defendant filed a motion for a continuance, which was overruled. On October 2, 1899, the cause came on for trial, and on October 7th the jury returned a verdict of murder in the second degree against the defendant. He was sentenced to the penitentiary for life. Thereafter the defendant filed a motion in arrest of judgment and a motion for a new trial, which were overruled. Judgment was entered against defendant, whereupon he took an appeal to this court. The record discloses the following important facts in the case: That on July 16, 1899, a posse of seven members, organized by the United States marshal for the district of New Mexico under telegraphic direction from the attorney general of the United States, while in pursuit and upon the trail of a band of felons, known to be three or more in num-

ber, who on the night of the 11th of July, 1899, held up and robbed of expressage a passenger train carrying the United States mail on the Colorado Southern System of Railway in New Mexico, suddenly, in a secluded and rugged place in the mountains of Colfax county, N. M., came upon the objects of their search. That one of the felons was believed to be a notorious desperado, named Sam Ketcham, for whom the United States marshal held a warrant charging him with a violation of the postal laws theretofore committed. The testimony of the witnesses for the prosecution tended to prove that the designated leader of the posse, Wilson Elliott, being the first to see the defendant McGinnis, called upon him, in a tone of voice which he believed loud enough to be heard by defendant from a distance of about 50 yards, to surrender; that thereupon the defendant, who was in motion, instantly stopped and raised to his shoulder what Elliott believed to be a gun; and that instantly thereupon shots were exchanged simultaneously between other members of the posse and the defendant and those with him. This the defendant denied, testifying that he was at the time on his way from the camp to a spring of water a few yards distant, for a pail of water, and unarmed. The evidence is conflicting upon the question from which side the report of the first shot came, but it is clear from the testimony of all the witnesses for the prosecution that the first report of the rifles from the opposing parties came so close together as to be almost indistinguishable. At the first firing the defendant fell wounded. Shots continued to be rapidly exchanged between the posse and the defendant's associates for about 10 minutes. The effect of the shots from the felons was the shooting of Edward Farr through the heart, causing his instant death, and the wounding of two other members of the posse; and the effect of the shots from the posse was the mortal wounding of Sam Ketcham and the wounding of defendant. The shooting having ceased, both parties retired,—the posse to care for their wounded; and the defendant, with his confederates, to make good their escape. The continued vigilance of the authorities, however, resulted in the apprehension of the defendant on the 16th of August, 1899, by the sheriff of Eddy county, N. M., who, with his posse, came upon the defendant at a point in Southeastern New Mexico some 300 miles from the place where Farr was killed. The defendant then again offered most strenuous resistance to arrest by the officers; wounding, by shooting, one of that posse, and also an old man whom he suspected of having betrayed his whereabouts to the authorities. The prosecution in the course of the trial also proved, besides other material facts, the whereabouts of the defendant and his confederates a few days prior to the assault upon the train, their sudden disappearance, and

their presence next near the scene of the assault and robbery early on the night of the hold-up; identified the defendant and his dead confederate, Sam Ketcham, as two of the men engaged in that assault; established the flight of the defendant and his confederate from the scene of the assault, and the fact that within a few hours thereafter the authorities were in pursuit and upon their trail, which pursuit, with some interruptions and delays, caused by the weather and formally organizing the marshal's posse, was continued down to the time of the fatal encounter in the mountains. The first incriminating evidence found was the torn letter addressed to Franks, one of the bandits, discovered early on the day following the assault by Sheriff Tiltworth at the place where the defendant and his confederates had been observed camped the day of the hold-up, in the vicinity of the scene of the assault; and at the mountain camp of the defendant and his confederates property was discovered which was identified as having been stolen from the car of the train which had been assaulted. The testimony as to what took place at the time of the assault upon the train goes to prove that the defendant himself assaulted the fireman and the express messenger with deadly weapons; that he and his confederates fired many shots into both sides of the train; that they entered the combination baggage and express car, and dynamited the safes therein, thereby wrecking the safes and partly demolishing the car; and that they secured and carried away certain express matter therefrom.

The first error alleged is as to the manner in which the jury that tried defendant was selected. In the selection of a jury to try the defendant, the regular panel being exhausted, two special venues were drawn by two commissioners acting for that purpose, with the judge of the court, for qualified persons to fill the petit-jury panel, and the jury which tried the defendant was in part constituted of persons so selected. It is contended by counsel for appellant that a jury thus selected is not legally selected, and that talesmen should have, properly, been drawn, by virtue of section 941 of the Compiled Laws of 1897. However, section 9, c. 66, of the Session Laws of 1899 governs such procedure, and from the record it is plainly to be seen that the court followed the procedure there prescribed. The act embracing said section 9, in relation to the selection of jurors, was intended to be, and is, a complete, new system; and section 941 of the Compiled Laws of 1897 was thereby repealed, section 9, above referred to, taking its place.

It is further contended by counsel for defendant that under the indictment in this case the defendant could not be convicted on the theory that he was present, aiding and abetting. They argue that there is evidence in the case tending to show that the defend-

ant did not fire a single shot, and took no part in the actual shooting between the alleged train robbers and the posse, and that the defendant, if guilty of any crime, was guilty as principal in the second degree, because of his being present, aiding and abetting the person or persons who committed the homicide. The question for determination here, then, is not what the evidence in the case is, but whether the indictment would authorize a conviction on the theory that the defendant was an accessory at the fact. The law is well settled that an accessory at the fact is deemed equally guilty with the principal, and is designated as principal in the second degree. To constitute this form of connection with the offense, the accused must have been present when the offense was committed, although his presence might be constructive. Those who, being present, aid and abet, or are present for that purpose, although they do no overt wrongful act whatever, are principals in the second degree. *McClain, Cr. Law, § 205*, and cases cited; *Whart. Cr. Law, § 116*. There is no distinction whatever, either in the guilt or in the method of procedure, between the two. *State v. Davis, 20 Mo. 391*; *Whart. Cr. Law, § 129*. The court therefore rightly refused defendant's instruction No. 15, laying down the proposition that under the indictment in the case the defendant could not be convicted as an aider and abettor. The indictment in this case, sufficiently charging murder in the first degree, is therefore sufficient to support a conviction of an accessory at the fact for murder, in whatever degree the jury should find by their verdict. *McClain, Cr. Law, § 389*, and cases there cited; *Tenorio v. Territory, 1 N. M. 280*. We are aware that in the case of *Borrego v. Territory, 8 N. M. 474, 46 Pac. 349*, views were expressed by this court to the effect that such an indictment charges murder in the first degree exclusively, and will not sustain a conviction of murder in any of the lower degrees. We regret to say that with those views we are constrained to differ, and that we cannot follow them, as correctly and authoritatively stating the law.

Defendant also complains of the action of the trial court in overruling his objections to the introduction of any evidence which might in any way tend to prove that the defendant on the 11th day of July, 1899, had participated in an assault upon a railway train, upon the ground that such evidence was irrelevant and prejudicial to defendant. The theory upon which the court permitted this evidence to be given to the jury was that it tended to show a motive for the homicide. Where there is a question whether an act was done by any person, any fact which supplies a motive for such an act is deemed to be relevant; and this is true although it may tend to show the accused guilty of another offense than the one charged. *People v. Wilson, 117 Cal. 688, 49 Pac. 1054*; *State*

v. Lowe, 6 Kan. App. 110, 50 Pac. 912; People v. Craig, 111 Cal. 460, 44 Pac. 186; People v. Lane (Cal.) 38 Pac. 16; Chase, Steph. Dig. Ev. art. 7, pp. 19, 21, 35, and cases cited. Any facts tending to prove that the defendant had, with others, conspired to commit a felony; that in pursuance of such unlawful conspiracy a felony had in fact been committed; that the felony was of such a character that the law might, upon conviction of the felons, exact as the penalty the forfeit of their lives; and that the felons were fleeing from justice on account thereof,—may very readily evince a cogent motive to have existed in the minds of the defendant and those associated with him for the commission of the homicide, and are therefore relevant to the issues in this case.

A further objection of counsel for appellant is based upon the giving of instruction No. 8, which lays down, as applicable to the evidence in the case, the law defining the responsibility of one, who is a party to a conspiracy to do a criminal act, for a crime committed by his co-conspirators in the accomplishment of the common design; of instruction No. 14, which instructed the jury that the hold-up of a railroad train is a felony, under the laws of the territory, and that one who has committed such a felony is liable to arrest without warrant by any person or persons, whether sworn officers or not; and of instruction No. 15, which directed the jury that, if they believed that the train robbery had been committed as testified to, they might consider it as a fact "to be considered * * * in showing that a felony had been committed, * * * and there was probable cause to believe that defendant had taken a part in such felony, * * * and as evidence to be considered * * * in ascertaining the motives of the different parties engaged in the fight near Cimarron." We cannot follow counsel in their intimation that these instructions permitted the jury to convict the defendant if they believed him to be an accessory before the fact. Neither can we assent to their proposition that the court erred in presenting to the jury the principle of law governing conspirators and principals in the second degree. It is urged upon us that the only conspiracies or common designs in which the accused could, in any view of the evidence, be held to have been a participant, are a conspiracy to commit the train robbery, and a plan to escape arrest after the robbery was committed; and it is argued that, inasmuch as the robbery took place five days before the commission of the crime alleged in the indictment, and at a place 70 miles away, the crime last mentioned could in no way be regarded as a result traceable directly to the conspiracy to rob the train, and that therefore the existence of such a conspiracy was a fact irrelevant to the question of the guilt or innocence of the accused. As to the common plan to escape, it is

argued that, as mere flight is no crime in itself, such a plan is not a criminal conspiracy at all. These arguments we are constrained to regard as more ingenious than helpful in the case at bar. It is plain that the learned judge, when he delivered the eighth instruction, had reference neither to the robbery, nor to the flight that followed it, but to a common plan of the defendant and those with him to make violent resistance to arrest. This is so manifest in the words of the instruction itself that no argument could make it plainer. The testimony as to what took place immediately before the shooting is conflicting, and it was for the jury to pass upon the credibility of the witnesses, and to decide whether the defendant aided or endeavored to aid his companions in their resistance, or whether he remained passive. The testimony for the prosecution tended strongly to prove that the defendant, when called upon to surrender, was armed, and endeavored to discharge his weapon (if he did not in fact do so) before any shots were fired; and it also tended strongly to show that he was within sight of, and in proximity to, his companions before and after the firing began. The facts that he had been associated with Franks and Ketcham in the making and consummation of the plan to rob the train, and in the long flight that followed, were clearly admissible as tending to show both that there existed in his own mind a strong motive to make violent resistance of arrest, and that the same motive existed in the minds of those with whom he was associated when the particular crime under examination was perpetrated. The question whether the defendant himself did or did not commit the crime for which he was under indictment being in issue, the fact of the existence or non-existence of the motive for such an act was a relevant and very important inquiry. And there being before the court the further question whether, supposing the shooting to have been done, not by the defendant, but by his companions, there existed such a common design and purpose between him and them as would, in law, render him liable for their criminal acts done in its prosecution, the existence in the minds of all of the same motive to commit an act, the direct result of which was the homicide in question, was an equally relevant and no less important inquiry. We are also of the opinion that proof of the relations of the defendant with Franks and Ketcham was admissible because of its tendency to show, when considered with the other facts in evidence, a deliberate agreement among them to oppose force to any attempt to apprehend them; but it was not requisite, in our view of the case, that the jury should be convinced of a preconceived plan of forcible opposition prior to the time when the felons were discovered in their camp. The common design might well have been suggested and assented to after the ar-

rival of the posse at the scene of the homicide. Nor was verbal communication necessary. Acts are often more eloquent than words. Especially is this true where the minds of the parties have been prepared by a common experience resulting in an identity of interest or motive. Under such circumstances, a single gesture or other act, as the raising of a gun, might be sufficient to conclude a perfect understanding instantly.

Further objection is made to instruction No. 14, because the court instructed the jury that, under the laws of this territory, assault on a railroad train (that is, what is known as "holding up" such train) is made a felony; counsel for appellant contending that a mere assault upon a railroad train, without intention to commit murder, robbery, or any other felony upon the person of some one connected with said train, is not a felony. Section 1151 of the Compiled Laws of 1897 is as follows: "If any person or persons shall willfully and maliciously make an assault upon any railroad train, railroad cars or railroad locomotive within this territory for the purpose and with the intent to commit murder, robbery or any other felony, upon or against any passenger on said train or cars, or upon or against any engineer, conductor or fireman, brakeman or any officer or employee connected with said locomotive, train or cars, or upon or against any express messenger, or mail agent on said train, or in any of the cars thereof, on conviction thereof, shall be deemed guilty of a felony, and shall suffer the punishment of death." We think that the language of the court stated the law correctly, in terms readily comprehensible to the jury. There is no ambiguity about the phrase "holding up," when used in relation to an attack upon a train. On the contrary, those words are distinctly and universally understood to mean the forcible detention of a train, with intent to commit a robbery or some other felony; and, under the circumstances of this case, we think the jury could not possibly have misunderstood the sense in which the court employed them.

Objection is also made by counsel for appellant to instructions Nos. 18 and 20, asked for by the territory and given by the court, on the ground that the court thereby left it to the jury to decide what notice should have been given by the posse under the circumstances, or whether any notice should have been given. In substance, the court thereby told the jury that, where a posse was in pursuit of a felon, the members of the posse had the right to be governed by the actual surroundings, and are required to give no greater warning than good faith and honest purpose require under the circumstances then existing, and that whether the posse did all the acts which could reasonably be expected from them before they began firing was a matter for the determination of the jury

under all the evidence in the case. No definite and fixed rule of law can be laid down, as governing the conduct of one who is about to arrest a felon. While it is true that, as a general rule, it is incumbent upon the person arresting to give to the person sought to be arrested some notice of his intention, the action of the party sought to be arrested may be such as in law to dispense altogether with such requirement. The conduct of the person arresting must be determined by the circumstances of each particular case. Much depends upon the known or suspected character of the accused, and upon his action prior to the time when the arrest is attempted. What does the law exact of a person who, while rightfully in pursuit of one known or reasonably believed to be a desperate criminal, is confronted by the object of his pursuit, with a deadly weapon in his hands, and apparently in the act of employing it against his pursuer? It cannot be seriously contended that in such an event the pursuit must be abandoned, and the felon be permitted to escape. What then? Does the law require of the pursuer that he stand inert, while in imminent peril of his life, taking no measures to save himself, until he shall have announced his purpose in deliberate words? Clearly not. That would be sheer folly, and the law exacts folly of no man. One so situated might be justified in taking life, for the double purpose of protecting himself and of preventing the escape of the felon. No more definite rule can be laid down than that the arresting person should give notice of his character and purpose, if the giving of such notice be consonant with the obvious dictates of prudence; due regard being had for the situation in which he finds himself. The court properly instructed the jury that the members of the posse were required to give no greater warning than good faith and honest purpose required under the circumstances existing at the time. It was for the jury to decide what those circumstances were, and whether the posse acted as reasonable men would have acted in like situation. The question was one of mixed law and fact. *State v. Gay* (Mont.) 44 Pac. 411; *People v. Coughlin* (Utah) 44 Pac. 94; *Starr v. U. S.*, 164 U. S. 627, 17 Sup. Ct. 223, 41 L. Ed. 577; *McClain, Cr. Law*, § 328.

Objection is also made to instructions Nos. 24 and 25 asked by the territory and given by the court, whereby the jury were instructed, in effect, that if an agreement had been made to resist arrest by the defendant and his alleged associates, and they were each doing what he could with a common design and intent to resist their arrest, and to kill any or all of the posse so seeking to effect their arrest, and, while they were so acting, the deceased was killed by either of the defendant's associates, their act would be as much the act, in law, of the defend-

ant, as if he himself fired the gun which gave the fatal shot. The objection to these instructions is based upon the view of the evidence, as taken by the defendant, that at the time of the perpetration of the homicide he had been wounded, and was not able to do anything. But the question is whether the instruction states the law as applied to any view of the evidence. If the jury believe that the defendant was a party to a conspiracy to resist arrest, and that he was actually present when the arrest was resisted in fact by his co-conspirators, and that he actually assisted them in their unlawful purpose, then they were entitled to convict him as a principal. The extent and effectiveness of the assistance rendered by him is quite immaterial. These instructions stated the law, and defendant's proposed instructions numbered 6 and 8, asking the court to instruct the jury to the contrary thereto, were properly refused by the court.

Further objection is made by counsel for defendant, based upon instruction No. 9, whereby the jury were instructed in part as to what constituted murder in the second degree, because the court omitted therefrom direct reference to the element of malice. However, this objection is without merit, because by instruction No. 4 the court gave to the jury the definition of murder in all the degrees, as defined by our statutes (sections 1000-1065, Comp. Laws 1897), and specifically instructed the jury that all murder was the unlawful killing of a human being with malice aforethought, either express or implied, and defined both express and implied malice. The court very carefully connected this instruction No. 9 with the instruction already given to the jury, and it was not necessary for the court to rehearse the law concerning the element of malice, after it had been so fully discussed in the fourth instruction.

That the arrest of a felon may be justified by any person, without warrant, if a felony has in fact been committed, has been so often and so unanimously laid down by all the authorities as the law, as to call for nothing more than its reiteration here, to support the action of the court below in refusing defendant's proposed instruction No. 5. 1 Am. & Eng. Enc. Law (1st Ed.) p. 741, and cases cited; Whart. Cr. Law (8th Ed.) §§ 433, 434.

And, lastly, counsel for appellant contends that this case should be reversed on the ground that the remarks of the court to the jury at the close of its charge on October 7, 1899, were a coercion of the jury, and prejudicial to the defendant. The court told the jury that, if they agreed upon a verdict at any time before 8 o'clock the next (Sunday) morning, the court would be there to receive it, and that, if the jury should not arrive at a verdict by that time, it would be necessary for them to remain together, from 8 o'clock Sunday morning until the next Monday morning, as the court would be absent in Las

Vegas on Sunday. From the record, it appears that the jury had heard all of the evidence in the case on the 6th, and the arguments of counsel and the charge of the court on the 7th (Saturday), and that "after due deliberation the jury returned into court their verdict" on the night of the 7th. There is nothing whatever to show that the jury were influenced in their conclusion by the remarks of the court, nor do we think that the defendant was prejudiced thereby. In view of the state of the testimony, and the length of time the jury deliberated, we think it clear that their conclusion was not influenced by any other consideration than the evidence, arguments, and the instructions. State v. Smith, 99 Iowa, 26, 68 N. W. 428, 61 Am. St. Rep. 225.

We think, from the record before us, that the appellant had a full and fair trial, and that there was no prejudicial error in any of the rulings of the court complained of in the motion for a new trial or in appellant's brief. The verdict being fully sustained by the evidence, the judgment of the district court is affirmed.

McFIE and PARKER, JJ., concur.

(22 Utah 43)

PETERSON v. BEAN.

(Supreme Court of Utah. May 4, 1900.)

INJUNCTION—RESTRAINING TRESPASS—PLEADING—ANSWER—COUNTERCLAIM—JUSTIFICATION—CONDEMNATION FOR PUBLIC USE—RIGHT OF ENTRY—DENIAL WITH EXCEPTION—HOW FAR AN ADMISSION.

1. In a proceeding for an injunction to restrain a trespass, it was alleged in the complaint that plaintiff was the owner and in the possession of certain premises; that defendant had wrongfully and forcibly entered and committed a trespass thereon, and, unless restrained by the order of the court, would continue to trespass upon said premises to the damage of plaintiff. The answer did not deny ownership and possession in the plaintiff, but did deny trespass, except as in the counterclaim set forth. The counterclaim alleged a trespass for a certain purpose, alleged to be public in its nature, and claimed a right of eminent domain. *Held*, that upon the pleadings plaintiff was entitled to recover damages unless the facts set up in the counterclaim justified the trespass. *Held*, further, that the facts alleged do not constitute a counterclaim or defense to plaintiff's action.

2. The mere fact that a person contemplates having certain land condemned for a public use, or that such land is necessary for such use, gives him no right of entry prior to condemnation, and condemnation cannot be had by way of counterclaim in an action brought to restrain a trespass and for damages.

3. A denial in an answer that the defendant wrongfully or forcibly committed the acts of trespass alleged in the complaint, except as thereafter stated, is an admission of the facts so alleged.

(Syllabus by the Court.)

Appeal from district court, Sixth district; W. M. McCarty, Judge.

Bill by P. C. Peterson against George T. Bean. Judgment for plaintiff, and defendant appeals. Affirmed.

The complaint is as follows: "That on the 27th day of March, 1899, he [plaintiff] was the owner and in the possession of the S. E. $\frac{1}{4}$ of Sec. 35, T. 23 S., R. 2 W., Salt Lake meridian; that on said day defendant unlawfully and forcibly entered upon said land, and made large cuts thereon, for the purpose of constructing a ditch over the same, to the injury of plaintiff in the sum of \$100. (2) That defendant will continue the construction of said ditch unless restrained by an order of this court. Plaintiff prays judgment for \$100 damages, and that defendant be perpetually enjoined from entering upon said land and constructing a ditch thereon." The answer denies "that on the 27th of March, or at any other time, he unlawfully or forcibly took down plaintiff's fence, or any part thereof, inclosing his land, or that he unlawfully or forcibly caused to be made large or any cuts over or through his land, for the purpose of constructing a ditch thereon, except as hereinafter stated, and denies that plaintiff's land or premises were injured in the sum of \$100, or any other amount whatsoever." The defendant also sets up an alleged counterclaim based upon allegations which are, in substance, as follows: That the defendant, in pursuance of the statutes of Utah, duly and regularly appropriated a large quantity of unappropriated water, and duly filed in the office of the county recorder of Sevier county the required notice of said appropriation, and then and there posted the required notices of his intention to divert and appropriate said water, and within the time specified by law began the prosecution of the work of constructing the necessary canals, ditches, and flumes for the purpose of conducting said water to the point at which it was intended to be used in generating electricity to be conveyed to the towns of Glenwood, Richfield, Elsinore, and Monroe, for the purpose of furnishing said towns and various manufacturing establishments situated therein, and the residents thereof, with electrical power, heat, and light; that the uses and purposes for which defendant seeks to utilize the water so appropriated, and the electrical power to be generated therefrom, are public in their nature, and, in order for the defendant to derive the benefit therefrom, it becomes necessary for him to construct dams, ditches, flumes, and canals for the purpose of conveying the water to the point at which defendant proposes to build and construct his electric plant; that the line of survey for the construction of said canal, ditches, and flumes lies across the plaintiff's lands as described in his complaint, and comprises an area of .357 of an acre; that the proposed canal, ditch, and flume across plaintiff's

land leads to, and communicates with and joins, a certain piece or parcel of land containing in all an area of about one acre, which said land forms a part of the land of plaintiff as set forth in his complaint; that said one acre of land is necessary, and defendant requires the same, for a mill site, or site for his electric plant, to be occupied in the generation of electrical power to be used for the purposes hereinbefore stated; that for the purpose of surveying said proposed canal, and locating said mill site or site for said power plant as hereinbefore mentioned, and for the purpose of constructing said canals, ditches, and flumes connected therewith, this defendant entered upon said premises, and for no other purposes whatever; that the defendant has offered to pay said plaintiff for said land, but has been unable to make arrangements therefor, and defendant alleges that he is ready and willing to pay any reasonable sum of money for said right of way over and through said premises; that the acts herein set forth, and none other, constitute the alleged wrongs and injuries complained of by plaintiff. Defendant prays judgment—First, that the plaintiff take nothing by his action; second, that the premises particularly described in his answer may be appraised in pursuance of the statutes of this state, and, upon filing of a sufficient bond or sum of money with this court, the defendant may be permitted to proceed with the construction work of said canal, ditch, and flume, and with the erection of said machinery and power house, and that when the amount of damage, if damage there be, shall have been ascertained, and payment therefor has been made by defendant, he may be directed to have eminent domain of said lands, and take possession thereof, for the purposes set forth in his answer, and for such other and further relief as may be proper and just. Defendant demands his costs. The plaintiff's answer to the cross complaint denied each and every allegation therein contained. The trial court adjudged and decreed that the plaintiff recover from defendant one dollar and his costs, and enjoined the defendant from taking down plaintiff's fence, and from continuing the construction of a canal or ditch upon plaintiff's land, and that the counterclaim be dismissed.

King, Burton & King and Grant C. Bagley, for appellant. J. B. Jennings, for respondent.

BASKIN, J. (after stating the facts). The answer does not deny that the plaintiff was the owner and in possession of the premises described in the complaint, and, not having done so, plaintiff's ownership and possession of said premises are admitted by the defendant. The denial in the answer that the defendant wrongfully or forcibly committed

the acts of trespass alleged in the complaint; except as thereafter stated, is an admission of the facts so alleged. *Podlech v. Phelan*, 13 Utah, 333, 44 Pac. 888; *Long v. Neville*, 36 Cal. 455; *Levinson v. Schwartz*, 22 Cal. 230; *Larney v. Mooney*, 50 Cal. 610; *Salmon v. Olds*, 9 Or. 488.

The alleged acts of trespass are not thereafter denied either in the answer or cross complaint, but, on the contrary, in the cross complaint it is expressly admitted that the defendant, for the purpose of making surveys, and constructing said canals, ditches, and flumes upon the premises of plaintiff, entered upon the same. Nor does the answer deny that the defendant would have, as alleged, continued to perform the acts complained of, unless restrained by the order of the court. Upon the pleadings the plaintiff was entitled to recover for the damages done to his premises by the acts of the defendant, unless the facts set up in the cross complaint justified the same.

At the time the defendant entered upon the plaintiff's premises, and commenced to construct canals, etc., thereon, he had acquired no right whatever to do so. The land had not been condemned, and certainly the mere fact that he contemplated to have it in the future condemned for his alleged purposes gave him no right to construct canals, ditches, and flumes upon the same. Therefore the alleged counterclaim neither qualifies, defeats, nor lessens the relief which the admitted facts show the plaintiff is entitled to. In the case of *Insurance Co. v. McKay*, 21 N. Y. 191, *Comstock, J.*, in the opinion said: "I apprehend that a counterclaim, when established, must in some way qualify, or must defeat, the judgment to which the plaintiff is otherwise entitled." *Bliss*, Code Pl. 386 et seq.; *Pom. Code Pl. 744* et seq. The facts set up by defendant do not constitute a counterclaim or defense to the plaintiff's cause of action. The alleged counterclaim was therefore properly dismissed. It is ordered that the judgment of the court below be affirmed, and that appellant pay the costs.

BARTCH, C. J., and MINER, J., concur.

(22 Utah 27)

STATE v. HILBERG.

(Supreme Court of Utah. May 3, 1900.)

INTERCOURSE WITH WOMAN UNDER AGE OF CONSENT—INDICTMENT—EVIDENCE OF PREVIOUS ACTS—ELECTION BETWEEN OFFENSES—IMPEACHMENT—CHASTITY NOT AN ISSUE—ACCOMPLICE—CORROBORATION.

1. Under sections 4730, 4732, Rev. St. 1898, the information in a criminal proceeding must be direct and certain as regards the offense charged.

2. A general rule in criminal cases, subject, however, to exceptions, is that, where one specific offense is charged, the commission of other offenses cannot be proven for the purpose of

showing that the defendant would have been more likely to have committed the offense for which he was on trial, nor as corroborating the testimony relating thereto; but, where the offense consists of illicit intercourse between the sexes, evidence of previous acts or improper familiarity between the parties, occurring prior to the offense alleged, is admissible as explaining the acts, and as having a tendency to render it more probable that the act charged was committed, though evidence of such acts would be inadmissible as independent testimony.

3. In a prosecution under the statute for unlawfully and carnally knowing a female over the age of 13 years and under the age of 18 years, where but a single offense is charged, and on the trial six different offenses are proven, four of them prior to the offense charged, and the prosecution fails to elect on which offense to stand, the law makes the election, and chooses the first offense of which evidence is offered to secure a conviction; and no subsequent election could be made, nor could the prosecution prove any other act of the kind as a substantial offense upon which a conviction could be had. It could, however, prove intimacy and improper relations of the parties prior to the offense elected, but not afterwards, and, if evidence of such subsequent acts is admitted, it is error, for which a new trial will be granted.

4. In impeaching the character of a witness the inquiry must be confined to the general reputation in the locality referred to.¹

5. Where the crime charged is sexual intercourse with a prosecutrix under the age of consent, the intercourse constituted the offense whether she consented or not, and her good or bad character for chastity, as affecting the crime charged, was not in issue; but her general reputation for truth and veracity was.

6. Where a statute fixing the age of consent makes the male participant, in a violation of it, the only guilty party, the female, although consenting, is not liable to indictment for the offense charged. She is, therefore, not an accomplice, and her evidence does not need corroboration, under section 4862, Rev. St.

7. Sexual intercourse constitutes the offense named in section 4221, Rev. St., even if the prosecutrix consented to the act. In prosecutions under section 4221, great care should be exercised in eliciting the truth from the witness, so that innocent parties may not be punished.

(Syllabus by the Court.)

Per Bartch, C. J., dissenting. Where there is a continuation of the relation of intimacy and illicit intercourse between the parties to the offense, evidence of improper familiarity and adulterous acts both before and after that charged is admissible.

Appeal from district court, Salt Lake county; A. G. Norrell, Judge.

Christopher Hilberg was convicted of crime, and appeals. Reversed.

Daniel Harrington and A. E. Snow, for appellant. A. C. Bishop, Atty. Gen., and William A. Lee, Dep. Atty. Gen., for the State.

MINER, J. The defendant was charged with having had unlawful sexual intercourse with one Anna Ward, a female over the age of 13 and under the age of 18 years, at Salt Lake City, on the 15th day of February, 1898. Upon the trial the prosecutrix was permitted, under objection, to testify to the

¹ *State v. Marks*, 51 Pac. 1089, 16 Utah, 204.

first act of sexual intercourse as having occurred in April, 1897, about 11 months before the act charged in the information; and subsequently, under objection, she was permitted to testify to five several and distinct acts of sexual intercourse occurring thereafter during the years 1897 and 1898. The last act occurred in April, 1898, two months after the act charged in the information. The defendant moved to strike out the testimony showing the several acts charged in the information, but the motion was denied. Section 4221, Rev. St. 1898, under which the information in this case was filed, provides that "any person who shall carnally or unlawfully know any female over the age of 13 years and under the age of 18 years shall be guilty of a felony." Under sections 4730, 4732, Rev. St. 1898, the information must be direct and certain as regards the offense charged and as to the statement of the acts constituting the offense. The information in this case contained but one count, alleging the commission of the act on a day specified. The trial court permitted the prosecution to introduce six distinct acts or crimes to be shown in evidence before the jury as having occurred in 1897 and 1898, during a period of 14 months, without requiring any election to be made, and allowed the case to go to the jury upon all the several acts of sexual intercourse shown, when only one act was or could be charged against the defendant. Such a course was calculated to confound, distract, and confuse the defendant in his defense. He was expected to meet one charge at a specified time, but was required to defend against and meet six different acts occurring during a period of 14 months, upon one of which the jury were asked to convict. Whether the jury united in a verdict upon each act, or some on one and others on another of the acts proved is problematical. The course pursued subjected the defendant to the risk of conviction upon six charges, occurring at different times and places, against which he could not be expected to be prepared to defend, and yet a conviction or acquittal upon one would be no bar to a future prosecution of any except the first act shown. No jury should be set to fishing or hunting for a charge which they are called upon to try. Such a course deprived the defendant of a fair trial, and compelled him, without warning, to defend against acts of which he had no notice. Manifestly, he could not be prepared to meet such confusing charges not contained in the information. The general rule in criminal cases subject to exceptions is well settled that, where one specific offense is charged, the commission of other offenses cannot be proven for the purpose of showing that the defendant would have been more likely to have committed the offense for which he was on trial, nor as corroborating the testimony relating thereto;

but where the offense consists of illicit intercourse between the sexes, such as is charged here, or in case of incest, adultery, or seduction, courts have relaxed the rule, and hold that previous acts of improper familiarity between the parties, occurring prior to the alleged offense, were admissible as explaining the acts, and as having a tendency to render it more probable that the act charged in the information was committed, though such acts would be inadmissible as independent testimony. *Lawson v. State*, 20 Ala. 65; *State v. Wallace*, 9 N. H. 517; 2 Starkie, Ev. 440; *Com. v. Merriam*, 14 Pick. 518; *Whart. Cr. Ev.* § 104; *People v. Jenness*, 5 Mich. 305; *People v. Clark*, 33 Mich. 112; *Underh. Ev.* §§ 87, 92; 2 Greenl. Ev. (15th Ed.) § 47; *State v. Markins*, 95 Ind. 464.

Having determined that previous acts of intercourse are admissible, we are next called upon to determine which of the six acts constituted an offense upon which a conviction could be had. The charge in the information was for a single act committed on the 15th day of February, 1898. The time stated was immaterial, and under well-settled rules in criminal cases the prosecution, before evidence was introduced, could have selected any one of the criminal acts in proof which occurred within the statute of limitations and the jurisdiction of the court as the offense for which it would ask a conviction. The defendant could be convicted of but one criminal offense. Only one offense was charged, but six different offenses were proven. Any one of the acts selected by the prosecution, before the introduction of the evidence, would be as properly the act charged in the information as the other. Until the evidence of some act was given, the charge in the information was floating, uncertain, and contingent, aimed as much at one act as at another; and, in the absence of an election by the prosecution, it remained for the evidence to designate and point out the particular act intended, and upon which the prosecution would rely for a conviction. When evidence was introduced tending directly to the proof of one act, and for the purpose of securing a conviction upon it, from that moment that particular act became the act charged. No election having been made by the prosecution, the law made the election. What before this had been uncertain and contingent was now fixed and definite. This election having been thus made by proving the first act of intercourse as having taken place in April, 1897, no subsequent election could be made; nor could the prosecution prove any other act of the kind as a substantial offense upon which a conviction could be had; but it could prove the intimacy and improper relations of the parties prior to the acts shown in the month of April, 1897, but not afterwards. Where the information contains several counts

charging distinct offenses, then it is competent, and the duty of the prosecution, to make its election at or before the close of its case. The act of intercourse occurring in April, 1897, being the first act to which evidence was introduced, and the evidence being directly upon the offense charged, it became from that moment the only offense the jury were called upon to try. This view was announced in the case of *People v. Jenness*, 5 Mich. 305, which is one of the leading cases upon that subject, where incest was charged. The court, among other things, said: "The prosecutor having the right to select among all the acts of the kind which he could prove to have been committed between the parties, within the period alluded to, and within the jurisdiction, any one of those acts, before evidence had been introduced, was as properly the act charged in the information, as any other. In other words, until evidence of some such act had been given, the charge in the information was floating and contingent, aimed as much at one as another, and at no one act in particular; and it remained for the evidence to point the charge to the particular act intended. But when evidence had been introduced tending directly to the proof of one act, and for the purpose of procuring a conviction upon it, from that moment that particular act became the act charged. What had, till then, been floating and contingent, had now become certain and fixed. The prosecutor had made his election, and could not elect again; nor could he be allowed to prove any other act of the kind as a substantive offense upon which a conviction might be had in the cause. The information could be used as a drag net only till the first act had been entangled in its meshes. Every other act must be allowed to escape this throw of the net, and thenceforward the evidence must be aimed at this act. If others of the same kind lie in the same range, they can only be noticed for a secondary purpose, as they may be connected with or bear upon this." In the case of *People v. Clark*, 33 Mich. 112, where seduction was charged in three counts, the court adopted and approved of this same rule. In delivering the opinion, concurred in by Judge Cooley, the court said: "The act alleged to have been committed in the buggy, in the town of Penfield, being the first to which evidence was introduced, was the only offense upon which the defendant could be tried; and, if proof of subsequent acts were admissible at all, they could not be admitted as distinct offenses to go to the jury, and upon which the defendant might be convicted. It was not necessary for the prosecution to expressly elect for which act they would try the defendant in order to bind them. The fact of their introducing evidence tending to prove a distinct substantive offense was a sufficient election. In this case, under the charge as given, there

was no certainty whatever that the jurors all united upon the same act in finding the defendant guilty. Nor could the prosecution, after having thus introduced evidence tending to show an offense committed in the town of Penfield on the 28th of July, show subsequent acts as corroborating testimony, as they would have no such tendency. Proof of previous acts of sexual intercourse would tend to show a much greater probability of the commission of a similar act charged to have occurred subsequent thereto, but the converse of this proposition would not be true, as the proof of a crime committed by parties on a certain day could have no tendency to prove that they had, previous thereto, committed a similar offense." In *Elam v. State*, 26 Ala. 48, it is held that, after the state has offered evidence of one particular offense, it will be held to that election through the trial, and cannot elect again. In *Lovell v. State*, 12 Ind. 18, it is held that, where an indictment contained a single count for incest, which was proved, the state cannot thereafter prove that the defendant had improper relations with the prosecutrix at any subsequent time. In *People v. Hopson*, 1 Denio, 574, the same rule is laid down. It necessarily follows that the testimony showing the several acts of intercourse subsequent to April, 1897, were improperly admitted, and the defendant was prejudiced thereby.

The defendant, in order to show the character of the prosecutrix, asked the following question: "Q. I will ask if you know what the reputation of Miss Ward was for chastity during the month of February, 1897, in that precinct?" The question was objected to, and the answer excluded. The question was not properly framed. In impeaching the character of a witness the inquiry must be confined to the general reputation in the locality referred to. *State v. Marks*, 16 Utah, 204, 51 Pac. 1089. The prosecutrix was under the age of consent. Sexual intercourse with her constituted an offense under the statute, whether she consented or not. Her good or bad character for chastity, as affecting the crime charged against the defendant, was not in issue, although her general reputation for truth and veracity was. The testimony offered was incompetent. So, specific acts of unchastity on the part of the young woman were not admissible. *People v. Glover*, 71 Mich. 303, 38 N. W. 874; *People v. Abbott*, 97 Mich. 484, 56 N. W. 862; *Underh. Ev.* § 418.

Error is also assigned on the refusal of the court to instruct the jury that no conviction could be had on the testimony of an accomplice unless corroborated as provided in section 4862, Rev. St. 1898. Manifestly, if the prosecuting witness was an accomplice in the act, her testimony required corroboration before a conviction could be had thereon. It appears that the witness know-

ingly and willingly consented to the act; but, being under the age of consent, the law will not presume that she consented. As to the defendant, she was incapable of consenting, or forming a criminal intent to commit the act. The true test of her relation to the act would be, could she have been indicted for the offense charged, either as a principal or accessory? The statute under which the information was framed renders the male participant the only guilty party. That she could not be indicted for the offense charged renders her incapable of being an accomplice. It necessarily follows that, although she participated in the act, this participation did not render her liable to an indictment for the offense charged, and therefore she was not an accomplice, and did not require corroboration. The following cases bear upon this subject: 1 Am. & Eng. Enc. Law, 390; Com. v. Wood, 11 Gray, 85; People v. Abbott, 97 Mich. 484, 56 N. W. 862; 1 Bouv. Law Dict. p. 21; Whart. Cr. Law (9th Ed.) 440. We do not overlook the danger attending prosecutions under this act. The rules of law governing trials under this statute are more stringent and less flexible than those applicable in other criminal cases. An accusation under this statute is easily made. The offense, if committed, is generally in secret. The general character of the prosecutrix cannot be attacked. Specific acts of unchastity on her part cannot be shown. Her testimony, as in many other cases where she may be an accomplice, does not require corroboration in order to obtain full credit, and the woman who participates in the act is not criminally liable therefor. Under such circumstances the charge, when made, is hard to disprove, and difficult to defend against, no matter how innocent the accused may be. While the protection of the honor and chastity of young women is of paramount importance to the state, and every effort should be made to fully care for and protect it, yet in such prosecutions full latitude should be given the accused to discover the truth by cross-examination and otherwise, so as to enable him to defend against any unjust accusation. For the reasons given, the judgment of the district court is reversed, and the case remanded, with directions to grant a new trial.

BASKIN, J., concurs.

BARTCH, C. J. (dissenting). I am unable to concur in reversing the judgment herein. Where, as in this case, there is a continuation of the relation of intimacy and illicit intercourse between the parties to the offense, evidence of improper familiarity and adulterous acts both before and after the act charged is admissible. Such evidence is received to prove the adulterous disposition in the parties implicated. This appears to be

the rule sanctioned by the weight of recent authority. "At the time of the present writing," says Mr. Bishop in his commentaries on Statutory Crimes (section 682), "this doctrine—namely, that subsequent familiarities and adulteries between the same parties, equally with the prior ones, are admissible—may be deemed to be established in all our courts, as respects alike the divorce suit and the indictment." So, in Whart. Cr. Ev. (8th Ed.) § 35, it is said: "In prosecutions for adultery, or for illicit intercourse of any class, evidence is admissible of sexual acts between the same parties prior to, or, when indicating continuousness of illicit relations, even subsequent to, the act specifically under trial." Likewise, in Underh. Ev. § 381, the author says: "Improper familiarities and adulterous acts between the same parties prior or subsequent to the act charged, but not too remote, or, if remote, connected with it so as to form a part of a continuous course of conduct, may be shown for the purpose of bringing out the relations and adulterous disposition of the defendant." In State v. Witham, 72 Me. 531, Mr. Justice Peters, speaking for the court, said: "It is objected that this mode of trial involved the admission of evidence of acts of adultery happening both before and after the principal act complained of. Formerly, the criticism might have been regarded favorably in many courts. Latterly, however, courts and text writers are rapidly falling in with the view that acts prior and also subsequent to the act charged in the indictment, when indicating a continuousness of illicit intercourse, are admissible in evidence as showing the relation and mutual disposition of the parties; the reception of such evidence to be largely controlled by the judge who tries the case, and the evidence to be submitted to the jury with proper explanation of its purpose and effect. We think this doctrine is most in accordance with the logic of the law and with the authorities." So, in People v. Hendrickson, 53 Mich. 525, 19 N. W. 169, Mr. Justice Sherwood, with whom the other justices, among them Judge Cooley, concurred, said: "On the trial the prosecuting attorney was permitted to make proof of acts of familiarity and intimacy between the defendant and Mrs. Smith, which occurred over two years before the prosecution was commenced. Such acts, within a reasonable time before the acts complained of, and also occurring very soon thereafter, so long as they may be regarded as continuous, are competent and admissible testimony; but those occurring two years before the criminal act charged must be held too remote, and it is error to admit them." In Thayer v. Thayer, 101 Mass. 111, Mr. Justice Colt, speaking for the court, said: "An adulterous disposition existing in two persons towards each other is commonly of gradual development. It must have some duration, and does not suddenly subside. When once shown to

exist, a strong inference arises that it has had and will have continuance, the duration and extent of which may be usually measured by the power which it exercises over the conduct of the parties. It is this character of permanency which justifies the inference of its existence at any particular point of time from facts illustrating the preceding or subsequent relations of the parties. The rule is that a condition once proved is presumed to have been produced by causes operating in the usual way, and to have continuance till the contrary be shown. The limit, practically, to the evidence under consideration is that it must be sufficiently significant in character, and sufficiently near in point of time, to have a tendency 'to lead the guarded discretion of a reasonable and just man' to a belief in the existence of this important element in the fact to be proved. If too remote or insignificant, it will be rejected, in the discretion of the judge who tries the case. The fact that the conduct relied on has occurred since the filing of the libel does not exclude it, and proof of the continuance of the same questionable relations during the intervening time, as in the case at bar, will add to its weight." 1 Am. & Eng. Enc. Law (2d Ed.) 754; Whart. Cr. Ev. (8th Ed.) § 35; Whart. Cr. Law (8th Ed.) § 1733; Bish. St. Crimes, § 682; 2 Bish. Mar., Div. & Sep. § 1374; Underh. Ev. 381; Thayer v. Thayer, 101 Mass. 111; State v. Bridgman, 49 Vt. 202; State v. Williams, 76 Me. 480; People v. Hendrickson, 53 Mich. 525, 19 N. W. 160; Burnett v. State, 32 Tex. Cr. R. 86, 22 S. W. 47; State v. Way, 5 Neb. 283; Com. v. Nichols, 114 Mass. 285; Callison v. State (Tex. Cr. App.) 39 S. W. 300; Hamilton v. State, 36 Tex. Cr. R. 372, 37 S. W. 431; State v. Stubbs, 108 N. O. 774, 13 S. E. 90; Beers v. Jackman, 103 Mass. 192; Baker v. U. S., 1 Pin. 641; Cole v. State, 6 Baxt. 239; Alsabrooks v. State, 52 Ala. 24; Pond v. Pond, 182 Mass. 219, 223; Com. v. Abbott, 130 Mass. 472, 474; State v. Markins, 95 Ind. 464. I am of the opinion that the judgment should be affirmed.

(21 Utah 286)

HANSEN v. ANDERSON et al.

(Supreme Court of Utah. April 9, 1900.)

SUPREME COURT—POWERS—CERTIORARI—APPEAL FROM JUSTICE OF THE PEACE—UNDERTAKING—DEPOSIT.

1. Under section 4, art. 8, of the constitution, and section 3630, Rev. St. 1898, the supreme court may, by certiorari, review the decisions and judgments rendered by district courts in cases appealed from justices of the peace, but only when district courts exceed their jurisdiction or fail to acquire jurisdiction.¹

2. Sections 3747 and 3748 refer to one undertaking only, and it is optional with an appellant, in taking his appeal, to either file an undertak-

ing as provided in section 3747, or make a deposit as provided in section 3748.

Bartch, C. J., dissenting.
(Syllabus by the Court.)

Application of Lars Hansen for writ of certiorari to A. J. Anderson and H. H. Rolapp. Writ quashed.

This is an application for a writ of certiorari. It appears from the petition and affidavit of the applicant that Anderson, one of the defendants, brought an action against the plaintiff in a justice of the peace court of Weber county, and subsequently appealed the case to the district court for said county. Anderson, the plaintiff and appellant in said action, failed to file an appeal bond, but in lieu thereof deposited \$13 with the justice of the peace before whom the case was tried; the same being the amount of the judgment for costs rendered against him in the justice's court. Hansen, the defendant in said action, and plaintiff in the case at bar, moved the district court to dismiss the appeal on the ground that no appeal bond had been filed as provided by section 3747, Rev. St., relating to appeals from justices of the peace courts to the district courts. The district court overruled the motion to dismiss, and proceeded to try the case, and submitted the issues to a jury, which resulted in a verdict against Hansen, the defendant in the case. Thereupon Hansen filed in this court the petition above mentioned. A writ and an order to show cause were issued ex parte. Defendants have demurred to the petition on the ground that said petition shows that the district court and the judge thereof proceeded in the regular manner, and within the jurisdiction of said court, and that this court has no jurisdiction to issue the said writ, or to hear and determine the same. Defendants also filed a motion to quash the writ and the order to show cause.

M. D. Lessenger, for petitioner. N. J. Harris, for defendants.

McCARTY, District Judge, after stating the facts, delivered the opinion of the court.

There are two questions presented by the pleadings in this case: (1) Has this court jurisdiction to review by writ of certiorari the decision of the district courts rendered in cases appealed from justices of the peace, when the district courts have exceeded their jurisdiction in such cases? (2) Did the district court in the case at bar exceed its jurisdiction, by overruling the motion to dismiss the appeal, and in proceeding to try the case?

Section 4, art. 8, Const. Utah, provides that the supreme court shall have original jurisdiction to issue certain writs therein enumerated, one of which is the writ of certiorari. This provision of the constitution invests this court with the general common-law powers heretofore exercised by courts

¹ Crooks v. District Ct., 59 Pac. 529, 21 Utah, —, distinguished.

of general jurisdiction over inferior courts to review by certiorari the proceedings of inferior tribunals. Section 3630, Rev. St. Utah, provides that "a writ of review, [certiorari] may be granted by the supreme court, or a judge thereof, when an inferior tribunal, board, or officer exercising judicial functions has exceeded the jurisdiction of such tribunal, board, or officer, and there is no appeal, nor, in the judgment of the court or judge, any plain, speedy, and adequate remedy." Unless there is some other provision of the constitution limiting the general powers thus conferred, it is manifest that, by virtue of the foregoing provisions of the constitution and Revised Statutes, this court has jurisdiction and power to review by certiorari the decisions and judgments of the district courts in cases appealed from the justices of the peace, when the district courts have exceeded their jurisdiction in such cases. Counsel for defendants contend that such a limitation is to be found in section 9, art. 8, Const., which, in so far as material to the questions involved in this case, proceeds: "Appeal shall also lie from the final judgment of justices of the peace in civil and criminal cases to the district courts * * * with such limitations and restrictions as shall be provided by law; and the decision of the district courts on such appeals shall be final, except in cases involving the validity or constitutionality of a statute." We think the position of counsel on this point is untenable, and that the provisions of the constitution do not expressly nor by implication support such a contention. The language above quoted, of the constitution, unquestionably has reference to appeals taken in the mode provided by law (that is, taken in such a manner as to confer jurisdiction in the courts appealed to); and, unless the provisions of the statutes providing for appeals from justices of the peace to the district courts are substantially complied with, the district courts fail to acquire jurisdiction to proceed to try the cases so appealed. Mr. Elliott, in his work on Appellate Procedure (section 19), states the rule as follows: "It may be said with accuracy that the general rule is that, where a valid statute provides the mode of reviewing the judgment, that mode must be pursued. This question connects itself with the general subject of appellate jurisdiction, inasmuch as a court cannot have authority over a case where parties assume to bring it within the authority of the court in a mode wholly unauthorized by law." Mr. Works, in his treatise on Jurisdiction (section 99), says: "The right of appeal is statutory, and the statute must be followed, or the appellate court will have no jurisdiction." 2 Enc. Pl. & Prac. 16, and cases cited; 12 Enc. Pl. & Prac. 120. The final decisions mentioned in the foregoing provisions of the constitution, when applied to

judgments, refer to valid judgments only; that is, such decisions and judgments as the district courts acquire jurisdiction to render. The rule has become elementary that the judgment rendered by a court having no jurisdiction is void and a mere nullity, and has no binding force whatever. 1 Freem. Judgm. § 117; 1 Black, Judgm. § 218. The doctrine, we think, is correctly stated in one of the early decisions of the United States supreme court, in the following language: "Where a court has jurisdiction, it has a right to decide every question which occurs in the cause, and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void, and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification, and all persons concerned in executing such judgments or sentences are considered, in law, as trespassers." *Elliott v. Peirsol's Lessees*, 1 Pet. 328, 7 L. Ed. 164; *Latham v. Edgerton*, 9 Cow. 227. Section 3183, Rev. St., defines a judgment to be a final determination of the rights of parties to an action or proceeding. Therefore, to give to the provisions of the constitution under consideration the sweeping force and effect contended for by defendants would be to secure judgments rendered in such cases against either direct or collateral attacks, however utterly and palpably void they might be, for want of jurisdiction. We do not think that such could have been the intention of the framers of the constitution, as it would bring the section under consideration in conflict with section 7, art. 1, of the same instrument, which provides that no person shall be deprived of property without due process of law. Black, Judgm. § 218. The contention that this court has jurisdiction and power to review by writ of certiorari the decisions and judgments of the district courts in cases appealed from the justices of the peace, when the district courts in such cases exceed their jurisdiction, is not without authority to support it, even in the face of the provisions of section 9, art. 8, of the constitution. Mr. Spelling, in his work on Extraordinary Relief (section 1921), says: "As a general rule, when no mode is provided by statute for the exercise by higher courts of the superintending control which they have over inferior courts, or of their appellate jurisdiction from the orders and judgments of such courts, certiorari lies to correct irregularities in their proceedings. And though a statute declares that no appeal shall be allowed from an inferior tribunal, but that its decision shall be final, yet the supreme court may review these decisions on certiorari." The case of *Lawton v. Commissioners*, 2 Caines, 179,

was an appeal taken from the determination of the commissioners of highway to a court of common pleas. The New York statutes declared the decision of the judges of the common pleas on appeal made to them in such cases to be conclusive. Notwithstanding this provision of the statute, the supreme court held that it had jurisdiction to review the proceedings of the court of common pleas by writ of certiorari. This rule is supported by the following authorities: *Murfree v. Leeper*, 1 Overt. 1; *Ex parte Roe*, T. U. P. Charlt. 38; *Philadelphia Co. Com'rs v. Spring Garden Com'rs*, 6 Serg. & R. 524; *Banking Co. v. Mitchell*, 31 N. J. Law, 99. The case of *Crooks v. District Ct. (Utah)* 59 Pac. 572, relied upon by defendants, is not in point, as an entirely different question was involved in that case from the questions under consideration in the case at bar. In that case a motion was made to dismiss the appeal on the ground that it was not taken within the time required by law. The court having jurisdiction to decide the issues raised by the motion, its decision dismissing the appeal was not subject to review by this court by a writ of certiorari, even though the court may have erred in its judgment. If the appeal in that case was properly taken, and the requirements of the statute complied with, and the court failed to exercise the jurisdiction conferred upon it by virtue of the appeal, and refused to proceed with the trial, the plaintiff's remedy was by writ of mandamus, and not by certiorari. In the case of *State v. Jefferson County Super. Ct.*, 8 Wash. 271, 36 Pac. 27, cited by this court in support of the conclusions reached in the *Crooks* Case, supra, the district court made an order that the new matter or affirmative defense pleaded in answer to the complaint be made more definite and certain. Upon failure of the defendant to amend, the court struck out the entire answer, including the direct denial. The defendant sought to have the action of the district court reversed by certiorari. The supreme court denied the writ, but in the course of the opinion says, "The district court had jurisdiction of the subject-matter and of the parties to the action." The decision rather tends to support the views herein expressed, than the contention of defendants; else, why did the supreme court expressly find that the district court had jurisdiction, when the question of jurisdiction was neither raised nor challenged? We are of the opinion, and so hold, that this court may, by certiorari, review the decisions and judgments rendered by the district courts in cases appealed from the justices of the peace, when the district courts in such cases exceed their jurisdiction and fail to do substantial justice. The constitution having provided that all decisions of the district courts in cases appealed to said courts from the justices of the peace shall be final, this court can only review by cer-

tiorari the judgments and decisions of the district courts in such cases when they exceed their jurisdiction or fail to acquire jurisdiction.

Having determined that this court has jurisdiction to review by writ of certiorari the decisions rendered by the district courts in the class of cases under consideration, we now come to the remaining question for our consideration in this case, viz. did the district court exceed its jurisdiction by overruling the motion to dismiss the appeal, and in proceeding to try the case? Section 3747, Rev. St. Utah, so far as is material in this case, provides that "an appeal from a justice's court shall not be effectual for any purpose unless an undertaking be filed within five days after filing the notice of appeal, with two or more sureties, in the sum of one hundred dollars, for the payment of the costs on appeal, and if a stay of proceedings be claimed, in a sum equal to twice the amount of the judgment, including costs, when the judgment is for the payment of money." Section 3748, so far as material here, is as follows: "When an undertaking on appeal is filed, notice of such filing shall be given to the respondent. * * * A deposit of the amount of the judgment appealed from including all costs * * * with the justice shall be equivalent to the filing of an undertaking mentioned in this section." Counsel for plaintiff insists that the two sections should be read and construed as one section, and that the deposit mentioned in section 3748 can be made for the purpose only of staying proceedings on appeal, and that such deposit does not relieve the appellant from filing an undertaking on appeal as provided in section 3747. We do not think the sections referred to, when read and construed together or separately, will admit of the construction contended for by counsel. The language of the statute is free from ambiguity, and plainly shows that one undertaking only is referred to or contemplated, and that a deposit as provided in section 3748 may be made in lieu of such undertaking; that is, it is optional with the appellant, in taking his appeal, to either file an undertaking as provided in section 3747, or make a deposit as provided in section 3748. We are of the opinion, and so hold, that the district court did not exceed its jurisdiction in the trial of this case. Therefore the motion to quash the writ must prevail, and it is so ordered. Costs to be taxed against the plaintiff.

BASKIN, J., concurs.

BARTON, C. J. I am of the opinion that the writ in this case ought to have been quashed and denied on the ground that this court, under section 9, art. 8, Const., is powerless to review, either by certiorari or appeal, a decision of a district court made in any case appealed to that court from a justice of the peace. Such has been the uniform

holding of this court since the adoption of the constitution. I am therefore unable to concur in the reasoning contained in the opinion of my Brethren in this case.

(22 Utah 6)

CIVIC FEDERATION v. SALT LAKE COUNTY.

(Supreme Court of Utah. May 2, 1900.)

CONFLICT OF LAWS—CONSTITUTIONAL LAW—LEGISLATIVE POWERS—REVENUES OF COUNTY—APPROPRIATION OF MONEY—COUNTY COMMISSIONERS—REJECTION OF CLAIM—REMEDY OF CLAIMANT—MANDAMUS—WHEN LIES.

1. Chapter 30, Sess. Laws 1897, authorizing counties to refund moneys advanced by citizens to aid counties to enforce the laws, is not in conflict with section 30, art. 6, of the constitution.

2. The legislature is not restricted, in its appropriation of public moneys by legislative enactment, to cases where a legal demand exists against the county or state. The same power which it may exercise over the revenues of a state it may exercise over the revenues of a county or city for any purpose connected with its present or past conditions, not repugnant to the organic law; and where a moral obligation exists the legislature may give it legal effect.

3. Where a board of county commissioners has rejected a claim against the county, appeal, and not mandamus, is the proper remedy.

4. Mandamus will only lie where a board or officer exercising a quasi judicial function has refused to act, and not after action to reverse or review the judgment or discretion of the board or officer.¹

Baskin, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by the Civic Federation of Salt Lake City against Salt Lake county. Judgment for plaintiff, and defendant appeals. Affirmed.

Graham F. Putnam, Ray Van Cott, and W. T. Gunter, for appellant. Morse & Whittemore, for respondent.

MINER, J. The facts stated in plaintiff's complaint, as amended, show, among other things, that the plaintiff is an association of 18 persons, which at various times between the 29th day of October, 1895, and the 27th day of June, 1896, made advancements of money to the county attorney of Salt Lake county for the purpose of defraying expenses necessarily incurred by him in the execution of the laws of the state of Utah, in prosecuting certain ex-county officials, who were indicted for the crime of bribery, and that the total amount of money so advanced, together with interest, was \$8,532.24; that the money was advanced at the solicitation of the county attorney and members of the then board of county commissioners of Salt Lake county, because no means were available to pay the expenses of the prosecution of the cases, or

expenses of securing witnesses from outside of the state, and on the promise of the county attorney and board of county commissioners that, if the money was advanced, it would be returned as soon as legal authority to do so could be obtained; that, in order to prosecute the cases, it was necessary to procure witnesses from Chicago, Ill., and the amount obtained was principally used to defray the expenses of witnesses to attend at the trial. It is further shown by the complaint that the plaintiff duly presented and filed with the county clerk of Salt Lake county, in accordance with the provisions of chapter 30, Laws 1897, a claim against said county for the amount so advanced, and that accompanying the claim were itemized vouchers, showing the manner in which the money had been expended, the persons to whom the same had been paid, and the purposes for which the expenses had been incurred; that the board of county commissioners, without consideration of the facts, and without considering that the said money so advanced was used for the good and benefit of the county, rejected said claim. It is also alleged in the complaint, upon information and belief, that the reason for the refusal of the said board to consider said claim was the belief of said board that they had no legal authority to consider said claim upon its merits. To this complaint the defendant filed a demurrer for the reason that said complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and a judgment rendered in favor of plaintiff. From this judgment the defendant appeals.

After the adoption of the constitution, the legislature enacted a special statute, found in Laws 1897, p. 46, wherein it is provided: "That in all cases since the first day of January, 1895, in which any county of the territory of Utah or of this state, or any officer thereof, has received advancements of money from any person or association for the purpose of defraying expenses incurred in the execution of the laws of said territory or state, and the money so received was actually used for such purpose by the county or officer receiving the same, the advancements of money so made are hereby declared to be legal and valid claims against such county as a county of this state in favor of the persons or associations paying the same, and the same shall be paid out of the treasury of such county in the manner provided by law for the payment of other claims of said county: provided however, that all such claims shall be presented and filed with the county clerk of the county made liable thereby within six months after this act takes effect, and all such claims not presented within the time herein prescribed shall be disallowed by the board of county commissioners of the county wherein the claim is filed. And provided further that no such claim shall be paid by the board of county commissioners unless they find that

¹ State v. Hart, 57 Pac. 415, 19 Utah, 438.

said money has been actually advanced and actually used for the good and benefit of said county." The able counsel for appellant strenuously insist that the above statute is unconstitutional, and in conflict with section 30, art. 6, of the constitution. The proviso added to section 30, art. 6, Const., reads as follows: "Provided that this section shall not apply to claims incurred by public officers in the execution of the laws of this state." Without this provision, section 30 would doubtless bear the construction placed upon it by counsel for the appellant. By the provisions of the constitution and laws of this state, offenses committed prior to its adoption were continued, and could be prosecuted to judgment thereafter. The claim under consideration was incurred by public officers in the execution of the laws of the state, and was not a legal claim against the county until the enactment of the statute. This section in the constitution in no way limited the power of the legislature to authorize the payment of a just claim so created against a county without authority of law. The legislature is not restricted in its appropriation of public money by legislative enactment to cases where a legal demand exists against the county or state. It may appropriate money for any purpose which it may consider as calculated to promote public good and protect its honor, within the provisions of the constitution. It may determine when the interest and honor of the government or municipality justify the appropriation of money in cases where no legal demand exists against said municipality or state. As to the wisdom or expediency with which taxation or an appropriation is made, the legislature is the sole judge. The same power which it may exercise over the revenues of a state it may exercise over the revenues of a county or city for any purpose connected with its present or past conditions, not repugnant to the organic law. Therefore, when the legislature enacted the statute in question, making certain advances of money to a county or county officers for the purpose of defraying the expenses of executing the laws of the state, for which the county has received an equivalent, a legal, valid claim against the county on compliance with the provisions of the statute, the claim becomes a legal charge, and should be paid, although such county was not legally bound to pay and discharge the same prior to the enactment of the statute. Where a moral obligation exists, the legislature may give it legal effect. There is nothing in our constitution which conflicts with the provisions of the statute. In the case of the *Town of Guilford v. Board of Sup'rs of Chenango Co.*, 13 N. Y. 143, the court said: "The legislature is not confined in its appropriation of the public moneys, or of the sums to be raised by taxation in favor of individuals, to cases in which a legal demand exists against the state. It can thus recognize claims founded in equity and jus-

tice, in the largest sense of these terms, or in gratitude or charity. Independent of express constitutional restrictions, it can make appropriations of money whenever the public well-being requires or will be promoted by it; and it is the judge of what is for the public good," *New Orleans v. Clark*, 95 U. S. 644, 24 L. Ed. 521; *Town of Guilford v. Cornell*, 18 Barb. 615; *Lycoming v. Union*, 15 Pa. St. 166; *People v. Burr*, 13 Cal. 343; *Black*, Const. Law, § 135; *Cooley*, Const. Lim. p. 466. In 1 Dill. Mun. Corp. (4th Ed.) § 75, it is said: "It is competent for the legislature to compel municipal corporations to recognize and pay debts or claims not binding in strict law, and which for technical reasons cannot be enforced in equity, but which, nevertheless, are just and equitable in their character, and involve a moral obligation." It appears from the pleadings that all the essential requirements of the statute creating the power have been complied with, although it must be conceded that it would have been more satisfactory had the money advanced been paid into the county treasury, and thereafter drawn therefrom in the regular manner, for the purposes named.

The appellant also claims that the respondent mistook its remedy by appeal; that the proper remedy was by mandamus. Under the statute referred to, the advances and payments made to the county attorney for the purposes named were made legal and valid claims against the county. Without proper consideration, and acting upon the supposition that the statute was invalid, the county commissioners rejected the whole of the claim. They did not refuse to consider or act upon the claim, but, on the contrary, acted upon it, and rejected it altogether. The case of *State v. Hart*, 57 Pac. 415, 19 Utah, 438, is one of the cases relied upon by counsel for the appellant to sustain its contention. In that case the trial judge refused to act and compel or impanel a jury of 12 men to try a case, for the reason that such act would be contrary to law, and this court held that mandamus was the proper remedy to compel the court to act. The facts in that case were very different from the contention here. In this case the court did act, and rejected the claim. If the commissioners had refused to act, or take cognizance of the case when properly brought before them, they would be compelled to do so by mandamus. Their action in such a case would not be the exercise of a discretion or quasi judicial duty, imposed upon them by law, but a refusal to take cognizance of a matter upon which the law required them to act. But, if the commissioners acted upon the claim, and decided against its validity, even if they were induced to do so because of their belief that the statute was unconstitutional, the remedy of the respondent was not by mandamus, but by appeal. The only

right the respondent had was under the statute which provides for the presenting to, passing upon, and allowance of such claim by the county commissioners, before it can be paid. Under such circumstances, if a party is aggrieved by the action of the commissioners in disallowing his claim, his only remedy is by appeal. Having acted upon the claim once, and disallowing it, the board cannot be compelled by mandamus to act again. In *Wood*, Mand. p. 49, it is said: "Mandamus lies to compel a court to fulfill its duties, and to hear and adjudicate upon a matter pending before it, when there is no reasonable excuse for not doing so. But when the court or body have entered upon the matter, and have decided it, the court will not compel them to reconsider the matter, or rehear it, upon the ground that they have come to a wrong conclusion. In such cases the party must pursue his remedy by appeal or otherwise, as the writ of mandamus cannot be used to interfere with the discretion of a court, or compel them to act otherwise than according to their own judgment in a matter left to their discretion." *Crandall v. Amador Co.*, 20 Cal. 72; *High*, Extr. Rem. § 328; *State v. Nemaha Co.*, 10 Neb. 32, 4 N. W. 373. In disallowing the claim the board exercised a judicial, or at least a quasi judicial, function; and when it exercised this function a writ of mandamus will not be issued requiring it to reverse or review its judgment. In such cases an appeal is the proper remedy for the defeated party. We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

BARTCH, C. J., concurs.

BASKIN, J. (dissenting). The complaint contains the following allegations: "Plaintiff further alleges that on the 7th day of September, 1897, said board of county commissioners, without considering or investigating in any manner the facts relating to the advancement by the plaintiff of the money aforesaid, and without considering the facts relating to the purposes for which said money had been advanced and used, and whether the same had been actually used for the good and benefit of said county of

Salt Lake, the said board of county commissioners rejected said claim. Plaintiff alleges upon information and belief that the reason for the refusal of said board to consider said claim was the belief by said board that they had no legal authority to consider the said claim upon its merits." These allegations are admitted by the demurrer, and it appears from them that the board of county commissioners refused to pass upon the question whether the money claimed by plaintiff had been actually advanced and actually used for the good and benefit of the county solely on the ground that they had no legal authority to consider such claim upon its merits. Under the provisions of the second proviso of the act, which authorizes, upon certain conditions, the payment of advancements of money for the purpose of defraying expenses incurred in the execution of the laws of the territory or state, when the same was used for that purpose, it was the duty of the board of county commissioners to entertain and pass upon the question whether the money claimed by plaintiff was advanced, received, and actually used for the purposes mentioned. Said provision is as follows: "Provided further that no such claims shall be paid by the board of county commissioners unless they find that said money has been actually advanced and actually used for the good and benefit of said county." Laws 1897, c. 30. A finding of the board of county commissioners, as required by said proviso, that said money had been actually advanced and actually used for the good and benefit of the county, was a condition precedent to the right of recovery by plaintiff; and, as the complaint alleges that this was not done, it stated no cause of action. The only remedy open to the plaintiff is by mandamus to compel the board of county commissioners to perform the duty imposed by said proviso; and if, when they pass upon the question, they should find that said money was not expended as required by said act, the plaintiff would not be entitled to recover. They had no right to refuse to consider the claim of plaintiff on the ground of a lack of legal authority, for it was their mandatory duty to do so. The demurrer should have been sustained.

(27 Colo. 324)

WIEDERRECHT v. PEOPLE

(Supreme Court of Colorado. June 4, 1900.)
ABSTRACT AND BRIEF—TIME OF FILING—RULE OF COURT—APPLICATION FOR EXTENSION—WRIT OF ERROR—DISMISSAL.

Where plaintiff in error fails to file his abstract and brief within the time prescribed by the rules of the supreme court, his application for an extension of time in which to make such filing must be presented within the time so fixed, and where made after that period it will be denied, and his writ of error dismissed.

Error to district court, Arapahoe county.

Henry E. Wiederrecht was convicted of a crime, and he brings error. Dismissed.

Ward & Ward and John A. Deweese, for plaintiff in error. David M. Campbell, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., and Dan B. Carey, Asst. Atty. Gen., for the People.

PER CURIAM. The abstract and plaintiff in error's brief were not filed within the time prescribed by our rules. After the expiration of the time thereby limited, plaintiff in error applied for an extension. The application comes too late. Where a party, either in a civil or criminal cause, desires an extension of time for the doing of an act which our rules prescribe shall be done within a specified time, the application for such extension must be made within the time so fixed, and not afterwards. The writ of error should therefore be dismissed for want of prosecution, and it is so ordered. Writ of error dismissed.

(27 Colo. 380)

EICKHOFF v. EICKHOFF.

(Supreme Court of Colorado. June 4, 1900.)
ALIMONY—JUDGMENT—SUPREME COURT—JURISDICTION—AMOUNT—WRIT OF ERROR—TIME.

1. Acts 1893, p. 241, § 11, provides that a party against whom a decree of divorce has been granted may have it reviewed by the supreme court on a writ of error. Mills' Ann. Code, § 406a, limits the jurisdiction of the supreme court to cases involving more than \$2,500. *Held*, that the supreme court would entertain error from a judgment for alimony rendered in a divorce case, though the amount of the judgment was under \$2,500, and though no decree of divorce had been rendered.

2. Acts 1893, p. 237, § 2, authorizes the same practice in divorce cases as in other civil actions, except as otherwise provided in the act (page 241, § 11), and limits the time of suing out writs of error in the supreme court to review a divorce decree to six months. Mills' Ann. Code, § 401, provides that writs of error may be sued out in the supreme court within three years from the date of the judgment complained of. *Held*, that the supreme court would entertain error from a judgment for alimony, though the writ was not sued out until more than six months from the rendition of the judgment, no decree of divorce having been rendered in the case.

Error to district court, Arapahoe county.

Suit by Elizabeth B. Eickhoff against Charles A. Eickhoff. From a judgment for alimony in favor of plaintiff, defendant

61 P.—15

brings error. Plaintiff's motion to dismiss writ of error denied.

Action by defendant in error as plaintiff in the court below against plaintiff in error as defendant for divorce. As an incident to the main relief sought, she prayed for alimony pendente lite, suit money, and attorney's fees. From a judgment for these items defendant brings the case here for review on error. No decree for divorce has been rendered in the case. The judgment against plaintiff in error is for less than \$2,500, exclusive of costs. His writ of error was sued out more than six months after the rendition of the judgment of which he complains, but within three years from that date. The act regulating proceedings for divorce and alimony, and providing for a system of practice and procedure in such cases, provides that a party against whom a decree of divorce has been granted may have the same reviewed by this court on error, if the writ is sued out within six months from the date of such decree. Page 241, § 11, Acts 1893; section 1567b, 3 Mills' Ann. St. The act also provides that the same practice and proceedings shall be had in divorce cases as are usually had in other civil actions, in accordance with the requirements of the Civil Code, except as expressly modified or provided in the act (page 237, § 2, Laws 1893; section 1563, 3 Mills' Ann. St.). Writs of error may be sued out of this court within three years from the rendition of the judgment complained of (section 401, Mills' Ann. Code), which is final (section 406, *Id.*), except as modified by section 406a, *Id.*, which, so far as the questions involved in this case are concerned, only lie to review judgments exceeding \$2,500, exclusive of costs. Defendant in error moves to dismiss upon two grounds: (1) The judgment is not sufficient in amount to give this court jurisdiction; (2) the writ of error was sued out more than six months after the rendition of the judgment by the district court.

E. A. Ballard, H. B. Johnson, and Ralph W. Smith, for plaintiff in error. Thomas W. Lipscomb, for defendant in error.

GABBERT, J. (after stating the facts). The first proposition advanced by counsel for defendant in error in support of the motion to dismiss has been decided adversely to his contention by this court at the last term, in the case of Mercer v. Mercer (Colo. Sup.) 60 Pac. 349, wherein it was held that under the act of 1893, providing a system of practice and procedure in relation to divorce and alimony, writs of error from judgments in such cases could only be sued out from this court, and that the amount for which judgment for alimony may have been rendered was immaterial. The reason for this ruling is, as stated in Mercer v. Mercer, supra: "The order or judgment for alimony grows out of the main case, and is inseparable from it; and

the cases are full to the point that, where an appellate court has jurisdiction of the main action, it also has jurisdiction of all incidents attaching to that action." All incidents must go where the issue which gives character to the case indicates that it belongs; for a cause cannot be dissected into parts, one part going to one appellate court, and another to another. *Eickhoff v. Eickhoff* (Colo. App.) 59 Pac. 411; *Mercer v. Mercer* (Colo. App.) 57 Pac. 750. Any other rule would tend to bring about unseemly conflicts between appellate courts. An incident to the main action for divorce might be taken to one court for review, and its decision on the questions thus presented might be entirely contrary to the decision of the court which ultimately determined the primary and principal issues in the action. *Eickhoff v. Eickhoff*, supra.

The law is clear that a writ of error for the purpose of reviewing a decree of divorce cannot be sued out after the lapse of six months from the date of such decree. It may also be true that a judgment for alimony cannot be reviewed upon writ of error sued out later than six months after the rendition of the decree of divorce, in connection therewith, for the reason that the judgment for alimony could not be reviewed without also reviewing the decree for divorce; but we are not concerned with that question here, because no decree of divorce has been entered. The question, then, presented is, does the six-months limitation apply to incidental judgments entered in divorce proceedings where no decree of divorce has been rendered? The section in which the six-months limitation is found does not so provide, for that relates to decrees of divorce only. Except as expressly modified or provided in the divorce act, "like process, practice and proceedings shall be had in such cases as are usually had in other civil cases, and in accordance with the requirements of the Code of Civil Procedure." Laws 1893, p. 237, § 2. This provision certainly contemplates that any judgment, other than a decree for divorce, rendered in an action of that character which is final, and therefore, by virtue of our Code, reviewable on error, may be so reviewed, except as otherwise provided or declared by the act itself. The only modification and provision on this subject is the limitation above noted, but that only applies to a divorce decree, or perhaps, as suggested, to incidental judgments in the action, when such a decree is rendered in the same case. So that this limitation, in the absence of a decree for divorce, is in no manner applicable to a judgment for alimony. Such a judgment, when unaffected by a decree of divorce, would be governed by the provisions of the Code relative to writs of error, by virtue of section 2 of the divorce act. The writ of error having been sued out within three years from the date of the judgment complained of, and no decree of divorce having

been entered in the case, the motion to dismiss must be denied; and it is so ordered. Motion denied.

FIRST NAT. BANK OF DENVER v. BOARD OF COM'RS OF MONTROSE COUNTY.

(Supreme Court of Colorado. May 7, 1900.)

APPEAL—JURISDICTION—MOTION TO DISMISS—ABSENCE OF BRIEF—DENIAL WITHOUT PREJUDICE.

Where a motion is made to dismiss an appeal because the court is without jurisdiction, and no brief or argument of any kind is filed or made, except that on the motion is written, "See folio 57-58, page 15, Abstract, as to what is involved in this case," the motion will be denied without prejudice.

Appeal from district court, Montrose county.

Action between the First National Bank of Denver and the board of county commissioners of Montrose county. From a judgment in favor of the board, the bank appeals. The board moves to dismiss the appeal. Motion denied, without prejudice.

F. D. Catlin and Chas. J. Hughes, Jr., for appellant. John Gray, for appellee.

PER CURIAM. Appellee moves to dismiss this appeal for the reason that this court is without jurisdiction "because the matter in controversy does not relate to a franchise or freehold, nor the construction of a provision of the constitution of the state or the United States, as will appear from the record and abstract filed herein." No brief or memorandum of any kind is filed in support of this motion, except on the motion appears the following: "See folio 57-58, page 15, Abstract, as to what is involved in this case." In the absence of any brief or argument whatever in support of the motion, we will not undertake to determine in limine a motion to dismiss an appeal for want of jurisdiction. Before determining such a motion, we must be advised by counsel presenting it as to what questions, according to their views, are involved in the appeal sought to be dismissed. *Lochbrunner v. Sherman* (Colo. Sup.) 58 Pac. 575. Until so advised, we are unable to say whether any point relied upon in support of the motion is well taken or not. Motion denied, without prejudice.

PEOPLE ex rel. DYETT v. McMURRAY et al.

(Supreme Court of Colorado. March 19, 1900.)

MUNICIPAL CORPORATIONS—CITY COUNCIL—STREET-RAILWAY TRACKS—REMOVAL—MANDAMUS.

Laws 1893, c. 78, § 20, cl. 37, provides that the city council of Denver shall have power to compel the removal of all obstructions from the streets, and clause 44 authorizes the council to regulate the laying of railway tracks and the operation of railways in the city streets. A railway company constructed a

track along a city street without authority, and an abutting lot owner brought mandamus against the city council to compel it to order the removal of the track. *Held* that, since the power of the council to remove the track was discretionary, mandamus would not lie to compel it to act.

Appeal from district court, Arapahoe county.

Mandamus by the people, on relation of Harriette H. Dyett, against Thomas S. McMurray and others, councilmen of the city of Denver, to compel them to order the removal of street-railway tracks. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

On February 3, 1898, relator filed her petition in the district court of Arapahoe county for a writ of mandamus to compel the mayor and city council to take such action as might be necessary to accomplish the removal of a certain railroad track constructed in and along Wewatta street, in the city of Denver, and to compel the board of public works and commissioner of highways to co-operate with them in such action as they might take for that purpose. The relator is, and for two years prior to the filing of her petition has been, the owner of the northwesterly half of lot 7, block 36, West Denver, which abuts on the southeasterly line of Wewatta street for a distance of 132.5 feet. The material facts as set forth in the petition are, in brief, as follows: On August 15, 1881, the city council of Denver passed an ordinance granting a right of way to the Denver & New Orleans Railway Company to construct, maintain, and operate a single or double track railroad, with the necessary depots, shops, etc., along and across certain streets,—among others, “from its track in Third and Wewatta street on and along said Wewatta street to the west bank of Cherry creek; provided, that no more than one-third of the street should be occupied at any one point.” That they might allow other railroad companies to run upon its tracks upon such terms as were agreed upon between the companies. In pursuance of the authority so conferred, the Denver & New Orleans Railway Company constructed two tracks in Wewatta street in front of the premises now owned by plaintiff, and in doing so occupied fully one-third of the street. Afterwards, in 1887, the Denver, Texas & Gulf Railway Company succeeded to the rights of the Denver & New Orleans Railway Company, and entered into a contract with the Denver & Santa Fé Railway Company, a leased line of the Atchison, Topeka & Santa Fé Railway Company, by virtue of which the last-named company has claimed and assumed the right to use, maintain, and operate for general railroad purposes its railroad, and to run its locomotives and cars along said street, between the points aforesaid, and over said track so placed thereon by said Denver & New Orleans Railway Company. In the fall of 1887 the Denver & Santa Fé Railway Com-

pany, without authority or license from the city, and without the leave or consent of any of the owners of property abutting on that portion of Wewatta street, constructed thereon, between Fifth and Eleventh streets, about 19½ feet (from center to center of tracks) southeasterly from and parallel to the southeasterly of said two tracks placed there by said Denver & New Orleans Railway Company, and at a distance varying from 29.55 feet near Seventh street to a distance of 27.-85 feet opposite petitioner's lot from the northwesterly lot lines between said points to the center of said track, a standard-gauge railway track, which the Denver & Santa Fé Railway Company, and, by its authority, the Atchison, Topeka & Santa Fé Railway Company, have ever since possessed and occupied in constant use for general railroad purposes, running its locomotives, cars, and trains over the same, and using it as its “main track”; thereby so obstructing the said street as to render the track and the use thereof a public and private nuisance. That the city authorities, although petitioned so to do by relator, not only refused to abate the same, but were about to adopt an ordinance which had been agreed upon between them and the railway company, by which the latter is to surrender its “Denver Circle” franchise, and convey certain lands to the city, in consideration that the city is to recognize and confirm the right of the company to maintain and operate the track complained of into the Union Depot. Incidental to the ultimate relief asked, relator seeks to enjoin the city authorities from adopting such ordinance. From the judgment of the court below dismissing the action, relator prosecutes this appeal.

Charles H. Dyett, George L. Hodges, and Thos. H. Hardcastle, for appellant. J. M. Ellis and Chas. E. Gast, for appellees.

GODDARD, J. (after stating the facts). The controlling question presented is whether or not mandamus is the appropriate remedy, or can be invoked to obtain the relief sought. Counsel for appellant strenuously insist that it is, since the city council, by clause 37, § 20, of the city charter (Sess. Laws 1893, c. 78), is clothed with the power to provide for the removal of all obstructions from, and to prevent all encroachments upon, the streets within the city; that the power, being granted for the public benefit, is not discretionary, and its exercise becomes a duty which the city is bound to perform. In support of their position they rely upon *Borough of Uniontown v. Com.*, 34 Pa. St. 293; *Trustees v. Kinner*, 13 Bush, 334; *People v. Mayor, etc.*, of Bloomington, 63 Ill. 207; *Village of Glencoe v. People*, 78 Ill. 383; *Brokaw v. Commissioners*, 130 Ill. 482, 22 N. E. 596. From an examination of these cases it will be seen that the duty there enforced was that of repairing the streets, or of re-

moving a character of obstructions that the city council, under no circumstances, could authorize or permit. In these respects the facts in those cases were essentially different from those in the case at bar. By clause 44 of the section of the charter above referred to, the city council is authorized "to permit and regulate the running of railway cars propelled by steam, cable, electricity or other motive power, the laying down of tracks for the same; * * * and to compel them to remove their tracks so as to avoid unnecessary interference with the use of the streets by the public or by the owners of the abutting property." This court in several cases has recognized and affirmed such right. *City of Denver v. Bayer*, 7 Colo. 113, 2 Pac. 6; *Railroad Co. v. Nestor*, 29 Colo. 403, 15 Pac. 714; *Railroad Co. v. Domke*, 11 Colo. 247, 17 Pac. 777; *Railway Co. v. Barsaloux*, 15 Colo. 200, 25 Pac. 165. It is therefore clearly within the province of the city council, in the exercise of such power, to determine whether a railway track which has been laid in a street without authority shall be permitted to remain, or the necessary steps be taken to remove it. Their action in this respect must necessarily be governed by the circumstances of the particular case, and involves the exercise of discretion and judgment, and is, therefore, not subject to the control of the courts by mandamus. Counsel, however, contend that, even conceding that the city council has the power, under the charter, to give license by ordinance for the locating of the track in question where it is in Wewatta street, that, not having granted such license, the occupation is, therefore, "without authority of law," and is an "obstruction," which it has been the duty of the city authorities for the past 10 years to abate; and that the status of the obstruction must be considered with respect to the time when the performance of the duty of the city officials to remove and abate the same was invoked on behalf of the public; and that duty must be performed in respect to that status, whatever the city authorities might see fit to do within the scope of any lawful powers vested in them thereafter. To this we cannot agree. At the time this remedy was invoked the authorities had taken steps to confer upon the railway company the right to use and operate the track as located, and were about to adopt an ordinance for that purpose. It would, therefore, be an idle ceremony for the court to adopt the suggestion of counsel, and compel them to remove the track, even if it had the power so to do, when they might immediately, in the exercise of their conceded authority, permit the company to replace it. We are therefore clearly of the opinion that in the circumstances of this case the relator is not entitled to the remedy asked, and that the court below properly dismissed the action. Its judgment is accordingly affirmed. Affirmed.

On Petition for Rehearing.

(May 21, 1900.)

PER CURIAM. In support of the petition for rehearing it is urged that the particular facts in the petition for mandamus upon which petitioner relies for relief, namely, that the track in question destroys all access to the property abutting on Wewatta street, have been overlooked. We fully understood and considered the averments of the petition in this respect. As stated in the opinion, the controlling question is whether or not mandamus is the appropriate remedy or can be invoked to obtain the relief sought. The contention of counsel for appellant is that the city authorities may be compelled by mandamus proceedings to remove obstructions which virtually close the street as a public thoroughfare. In an appropriate action against the proper parties the question of the power of the municipal authorities to permit the obstruction complained of could undoubtedly be determined, but it cannot in this proceeding. The city has the authority to permit a street to be occupied by railroad tracks. This involves the exercise of discretion and judgment on the part of its proper officials. It is authorized to compel the removal of tracks which unnecessarily interfere with the use of a street by the public or by the owners of abutting property. The degree of obstruction, however, caused by such occupation, does not change the rule that the exercise of discretion on the part of municipal officials cannot be interfered with by mandamus; otherwise, in every case where a track was laid upon a street, the question whether or not it resulted in unnecessary interference with its use would become the subject of inquiry through mandamus. This would result in transferring the government of municipalities to the judiciary, when, under the law, it is vested in the municipal officials. Petition for rehearing denied.

BERGDAHL et al. v. PEOPLE.

(Supreme Court of Colorado. April 9, 1900.)

CRIMINAL LAW—INFORMATIONS—VERIFICATION—PERSONAL KNOWLEDGE—CONSOLIDATION—MOTION TO QUASH—STIPULATION—ERRONEOUS INSTRUCTIONS—BILL OF EXCEPTIONS—VERDICT—CONSTRUCTION—EVIDENCE—LARCENY—SUFFICIENCY.

1.1 Mills' Ann. St. § 1452, provides that where several charges exist against a person for one or more acts or transactions of the same class of crimes or offenses, and two or more indictments are found in such cases, the court may order them consolidated. Defendants were charged, in two counts, under 2 Mills' Ann. St. § 3234, (a) with breaking ore from certain mines, with intent to steal, and (b) with removing the same ore from the same premises, with intent to defraud; and by a subsequent information under 3 Mills' Ann. St. § 1230, and 1 Mills' Ann. St. § 1232, (a) with the larceny of \$500 worth of ore, and (b) with buying and receiving it from some unknown thief, knowing it to have been stolen. The subject-matter in each of the counts of the re-

spective indictments was the same, the ore was identical, and the time and place of the crime in each case were the same. *Held*, that the two informations were properly consolidated.

2. Where a transcript on appeal in a criminal case contains what purports to be a motion to quash the information, but fails to show that the decision of the trial court overruling the same had been preserved by a bill of exceptions, the ruling cannot be reviewed.

3. Const. art. 2, § 7, provides that no warrant to seize any person shall issue unless probable cause therefor is made to appear by oath reduced to writing. 3 Mills' Ann. St. § 1432h, provides that, where a defendant has not had or waived a preliminary examination, the information shall be accompanied by an affidavit of some credible person verifying the information on the personal knowledge of affiant that the offense was committed. A defendant filed a motion to quash the information for the reason that the person making the affidavit had no personal knowledge of the matters stated in the information. The motion was overruled, but the ruling was not preserved by a bill of exceptions. The defendant and district attorney stipulated that defendant had no preliminary examination, and that no affidavits supporting the information were filed, except the one referred to. *Held*, that as the motion to quash was no part of the record, and the stipulation was insufficient to preserve the exception, defendant would be deemed to have waived the error, and no review can be had thereon.

4. The fact that the testimony disclosed that the party who verified an information did not have personal knowledge of the guilt of the accused did not impair its sufficiency, since its statements cannot be attacked by extraneous evidence.

5. Errors in the giving of instructions on the behalf of the state in a criminal case, and in refusing to give those requested by the accused, must be preserved by a bill of exceptions, or no review can be had thereof.

6. An information in two counts charged two persons in the first count with the larceny of \$500 worth of ore, and in the second count with buying and receiving it from some unknown thief, knowing it to have been stolen. The jury returned a verdict in the following form: "We, the jury in the above-entitled cause, do find the defendants guilty as charged in information; * * * and we further find the value of the ore taken to be \$316.66." *Held*, that by fair intendment the verdict had reference to the first count only, and was not void for indefiniteness.

7. In a prosecution for the larceny of ore, the defendants were employed on the property from which the ore was stolen, and on the particular mines producing ore of the character found in their possession, which was identified as coming therefrom. They were found with it in their possession at a time and place and under circumstances which fully indicated that they had not come by it honestly, and they acted in concert. They offered no explanation of how they obtained the ore. *Held* sufficient to sustain a verdict of guilty.

Error to district court, San Miguel county.

Prosecution for larceny by the people of the state of Colorado against Nils Bergdahl and Charles Anderson. From a judgment of conviction, defendants bring error. Affirmed.

H. B. O'Reilly, for plaintiffs in error. D. M. Campbell, Atty. Gen., Calvin E. Reed, D. B. Carey, M. B. Gerry, and H. M. Hogg, for the People.

GABBERT, J. By information filed in the court below, plaintiffs in error were jointly

charged, in two counts, (1) with breaking ore from certain mines, with intent to steal; and (2) with removing ore from the same premises, with intent to defraud. The information in this case was based upon the provisions of section 3234, 2 Mills' Ann. St., which in terms provides that if any employé shall break and sever, with intent to steal, or shall take, remove, or conceal the ore from any mine, with intent to defraud the owner of such mine, such offender shall be deemed guilty of felony, and on conviction shall be punished as for grand larceny. By a subsequent information, also filed in the trial court, they were jointly charged, in separate counts, (1) with the larceny of \$500 worth of ore; (2) with buying and receiving it from some unknown thief, knowing it to have been stolen. The counts in this information were respectively based upon the provisions of section 1230, 3 Mills' Ann. St., and section 1232, 1 Mills' Ann. St. The first of these sections defines larceny to be the felonious stealing of the personal goods or chattels of another. By the latter section it is declared that every person who, for his own gain, shall receive stolen property, or anything the stealing of which is declared to be larceny, knowing the same to have been so obtained, shall be punished the same as for larceny. For each of these offenses the punishment prescribed is the same, and is measured by the value of the property stolen or received. The owner of the ore was alleged to be the same in each information, and the respective offenses were charged to have been committed at the same time and place. Over the objection of plaintiffs in error, these informations were consolidated, and the first question we shall determine is whether or not the court erred in this respect. The law provides that counts in larceny and for receiving stolen goods may be joined in the same indictment. Section 1438, 1 Mills' Ann. St. The legislature has also enacted that all provisions of the law relative to proceedings upon indictment shall, so near as may be, apply to informations, and to all prosecutions and proceedings thereon. Section 1432e, 3 Mills' Ann. St. It is also provided by the act relative to prosecutions of criminal offenses by information that "different offenses and the different degrees of the same offense, may be joined in one information in all cases where the same might be joined by different counts in one indictment." Section 1432c, Id. By section 1452, 1 Mills' Ann. St., it is provided that "whenever there are * * * several charges against any person * * * for one or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts, and if two or more indictments are found in such cases, the court may order them consolidated." This is but a declaration of the common law on the subject

of joinder of counts in one indictment, or the consolidation of indictments, and the only question necessary to determine is whether or not the case at bar falls within the provisions of the portion of the section above quoted. It is conceded that the subject-matter of the offenses in each of the counts of the respective indictments is the same; that is to say, the ore described in each count is identical. It also appears that the owner of the ore in each case is the same, and it is charged that each offense was committed at the same time and place. Different offenses are charged, but the conceded facts are such that plaintiffs in error could not be guilty of more than one. The different counts, therefore, are drawn with a view that one of them upon the trial may be found to meet the evidence, so that plaintiffs in error were not subjected to a trial upon four distinct charges, but for one only, which would be determined solely from the evidence submitted to the jury. This procedure was permissible at common law, and the statute, by employing the expression "which may properly be joined," refers to those cases in which such procedure may be adopted as one of the class which may be united in the same indictment in different counts, or, if in separate indictments, may be consolidated. *White v. People*, 8 Colo. App. 289, 45 Pac. 539; *People v. Aikin*, 66 Mich. 400, 33 N. W. 821; *Cummins v. People*, 4 Colo. App. 71, 34 Pac. 734. The punishment for each offense charged is identical. Hence they belong to the same class of crimes, and, under the provisions of the law cited, might have been charged in one information, under separate counts; but, not having been so presented, the court properly ordered the two informations consolidated. In thus construing the portion of the section above quoted, we do not wish to be understood as holding that these informations might not properly be consolidated under other of its provisions.

Each of these informations was verified, to the effect that the facts stated in the information are true, and that the offenses therein charged were committed to the personal knowledge of the affiant. It is urged that this verification is insufficient, for three reasons: (1) That it could not take the place of the separate affidavit upon which the filing of an information by the district attorney can be based; (2) because it appears from the testimony of the affiant that he did not have personal knowledge of the facts stated in the information; and (3) that inasmuch as the plaintiffs in error were charged with different felonies, relating to the same transaction, of such a character that they could not be guilty of more than one of the offenses charged, therefore it is manifest that the affiant did not possess the degree of knowledge which the law contemplates he should have.

The first and third objections may be considered together. In the bill of exceptions it appears that plaintiffs in error interposed a

motion to quash the information, which was denied. It also appears from the same source that it was agreed between counsel that the proofs with respect to this motion would show that plaintiffs in error had no preliminary examinations on the charges set out in the respective counts, and that no affidavits supporting the informations were filed, except as above referred to. In what is returned to this court as a transcript of the record proper appears what purports to be a motion to quash the informations in this case. A motion to quash is not a part of such record, and can only be preserved by a bill of exceptions. *Smith v. People*, 1 Colo. 121. And we are therefore precluded from considering any of the reasons assigned in the motion claimed to have been filed below, unless what appears in the bill of exceptions as to the action of the court on the motion to quash is sufficient to properly raise the questions presented by objections 1 and 3. The failure to properly verify an information is not one which affects its sufficiency. It is required to be verified as designated by sections 1432b, 1432h, 3 Mills' Ann. St. These are provisions which are intended to, and do, comply with section 7, art. 2, of our bill of rights, which, in substance, declares that no warrant to seize any person shall issue unless probable cause therefor is made to appear by oath or affirmation, reduced to writing. This right, however, is one which may be waived, and, unless properly presented below, cannot be raised in this court. *Taylor v. People*, 21 Colo. 426, 42 Pac. 652. A motion to quash must point out specifically the grounds upon which it is based. That the bill of exceptions shows that a motion to quash the information was interposed; that the district attorney and counsel for plaintiffs in error agreed that no preliminary examination of the latter had been held, touching the charges mentioned in the information; and that no affidavits supporting them were filed, except as above referred to,—presents no question relative to the insufficiency of the verification, for the reason that, in the absence of a motion to quash, we are unable to say that the facts stipulated were material, or that any specific ground was mentioned in the motion which was sufficient to sustain it.

In support of the second ground, attacking the sufficiency of the verifications of these informations, it is urged that, inasmuch as the testimony disclosed that the party who verified them did not have personal knowledge of the guilt of the plaintiffs in error, therefore they were not properly verified. Whether or not an affidavit upon which an information is based complies with the statute must be determined from the context of the affidavit itself, and its statements cannot be attacked by extraneous evidence. *Holt v. People*, 23 Colo. 1, 45 Pac. 374.

The next point made by counsel for plaintiffs in error is that the instructions of the court were erroneous, and that the court er-

ed in refusing to give those requested on their behalf. The Civil Code has no application whatever to the practice in criminal cases. In the latter everything which is not a part of the record proper must be preserved by a bill of exceptions. *Smith v. People*, supra. This includes instructions given by the court, and the exceptions thereto, as well as those refused, and the exception to the ruling of the court in this respect. This proposition has been so frequently decided by this court that it is unnecessary to discuss it at this time. The latest declaration on the subject is *Packer v. People* (Colo. Sup.) 57 Pac. 1087, which cites the numerous authorities on this question.

The jury returned a verdict in the following form: "We, the jury in the above-entitled cause, do find the defendants guilty as charged in information No. 329; and we further find the value of the ore taken to be \$316.66." Cause No. 329 was the one in which plaintiffs in error were charged with larceny and receiving stolen goods. It is claimed that they were found guilty of both offenses. Their counsel contend that it is manifestly impossible that they could be guilty receivers of stolen property which they themselves had stolen, or, in other words, that they cannot be found guilty of offenses which cannot, by their very nature, co-exist. If the verdict was susceptible of the construction contended for by counsel, it would raise a serious question; but verdicts are rendered by "lay people," not versed in the strict rules of pleading. Whatever language in the verdict conveys the clear intention of the jury to the common understanding will suffice. It must also be construed as a whole, not in separate parts, and all fair intendments should be made to support it. Section 1005a, 1 Bish. New Cr. Proc.; *State v. Ryan*, 13 Minn. 370 (Gil. 343); *State v. Bowen*, 16 Kan. 475. Tested by these rules, the verdict is clearly sufficient. The first part might indicate that the jury had found plaintiffs in error guilty of both offenses, but, when that is considered in connection with the part immediately following, it is clear that they found them guilty of the offense of larceny only, and so meant and intended when they stated, "We further find the value of the ore taken to be \$316.66." The word "taken" must be understood to have been used in its ordinary English significance, and, as employed in the verdict, clearly refers to the ore stolen. Had the jury intended to find the plaintiffs in error also guilty of the crime of receiving the ore, they would certainly have employed an appropriate word to express that intention, or, if they had only intended to find them guilty of that offense, they would have employed language from which that conclusion could be deduced.

The final point made by counsel is that the evidence is insufficient to support the verdict. To notice the testimony at any

great length would serve no useful purpose. It appears therefrom that the plaintiffs in error were employed upon the property of the smuggler Union Company, from which it is alleged the ore in question was stolen; that they were employed upon the particular mines producing ore of the character found in their possession; that this ore was identified as coming from the property of the company; that they were found with it in their possession at a time and place, and under circumstances, which fully indicated that they had not come by it honestly, and that they were acting in concert. They offered no testimony in their behalf, and made no attempt to explain where the ore came from, or how they obtained possession of it. From these facts and circumstances the jury found them guilty, and, in our judgment, the evidence fully warrants their conclusion. *Roberts v. People*, 11 Colo. 213, 17 Pac. 637. Finding no error in the record, the judgment of the district court is affirmed. Affirmed.

LAMSON et al. v. VAILES et al.

(Supreme Court of Colorado. Feb. 5, 1900.)

WATERS AND WATER COURSES—WATER PRIORITIES—LANDS OUTSIDE THE STATE.

1. Gen. St. 1883, §§ 1762, 1766, providing a mode of adjudicating questions concerning the priority of rights to water appropriation for irrigation purposes, have no application to cases where the point of diversion is within the state, but the lands to be irrigated lie without its territorial limits, and hence, in a proceeding under such statutes, water will not be decreed to irrigate New Mexico lands.

2. Where, on a referee's report recommending an award of a water priority to plaintiff of 12 cubic feet per second of time, the court reduced the award to 4 cubic feet, it was error to do so on the ground that the referee's report was based largely on the original carrying capacity of the ditch and the number of acres intended to be irrigated, the evidence being so indefinite as to make it impracticable to determine what quantity of water plaintiff's ditch should have.

Appeal from district court, La Plata county.

Action by Edwin Lamson and others against William T. Vailes and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

S. W. Carpenter, B. W. Ritter, and Talbot, Denison & Wadley, for appellants. Richard McCloud and Reese McCloskey, for appellees.

CAMPBELL, C. J. This is an appeal from a portion of a decree of the district court of La Plata county rendered in a proceeding instituted under the irrigation statutes of 1879 and 1881 for the adjudication of the priorities to the use of water for irrigation in water district No. 33. The questions argued by counsel are one of fact and two of law.

The question of fact is embraced within an assignment of error that a less quantity of water was awarded to the ditch of ap-

pellants than that to which the evidence entitled it; but, as will be seen later in the opinion, this is eliminated from the present discussion.

The material facts out of which spring the legal propositions are these: The point of diversion of the ditch of appellants is in the state of Colorado, and the lands for the irrigation of which the ditch was constructed as a carrier are situate partly in the state of Colorado and in part in the territory of New Mexico. The legal questions discussed are: First. Can water be appropriated by diversion in Colorado for use in New Mexico? In other words, may one owning land in the territory of New Mexico, whether he be a citizen of the state of Colorado or of some other state or territory of the Union, make a diversion in this state from the waters of a nonnavigable stream, and convey the same into the territory of New Mexico for the irrigation of lands therein? Second. Has the district court of La Plata county, under the so-called "Irrigation Statutes," jurisdiction in the statutory proceeding to award priorities to a ditch which, though having its headgate in this state, was intended to, and does, carry water outside of this state, and into the territory of New Mexico, for the irrigation of lands there?

The first is a very important question, and one which, so far as we are advised, has not been passed upon by a court of last resort, though it is claimed that, in principle, the decision in *Howell v. Johnson* (C. C.) 89 Fed. 556, is authority for the contention. Certain it is that it is a case of first impression in this jurisdiction. In the view we take of the second legal proposition, it is not necessary to a decision of this appeal to determine the first.

It is clear that the court below, in deciding that it had not jurisdiction to award a priority to the ditch of appellants for the irrigation of lands in New Mexico, but only to the extent that the appropriation was made for lands in Colorado, was right under the statutes governing this special proceeding. The appellants contend that sections, 2399, 2403, Mills' Ann. St. (Gen. St. 1883, §§ 1762, 1766), contemplate an adjudication for settling the priority of rights for irrigation for all ditches whose points of diversion are within the state, even though the lands to be irrigated are, in whole or in part, beyond its territorial limits. These sections provide for an adjudication of priorities for ditches drawing water for irrigation from the same stream or its tributaries within the same water districts. If driven to that extremity, it would not be difficult, from the language used, to demonstrate that the adjudication was limited to ditches, etc., used for irrigating lands in this state only, though the language does not in terms so provide. We do not, however, rest our conclusion solely upon the language of these sections. We cannot presume that the general assembly intend-

ed to enact a law to operate beyond the territorial limits of the state. The distinction sought to be made by appellants, that the point of diversion of the ditch is the sole factor determining the jurisdiction of the court, is not good. The statutes under which this proceeding was instituted—those creating the various water districts, and our entire irrigation law—must be taken together, and, if possible, the different provisions so interpreted as to give effect to all, and make them harmonious, the one with the other. It is not to be supposed that the state was legislating for the reclamation or irrigation of lands beyond its boundaries, or making provisions, by the way of police regulations (which we have held these statutes, in some measure, to be), over a territory beyond its jurisdiction.

The different acts establishing water districts (1 Mills' Ann. St. § 2310 et seq.; Gen. St. 1883, § 1741 et seq.) either in terms declare, or by implication assume, that these districts are restricted to lands within the state; and the particular act creating district No. 33, the one in question, is "that district number thirty-three shall consist of all lands lying in the state of Colorado irrigated from ditches or canals, taking water from the La Plata river, and its tributaries, which lie in Colorado." 1 Mills' Ann. St. § 2344 (Sess. Laws 1885, p. 259, § 26). The earliest territorial acts expressly confine legislation relating to irrigation to lands situate in the territory. 1 Mills' Ann. St. § 2256 et seq. (Gen. St. 1883, § 1711). From these enactments it is altogether conclusive that in these proceedings, at least, the intention of the general assembly was to limit the adjudication to ditches irrigating lands situate in this state, and not elsewhere.

Such being our conclusion, it is unnecessary, as we have said, to pass upon the other legal proposition pressed upon us. No complaint having been made of the quantity of water awarded for the irrigation of appellants' lands situate in Colorado, and the additional quantity to which they claim they are entitled being based upon their attempted diversion and appropriation for the benefit of lands in New Mexico, it becomes unnecessary to determine the assignment of error based upon an alleged erroneous award. The decree of the district court is in accord with the views herein expressed, and it is affirmed. Affirmed.

Petition for Rehearing.

(June 4, 1900.)

PER CURIAM. As will be seen from the concluding sentence of the foregoing opinion, we refused to pass upon the assignment of error that an insufficient quantity of water was decreed. This action was based upon a statement in appellants' original brief to the effect that their claim therefor was based upon an attempted ap-

propriation for lands in New Mexico. In their petition for rehearing, and in their argument in its support, appellants maintain that, though such statement be susceptible of that interpretation, their true position was, and is, that under the evidence they are entitled to a larger quantity of water than they received for irrigating their Colorado lands. An examination of the record satisfies us that appellants' position was misapprehended, and we have therefore examined the record with a view to ascertain its soundness. The referee, who heard the witnesses testify, recommended that to appellants' ditch there be awarded a priority of 12 cubic feet per second of time, which the court reduced to 4 cubic feet. We do not know why this change was made. The appellees maintain that the reduction was made because the referee's award was based largely, if not altogether, upon the original carrying capacity of the ditch, and the number of acres of land which it was intended to irrigate, and not upon the quantity of water that was actually applied to a beneficial use. This may have been the principle adopted by the trial court, but, if so, its conclusion is not warranted. The evidence is so indefinite that we do not believe it practicable to determine from it the quantity of water appellants' ditch should have. The original opinion, therefore, is modified in this particular only. The cause is remanded, with instructions to the district court to proceed upon the evidence already before it, together with such additional evidence as the parties may see fit to introduce, to ascertain and determine the quantity of water to which the appellants' ditch is entitled for the benefit of lands situate in Colorado. Reversed and remanded.

TAYLOR et al. v. COLORADO IRON WORKS.

(Supreme Court of Colorado. April 9, 1900.)

APPEAL AND ERROR—SUPREME COURT—JURISDICTION—APPEAL FROM COURT OF APPEALS—MECHANICS' LIENS.

Sess. Laws 1891, p. 118, § 1, provides that no appeal to the supreme court shall lie unless the judgment to be reviewed exceed \$2,500, except where a franchise or freehold is involved, or the construction of a constitutional provision is necessary to the decision; and section 15 declares that appeals shall only lie from the court of appeals to the supreme court in cases where they might have gone to the supreme court direct. *Held*, that whether an appeal to the supreme court would lie from a judgment of the court of appeals was to be determined by the judgment of the district court; and hence, where a judgment was entered in favor of a mechanic's lien claimant for a money judgment against a lessee of a mine, but denied enforcement of the lien on the property of the lessor, an appeal could not be taken by such lessor from a judgment of the court of appeals reversing such judgment, and directing enforcement of the lien, since there was no judgment against the lessor in the district court.

Appeal from court of appeals.

Suit to enforce a mechanic's lien by the Colorado Iron Works against W. A. Taylor and others. A decree against all defendants except W. A. Taylor and John Leonard was reversed by the court of appeals (55 Pac. 942), from which defendants Taylor and Leonard appeal. Dismissed.

Hogg & Ingersoll and J. Warner Mills, for appellants. Teller & Orahood, for appellee.

PER CURIAM. This case was originally brought in the district court of San Miguel county, and involves the right of the Colorado Iron Works to a mechanic's lien for work, labor, and materials furnished, amounting in the aggregate to upwards of \$4,000, for the erection of certain mill improvements upon a mill site owned by Taylor and Leonard. The materials and work were furnished to the Alleghany Mining Company, which was in possession of the property, and erected the improvements under and in pursuance of a contract to purchase the latter. The district court rendered judgment against the mining company for the amount claimed, but denied appellee's right to a lien against the property of appellants, and rendered judgment in their favor for costs. On appeal to the court of appeals, the judgment of the district court was reversed, and the cause remanded, with instructions to modify its decree so as to give appellee a lien upon the title and interest of appellants in the improvements erected and the mill site upon which they are situate. From this judgment Taylor and Leonard prosecute this appeal. The appellee moves for an order dismissing the appeal, upon the ground that this court has no jurisdiction to entertain it.

Counsel for the respective parties have discussed this motion upon the theory that the judgment of the court of appeals is the criterion by which our jurisdiction is to be determined, and have devoted their entire arguments to the question of whether or not that judgment was, in effect, a judgment for more than \$2,500, exclusive of costs, and therefore appealable to this court under section 1 of the court of appeals act (Sess. Laws 1891, p. 118), or one that merely established a mechanic's lien against the property of appellants, and therefore not within our appellate jurisdiction. In our opinion, such an inquiry is entirely unnecessary, since it is clear, from the express terms of that act, that our appellate jurisdiction depends upon the character of the judgment rendered by the district court, and whether an appeal would lie to this court from that judgment in the first instance. Section 1 provides: "No writ of error from, or appeal to, the supreme court shall lie to review the final judgment of any inferior court, unless the judgment * * * exceeds two thousand five hundred dollars exclusive of costs: provided, this limitation shall not apply where the matter in controversy relates to a franchise or freehold, nor

where the construction of a provision of the constitution of the state or of the United States is necessary to the determination of a case." Section 13, *inter alia*, enacts: "Writs of error from, or appeals to, the supreme court, shall lie to review every final judgment of the court of appeals in cases which, under this act, might have been taken for review to the supreme court in the first instance." It will be seen that the judgment rendered by the district court does not come within any of the classes enumerated in section 1, and could not have been brought to this court for review in the first instance, and therefore the present is not a case in which an appeal will lie to review the judgment rendered by the court of appeals. Without expressing any opinion as to whether or not the decree directed by the court of appeals, when entered by the district court, comes within our appellate jurisdiction, we are satisfied that we are without jurisdiction to entertain the present appeal, and the same is accordingly dismissed.

LEE v. STANARD, County Treasurer.

(Court of Appeals of Colorado. May 14, 1900.)

TAXATION—PERSONAL PROPERTY—CHATTEL MORTGAGES—LIENS—PRIORITY—MORTGAGOR'S POSSESSION—FRAUD—COLLATERAL AGREEMENT—EFFECT—MORTGAGEE—AGENT FOR MORTGAGOR.

1. Gen. St. § 2819, declares that taxes levied on personalty shall remain a lien thereon until paid, and requires the county treasurer to collect the same, if delinquent on the 1st of the following January, by distress and sale. Section 2833 provides that horses running at large shall be assessed in the county in which they are herded on May 1st of each year. During the years 1892 to 1895, inclusive, taxes were charged on "200 head of range horses" in K. county, on schedules returned by the owner of a herd ranging in both K. and B. counties; and prior to May, 1897, when the treasurer of K. county levied on a part of the herd, consisting of colts, yearlings, and three and four year olds, the owner mortgaged the herd and its increase. *Held*, that since a part of the horses levied on were not in existence at the time of the assessment, and it did not appear that the remainder were in K. county when the assessments were made, the county was not entitled to priority of lien as against the mortgagee.

2. That mortgages of a herd of unworked range horses provided that the mortgagor might retain possession until default did not render the mortgages void, since, by reason of the nature of the property, such possession did not affect the interest of the mortgagee or the mortgagor's creditors.

3. Where mortgages of unworked range horses provided that the owner might retain possession of and use and enjoy them until default, the fact that the mortgagor, being without funds or credit to care for, brand, and break the horses in order to fit them for sale, executed a contemporaneous agreement under which the mortgagee took possession of the herd, with authority to make sales, pay running expenses out of the proceeds, and apply the balance to the mortgage indebtedness, did not annul the right reserved to the mortgagor in the mortgages, and the mortgagee held the property and acted as the mortgagor's agent only.

4. That a mortgagor, being without funds or

credit to care for, brand, and break a herd of range horses in order to fit them for market, and entitled to retain possession thereof and enjoy the same until default, delivered them to the mortgagee, as his agent, under an agreement that the mortgagee should make sales, pay running expenses out of the proceeds, and apply the balance to the mortgage indebtedness, did not render the mortgages invalid as against the mortgagor's creditors, since the disposition of the proceeds was not for the mortgagor's personal benefit, but for the purpose of enhancing the security.

Appeal from district court, Kiowa county.

Proceedings between John Lee and A. H. Stanard, county treasurer, to determine priority of liens on stock levied on for taxes. From a judgment in favor of the county treasurer, Lee appeals. Reversed.

This is an agreed case, made by the parties pursuant to chapter 24 of the Code. The parties stipulated as follows: A certain herd of horses, branded 55 on left shoulder, known as the "55 herd," consisting of mares and geldings of all ages, and colts, numbering upwards of 500,—the exact number being unknown,—ranged in the counties of Bent and Kiowa, but chiefly in Bent. In the years 1892, 1893, 1894, and 1895, schedules were returned to the assessor of Kiowa county by George H. Hill, as agent for Alexander Pitts, of a certain number of horses as being assessable in Kiowa county; and upon those schedules, and by virtue of the levy for those years, and the assessment by the county assessor, taxes were charged upon the proper books against George H. Hill, as agent for Alexander Pitts, upon "200 head of stock range horses," as follows: For the year 1892, \$119.59; for the year 1893, \$105.80; for the year 1894, \$60.93; for the year 1895, \$114.75. No return of the property was made for the year 1896, and the assessor listed it himself. The taxes for that year were \$67.44. On the 24th day of February, 1896, George H. Hill executed to Alexander Pitts a mortgage of the entire "55 herd" to secure the payment of two notes of the same date made by him, and payable to Pitts,—one for \$415, due in 1 year, and one for \$1,559.75, due in 15 months. This mortgage was recorded in the office of the recorder of Bent county on the same day. On the 27th day of February, 1893, Pitts assigned the notes and mortgage to John Lee. On the 9th day of March, 1893, Hill executed to John Lee a mortgage of the same herd to secure four notes of that date, made by Hill to Lee,—one for \$1,500, due May 1, 1896, one for \$1,000, due May 1, 1897, one for \$370, due May 1, 1898, and one for \$7.90, due May 1, 1900. This mortgage was recorded in both Bent and Kiowa counties. Both mortgages covered, not only the herd, but its natural increase. Contemporaneously with the execution of the last mortgage, a written agreement was entered into between Hill and Lee, which, after reciting that most of the horses were in an unbroken condition, and that, to render them salable, it was necessary to gather and break those fit for sale, to

brand others, and, in general, to care for the herd, and that Hill had not sufficient money or credit to properly care for the horses and gather and break them, provided that the horses might be gathered and broken by Lee, and as many of them as were fit for sale, sold by him; that the expenses of managing the herd, not to exceed \$1,500 per year, might be paid out of the sales; that no person should be employed at higher wages than might be agreed upon by the parties to the agreement; that none of the proceeds of the sales should be applied to any purpose other than the payment of the necessary expenses, and the discharge of the debts secured by the mortgages; and that, if Lee should advance any money in the management of the herd or the effecting of sales, he should be reimbursed from the sales. Within a short time afterwards Lee took possession of the mortgaged property pursuant to the agreement, and gathered, broke, and branded horses; but the proceeds of the sales were insufficient to pay the running expenses, so that no money was applied upon the notes. During all the time from the first assessment there were sold annually, out of the herd, from 100 to 125 head of horses. The description of the horses, as listed and assessed, did not refer to brands or ages, or other means of identification, but was simply "200 head of stock range horses." Pitts was at all times the owner of personal property in Bent county of a value in excess of the amount of the taxes. On the 11th day of May, 1897, by virtue of a distraint warrant issued on the 30th day of April, 1897, for the collection of the taxes of 1892, 1893, 1894, and 1895, and the accrued interest, the treasurer of Kiowa county levied upon 90 head, belonging to the "55 herd" and in the possession of Lee in that county, consisting of 12 suckling colts, 13 yearlings, 6 two year olds, 10 three year olds, 54 four year olds, and one whose age is not given, and advertised the property for sale. Thereupon this cause was submitted to the district court for the determination of the question whether the county had a claim upon the property distrained for the taxes of those years, which was superior to the lien of the mortgages held by Lee, or whether the right of Lee took precedence of the claim of the county. The decision was in favor of the county, and judgment was entered accordingly. Lee appeals.

Allen M. Lambright, for appellant. D. M. Campbell and Chas. B. Hughes, for appellee.

THOMSON, J. (after stating the facts). We do not see how this judgment can be upheld. Section 2819 of the General Statutes provides as follows: "All taxes levied or assessed upon personal property of any kind whatsoever, shall be and remain a perpetual lien upon the property so levied upon, until the whole amount of such tax is paid; and if such tax shall not be paid on

or before the first day of January next succeeding such levy, it is hereby made the duty of the county treasurer to collect the same by distress and sale of any of the personal property so taxed, or of any other personal property of the person assessed; and if such property so taxed, or any part thereof, shall have been removed from the county wherein the same was taxed, or is so conditioned that the treasurer cannot find or obtain the same, then the county treasurer shall sue the person so taxed, in an action of debt before any court of his county having jurisdiction; * * * and may obtain a judgment for the amount of such tax, together with all costs, interest and charges thereon, and may have execution therefor against any of the property, real or personal, of such person." The following is from section 2833 of the General Statutes: "Horses, mules, cattle and sheep running at large and not being worked, shall in all cases be returned and assessed in the county in which they are being herded or kept on the first day of May in each year." The lien for which section 2819 makes provision attaches to the specific property assessed or levied upon, and while, for the collection of the tax, any property of the person assessed may be taken, as against a subsequent purchaser or incumbrancer, only the property to which the lien has attached can be seized. *Bazar Co. v. McNichols* (Colo. App.) 56 Pac. 672. Now, there is nothing in the agreed statement to show that any of the animals distrained were in Kiowa county during any of the years for which the assessments were made. The herd ranged in both Bent and Kiowa counties, and, unless the animals in question were in Kiowa county when some one of the assessments was made, no lien attached to them, and, in the hands of Lee, they could not be subjected to the payment of the taxes. By reason of the sales made from year to year and the natural accessions between the first assessment and the last, the composition of the herd must have been mostly, if not entirely, changed; and it very distinctly appears that a portion, at least, of the animals seized were not, and could not have been, embraced in those assessments, or any of them. The treasurer took 12 suckling colts and 13 yearlings. As the distraint was made in May, 1897, those animals could not have been in existence in May, 1895. As to the others, the statement is too utterly indefinite to enable a court to say that they were subject to any lien by virtue of the assessments. The right which Lee had in the property appeared from his mortgages. Having exhibited these, he made a prima facie case, and it then devolved upon the county to show wherein its claim was superior to his.

But the argument in behalf of the county touches the question of priority of lien very lightly. Its main effort is to show that by reason of certain provisions of the mortgages,

and the agreement executed contemporaneously with the mortgage to Lee, the mortgages were void as to the creditors of the mortgagor. If such conclusion is warranted, then the seizure by the treasurer may be upheld, not by reason of a prior lien upon the property, but because, so far as the county was concerned, they were still the property of the former owner, and, by virtue of the statute, subject to distress and sale for the taxes which he owed. Now, it is said that by the terms of the mortgages and agreement the mortgagor and Lee, as his agent, were authorized to sell and dispose of the property, and apply the proceeds to the use and benefit of the mortgagor. It is entirely settled, in this state, at least, that a provision in a mortgage of chattels by which the mortgagor is allowed to sell the property and retain the proceeds, or, without such provision in the instrument, a separate agreement with the mortgagee permitting the mortgagor to so dispose of the property, vitiates the mortgage, as to the creditors of the mortgagor. *Wilson v. Voight*, 9 Colo. 614, 13 Pac. 726; *Hall v. Johnson*, 21 Colo. 414, 42 Pac. 660; *Roberts v. Johnson*, 5 Colo. App. 406, 39 Pac. 596. Each of the mortgages in question contained a provision that, until default by the mortgagor, it should be lawful for him to retain the possession of the property, and use and enjoy it. Respecting a provision like this, in *Wilson v. Voight*, in which the validity of a mortgage of merchandise was in question, Mr. Justice Helm said: "It is difficult to understand how the mortgagor could 'use and enjoy' a stock of merchandise without selling or disposing of the same." But the court did not decide that, even where the security was a stock of merchandise, the authority to the mortgagor to retain the possession, use, and enjoyment of the property would, alone, vitiate the mortgage. The observation was confined to a mortgage of merchandise, and, while it did not amount to a decision, yet, in reference to the particular case the learned judge was considering, its force is obvious. The only use to which a stock of merchandise is supposed to be put is the sale from day to day of the articles composing it, and it is apparent from the language used that the doubt which the remark suggests troubled the mind of the learned judge only in connection with a mortgage of a stock of merchandise. That the provision generally was not regarded as harmful is apparent from the following language further on in the opinion: "The use and enjoyment mentioned are a use and enjoyment not inconsistent with the continued protection of the mortgagee and other creditors of the mortgagor." Unless, therefore, there is something to indicate that the use and enjoyment authorized by these mortgages were or might be inconsistent with the continued protection of the mortgagor and the other creditors, the presence of that provision constitutes no objection to the instrument. There was nothing

in the nature of the property to suggest the inconsistency, and, to find what effect the parties intended the language to have, we must go to the agreement. To properly care for the herd, make the horses salable, and do the requisite branding, involved an outlay of money. Hill had neither the funds nor the credit necessary to enable him to do what the welfare of the herd demanded. The agreement therefore provided for the turning of the herd over to Lee, with authority in him to make sales, and out of the proceeds to pay the running expenses, which should not exceed a rate of \$1,500 per year, and apply what might be left upon the indebtedness secured. There is some controversy here as to whether the possession which Lee acquired was that of mortgagee or agent for Hill. We do not regard the question as very important; but it seems quite clear that the authority which Lee had in the premises was derived from the agreement, and not from the mortgage. The property was delivered to Lee in order that he might do for Hill what Hill was financially unable to do for himself. He therefore represented Hill, his possession was Hill's possession, and his acts were Hill's acts. He was authorized to incur expenses which would have fallen upon Hill if Hill had personally retained the possession, and to reimburse himself from sales. The mortgages gave Hill the possession, use, and enjoyment of the property until default by him. The agreement did not annul this right reserved to Hill, but simply empowered Lee to act in his stead, and its provisions concerning sales of horses and the disposition of the resulting money were the interpretation which the parties put upon the clause in the mortgages giving Hill the use and enjoyment of the property. The sales and expenditures made by Lee must be regarded as Hill's, and, if the disposition of the money authorized by the agreement amounted to its retention by Hill for his own personal benefit, the argument in behalf of the county is sound.

The cases in which chattel mortgages have been adjudged invalid as against creditors on account of the authority given to the mortgagor to dispose of the property have been cases where, under the apparent protection of the mortgage, the mortgagor was allowed to appropriate to himself property which should have been used to discharge his debts. It is the right of other creditors that the property mortgaged should be subjected to the payment of the mortgage indebtedness, so that they may have the benefit of what may remain after that indebtedness shall be paid; and to hold them at bay with a mortgage, while their debtor is reaping the same benefit from the property as if there were no mortgage, would be manifestly unjust. In the language of the opinion in *Wilson v. Voight*, supra: "When the mortgagee stipulates, either in the mortgage or out of it, that the mortgagor may sell the very thing composing his security, and re-

tain the proceeds, he thereby destroys every vestige of a valid statutory or common-law mortgage, and leaves himself in no better position than if it had not been executed. Besides, the inevitable tendency of the transaction is disastrous to other creditors of the mortgagor; for the effect is to hinder and delay such creditors while the mortgagor makes way with the property, and leaves the general aggregate of his indebtedness undiminished." But the sales which Lee was authorized to make were designed for the benefit of the security. Domestic animals require care to prevent their deterioration in value, and this care involves expense. And, where they are running at large upon an extensive range, it is evident that they must be looked after, to prevent loss. It appears from the stipulation that most of the horses composing the herd were unbroken, and that, to give them a market value, they must be broken; also, the increase required branding. To break and brand the horses, it was requisite that the herd should be gathered. It was to provide for the outlay necessary in gathering, breaking, and branding the horses, that the authority to sell was given, and its ultimate purpose was the enhancement of the value of the herd. As Hill was without money to do the necessary things, and as, for the preservation of the security, it was requisite that those things should be done, the expense must be borne by the herd. There was no other source from which the money could come. The sales which were authorized might be said to have been intended for Hill's advantage, in this: that the proceeds were to be expended for the benefit of the herd, upon which he relied to relieve him from the debt, and from which, perhaps, something might eventually be realized to him in excess of his liability. But not a dollar of the money was to be given to or retained by him, and, except as the herd might be kept in a condition to sell for a good price, he could not, even indirectly, derive a dollar of benefit from the transaction. The purpose for which the sales were authorized, and the use to which their proceeds were to be applied, were not the purpose and use which the decisions have condemned. No inference against the good faith of the parties can be drawn from the agreement, and, so far as we are advised, its provisions were entirely consistent with the rights and interests of the other creditors of Hill. We do not think that it affected the validity of the mortgages.

It is to be inferred from the agreed statement that, down to the assessment of 1895, Alexander Pitts was the owner of the property, and that in February, 1896, Hill was its owner. How or when the title of Pitts passed to Hill, is not disclosed. But that when the mortgage to Pitts and the one to Lee were executed Hill was the owner, and could rightfully mortgage the property, is conceded; and, in so far as the liability of

the property taken by the treasurer for the taxes upon which his distraint warrant was issued is concerned it is immaterial whether those taxes were primarily chargeable against Hill or Pitts.

The assessment for 1896 is the subject of some argument, but it was made after the mortgages were executed, and apparently after Lee had taken possession of the herd. Whether that assessment was against Hill or Lee, or what was its form or purport, we are not informed. No distraint warrant was issued for the taxes of that year, and we do not know whether they were embraced in the judgment. Our decision applies only to the taxes of the former years. The judgment is reversed. Reversed.

MCINTYRE et al. v. BOARD OF COM'RS OF EL PASO COUNTY et al.

(Court of Appeals of Colorado. May 14, 1900.)

MUNICIPAL CORPORATIONS—CONTROL OF PUBLIC PARKS—PURPOSES OF DEDICATION—CONSTRUCTION—ACTION BY TAXPAYERS—PARTIES.

1. Where the owners of land in laying out a town site dedicated a part thereof for a public park, and the dedication was accepted by the city, it has no power to authorize its use as a site for a county court house, though such building would only occupy a part of the park.

2. The owners of land platted it into lots and blocks for city purposes, and reserved a block, which they did not plat into lots, and which they stated was reserved for public buildings and park purposes. The city accepted the dedication, and used the block for a park. *Held*, that the dedication did not authorize the construction thereon of a county court house, since the words "public buildings" will be deemed to refer solely to city public buildings.

3. Mills' Ann. St. § 4403, subd. 7, providing that municipalities shall have power to establish, alter, widen, extend, and vacate public parks and grounds, does not empower the city to authorize the construction of a county court house in one of its parks.

4. Resident property owners and taxpayers of a city may maintain an action in their own names to enjoin county commissioners of the county in which the city is situate from erecting a county court house on one of the city's public parks, where the city council have assented thereto.

5. A city is not a necessary party to an action by resident property owners and taxpayers to enjoin the county commissioners from building a county court house on a tract dedicated to city park purposes, where the city council have assented to such use by the county.

Appeal from district court, El Paso county.

Action by J. E. McIntyre and others against the board of county commissioners of the county of El Paso and others to enjoin the use by the county commissioners of a public park in the city of Colorado Springs as a site for a county court house. From a judgment sustaining a demurrer to plaintiffs' complaint, they appeal. Reversed.

Colburn, Dudley & Lewis, Richard Lea Kennedy, and J. C. Helm, for appellants. Robert L. Hubbard and Joseph W. Ady, for appellees.

WILSON, J. Plaintiff McIntyre, with four other residents, property owners, and taxpayers of the city of Colorado Springs, suing for themselves, as well as for all other residents, property owners, and taxpayers of the city, commenced this action to restrain the board of county commissioners of the county of El Paso, in which the city of Colorado Springs is situate, from the erection of a county court house upon a certain public square within the city, which it was claimed had been dedicated and used for 29 years as a public park. The complaint is very lengthy, and hence we shall insert only such portions of it as are requisite to a proper understanding of the issues and the questions presented and determined. It recites that in the year 1871 the Colorado Springs Company, a private corporation, laid off and platted as a town site for the city of Colorado Springs a certain tract of land, of which it was the owner; that it filed in the office of the county clerk and recorder of the county a plat of said town site, showing the blocks, lots, streets, avenues, alleys, and reserved squares, to which plat was attached an acknowledgment of the vice president of the company, as required by law,—and then proceeds:

"Fourth. That all of the blocks designated upon said plat were divided into lots, except a certain block designated on said plat as block number sixty-two (62), lying two blocks north of Pike's Peak avenue, and marked on said plat as Acacia Place, and except a certain block designated on said plat as block number one hundred twelve, and lying two blocks south of Pike's Peak avenue, and marked on said plat as Alamo Square; neither of said two last-named blocks having lots designated thereon. That said Pike's Peak avenue runs east and west in said city, and is equidistant from either end of said platted ground. That said blocks designated as Acacia Place and Alamo Square are of equal size with all the other blocks within said platted ground; being about four hundred (400) feet square, and each bounded by streets on the four sides thereof.

"Fifth. That, at the time said plat was filed as aforesaid, said company laid off said ground as the original town site of the city of Colorado Springs; there being then only a few, if any, residents within the present limits of said city; it being the intention of said the Colorado Springs Company to place upon the market for sale the lots so designated and shown upon said plat.

"Sixth. That, with the purpose of inducing the public to purchase the lots as platted as aforesaid, which it immediately thereafter began selling to divers and sundry persons with reference to said plat, said Alamo Square and Acacia Place were reserved from sale, and it was then and there given out by said company, and so understood by the public generally, and by those purchasing lots from said company in said platted ground, that both of said blocks of ground would be kept

and reserved for the public for public parks; they having been reserved upon said plat as then provided by statute.

"Seventh. That soon thereafter both of said blocks of ground, Acacia Place and Alamo Square, were taken possession of by the city authorities of said Colorado Springs for parks, and were improved by the said city authorities, at public expense, for parks, and have ever since been maintained at public expense by the said city authorities for park purposes, being beautified by lawns, shade trees, public walks, water fountains, and seats for the accommodation of the general public; and the public for more than twenty (20) years last past have held the open, exclusive, continuous, uninterrupted, and peaceable possession of both of said blocks of ground for park purposes, and are now so using the same.

"Eighth. That the city of Colorado Springs now has a population of about 25,000, and the two blocks of ground aforesaid are the only parks in said city centrally located, and are convenient and necessary to the inhabitants thereof and the general public for the purposes to which they have been continuously devoted, and the public hold and own an irrevocable easement in said blocks for park purposes.

"Ninth. That heretofore, on or about the — day of April, A. D. 1899, the defendants Sinton, France, and Doran, conspiring with the mayor and city council of the city of Colorado Springs to destroy the park situate on the said block of ground known as 'Alamo Square,' persuaded and induced said mayor and city council to pass an ordinance in words and figures following, to wit:

"An ordinance to provide for the relinquishment of all rights in and to block numbered one hundred and twelve, in the city of Colorado Springs, county of El Paso and state of Colorado, to the county of El Paso, upon certain terms and conditions, that the same may be used as a site for a court house for the said county.

"Be it ordained by the city council of the city of Colorado Springs:

"Section 1. Whereas, the Colorado Springs Company, a corporation, filed in the office of the clerk and recorder of El Paso county, Colorado, a plat of the original town of Colorado Springs, and reserved blocks sixty-two (62) and one hundred and twelve (112) for public buildings, company building and parks; and whereas, the county of El Paso, in the state of Colorado, is about to erect a new court house for said county: Now therefore, the city of Colorado Springs does hereby relinquish all its right, or rights, in and control over said block numbered one hundred and twelve (112) in favor of the said county of El Paso, for the purpose of permitting the said county of El Paso to erect a court house upon said block of ground for said county; the city reserving the right to enter in and

upon the ground for maintaining its sewer and water systems and the expense to be borne by the county of El Paso for making any necessary changes upon said ground: provided, however, that only so much of said block shall be used by the county of El Paso, as may be necessary for the purpose of erecting thereon a court house consisting of one building, and for necessary paths and roadway for ingress to said court house and egress therefrom; and that all of the residue and remainder of the said block, numbered one hundred and twelve (112), not so used as above stated, for the erection thereon of said court house, shall be appropriately kept, properly planted and maintained as a public park, at the expense of the said county of El Paso, and the same shall remain a public park forever: provided, further, that if the said block of ground, or any part of it, shall at any time be used otherwise than for the purpose of building and maintaining a court house thereon, unless it be for the future enlargement of said court house, then, and in that case, all the rights and interests of the city of Colorado Springs in and to said block of ground, hereby granted to the said county of El Paso, shall immediately revert to, and become the property, rights and interests of the said city of Colorado Springs, as the same existed immediately prior to the passage of this ordinance: and provided, further, that, if the said county of El Paso shall fail or neglect to maintain said grounds in a suitable condition for park purposes, as hereinbefore set forth, then, and in that case, the said county shall pay to the said city of Colorado Springs, each and every year such failure or neglect shall continue, the sum of five thousand (\$5,000) dollars, which said sum shall be used and applied by the said city of Colorado Springs for the purpose of maintaining said block of ground for park purposes, and any surplus remaining of the said five thousand dollars, after making necessary expenditures upon said block of ground, shall be applied to the proper fund of the city of Colorado Springs to be used for the maintenance of the parks of said city.

"Sec. 2. The mayor of the city of Colorado Springs is hereby appointed as a commissioner to carry out the provisions of this ordinance, and to execute all conveyances necessary or proper in carrying out the provisions of this ordinance. All such contracts, agreements and conveyances shall be attested by the city clerk of the city of Colorado Springs, under the corporate seal of said city."

It then recites the execution by the mayor of the city, in pursuance of this ordinance, of a deed conveying to the county the premises in question, with the provisos and upon the conditions specified in the ordinance, to wit, that no part of the ground should be used by the county for any other purpose than the building and maintaining of a court house thereon, and providing, further, "that if the

said county of El Paso shall fail or neglect to maintain said ground in a suitable condition for park purposes, as hereinbefore set forth, then and in that case the said county shall pay to the city of Colorado Springs each and every year during which said failure or neglect shall continue the sum of five thousand dollars (\$5,000), which said sum shall be used and applied by the city of Colorado Springs for the purpose of maintaining said block of ground for park purposes; and any surplus remaining of the said five thousand dollars, after making the necessary expenditures on said block of ground, shall be applied to the proper fund of the city of Colorado Springs, to be used for the maintenance of the parks of said city." The complaint further recites the execution on the same day of a deed by the Colorado Springs Company conveying to the county all of its right, title, and interest in and to the premises.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and on various special grounds, the nature of which will appear during the course of this opinion. The demurrer was sustained, and, the plaintiffs electing to abide by their complaint, judgment of dismissal was rendered, and the cause is brought to this court for review.

It is conceded in their argument by counsel on both sides that there was a dedication of the square to public use, and that it is sufficiently pleaded. The contention between them is as to the restrictions, if any, on its use and control by the city authorities, and as to whether the proposed use is inconsistent with the purposes and objects of the dedication. We are relieved, too, from the necessity of considering whether the dedication was a statutory one or one at common law, or whether the right which the city authorities possessed to control the square, and the people of the city to use it, is acquired by prescription. Under the facts of this case, the principles which control and determine are the same, whatever may have been the manner of dedication. It is not disputed, either, that the city of Colorado Springs acquired, and has the right to control and regulate the use of, this square, as trustee for the people of the city, and is bound to perform the duty. In such case it is well settled by the universal current of authority that the municipality holds the dedicated ground for the use and benefit of its citizens, for the purposes only of its dedication. The trustee cannot impose upon it any servitude or burden inconsistent with these purposes, or tending to impair them. Neither can it alienate the ground, nor relieve itself from the authority and duty to regulate its use. We cite a few of the very many authorities to this effect: *Warren v. Mayor of Lyons City*, 22 Iowa, 351; *City of Llano v. Llano Co.*, 5 Tex. Civ. App. 132, 23 S. W. 1008; *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 541; *McCullough*

v. Board, 51 Cal. 418; Village of Princeville v. Auten, 77 Ill. 327; Harris Co. v. Taylor, 58 Tex. 690; Rutherford v. Taylor, 38 Mo. 315; Church v. City of Portland, 18 Or. 74, 22 Pac. 528, 6 L. R. A. 259; Kreigh v. City of Chicago, 86 Ill. 410; City of Alton v. Illinois Transp. Co., 12 Ill. 54; Le Clerq v. Trustees, 7 Ohio, pt. 1, 217. There is no question that the complaint sufficiently pleads a dedication of this square for the purposes of a public park. A dedication may be made without writing. It may be made by acts from which the intention to dedicate may be rightfully presumed, and with which any other presumption would be inconsistent. For instance, a town proprietor who exhibits upon his plat a plot or square of ground not subdivided into lots, and who states to intending purchasers of lots that this square or plot is reserved for a public park or for any other public use, and who, upon the face of these representations, sells lots, thereby dedicates the plot to such public use as fully and effectually as if he had expressly done so by deed. When the dedication is accepted, the proprietor cannot be heard thereafter to say that such was not the intent. To hold otherwise would be to allow him to practice a palpable fraud upon the public, and to take advantage of his own wrong. City of Alton v. Illinois Transp. Co., supra; Rutherford v. Taylor, supra; Abbott v. Mills, 3 Vt. 521; Washb. Easem. (4th Ed.) p. 239. If the dedication of the square in controversy was solely for the purpose of a public park for the use and benefit of the citizens of Colorado Springs, there is no question that it is wholly without the power of the city authorities to convey it or permit it to be used for the erection thereon of a county court house. It would be a use utterly inconsistent with that for which it was dedicated. The term "park," in its ordinary and usual significance, imports a plot of ground in a city or town set apart for ornament,—a place which the residents of the municipality may frequent for pleasure and exercise or amusement. It is, besides, conducive to health; furnishing to the citizens of crowded cities a place where they may breathe the pure air, untainted by smoke and noxious gases. Certainly it cannot be contended that the erection of a large building in such a place, however massive, grand, or beautiful may be its architecture, to be used by either city or county for the carrying on of its business, is consistent with this use. Besides, if the ground is dedicated for a park, the citizens—the beneficiaries of the trust—are entitled to the use of the whole. If the trustee may be permitted to say that any particular part of it is not needed nor necessary for the dedicated purpose, then it may say that the larger portion of it is not so needed, and in fact defeat the whole purpose of the dedication. These views are fully sustained by the authorities which have been cited above.

The complaint does not state that there

was marked upon the recorded plat any designation of the plot or square in question, except "Alamo Square." It alleges no words on the plat from which any dedication for a specific purpose might be inferred. The ordinance of the city, however, which is set forth in the complaint, recites in its first section that this block, with one other, was reserved for "public buildings, company building and parks." This may or may not be true, but, as counsel for both parties in their briefs argue the case upon the basis of its truth, we may infer that the recital is correct. This being true, counsel for the county strenuously urges that the proposed use is not inconsistent with that of its dedication, but is, on the contrary, a use expressly permitted by the terms of the dedication. This he maintains upon the ground that the county court house is a public building. A sufficient and complete answer to this is that under no rules of construction could the words "public buildings," in the sense and under the circumstances there used, be construed to mean other than public buildings of the town or city. The town proprietors were laying out a town site. They made their subdivisions, plats, and their reservations solely with reference to the building up of a town, and to the promotion of its interests. True, a county court house is a public building; but so are a state capitol, a penitentiary, an insane asylum, school houses, and in fact all buildings erected and owned by state, county, or municipal authorities. If the contention of defendant is correct, then, without consulting the wishes of the municipality or of its people, for whose use this ground was dedicated, any buildings of the character which we have mentioned might be erected upon this ground. If its theory is correct, there was no necessity to secure a deed from, or the passage of an ordinance by, the city, giving the county the right which it attempted to confer.

The defendant insists, however, that a municipality holds and controls its property subject to the paramount authority of the legislature. This is true, as a general proposition, but there are restrictions upon, and limitations of, this legislative power. The rule is that, in cases of dedication of ground for specific use, in case of abandonment or failure to utilize the property for the specified use the property reverts to him who dedicated, or attempted to do so. Surely, it cannot be contended that in such case as this the legislature would have the power to destroy these property rights of an individual. This claim of defendant is based upon the provisions of subdivision 7, § 4403, Mills' Ann. St., originally enacted in 1877, which gives municipal authorities the power "to lay out, establish, open, alter, widen, extend, grade, pave or otherwise improve, streets, alleys, avenues, side-walks, parks and public grounds, and vacate the same, and to direct and regulate the planting of ornamental and shade

trees in such streets, avenues and public grounds." If there was a dedication of this ground for public use as a park, it was long prior to 1877,—long after the rights of the beneficiaries of this trust had accrued. It was made, if at all, subject to the law as it existed before 1871, and we do not find in the old statutes a provision similar to the one upon which the defendant relies. By the statutes of 1868 (section 1, art. 3, p. 606, Rev. St. 1868), town authorities were given the power to vacate any street, avenue, alley, or sidewalk, and abolish the same, but we do not find any authority given for the vacation of parks. Waiving this question, however, and conceding that the statute of 1877 controls, it is of no avail to defendant in this case, because there is no attempted exercise of the power there given. The complaint in this case is not of any attempted vacation of this square or park, but of an attempted appropriation of a portion of it for a use inconsistent with the purpose of the dedication, and of an entire alienation and abdication by the city—the trustee of the people—of its right to control the possession and regulate the use of the square.

It is insisted, however, that in any event the demurrer was properly sustained on the ground that the plaintiffs have not the legal capacity to maintain the suit. This is based upon the doctrine that a private action cannot be maintained where the injury is purely a public one, unless the individual seeking relief is able to show some damage special or peculiar to himself. This well-settled legal principle is not applicable to cases like the one at bar. On the contrary, the doctrine established by the great weight of authority is that a resident taxpayer of a municipality has the right to maintain a suit to prevent the unlawful disposition by the municipal authorities of the money or property of the town, and to restrain the diversion of property in his town from any public use, in which he shares, to which it has been dedicated. *Davenport v. Buffington*, 38 C. C. A. 453, 97 Fed. 234; *Rowzee v. Pierce* (Miss.) 23 South. 307, 40 L. R. A. 403; *Crampton v. Zabriskie*, 101 U. S. 601, 25 L. Ed. 1070; *Cummings v. City of St. Louis*, 90 Mo. 261, 2 S. W. 130; 2 Dill. Mun. Corp. §§ 653, 915; *Carter v. City of Portland*, 4 Or. 339; *Packard v. Board*, 2 Colo. 350. The reason upon which the rule is based is thus aptly expressed by Mr. Dillon: "If the property or funds of such a corporation be illegally interfered with, ordinarily the action to prevent or redress the wrong should be brought by and in the name of the corporation. But if the officers of the corporation are parties to the wrong, or if they will not discharge their duty, why may not any inhabitant, and particularly any taxable inhabitant, be allowed to maintain a suit to prevent or avoid the illegal act? Such a right is especially necessary in the case of municipal and public corporations, and, if it be denied, they

are liable to be plundered, and the taxpayers and property owners, on whom the loss will eventually fall, are without effectual remedy." This doctrine is not in conflict with the rulings of our supreme court in the cases to which we have been cited. *Whitsett v. Railroad Co.*, 10 Colo. 243, 15 Pac. 339; *Railway Co. v. Foley*, 19 Colo. 280, 35 Pac. 542; *City of Denver v. Girard*, 21 Colo. 450, 42 Pac. 662. The principle announced in these applies to cases in which the city council, in the exercise of its acknowledged legal power, confers a license for some unusual use of a street, or concerns nuisances. The principle which controls in this case has been affirmed, in accordance with the views which we have expressed, by our supreme court. In *Packard v. Board*, supra, the court said: "The right of taxable inhabitants and property holders to resort to equity to restrain misuse of public property and misapplication of public funds has been denied in New York and elsewhere, but we incline to the opposite view, which is also supported by many authorities." The doctrine there announced has never been controverted in this jurisdiction. The city is not a necessary party to this suit. It is an action to restrain the commission of a trespass upon the public property dedicated for the use of the people of the municipality. Adequate relief can be given, and all issues determined, without bringing the city in as a party. It is the county authorities who are seeking to use the property in question for a purpose foreign to its dedication, and the suit against them is in the nature of a suit by a cestui que use to prohibit a violation of the trust, or a destruction of the right of user.

Entertaining these views, it necessarily follows that, in our opinion, the court erred in sustaining the demurrer. The judgment will therefore be reversed, and the cause remanded for further proceedings in accordance with this opinion. Reversed.

COLBURN v. BOARD OF COM'RS OF EL PASO COUNTY et al.

(Court of Appeals of Colorado. May 14, 1900.)

COUNTIES—AUTHORITY OF COUNTY COMMISSIONERS—COURT-HOUSE SITE.

Under Gen. St. § 521 (Mills' Ann. St. § 774), providing that each organized county shall constitute a body corporate, and be empowered to purchase and hold real and personal estate for the use of the county, to sell and convey the same, and make such orders respecting the same as may be deemed to be in the interest of the inhabitants, and section 523 (776), providing that such powers shall be exercised by the board of county commissioners, the county commissioners have no power to contract to perpetually maintain the county court house on a particular site; and an action will not lie to restrain the removal of a court house, by one who deeded land to the county in consideration of such an agreement, where the county commissioners deem it to be for the best interests of the county to remove the site.

Appeal from district court, El Paso county.

Bill by E. A. Colburn against the board of county commissioners of El Paso county and others to enjoin the removal of the county court house to another site in the city of Colorado Springs. From a judgment sustaining a demurrer to the bill, complainant appeals. Affirmed.

Colburn, Dudley & Lewis, Richard Lea Kennedy, and J. C. Helm, for appellant. Joseph W. Ady and Robert L. Hubbard, for appellees.

WILSON, J. This suit, like that of McIntyre v. Board (Colo. App.) 61 Pac. 237, grows out of the proposed removal of the court house of El Paso county to another site in Colorado Springs from that at present used. It involves, however, different questions and principles. In this the plaintiff claims the right to enjoin the attempted change because of the fact that he was the owner of, and conveyed to the county, certain lots embraced in the present site, and, as a part of the consideration therefor, the county commissioners at the time entered into a contract with him that the lots so conveyed, together with adjoining lots then owned by the county, should be used as the site for the county court house. The allegations of the complaint, so far as necessary to a proper understanding of the issues presented and necessary to be determined, are as follows: "(3) That in 1878 said county purchased lots 31 and 32 in block 82 in Colorado Springs for court-house purposes, constructed a building thereon, and has ever since been using same for court house. (4) That thereafter the county, wishing to enlarge its court-house site, purchased six other lots adjoining said lots 31 and 32, making a block of ground 200 feet by 190 feet, facing Nevada avenue on the east, Kiowa street on the north, and having 20-foot alleys on the south and west. (5) That the plaintiff owned an undivided half interest in two of the six lots, which he sold to El Paso county on June 3, 1892, and conveyed by warranty deed. (6) That, at the time plaintiff sold these two lots to the county, he was the owner of, and ever since has been the owner of, three lots immediately south of the said court-house site, facing Pike's Peak avenue and Nevada avenue, having brick buildings situated thereon for storerooms and office rooms. (7) That, in addition to the sum of ten thousand dollars (\$10,000) paid plaintiff by El Paso county for his half interest in said two lots, it was stipulated and agreed between plaintiff and El Paso county that, as a part of the consideration which plaintiff and his co-owner were to receive for said two lots, said two lots were to be used, with all other lots constituting said court-house site, for a site on which to erect a county court house for said county, and that said county would thereafter erect on said site a court-house building to cost not less than two hundred thousand dollars (\$200,000), which agree-

ment written into the deed is as follows: 'And also, for a further consideration of the agreement between the parties hereto, for themselves, their heirs, legal representatives, and assigns, that the premises hereby conveyed shall be used by the party of the second part only as a part or parcel of the site or location for a county court house for El Paso county, and the ground in connection therewith, and that the said court house to be erected upon said site or location shall cost and be of the value of not less than two hundred thousand dollars (\$200,000) when completed, and that the erection thereof shall be commenced within five years from the date thereof, and the same completed within such reasonable time as the finances of the said El Paso county may reasonably justify. * * * And the said party of the second part, by accepting this deed, for itself and its assigns, covenants and agrees to each and every one of the reservations, conditions, and agreements aforesaid. * * * To have and to hold the same forever, * * * subject, nevertheless, to the conditions, reservations, and agreements hereinabove named and set forth, according to the true intent and meaning thereof.' (8) That the said conditions and covenants embodied in said deed were material and valuable to the plaintiff, as a part of the consideration for his interest in said lots, by reason of his being the owner of the said lots on Pike's Peak and Nevada avenues immediately south of the said court-house site." The prayer was that the county commissioners be restrained from attempting to change the court-house site from its present location to the proposed one, and from selling or attempting to dispose of the present site, and from erecting a court house on any other site. The defendant county interposed a demurrer upon the ground that the complaint did not state facts sufficient to constitute a cause of action. This was sustained, and judgment of dismissal rendered, and from this an appeal was taken to this court.

The only theory upon which the plaintiff would be entitled to the relief which he seeks is that the contract or agreement recited in the complaint was binding upon the county; that it imposed a perpetual restriction on the use of the lots conveyed, and the adjoining lots then used for court-house purposes; that it perpetually restrained the county from the adoption of any other site thereafter for a county court house; and that it perpetually restrained the alienation of the lots. Without stopping to inquire whether the contract would bear this interpretation, which might be somewhat doubtful, even admitting its validity, it is quite clear that such a contract was and is, so far as the county commissioners were concerned, ultra vires and void. The statute provides that each organized county within the state shall be a body corporate and politic, and, as such, shall be empowered, among other things, to purchase and hold real and

personal estate for the use of the county; to sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interest of the inhabitants; to make all contracts and do all other acts in relation to the property and concerns necessary to the exercise of its corporate or administrative powers. Gen. St. § 521 (Mills' Ann. St. § 774). The powers conferred upon a county are to be exercised by a board of county commissioners. Gen. St. § 523 (Mills' Ann. St. § 776). These powers, it is evident and unquestioned, are to be used in such manner as would best subserve the interests of the citizens of the county, of which the county commissioners are simply the representatives. The commissioners are the governing body, and by the statute are clothed with full authority to make all contracts which are essential to the management of county affairs; but they are not clothed with the authority to barter away in perpetuity the rights and interests of the public, whatever may be their power as to discretionary acts. "Any contract which will disable a public or quasi public corporation from performing the duty which it has undertaken, or has been imposed upon it, for public weal, * * * is void." Greenh. Pub. Pol. p. 316 et seq.; Railroad Co. v. Ryan, 11 Kan. 602; Railroad Co. v. Taylor, 6 Colo. 1; 11 Pom. Eq. Jur. § 935; Wabash R. Co. v. City of Defiance, 167 U. S. 88, 17 Sup. Ct. 748, 42 L. Ed. 87; New York & N. E. R. Co. v. Town of Bristol, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079. In this last-cited case the court said: "But the power of governing is a trust committed to the people of the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of public health and public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must vary with varying circumstances." A county "is merely a subdivision of the state for the purposes of state government. It is nothing more than an agency of the state in the general administration of the state policy." Its powers are solely governmental. It does not, like a municipal corporation, possess a complete local government of its own,—executive, legislative, and judicial. It is clothed with certain executive powers, but these are only such as are specially granted to it by the state. Stermer v. Board, 5 Colo. App. 388, 38 Pac. 839. If a contract like this could be upheld in its legal effect, as contended for by plaintiff, then the rights of the citizens of the county would rest upon a very uncertain and unstable

foundation. In the early settlement of county seats, a small area of ground and a small building, only, are usually necessary for a court house. In after years, when the town may have increased in wealth and importance and population, public interests might imperatively demand that a different location be selected,—that a much larger building be erected; and yet, if the theory contended for in this case be correct, the public would be powerless, because, years before, some board of county commissioners had made for them a contract which absolutely precluded any chance for future relief. Suppose, too, as occasionally happens, the county seat is changed in the manner provided by law; what then would be the effect of such a contract? If its legal effect was to compel the county to perpetually use the ground conveyed for a court house, a most anomalous condition of affairs would arise. The contention of the plaintiff cannot be for a moment sustained. It is manifestly contrary to every principle of public policy.

If the contract as construed by plaintiff was, for the reasons stated, and as we hold it to have been, void ab initio, it could not be made valid and binding upon the county by any subsequent acts of the commissioners, either of acceptance or user. The cases cited by counsel do not apply to the question here involved. In this case it is claimed there has been an attempted absolute surrender by the county authorities of the governmental power vested in them by the legislature to be exercised for the public welfare. It is obvious, for reasons too manifest for discussion, that no subsequent acts by them could estop the public from asserting the rights vested in them by the state. The commissioners had only such rights as were given to them by the state for the benefit of the people of the county, and these, without the consent of the supreme governing power, they could not abdicate. They had the discretionary power to select and purchase a site for a court house, and to erect the building thereon. Here the power ended. They had no authority from the legislature, either express or implied, to bind the public to maintain the court house upon the site so selected for all time to come. The public were not bound by any alleged acts of ratification of the void contract.

We do not intend to say that the plaintiff is wholly without remedy, and is entitled to no relief whatever. About this it is not necessary to express any opinion in this case. We simply determine that he is not entitled to the relief which he seeks, and that he cannot maintain this action. Whatever his rights or remedies may be, he cannot, by reason of his alleged personal contract with the county commissioners in 1892, restrain the county from the removal of the court house from its present site. For these reasons, we think the demurrer was properly sustained, and the judgment will be affirmed. Affirmed.

DUNCAN v. FULTON et al.

(Court of Appeals of Colorado. May 14, 1900.)

MINES AND MINING—CERTIFICATES OF LOCATION—DESCRIPTION—SUFFICIENCY.

1. Gen. St. § 2400, allows the filing of an additional certificate of the location of a mining claim where the locator apprehends that his original certificate is defective, or he desires to change his surface boundaries, or take in part of an abandoned claim. *Held*, that where an original certificate sufficiently located a discovery shaft, and an additional certificate gave a description by metes and bounds starting with the discovery shaft, and running to posts in a mound of stone, the claim could be identified with certainty from both certificates taken together, and hence such certificates were admissible to establish the locator's claim, though neither, taken alone, sufficiently described such claim.

2. A description in a certificate of the location of a mining claim which locates the mine a certain distance from a patented mine is sufficient, since such patented mine will be presumed to be a natural object or permanent monument, until the contrary appears.

3. A description in a certificate of the location of a mining claim that the mine is located in a certain section on top of the mountain south of Dew Drop gulch is sufficient, since such gulch is a natural object or permanent monument.

Appeal from district court, Boulder county.

Action by Alice I. Fulton and others against Eleena Duncan. From a judgment in favor of plaintiffs, defendant appeals. Reversed.

Fulton and her co-partners filed an adverse to Duncan's application for a patent to the Sampson lode, which is located in Boulder county. To support it, they brought suit, set up their ownership of the Rainbow lode in the same mining district, and alleged an occupancy and a right of possession. We shall assume, since it is in no manner questioned, a valid discovery of mineral, a legal location, and a sufficient record of the Rainbow lode. It must not be assumed on the trial that we decide any of these matters. It has not been necessary to determine the adequacy of the plaintiffs' proof, or the legality of their title. Both parties concede it, and the whole case turns on the direction to the jury to find a verdict for the plaintiffs. When Duncan came to his proof, he offered the original location certificate of the Sampson lode, then known as the "Comstock," and the additional certificate of 1891. Since the whole case turns on the rejection of these certificates and their legal sufficiency, either separately or together, we quote them. The first certificate is:

"Know all men by these presents, that I, L. D. Chase, of the county of Boulder, in the state of Colorado, claim by right of discovery and location 1,500 feet linear and horizontal measurement on the Comstock lode along the vein thereof, with all its dips, variations, and angles, together with 75 feet on each side of the middle of said vein at the surface, and all veins, lodes, ledges, deposits, and surface ground within the lines of said claim 1,400 feet running west from the center of

the discovery shaft, and 100 feet running east from said center of discovery shaft. Said claim is situate in the Ward mining district, county of Boulder, and state of Colorado, and is bounded and described as follows: Beginning at the northeast corner post No. 1, and running due west 750 feet to the N. center side-line post No. 2; thence on the same course 750 feet to the N. W. corner post No. 3; thence due south 150 feet to S. W. cor. post No. 4; thence due east 750 feet to S. center side-line post No. 5; thence on the same course 750 feet to the S. E. corner post No. 6; thence due N. 150 feet to the place of beginning. Sugar Loaf Mountain, at its highest point, bears from the center of the discovery shaft S., 70° 30' east, and this claim is located in section 11, T. 1 N., and range 73 W. of the 6th principal meridian. L. D. Chase. [Seal.]

"Said lode was discovered on the 11th day of July, A. D. 1889.

"Date of location: July 11, 1889.

"Date of this certificate: Sept. 29, 1889.

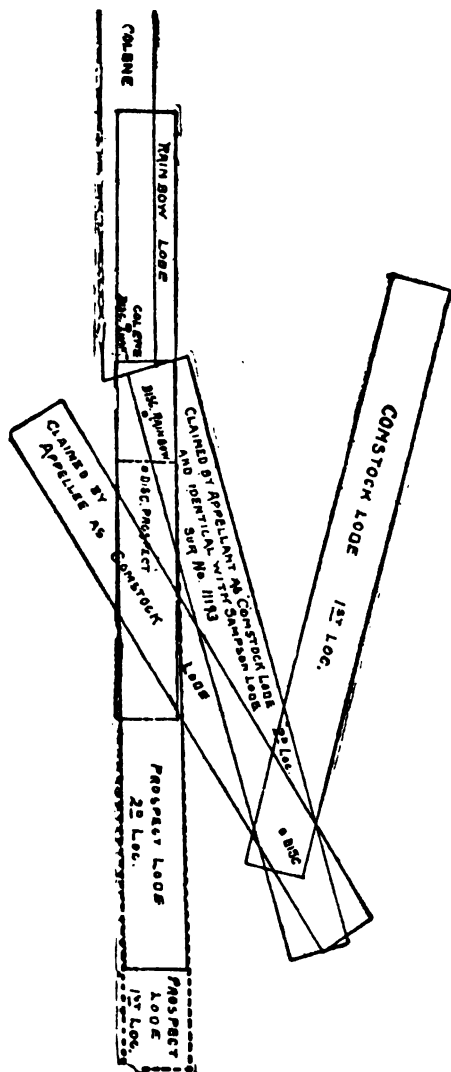
"Attest: R. Z. Mason, Surveyor."

This certificate was recorded in the proper office on October 2, 1889, in Book 117, at page 505 thereof. Whatever title Chase acquired passed by mesne conveyances to one Sampson. While Sampson held title he filed an additional location certificate, viz.:

"Know all men by these presents, that I, Mason L. Sampson, the undersigned, have relocated, and do hereby claim, by right of discovery and relocation, 1,500 feet linear and horizontal measurement on the Comstock lode, together with all veins, lodes, ledges, and surface ground within the lines of said claim as hereinafter stated: 300 feet on said lode running N. E. from the center of the discovery shaft on said lode, and 1,200 feet running S. W. therefrom; said lode being situated in Ward mining district, Boulder county, and state of Colorado, and more particularly described as follows: Beginning at the discovery shaft, an 18-foot shaft; thence running N. E. 300 feet to N. E. end line; thence running N. W. 75 feet to N. E. cor. post No. 1, set in a mound of stone; thence running S. W. 750 feet to N. side center stake; thence running S. W. 750 feet to N. W. cor. post No. 2, set in a mound of stone; thence running S. E. 150 feet to S. W. cor. post No. 3, set in a mound of stone; thence running N. E. 750 feet to S. side center stake; thence running N. E. 750 feet to S. E. cor. post No. 4, a pine post set in a mound of stone; thence running N. W. 75 feet to a point of intersection on the N. E. end line,—all of said lode claim being in and forming a portion of sec. 11, T. 1 N., range 73 W. 6th prin. meridian, and locally known as lying on the top of mountain S. of Dew Drop gulch, and about 3,000 feet W. of the old California mine, a patented property. Said lode was discovered July 11, 1889, and was located Sept. 29th, 1889. The object of this relocation and amendment being to more accurately locate the territory along the course

of the lode. The original location certificate is recorded in Book 117, page 505, of Boulder Co. Date of certificate, August 29th, 1891. Mason L. Sampson. [Seal.]

This certificate was recorded in the proper office on the 28th of September, 1891. It will be observed the description in this additional certificate starts at the discovery shaft as the locating point, and runs the claim northeast of it 300 feet to the northeast end line; thence northwest to corner post No. 1, set in a mound of stone; thereafter, according to the description, the courses and distances are run southwest, northwest, southeast, and northeast. It will be further noticed there is no allowance for the variation of the needle, which, speaking generally, is between 14° and 15° in Boulder county. This circumstance has been made a basis of considerable argument by counsel. To make the situation entirely plain, we attach a reduced copy of a map which was received in evidence, and which will more clearly exhibit the controversy:



The Comstock lode originally ran due east and west. When Sampson filed his additional certificate, he used the discovery shaft as a pivot on which he swung his claim so that it ran northeasterly and southwesterly. The appellees put on the map what they designate as the "second location of the Comstock." The difference between this and the location as stated in the certificate and the application for the patent comes from the allowance in the latter case for the variation of the needle. Allowing for that variation, the claim did not run northeast and southwest, unless the true northeast and true southwest be that point of the compass with the variation allowed. The evidence tended to prove that at the time of this location in 1891 Sampson staked the claim at its four corners and the center of both side lines with posts set in mounds of stone, and that the claim as thus staked ran northeast and southwest with the due allowance for the variation of the needle. If these facts did not clearly appear, there was an offer of evidence to these points. According to the appellees' contention, the claim was never staked as platted on the map, nor was there any other location made by Sampson or his grantees, and located on the ground along the lines, and covering the course exhibited by the second location, as the appellant platted it. When Duncan offered these certificates, they were rejected on the theory that the description was indefinite, and did not show a compliance with the statute. The objection was that the claim was not tied to any patented claim or section corner, or to any other natural object or permanent monument which would make the record a statutory one. It must be remembered that in the certificate of 1891 the claim was described as in "section 11, T. 1 N., range 73 W.," and as lying on top of the mountain south of Dew Drop gulch, and about 3,000 feet west of the California mine. The appellant then offered to prove that this mine was 3,000 feet from the claim, and that it was the oldest and only patented mining claim in the vicinity; whereupon the further objection was made that this could not be proven aliunde. He also offered to prove that Dew Drop gulch was a well-known gulch, the center of which was about 750 feet east from the Sampson, and that the head of it was northerly therefrom about 500 feet. The defendant further offered to prove that the quarter section corner between sections 11 and 12 was not known and its location could not be ascertained. Duncan further offered to prove that the stakes set at the time of the survey in 1891, when the additional certificate was filed, were on the ground and had stood from this time to December, 1895, and that these stakes marked the lines, and corresponded with the points designated at the time of the survey. All this testimony was excluded. This statement substantially exhibits the only facts to which we need refer. As has already been suggested, no question was made respecting the abstract of title

or the regularity of the deeds whereby the title passed to Duncan. If any title was acquired by what the locators and subsequent owners did, this title vested in Duncan, and he had a right to prove it, or to produce his evidence to support it, and go to the jury on the proposition.

Guy D. Duncan, for appellant. Giffin & Rowland, for appellees.

BISSELL, P. J. (after stating the facts). Mineral rights are granted to miners by federal statutes. Under the grant expressed, miners may go on the public domain, discover lodes and veins, and acquire title. Thereunder mining claims have been located in all the states and territories in the Rocky Mountains. The courts of these various states and territories have attempted to interpret and construe them. There is considerable diversity of judicial opinion about them. Their true meaning must ultimately be determined by the supreme court of the United States. We take it, wherever that court has expressed an opinion, it is binding on all courts, and the construction which it adopts must be accepted and followed, though there may be decisions of state and territorial courts to the contrary. This is axiomatic under our judicial system. We state the proposition without qualification, because we do not wholly follow the decisions of the supreme court of the state which would otherwise be binding on us. We accept and follow the decision of that tribunal to which is committed the power and the duty to interpret federal enactments. We bespeak a close scrutiny and a careful examination of the statement of facts preceding this opinion, which has been prepared by the court.

Returning to the subject, and taking up the questions in the order in which they naturally present themselves, we will advert, in the first place, to the fact that there were two location certificates filed, to the descriptions found therein, and determine therefrom whether, singly or together, they meet the requirements of the statute. The first branch of this inquiry necessarily relates to the circumstance that two certificates were offered in evidence, the original one of 1889, and the additional one of 1891. At the outset we hold, following the supreme court of the state, that both ought to have been received. If we concede the position assumed by the appellees that the first was insufficient, yet it should have been admitted, providing it was followed by one which either supplied what it lacked, or, as a whole, conformed to the statute. *Strepey v. Stark*, 7 Colo. 614, 5 Pac. 111; *Frisholm v. Fitzgerald*, 25 Colo. 290, 53 Pac. 1109. Therein it was determined that, when the original certificate of location may be deemed void, an additional one may be filed to correct its defects, and both may be put in evidence. These authorities fairly decide this proposition. The question is not an open one, since

we find no binding federal decision to the contrary. It is undoubtedly the law, and what we may say about it is in no manner intended to attack the doctrine. I do not quite approve the selection of the adjective which the learned justices have used to describe the second certificate. The statute which requires the record permits a second filing (Gen. St. § 2400), and thereby it is provided that, whenever the locator apprehends that his original certificate is defective or erroneous, or that the law has not been complied with, or he desires to change his surface boundaries, or take in a part of an abandoned claim, he may file an additional certificate, subject to the other provisions of the act. I prefer the language of the statute to the language of the opinions. It seems to me that the subsequent certificate should be called an additional certificate, rather than an amended one, and that the use of this adjective more aptly and properly defines the privilege conferred, and certainly suggests a better reason for the doctrine which permits the introduction than any which I have found in the opinions of that distinguished court. In the first case it is said that it tends to show good faith on the part of the locator, and, again, that it offers a means of comparison in respect to description and surface boundaries. Neither of these reasons are, to our minds, very persuasive, because the question of good faith is of very little significance. If the locator wholly fails to properly describe his claim, he thereby, as against subsequent and intervening claimants, acquires no rights. This would be true whether his attempted location was made in good or in bad faith. In another sense, of course, the question of good faith is an important consideration, because that is the real basis of the rule which all the courts, as we observe them, have adopted in construing these mining statutes,—liberality of construction. This is the only direction in which the matter of good faith cuts any figure. Neither, on the other hand, am I much impressed with the reason suggested that it offers a means of comparison. Under the specific terms of our statute the boundaries need not be the same. The miner is given the absolute right to change his boundaries to take in overlapping and abandoned claims or other territory which has not then been located or occupied. It is to the end that the prospector may cure any defects in his location, and conserve and protect the results of his industry, that the authority is given. For this reason, rather than the others, it is our judgment that both certificates, the original and the additional one, ought to be admitted; and we believe if therefrom and thereby, and not necessarily from one alone, but from either one or both together, the necessary statutory steps can be shown to have been taken, the miner thereby establishes an unimpeachable title as against the subsequent claimant. In other words, we believe the law to be that, though neither

one, as a whole, may be absolutely correct, and in perfect conformity to the statute, yet if in both and from both there may be found and deduced all that the law requires, the statute being otherwise complied with, the miner's record is complete, and his title is perfect.

We now recur to the inquiry whether the original or the additional certificate or both conformed to the statute. Whether the original location certificate was radically defective may be quite a debatable question. We are not so thoroughly well satisfied about it that we concede it, except for the purposes of the discussion. Following its recitals, it began at the northeast corner post No. 1, and then, following specified courses and distances, ran to the center and south end line to posts. It was a parallelogram running due east and west. Assuming the posts to have been put in place, the claim was located on the ground. These posts were in no way tied to any other part of the claim, nor to the discovery shaft, nor to any natural object outside the claim. It will be observed however, that the discovery shaft was located, and that Sugar Loaf Mountain, from its highest point, bore from the center of it south, $70^{\circ} 30'$ east, and that the claim was located in section 11, township 1 N., range 73 W. of the sixth P. M. Had the shaft been tied to a corner, it would doubtless have been good as a tie, and there would have been a sufficient reference to a natural object or permanent monument. Yet we are not prepared to hold, nor do we say, that the posts themselves, as set, were not permanent objects or natural monuments. Whether, when a location certificate makes no other reference, it would be adequate, we do not determine. It is wholly unnecessary. There is much in the Hammer Case, hereafter referred to, which would permit an argument supporting the proposition. Conceding, for the purposes of the opinion, that the first certificate was insufficient, we now recur to the second. Therein we find a description which starts at an 18-foot shaft called the "discovery shaft"; thence a line is run northeasterly 300 feet to the northeast end line; thence from the intersecting point northwest 75 feet to the northeast corner post No. 1, set in a mound of stone. Here we have a description started in a discovery shaft 18 feet deep, and a line drawn to the northeast end line 300 feet long; then a line northwest 75 feet to a post, set in a mound of stone. Now, if it be true that a stake driven into the ground is one of the most certain means of identification where there is a description of the premises by metes and bounds, as decided in the Hammer Case, we have got an absolutely perfect description by a reference to a natural object. It may be said it is quite impossible to know where the discovery shaft is, or to find the point from which the 300-foot line is to start, and from which, by the northwest continuation of 75 feet, we

find corner post No. 1. At this point, and for the purposes of identification, we recur to the original certificate, wherein the discovery shaft is absolutely located, and its position perfectly identified, by the highest point of Sugar Loaf Mountain, from which bears the center of that shaft $70^{\circ} 30'$ east, the claim itself being located in section 11, township 1 N., range 73 W. of the sixth P. M. We certainly then have, in both certificates combined, if not by the last alone,—as we shall attempt hereafter to demonstrate,—an absolutely perfect description, which cannot be mistaken, and wherefrom any engineer could locate and bound the claim. This follows because the courses and distances from post No. 1, set in a mound of stone, are all set down in the certificate.

Even though the court might be wrong on this proposition, and our position might be disputed, it still remains true the claim was perfectly located by the terms of the additional certificate. At this point we revert to a decision of the supreme court of the state, which we shall assume has been overruled by the supreme court of the United States. The appellees rely on it with great confidence, and, practically, counsel base their whole argument thereon, and attempt thereby to support the ruling of the nisi prius tribunal. *Mining Co. v. Drake*, 8 Colo. 586, 9 Pac. 787. An examination of that case will disclose that the only natural object or permanent monument to which reference was made in the rejected certificate was one which described the claim as beginning at the westerly end of the Gilpin Mining Company's property on the Williams lode. This was treated by the opinion as a description of a starting point at the westerly end of a certain mining claim. The court holds that this description is insufficient, that it is no tie, and that the certificate was void because it made no reference to a natural object or to a permanent monument. The difficulty, as stated by the court, is that there is no point named from which the description should start. It may be that the court did not wholly base its opinion on this proposition, because we find, in continuance of the discussion, that the discovery shaft was tied to nothing, and there was no information furnished by the certificate which would enable any one to trace the boundaries of the claim. In departing from the apparent conclusions of the supreme court, we go no further than to hold that, in so far as that court decided that a tie to a patented claim was not a good tie, it is not in accord with the supreme court of the United States. We do not discuss nor consider whether in other respects the description was so far invalid that it could not be upheld. We only intend to dissent from the opinion with respect to its determination that a tie to a patented claim is insufficient. In this we are completely supported by the following cases: *Hammer v. Milling Co.*, 130 U. S. 291, 9 Sup.

Ct. 548, 32 L. Ed. 964; *Bennett v. Harkrader*, 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046. Vide *Jackson v. Dines*, 18 Colo. 90, 21 Pac. 918. According to the *Hammer Case*, which was rendered by a unanimous court, the opinion having been written by that eminent mining lawyer, Mr. Justice Field, the only tie mentioned in the recorded certificate was in these terms: "This lode is located about 1,500 feet south of Vaughan's Little Jennie mine." There was no other tie; there was no other reference to a permanent object, or to a natural monument; no courses or distances given, except courses and distances stated as north, east, west, and south; and four named stakes, A, B, C, and D. How those stakes were set, how the claim was to be found otherwise than by this reference, it is impossible to discover. Notwithstanding this, and with this general description and this general tie, the court holds that the statute which requires that the records of mining claims shall contain a description by reference to some natural object or permanent monument was fully complied with by such a description and by such a reference. It holds that stakes driven in the ground are the most certain means of identification. It states that in this case the stakes were placed, and that the location of the lode was identified by its distance south of Vaughan's Little Jennie mine. That distinguished court says: "We agree with the court below that the Little Jennie mine will be presumed to be a well-known natural object or permanent monument until the contrary appears." If this doctrine be true,—and we are compelled to accept it, and we fully concur in it,—how it can be held in this case that there is no reference to a natural object or permanent monument when the claim is described as 3,000 feet west of the old California mine, a patented property, and the defendant offered to prove that this was the exact distance of the Sampson mine from it? This same doctrine was followed six years later, and the case approved, by the same court. *Bennett v. Harkrader*, *supra*. We find, however, in the additional certificate a still further reference which adds force and strength to the tie, on which the defendant had a right to rely. The lode is described as on top of the mountain south of Dew Drop gulch. It is located as in section 11, township 1 N., range 73 W. of the sixth P. M. It had an adequate description by the combination of the original and the additional certificate in the tie of the discovery shaft. That shaft is tied to the highest point of Sugar Loaf Mountain by a surveyor's line described as 70° 30' east therefrom, and the defendant offered to show that such was the bearing of that discovery shaft, and such the proper line and the proper point. In addition to this, it may be well argued and contended—and, we think, properly so—that when once the discovery shaft is located by reference to a mountain peak, and therefrom a line is run

to one of the end lines and to the middle of it, and thence to a corner post set in stones, that thus and thereby by reference to a natural object and permanent monument the minor has located his claim in exact conformity to the statute. We further hold that these two certificates—the original and the additional certificate—may be taken together, and if, from the description contained in both, each referring to the other, the claim is properly described and adequately located by reference to a natural object and to a permanent monument, the locator has fully complied with the law. Permanent monuments have been defined in many cases. *Oredo Mining & Smelting Co. v. Highland Min. & Mill Co.* (C. C.) 95 Fed. 911; *Meydenbauer v. Stevens* (D. C.) 78 Fed. 787; *Southern Cross Gold & Silver Min. Co. v. Europa Min. Co.*, 15 Nev. 383. In these various decisions, and many others, which need not be cited, it has been time and again held that mountains, hills, cañons, gulches, ravines, and like natural elements in the landscape are natural objects and permanent monuments to which reference may be made. We here have not only a reference to the California mine, but the claim is described as in section 11, and on the top of a mountain south of Dew Drop gulch, which, when the claim is properly staked on the ground, is probably an adequate description. The whole object of the statute which requires a reference to a natural object or permanent monument is to direct the attention of the aftercomer to the locality of the claim; and if he goes on the ground, and finds the claim properly staked, he may then go to the record, and find out whether the statute has otherwise been complied with, and, if therein there is a statutory description, the record is adequate and sufficient. *Flavin v. Mattingly*, 8 Mont. 242, 19 Pac. 884; *Brady v. Husby*, 21 Nev. 453, 33 Pac. 801. We therefore conclude from an inspection of these two location certificates that the court erred in refusing to admit them.

We do not regard the decision in *Drummond v. Long*, 9 Colo. 538, 13 Pac. 543, as necessarily in opposition to this position. It is quite true a reference was made to the Hawkeye lode, from which the Portland is said to lie about 1,500 feet north. Nothing further is stated about the Hawkeye. We are not advised whether it was a patented or a well-known claim. The discovery shaft of the Portland was not tied to any corner or monument of either the location or the lode, nor was it possible to determine from what point on the Hawkeye location one should start to find and identify the shaft. It is quite true there is an apparent discrepancy between that opinion and the *Hammer Case*. It is quite possible to construct an argument on the latter which would tend to overthrow, or at least to weaken, the force of the decision. We are not compelled, however, to resort to a criticism of that case

in order to support the present decision. In the location certificate under examination we have a discovery shaft perfectly located by reference to a natural object. The northeast end line and the center of it is determined by a line run 300 feet from the discovery shaft. Thus drawn, it will strike the end of the lode. Thence northwest a line is run 75 feet to corner No. 1, which is a post set in a mound of stones. The discovery shaft is perfectly located by reference to a natural object, and, taking that as a starting point, we come to a post in a mound of stones, which is a natural object in the ground, and one of the best of all monuments for the description of a mining claim. We likewise have a description of a claim lying on the top of a mountain south of Dew Drop gulch, and 3,000 feet from the California mine to the east. There can be found within the lines of the Drummond decision an argument and some positions which are seemingly in conflict with our decision. It may be difficult, and require much ratiocination of a keen and subtle variety, to reconcile this decision with those two cases in 8 and 9 Colo., and it may appear as though we were straining a point in attempting to distinguish this case from them. Whether distinguishable or not, we are bound by the decision of the supreme court of the United States. These references and these descriptions are entirely adequate, and support the appellant's title; his claim being otherwise validly located.

We deem it best now to refer to one other proposition which may become of some consequence on the subsequent hearing. It will be remembered that the Sampson lode, as it was called after it was swung on the discovery shaft as an axis, was transmuted from a claim running due east and west to one running northeast and southwest. At the time of the swing the Sampson lode was staked on the ground by stakes at the four corners, set in mounds of stone, and with another in the center of each side line. If the location was made on a valid discovery, and the statute was otherwise complied with, and the jury shall so determine, then we must hold the Sampson lode, as located in 1891, was a valid location as against the Rainbow at that date. This is self-evident, because at the date of that location the Rainbow lode had not been discovered or located, nor had any shaft been sunk on it, nor any claim made about it. Nothing was done on this claim until August 30, 1895. It consequently follows, if the Sampson lode was properly located on the ground, and properly staked, the notices properly posted, the annual labor performed, and all things done in conformity to the statute, the Sampson lode had a good title when the Rainbow lode was located. On the argument and in the briefs of counsel we have been referred to the case of Frisholm v. Fitzgerald, 25 Colo. 290, 53 Pac. 1109. We cite the case to support our posi-

tion that the original and additional certificates were admissible. It states a further proposition, which is used as an argument here, about which we are not at liberty to express our views. The principal opinion was prepared by Mr. Justice Goddard, in whose judgment I have great confidence. This proposition respects the extent to which a locator may go when he files an additional certificate, and the rights which he may thereby acquire. Observing the special concurrence of the chief justice and of Mr. Justice Gabbert, I notice that they express no opinion concerning his construction of section 2400 of our General Statutes. Mr. Justice Goddard very broadly holds that the locator of a mining claim may file this additional certificate for the purpose of correcting errors in his original location, or errors in the description of his claim; and that this additional certificate will confirm and secure his title as against any intervening claimants, his rights having been otherwise properly initiated and secured, providing he does not change the boundaries of his location. We are not required to consider this question. We neither decide it nor express an opinion about it, because the subsequent location certificate of the Sampson lode, which describes the lode as swung upon the discovery shaft to a northeasterly and southwesterly direction, was fait accompli before the Rainbow lode was located. The owner of the Comstock, which he ultimately called the Sampson, swung the claim, staked the ground, and did the annual work, and, we assume,—although all these questions are open to evidence on the subsequent trial,—did everything necessary to perfect the claim prior to the time Fulton and her co-partners located the Rainbow. There was a change of boundaries and a taking in of other land, but there were no intervening claimants. We therefore hold that the owner of the Sampson lode had a perfect right to swing the claim, and change the location, and take in other ground. Since this is true, it necessarily follows, all other facts being found by the jury in his favor, he acquired a good title.

In all this discussion, and in whatever may be found in this opinion bearing on the questions of fact, it must not be assumed that we have attempted to conclude the parties on any matters of proof respecting the discovery of mineral, the staking, or the posting of notices, or the completion of the record and the transfer of title. It has necessarily been indulged in to elucidate and settle the questions of law. What we intend to hold is that the court erred in refusing to admit the original and the additional certificate of location of the Comstock or Sampson lode. We hold that there is on the face of the second certificate a sufficient and adequate description by references to a natural object and a permanent monument. We further hold that the original location certifi-

cate is admissible, and that it, with the additional certificate, may be used to determine any point in the claim or in the description of it by the required reference to a natural object and a permanent monument. Since we conclude the court erred in rejecting these certificates, its judgment entered on a directed verdict must be set aside, and the cause remanded for a new trial in conformity to this opinion. Reversed.

JAY v. SCHOOL DIST. NO. 1 OF CASCADE COUNTY.

(Supreme Court of Montana. May 29, 1900.)

STATUTES—CONSTRUCTION—SCHOOL DISTRICTS—TEACHER'S EMPLOYMENT—CERTIFICATE—TERM—ANNUAL REPORTS—SALARY—FAILURE TO PAY—JUDGMENT—INDEBTEDNESS—POWER OF BOARD.

1. In construing a statute the courts will endeavor to give effect to the purpose and intent of the legislature, and for that purpose will apply the ordinary rules of grammar.

2. Under Pol. Code, § 1756, as amended by Sess. Laws 1897, p. 129, providing that the school trustees or school board of any district who shall employ any teacher for a period of more than three months, or one who shall not hold a legal certificate in full force, shall be deemed guilty of a misdemeanor, the board has no authority to contract with a teacher who has not a certificate, or to employ a teacher holding a certificate for more than three months. Hence a contract for the employment of a teacher holding a certificate for a school year of nine months is of no effect.

3. The fact that Pol. Code, § 1756, as amended by Sess. Laws 1897, p. 129, prohibits the employment of teachers holding certificates for a period exceeding three months, does not obviate the necessity of teachers making annual reports to the county superintendent as is required by Pol. Code, § 1841, or, if the employment be for only three months, at the end of such term.

4. Pol. Code, § 1803, providing that the board of trustees of any school district shall be liable, in the name of the district, for any judgment against the district for any salary due any teacher on contract, and that they shall pay such judgment out of any moneys to the credit of such district, does not authorize the entry of a judgment against the school district for unpaid salary of a school teacher, where the district admits the claim, and the only reason that it does not pay it is that it has no funds applicable to the purpose, since, until it has funds on hand with which to pay, failure or refusal to pay is in violation of no duty.

5. A court will not enforce an invalid contract of employment of a school teacher by a school board merely because its failure to do so will result in the closing down of the public schools of a school district.

6. School-district officers, not having power to levy taxes, have no power to incur indebtedness for the purpose of keeping the schools open beyond the time for which funds are provided.

Appeal from district court, Cascade county; J. B. Leslie, Judge.

Action by G. H. Jay, as assignee of a teacher's claim for services, against school district No. 1 of Cascade county. From a judgment overruling a demurrer to the complaint, defendant appeals. Reversed.

Action by plaintiff, G. H. Jay, as assignee of one Helen Edgerton, to recover the sum

of \$120 for the services of said Helen Edgerton as teacher in the public schools of school district No. 1, Cascade county, Mont. The complaint, after alleging the corporate capacity of the defendant, proceeds: "(2) That on the 1st day of June, 1899, the board of trustees of the defendant district, by a written order made and entered at a regular meeting of said board had and held in the city of Great Falls, in said district, county, and state, entered into an agreement and contract with one Helen Edgerton, who possessed and still possesses a good and legal certificate as teacher, by which the said board employed and hired the said Helen Edgerton as a teacher in the public schools of said district for the term of nine and one-half months, to begin at the beginning of the ensuing school year, to wit, on the first Monday, September, 1899, and at a salary of one hundred and twenty dollars per month. (3) That the said Helen Edgerton entered into said contract with said board of trustees, and accepted, in writing, said employment as teacher for the time so agreed upon, and that she entered upon the discharge of her duties as such teacher on the first Monday of September, 1899, and has continuously performed her duties in all respects as such teacher since that date; that said board has had full knowledge of the performance of said services by said Helen Edgerton, and has accepted the same and consented thereto, though no express contract or agreement has ever been entered into between said board and said Helen Edgerton, save and except on the 1st day of June, 1899, as aforesaid; that said board has further certified and acknowledged that the sum herein sued for, to wit, one hundred and twenty dollars, is due and owing said Helen Edgerton for such services as teacher for the month ending December 22, 1899. (4) That at the time of the employment of said Helen Edgerton by said board as aforesaid, on the 1st day of June, 1899, the money on hand and available to the credit of said defendant district amounted to the sum of fourteen thousand four hundred and forty-six and $\frac{80}{100}$ dollars; that out of said sum were paid the salaries of teachers and other expenses of the school for the balance of the school year after said contract was made, leaving on hand the sum of seven thousand eight hundred and ninety-five and $\frac{89}{100}$ dollars on the first Monday of September, 1899, the date of the beginning of the current school year, and that this said last-named sum was fully used and exhausted in paying the salaries and other school expenses for said month of September. (5) That since said date there has been no other money to the credit of said district wherewith to pay the salaries of any of the teachers employed in the schools of said districts, but that the salaries of all the teachers employed in the schools of said district for the months of October and November have been paid by a local bank, to which said teachers

have assigned their claims against said district; that there is no money to the credit of, or available for, said district at the present time; that the general levy for school purposes made by the board of commissioners for the year 1899 under and by virtue of section 1940 of the Session Laws of 1897 was three and one-half mills on the dollar, and, had the commissioners made a levy of five mills for such purpose, the additional sum of \$8,758.89 could and would have been collected as taxes for the use of said school district No. 1, and such sum would thereby have been sufficient to pay all expenses of running the schools of said district up to the — day of February, 1900. (6) That said district has not paid said Helen Edgerton her salary for the month ending December 22, 1899, or any part thereof, but that her said month's salary, to wit, one hundred and twenty dollars, is wholly unpaid, and has been due and owing to her from said district since the 22d day of December, 1899. (7) That in the employment of the corps of teachers for the present school year, including the said Helen Edgerton, for the term of nine and one-half months, as hereinbefore stated, and at the time hereinbefore stated, to wit, on or about June 1st of the year, the board of trustees of the defendant district have acted as has been usual and customary with the board of trustees of said district, and as the educational and school interests of said district require. (8) That the total number of teachers employed for the current school year in said district is 43, their salaries aggregating \$3,700 per month, and that the average number of children residing in said district and attending the public schools thereof for the current school year is 1,500; that a well-equipped high school is embraced in the public-school system of said district, and that the educational and school interests of said district require that the said schools should be kept open and maintained for at least nine and one-half months of each and every school year. (9) That the electors of said school district did on the 8th day of September, 1899, vote a special tax by which the sum of \$27,125.40 would have been collected in order to continue and maintain said schools for said period of nine and one-half months, but that, on account of the decision of the supreme court declaring inoperative the law under which said tax was voted, no part of said taxes has or can be collected. (10) That unless the contract heretofore made by the board of trustees of said district with the teachers in said public schools, including the contract with said Helen Edgerton, can be enforced by a good and valid judgment against said district, to be paid by moneys that may hereafter come into the treasury of said district, then it will be necessary that the schools of said district should forthwith be closed, and the educational and school interests of said district will accordingly be seriously crippled and impaired. (11) That

the total indebtedness of every kind against said district does not exceed the sum of \$182,500, nor has it exceeded that sum at any time mentioned in this complaint; that the total assessed valuation of the property of said district is \$8,345,276." After alleging the assignment of the claim to plaintiff, the complaint concludes with a demand for judgment for the sum of \$120 and costs of suit. To this complaint the defendant interposed a general demurrer, and on the 9th day of January, 1900, the court, after consideration of the questions presented by the demurrer, overruled the same. Thereupon, the defendant having refused to plead further, judgment was rendered against it for the amount claimed. The defendant appeals from this judgment.

O. B. Nolan, Atty. Gen., and Thos. M. Brady, for appellant. A. C. Gormley, for respondent.

BRANTLY, C. J. (after stating the facts). 1. Counsel for appellant argues that the judgment is void because founded upon a contract made in contravention of an express prohibition of section 1756 of the Political Code, as amended by Sess. Laws 1897, p. 129. This section, as it originally stood, provided that no school district should be entitled to receive any apportionment of school money unless all the teachers employed in the schools therein during the three months next preceding the apportionment held certificates of fitness for teaching. As amended it provides: "The school trustees or school board of any district who shall employ any teacher in the public schools of their district for a period of more than three months or who shall not hold a legal certificate of fitness for the occupation of teaching, in full force and effect, shall be deemed guilty of a misdemeanor." The obvious purpose of this provision, counsel says, is not only to prohibit altogether the employment of teachers who have not certificates of fitness, but also, in all cases, to limit the term of employment to three months. Counsel for respondent assumes the position that the intent and purpose of the section is to prohibit only the employment for a period longer than three months of teachers not holding the required certificate; leaving the trustees to make the term of employment of qualified teachers to suit their own notions of their duty, and the necessities of their particular district. The argument is that a reading of the section according to its obvious grammatical sense requires the conjunction "or" to be considered as properly connecting the two relative pronouns, "who," making them both refer to the same antecedent, viz. trustees or board; thus showing the manifest absurdity that a trustee not holding a certificate of qualification is guilty of a misdemeanor. To avoid this absurdity, he says, we must omit entirely the connective "or," as surplusage. The

latter relative, "who," will then grammatically refer to the word "teacher," and thus it will appear that it is the purpose of the section to punish trustees who assent to the employment of teachers for more than three months when they have no certificate. The suggestion is also made that under the old section the moneys apportioned to a district were withheld as a punishment to the district, when its trustees failed to observe the law in employing teachers, while the sole purpose of the amended section is to shift the punishment to the trustees personally. Any other view of the statute, it is argued, will seriously impair the efficiency of the school system of the state. The section in question is not very skillfully drawn. Nevertheless, we must elicit the purpose and intent of it from the terms and expressions employed, if this is possible; calling to our aid the ordinary rules of grammar. This is the elementary rule applicable to all statutes. Other rules may be invoked only when this fails. *End. Interp. St. § 4.* "The moment we depart from the plain words of the statute, according to their ordinary and grammatical meaning, in a hunt for some intention founded on the general policy of the law, we find ourselves involved in a 'sea of troubles.' Difficulties and contradictions meet us at every turn." *Dame's Appeal, 62 Pa. St. 417.* See, also, *End. Interp. St. § 7; Hamilton v. Rathbone, 175 U. S. 419, 20 Sup. Ct. 155, Adv. S. U. S. 155, 44 L. Ed. —; Smith v. Williams, 2 Mont. 195; Carruthers v. Commissioners, 6 Mont. 482, 13 Pac. 140.* Applying this rule of interpretation, whatever may have been the actual intention of the legislature, it is clear that the latter relative refers for its antecedent to the word "teacher," and that the author of the section, in stating the other alternative, omitted a repetition of it, as unnecessary. This clause would then properly read, "or any teacher who shall," etc. This reading does no violence to the rules of grammar, and does not require the omission of any word. It entirely avoids the absurdity suggested by respondent's counsel, and makes the section denounce as a misdemeanor the doing of either of the acts mentioned in the clauses connected by the conjunction. There is nothing in the section as it stood before the amendment to suggest that the intention of the legislature was otherwise. Under it the employment of a teacher without a certificate could not cover a period of more than three months. Under the amended section this employment cannot be made at all, nor can any contract of employment endure longer than three months. What purpose was had in view by this change, it is not our province to inquire. It is not for us to say whether it is wise. Nor do we think it incumbent upon us to seek for a construction of this section which would bring it in harmony with other provisions touching the duties enjoined upon

teachers in regard to annual reports to the county superintendents. Every teacher is required to make a report to this officer on or before September 10th next after the close of the school year. *Pol. Code, § 1841.* This provision, it is argued, necessarily implies at least an annual employment. It may be conceded that it does. Still, if the plain intent of the section in question cannot be harmonized with other sections regulating the duties of teachers, its provisions must control upon the subject with which it deals. The amended act containing this section was passed after the other Code provisions, as a revision of them in many particulars. It expressly repeals all other provisions of the Code which are in conflict with its own provisions. The intention being clear, the older provisions must yield to the explicit requirements of the new provision. The section cannot be construed, under any recognized standard, to mean anything but what it says. The word "or" may have crept into it by inadvertence, yet it does not appear so. The engrossed bill, which we have examined, shows no evidence of such inadvertence. We are not justified, therefore, in making the assumption that such is the case. A careful examination of all the other sections of the statute, as it originally stood and as amended, fails to show anything to justify such a conclusion. The ultimate purpose to be accomplished by the provision is not clear. It may be to require a quarterly renewal of contracts with teachers; thus leaving the trustees in position to terminate the employment of those whose services are not entirely satisfactory, but for whose removal there exists no statutory cause justifying a disregard of an existing contract. It may be, also, to enable the trustees to close the school upon the happening of epidemics, without having to continue the payment of salaries beyond a limited time, which they would otherwise be compelled to do under annual contracts, or to shorten the term upon an unexpected failure of funds from unforeseen causes, and thus avoid involving the district in debt. But, whatever may have been the purpose in the mind of the legislature, such legislation is entirely within its power; and, whether the provision be wise or not, our duty is to require the enforcement of it as we find it. We do not think the contract such a one as the board of trustees could make, and therefore conclude that it cannot be sustained. It is not necessary to conclude, however, that the section in question dispenses with the requirement of annual reports by teachers under section 1841, *supra*. Teachers in the employment of the board must still make these annual reports as directed. At any rate, they are required under the latter part of the section to report at the end of the term for which they are employed.

2. It appears from the order of the district

judge directing judgment for the plaintiff that he was of the opinion that, though it be conceded that the contract set forth in the complaint is void under the statute, there are still sufficient substantial allegations in the pleading to sustain a judgment for services for the month of December, of the reasonable value of \$120, rendered with the consent of, and accepted by, the defendant. This view was entertained upon the authority of *State v. Dickerman*, 16 Mont. 278, 40 Pac. 698. In this case this court quoted with approval from *Brown v. City of Atchison*, 39 Kan. 37, 17 Pac. 465, as follows: "From the authorities, we think the following principle may be deduced: Where a contract has been entered into in good faith between a corporation, public or private, and an individual person, and the contract is void, in whole or in part, because of a want of power on the part of the corporation to make it or enter into it in the manner in which the corporation enters into it, but the contract is not immoral, inequitable, or unjust, and the contract is performed, in whole or in part, by and on the part of one of the parties, and the other party receives benefits by reason of such performance over and above any equivalent rendered in return, and these benefits are such as one party may lawfully render and the other party lawfully receive, the party receiving such benefits will be required to do equity towards the other party, by either rescinding the contract and placing the other party in statu quo, or by accounting to the other party for all benefits received for which no equivalent has been rendered in return; and all this should be done as nearly in accordance with the terms of the contract as the law and equity will permit." Conceding this to be the general rule, appellant asserts that, as the complaint in this case discloses the fact that there is no dispute between itself and the plaintiff as to the fact and amount of the indebtedness involved in this suit, and also that the failure to pay is due entirely to a want of funds to meet the claim, no judgment may be rendered against it in this case. This argument proceeds upon the assumption that, as the trustees have no power to levy taxes for current school purposes (*Hilburn v. Railway Co.*, 23 Mont. 229, 58 Pac. 551, 811), and as they are prohibited by statute from drawing a warrant to pay any outstanding claim unless there is money in the county treasury to the credit of the district (Pol. Code, § 1737), the trustees are guilty of no breach of duty until they refuse to properly apply funds subject to their order to the payment of the particular claim. Let us see if this assumption is justified. The funds provided by law for the maintenance of schools are derived in the first place from interest on the state school fund, rents of school lands, escheats, and other sources mentioned in section 1940 of the Political Code. Besides the revenues from these sources, the commissioners of each county are required to levy every year, for

current school purposes, a tax upon all the property in the county, of not less than three nor more than five mills upon each dollar of assessed valuation, as fixed by the county assessment. Laws 1897, p. 134. The amounts of all fines remaining after the payment of costs in the cases in which they are imposed are also paid into the county treasury, and are set apart for school purposes. Laws 1897, p. 134; Pol. Code, §§ 1891, 1892. The moneys derived from the interest on the state school fund, and other sources, controlled by the state, are apportioned to the various counties by the state superintendent not later than February 10th each year, and the amount falling to each county is then made available for school purposes. Pol. Code, § 1714. The county superintendent from time to time apportions the whole fund thus accumulated in the county treasury to the various districts, and the apportionment falling to each district is the only fund upon which the local trustees can draw for the payment of salaries and other current demands. The school year opens on September 1 (Pol. Code, § 1864), but none of the funds mentioned, except those derived from fines, can be made available for the year earlier than the first Monday in December, on which date the time for the payment of county taxes expires. As the amount derived from fines is generally insignificant, and as the funds belonging to the various districts are usually exhausted at the end of the current year, or nearly so, it is clear that the local boards must frequently withhold payment until the apportionment falling to their districts becomes available; for, as we have already seen, the trustees can draw no warrant until there is money to the credit of the district. Section 1737, supra. If the trustees were permitted to anticipate their apportionment and issue warrants against it, persons holding such warrants could dispose of them, and thus obtain their money. Under plaintiff's view of the law, though the trustees cannot do this, yet he may pursue the district by suit, and recover a judgment. To support this claim he cites and relies upon section 1803 of the Political Code, which provides that the board of trustees of any district shall be liable, in the name of the district, for any judgment against the district for any salary due any teacher on contract, and for all debts legally contracted, and they shall pay such judgment out of any moneys to the credit of such district. Manifestly, if a judgment be recovered against the district when there is no fund available out of which to pay it, the plaintiff is in no better condition than before it was rendered, except that he has an established claim. He cannot be paid until the apportionment is made. Even then he can be paid only by warrant. It would seem clear, therefore, that, if there is no dispute as to the validity and amount of the claim, the only difficulty being that there are no funds, no judgment should be permitted,

for the reason that no breach of duty is shown on the part of the district. Under the allegations of the complaint, when this suit was brought there were no funds in the treasury of Cascade county against which the trustees of defendant could draw. The trustees say to the plaintiff: "Your claim is just, but our hands are tied until the apportionment is made to our district. As soon as this is done, we will draw the warrant, but we may not violate the law." To render a judgment against the district under these circumstances would be to adjudicate the fact that it has violated its contract, in that it has, through its officers, refused to violate the law; and, because of this refusal on their part to violate the law, the district must be mulcted in costs, and pay interest until the funds are provided by the authorities of the state and county to meet the demand.

We think it the policy of the whole system of our school law that all persons dealing with school officers are presumed to do so, not only with full knowledge of the power of these officers to bind their corporations under the particular contract, but also with reference to the mode of payment, and the means at their disposal for this purpose. *Union School Tp. v. First Nat. Bank of Crawfordsville*, 102 Ind. 464, 2 N. E. 194. If there is a disputed claim against the district, it can be determined only by means of an adjudication under section 1803, *supra*. If, however, there is no dispute as to the claim, the trustees standing ready to perform their duty as soon as they may, the district cannot be subjected to the needless vexation and embarrassment of suits because other officers of the government have not done their duty in providing funds to make payment. The purpose of a suit is to redress a wrong or to protect a right. What wrong has been done in this case that may be redressed by this suit? The liability is not disputed. The defendant says: "I will pay as soon as the law permits. I cannot pay until there is a fund out of which to pay." The judgment, if granted, cannot be enforced until the fund is available. No execution may issue. Const. art. 12, § 8. True, if the trustees, admitting the indebtedness, willfully refuse to issue a warrant, mandamus would lie. *State v. City of Great Falls*, 19 Mont. 518, 49 Pac. 15; *Greeley v. Cascade Co.*, 22 Mont. 580, 57 Pac. 274. But, there being no funds, they cannot be compelled to issue the warrant. The judgment would therefore amount to nothing more than an admitted claim. If the trustees had power to levy taxes to pay the claim, or to raise money in any other way for this purpose, it would be their duty to do this, and a failure to act would be a breach of duty. But this power is not conferred by the statute. If it were the ultimate purpose to compel the commissioners of the county, by mandamus, to levy a tax to pay the debt of the district, the admitted claim would be as available as a foundation for this proceeding as a judgment. There is

nothing in the case of *State v. Commissioners of Yellowstone Co.*, 12 Mont. 503, 31 Pac. 78, to controvert this view. It is not there held that a judgment is a necessary basis of a mandamus proceeding to compel the levy of taxes to pay such a claim as the one under consideration. Whether Helen Edgerton rendered the services under an express or implied contract, they were, in contemplation of law, to be paid for when funds became available. This suit was instituted on December 29, 1899. For aught that appears in this case, there would have been funds enough to meet the claim as soon as the taxes for that year were apportioned by the county superintendent. It is nothing to the point that the school term in Cascade county will be shortened if this judgment be not sustained. It is the fault of the legislature or the taxing authorities that ample means are not provided to continue the schools. The propriety of a money judgment against a county upon a warrant was fully discussed in *Greeley v. Cascade Co.*, *supra*. It was there held that a suit for this purpose does not lie. We think the discussion found in the second paragraph of the opinion in that case directly applicable to the question raised here, and that the judgment herein cannot be sustained upon the ground stated by the district court.

3. And this brings us to the consideration of the last point made by the appellant, *viz.* That the trustees of a school district have no authority to contract debts for the purpose of continuing a school, without reference to the amount of funds provided by law from year to year. This contention, we think, is correct. The school-district officers cannot levy taxes for current school purposes. This is done by other officers of government, under the law. If the school trustees may incur debts, without reference to the amounts thus raised, so long as the constitutional limit is not overstepped (Const. art. 13, § 6), then, though they are denied the power to levy taxes for any purpose, they are by implication clothed with the power of imposing the burdens of debt upon the district, for the payment of which the authorized taxing officers must provide, which is more extensive than a limited taxing power. It is clearly the duty of the trustees to confine their expenditures to the limits of the funds provided by law. They may reasonably anticipate the funds before they become available, but they may not embark generally upon a course of expenditure not measurably within this limit. In each case where a debt is contracted by them which overreaches this limit, recourse must be had to the attendant facts and circumstances, and the liability of the district, if any, must be determined accordingly. School districts are public corporations (Pol. Code, § 1759), but their powers are very limited. They can exercise none except such as are conferred by the law creating them, either expressly or by fair implication. Dill. Mun. Corp. §§ 22, 24, 25, and note; 21 Am. & Eng:

Enc. Law, 779, and note. Not having the power, under the statute, either with or without a vote of the electors, to levy taxes for current purposes, they may not extend the term of school beyond the time for which there are funds provided. *Morley v. Power*, 2 Am. & Eng. Corp. Cases, 854; *Weatherly v. Mayor*, etc. (Tenn. Ch. App.) 48 S. W. 136.

Respondent cites many cases in support of his contention that the judgment herein should be sustained, but they are based upon different statutory provisions, and cannot be deemed controlling under the provisions of our statute. Nothing we say here, however, is to be construed as an adjudication that the claim involved in this case is not a just liability of the defendant. It does not appear that there would not be ample funds in the county treasury to meet this claim under the apportionments made by the state and county superintendents since this suit was instituted, and to be made by the county superintendent hereafter during the present school year. Nor does it appear from the facts stated in the complaint that the trustees of the defendant, in contracting the debt, have done more than attempt to anticipate the funds which would presently be apportioned to the district by the county superintendent. The question as to whether the defendant may be ultimately liable in any event for the plaintiff's claim does not, therefore, properly arise. For the reasons stated, the judgment must be reversed, and the cause remanded, with directions to the district court to sustain the demurrer. Reversed and remanded.

PIGOTT, J. I concur in the decision upon the first two grounds discussed. I think the third ground is an obiter.

HUNT, J., being absent, does not participate in the foregoing opinion.

(22 Wash. 500)

SMITH v. NORTHERN PAC. R. CO. et al.
(Supreme Court of Washington. May 22, 1900.)

MORTGAGES—FORECLOSURE—LAND CONTRACT
— CANCELLATION—ADVANCEMENTS OF
THIRD PARTY—REIMBURSEMENT.

1. A holder of an undivided one-eighth interest in a land contract executed and recorded a mortgage thereon, of which the vendor had notice. Afterwards, payments due under the contract having been extended several times on payment of interest, by agreement between part of the holders and the vendor, the contract was attempted to be canceled by sending notices as therein provided to each of the holders, but no notice was given the mortgagee. A new contract was made out, whereby the executor of the holder of the one-eighth interest and defendant, another holder, acquired a one-half interest; payments on the old contract being credited on the new, and the time for payment of the balance being extended. Held that, no notice having been served on the mortgagee, the old contract never was in fact canceled as to him, and that the mortgage was a lien on the interest covered thereby.

2. Where a holder of an undivided interest in a land contract, being unable to meet his

payments, agreed that a co-tenant should take a deed to his interest, and convey to him on payment of moneys advanced, a mortgagee may, on payment of such advancements, foreclose his lien on such contract holder's interest.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by John R. Smith against the Northern Pacific Railroad Company, Benjamin Rosenstein, and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

Wm. T. Birdsall and R. L. Edmiston, for appellant. Samuel R. Stern, for respondent Rosenstein. Stephens & Bunn, for respondents Northern Pac. R. Co. and others.

GORDON, C. J. There are two causes of action set up in the complaint,—the first being to foreclose a mortgage upon distinct parcels of real estate; the second, to set aside an alleged fraudulent conveyance of one of the tracts, and to adjudge the holder of the legal title to be a trustee for a one-eighth interest. As to the latter cause of action, it appears to have been abandoned at the trial, and the real controversy was waged over the right of plaintiff to foreclose as to one of the tracts.

From the undisputed facts it appears that in January, 1892, one Simon Oppenheimer executed and delivered to Laura Winne four promissory notes, each for the sum of \$5,000, bearing interest at 10 per cent. per annum. These notes were due in one, two, three, and four years after date; and, to secure their payment, Solomon Oppenheimer (since deceased) and Harriet Oppenheimer, his wife (being the parents of Simon), executed and delivered a mortgage which included, among other property, an undivided one-eighth interest in and to the N. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 25, township 25 N., of range 42 E., Willamette meridian, except 19 acres contained in the right of way. The mortgage was duly recorded. The first and second of the notes were paid, and, prior to the maturity of the third one to mature, they were transferred to the plaintiff, and the mortgage securing them was duly assigned. Solomon Oppenheimer died in this state on the 12th of September, 1892, leaving a will in which Harriet Oppenheimer, the wife, and Simon, the son, were appointed executrix and executor thereof, and they thereafter duly qualified. The premises in question were prior to August, 1889, owned by the defendant the Northern Pacific Railroad Company, a corporation. On the 28th of that month the railroad company made and executed a certain land contract to one Lucius B. Nash, wherein and whereby, in consideration of certain payments thereafter to be made, aggregating \$11,615, it undertook and agreed to convey the premises to Nash, and thereafter Nash, by instrument in writing duly executed, on the 3d day of September, 1889, assigned his

interest in said contract to Horace E. Houghton and others; said Houghton taking under said assignment a one-fourth interest therein. This assignment was duly recorded, as was the original contract of sale. Thereafter, by a similar instrument in writing, dated the 11th of September, 1889, and duly recorded, Houghton transferred and assigned his one-fourth interest in and to the contract to Solomon Oppenheimer and respondent Benjamin Rosenstein, each of whom became the owner of an undivided one-half interest in the one-fourth interest so transferred. Of the remaining interest, one-fourth was transferred to one E. J. M. Hale, and the remaining one-half to defendants Stellwagen and Harban. The court found that due notice of the assignment to Solomon Oppenheimer and respondent Rosenstein was given to the railroad company before the execution of the mortgage, and was duly entered upon its books, and that due notice of the execution and recording of the mortgage was given to the railroad company on the 9th day of January, 1892, and also duly entered on its books. The land contract referred to called for the payment of \$2,615 at the time of the execution of the contract, which sum was paid. It also provided for the payment of \$4,500 on the 28th of August, 1890, and the remaining \$4,500 on the 28th of August, 1891, containing the condition "that should default be made in the payment or in any of the payments of the principal or interest aforesaid, at the time or any of the times above specified for the payment thereof, or in case the party of the second part shall fail to pay the taxes or assessments upon said lands as hereinbefore agreed, then and in such case this agreement, at the option of said party of the first part, shall be null and void, and no longer binding on the party of the first part, and all of the payments that shall have been made under this agreement on the said land, and all the buildings and improvements on said lands, shall be and forever remain the property of the party of the first part, its successors or assigns; * * * it being expressly understood and agreed that time is of the essence of this contract, and that the performance of each and every of the covenants and agreements of the party of the second part hereinbefore contained is as much a part of the consideration of this contract, and a condition precedent, as the payment of the purchase money aforesaid." Also, the following: "And it is mutually covenanted and agreed that if, in case default shall be made by the party of the second part in any of the covenants or agreements herein contained, to be performed by him, the party of the first part shall see fit to declare this contract null and void by reason thereof, such declaration may be made by notice from the party of the first part, addressed to the party of the second part, directed to the post office named below, and deposited in the post office at Tacoma, Washington, which shall consti-

tute a good and sufficient notice and service thereof." Also: "And it is further agreed that no sale, transfer, assignment, or pledge of this contract, or of any interest therein, * * * shall in any manner * * * relieve the original purchaser or purchasers from the obligations imposed by this agreement. And it is also further agreed that no assignment or transfer of any interest of or in this agreement or the said premises, less than the whole, shall be recognized or admitted by said party of the first part under any circumstances, or in any event whatever." In addition to the payment made at the date of its execution, the payment of \$4,500 and interest maturing under the terms of the contract on August 28, 1890, was duly paid prior to the time of the execution of the mortgage. The court also found that, prior to the maturity of the contract, by the terms thereof the railroad company, by instrument in writing, extended the payment of the contract for one year, and in the month of August, 1892, in consideration of the payment of the interest accruing on the balance remaining unpaid, further extended payment on the balance due on the contract until August 28, 1893, and thereafter, by a similar instrument in writing for a similar payment, extended the payment of the balance of the principal remaining unpaid another year, or until the 28th of August, 1894; that in November, 1894, an agreement was made between Simon Oppenheimer, respondent Rosenstein, and defendants Harban and Stellwagen, of the one part, and the railroad company of the other part, whereby it was verbally agreed that time for the payment of the balance remaining unpaid was to be extended three years, and the principal remaining unpaid thereon was to be paid in three annual payments, the first to be \$1,745, and "that because of the alleged inability of one of the contracting parties, to wit, the assignee, E. J. M. Hale, to keep up his payments on the one-fourth interest held by him, notices were to be given by said land agent of the Northern Pacific Railroad Company, professing to cancel said contract 584 [that being the number of the land contract referred to], and a new contract was to be made on behalf of the railroad company with some stranger to the transaction, as professed trustee of said Harban and Stellwagen, jointly representing the half interest, * * * and Oppenheimer and Rosenstein, professing to represent the other half interest therein; but whether the new professed contract was to be to the estate of Solomon Oppenheimer, deceased, does not appear. It does, however, appear that Simon Oppenheimer, signing his name as S. Oppenheimer, had at all times previous thereto represented the interest in said contract 584, which had been assigned to Solomon Oppenheimer." The court also found "that such agreement was brought about at the instance and request of the said Simon Oppenheimer and Benjamin Rosen-

stein," and that in pursuance of such arrangement the railroad company caused notice to be given to Harban, Stellwagen, Simon Oppenheimer, and Rosenstein on the 18th day of November, 1894, professing to state that all payments of principal and interest on said contract were in arrears since August 28, 1891, and required that the same should be paid on or before November 30, 1894, and stating that in case of nonpayment the contract would be canceled; and on the day that said notices were so given the railroad company accepted, in writing, the proposition contained in the finding above set out, wherein the old contract was to be canceled, and a new one made to a trustee for the benefit of all of those interested in the old contract, with the exception of Hale. On December 31, 1894, the railroad company caused an additional notice to be given, which notice professed to declare contract 584 canceled in consequence of nonpayment. The court found: That Simon Oppenheimer was not able to carry out his part of the new agreement with the railroad company, whereupon Rosenstein should take an undivided one-half of the land, and Oppenheimer should, when able to pay therefor, purchase from him one-half of his interest. A new contract was entered into between the railroad company and M. N. Cowley, as trustee for the purchasers. This last-mentioned contract was in pursuance of, and upon the terms of, the agreement hereinbefore mentioned. That in May, 1895, upon request of Simon Oppenheimer, respondent Rosenstein submitted a statement of the amount due from Simon to respondent under the new agreement, and this amount was paid by Simon to Rosenstein on the 18th of June, 1895, the amount so paid being a sum equal to a quarter of the total sum paid under the new agreement, viz. one-fourth of \$1,745, and at about the same time Simon paid one-half the taxes upon the land mentioned in the contract. No further sum has been paid by Simon Oppenheimer, and subsequently the last-mentioned contract was further modified; the particulars of which modification, however, need not be here stated. In November, 1897, the respondent Northern Pacific Railway Company, having succeeded to all of the interest of the Northern Pacific Railroad Company in the property, caused a deed to be executed to the premises in question, to respondents Rosenstein, Stellwagen, and Harban, in the proportion of an undivided one-half thereof to Rosenstein, and an undivided one-half thereof to Stellwagen and Harban, which deed was subsequently recorded; and in this connection the court found that "said deed was executed because of the payment of the balance of the money so agreed to be paid in said contract 584." The court also found that Cowley was a mere trustee, and paid no part of the purchase price from his own resources, of which fact the railroad company and railway company

had full notice. The court further found that neither the appellant nor his assignor had any knowledge or notice of any of the transactions between the railroad and railway companies and Rosenstein and Oppenheimer, or of any sum remaining unpaid on the original contract, "or of any demand or any payment thereon, or any threatened or actual cancellation thereof, or of any of the subsequent transactions set forth in the findings, but that, on the contrary, in the months of July and August, 1896, and more than three months prior to the making of the professed new contract, the Northern Pacific Railroad Company had actual notice of the continued existence and lien of said mortgage, and executed said new agreement after having acquired said knowledge, in defiance thereof." Upon the facts found the court concluded, as matter of law, "that the railroad company had the right to forfeit the contract, and to sell the property, for the balance that was due thereunder, to part of the persons who were interested in the original contract, and they had the right to buy it."

We think the learned trial court erred in thus concluding. The facts warranted a decree in plaintiff's favor. The theory that the original contract was forfeited prior to the execution and recording of plaintiff's mortgage has no firm basis upon which to rest. The conclusion is inconsistent with the findings; the court having expressly found that, after default was made under the terms of the original contract, the railroad company from time to time extended the time of payment, and received annual interest payments thereupon, and in this way the contract was continued in full force and virtue for a long period after the attaching of the lien of plaintiff's mortgage. The acceptance of these interest payments was sufficient in itself to keep the contract alive, even if it were not true, as found by the court, that agreements for extensions were entered into. The law does not favor forfeitures, and will seize upon any circumstance, however slight, to prevent the enforcement of a forfeiture. The acceptance of these interest payments, and the other acts of recognition of the contract, are absolutely inconsistent with the notion that the company had elected to claim the benefit of the forfeiture clauses. As above noticed, the mortgage under which the plaintiff claims was recorded on the 9th day of January, 1892. No notice of an election to declare the contract forfeited was given prior to November, 1894. The provision of the contract against the assignment of an interest less than the whole was waived when the company saw fit to recognize such assignment, and thereafter to deal with the parties in distinct recognition thereof; and, having actual notice of the existence of plaintiff's mortgage prior to any attempt upon its part to declare a forfeiture, the

mortgagee was entitled to notice of the pretended subsequent election of the company to terminate it. No such notice has ever been given or attempted.

But, entirely apart from these considerations, the court having found that the new contract which culminated in a deed was conceived and brought about by Simon Oppenheimer presumably in the interest of his father's estate, the lien of the mortgage upon the interest of Solomon Oppenheimer in the premises continued under the new agreement, and has never been forfeited or lost. Viewed from any standpoint, but one conclusion can be reached, and that is that plaintiff was entitled to a decree of foreclosure, and the defendant Rosenstein was entitled to have the sum due him from Simon Oppenheimer as executor, under the agreement between them, adjudged a first lien, to be preferred to plaintiff's mortgage. Plaintiff tendered such an accounting in his complaint. The defendant did not see fit to avail himself of it, but, after full consideration, we are disposed, in reversing the decree, to remand, with direction to the lower court to permit such an accounting to be made, and to proceed to a decree in conformity with this opinion. In disposing of this case, we have considered that Simon Oppenheimer, in all of his dealings with the premises in controversy, was acting as the executor of his father's will. It is not material that the court was unable to find as a fact whether he so acted, or acted upon his own account. It is enough to know that the law made it his duty to conserve the interest of the estate of which he was executor, and it would be monstrous to permit him to assert an interest or claim hostile to that of the testator. No such claim or assertion is made by him, however. In fact, although made a party to the present action, he has not appeared therein. The plaintiff having abandoned his second cause of action, the railroad company should have been dismissed upon its disclaimer of interest, and no costs will be taxed against it. Reversed and remanded accordingly.

DUNBAR, FULLERTON, and REAVIS,
JJ., concur.

FARM INVESTMENT CO. v. CARPENTER et al.

(Supreme Court of Wyoming. May 26, 1900.)

WATERS AND WATER COURSES—STATUTES—
VALIDITY—TITLE—CONSTRUCTION—RETRO-
ACTIVE EFFECT—CONSTITUTIONAL LAW—
STATE WATERS—SUPERVISION—BOARD OF
CONTROL—UNITED STATES RIGHTS—WATER
—APPROPRIATION BY STATE—PROCESS—NOTICE—SERVICE BY REGISTERED MAIL—DUE
PROCESS OF LAW.

1. Act Dec. 22, 1890, entitled "An act providing for the supervision and use of waters of the state," is not invalid, as containing more than one subject clearly expressed in its title, in violation of Const. art. 3, § 24, in that it authorizes the state board of control to adjudicate

priority of water rights, since such provision is within the general subject of the act as expressed in its title.

2. Act Dec. 22, 1890, authorizing the state board of control to adjudicate priority of water rights on evidence, giving persons interested the right to contest adverse claims, authorizing certificates of priority awarded, and providing for an appeal to the district court, is not unconstitutional, as conferring judicial power on an administrative board in violation of Const. art. 5, § 1, vesting the judicial power of the state in certain specified courts, since the duties of the board were primarily administrative, and not judicial, in character.

3. Const. art. 8, § 1, declaring that the waters of all natural streams, lakes, springs, or other collections of still water within the boundaries of the state are the property of the state, is not void on the ground that the United States is primarily possessed of title to the waters of the streams flowing across the public lands, since the act of congress admitting the state into the Union accepted, ratified, and confirmed the constitution the people had formed, and thereby, and by the several desert-land acts, beginning with Act July 26, 1866, and including Act March 3, 1877, congress consented to such appropriation by the state.

4. Const. art. 8, § 1, declaring that the waters of all natural streams, springs, and lakes within the boundaries of the state are the property of the state, is not unconstitutional, as divesting those who had appropriated parts of such waters prior to the adoption of the constitution of their property, since they never acquired any title to the water in the natural channels before it was diverted into the private ditches or laterals, and only the running water in the natural channel was appropriated to the state.

5. Act Dec. 22, 1890, giving the board of control power to determine water rights, etc., is retroactive, since it makes no distinction between rights acquired prior and subsequent to the adoption of the constitution; and hence a party whose right accrued prior to the adoption of the constitution must present proof of his claim to the board for adjudication.

6. Where defendant acquired the right of appropriation of certain water before the adoption of the constitution, the fact that he failed to present his claim of priority to the board of control established by Act Dec. 22, 1890, after notice of proceedings to establish such claims, will not estop him from asserting his right in the district court, since the proceedings of the board awarding priorities to others were not necessarily adverse to his claim, and hence not res judicata of his rights.

7. Under Act Dec. 22, 1890, authorizing the service of notice of proceedings before the state board of control to adjudicate water rights by registered letter in the United States mail, such service is a sufficient service to constitute due process of law.

Reserved case from district court, Johnson county; Joseph L. Stotts, Judge.

Action by the Farm Investment Company against Mary L. Carpenter and others. On reserved questions from the district court.

James W. McCreery and Alvin Bennett, for plaintiff. Carroll H. Parmelee, for defendants Carpenter, Fischer, and Gorgen. G. E. O. Moeller, for defendants Taylor, Foster, Hart, and Foote. J. A. Van Orsdel, Atty. Gen., amicus curiae.

POTTER, C. J. This suit was instituted in the district court of Johnson county for the purpose of securing a decree quieting the title of plaintiff to the right to use water

from French creek for the irrigation of certain lands, as against each and all of the defendants, who, it is alleged, are asserting prior and superior rights to the plaintiff. An appropriation by plaintiff's grantor in the year 1879, and the continued use and application of the water so appropriated, are set out, and in consequence thereof a right superior to the defendants is alleged to reside in the plaintiff. The answer of but one of the defendants is in the record. Admitting the original appropriation alleged in the petition, and the ownership of plaintiff to the water right acquired thereby, if any, the answer, as a separate defense, after disclosing the claim of the answering defendant to the use of certain of the waters of the stream for irrigation purposes by reason of an appropriation in 1883, sets up an adjudication by the state board of control of the rights of the various claimants to the use of the water of said stream on or about October, 1893, in accordance with the provisions of chapter 8 of the Laws of 1890-91; the same being an act entitled "An act providing for the supervision and use of the waters of the state." It is alleged that all the notices required by said act were duly given and published, and that the plaintiff had actual notice, and that the proceedings were conducted in accordance with the statutory provisions, and that neither the plaintiff nor his grantors appeared or submitted any proof of their alleged rights. It is also alleged that by the order of the said board in that proceeding the defendant was awarded a certain priority for a definite quantity of water, for which a certificate was issued to him, and that "no amount of water whatever was awarded or decreed to the plaintiff or to any other person for use upon the lands described in said plaintiff's petition." Wherefore it is averred that the plaintiff has abandoned its rights, and is now estopped from asserting the same. To this defense plaintiff filed a general demurrer, upon the consideration of which the district court ordered that the following questions, being deemed difficult and important, be reserved for the decision of this court: "First. Is the board of control of the state of Wyoming, provided for by article 8, § 2, of the constitution of Wyoming, vested with judicial power, in such manner that it may adjudicate and determine the rights of priority among claimants to the use of water for beneficial uses from the public streams of this state? Second. Is chapter 8 of the Laws of Wyoming of 1890-91, the same being an act entitled 'An act providing for the supervision and use of the waters of the state,' or the sections of said chapter which authorize the board of control to adjudicate water rights, and providing a system of procedure therefor, constitutional? Third. If the board of control be a legal tribunal for the adjudication of water rights, and the act in question constitutional, are such pro-

visions retroactive, and are claimants of prior rights to the use of water, which were acquired prior to the adoption of the constitution and passage of the acts in question, required to submit their rights to the adjudication of said board? Fourth. In case claimants of water rights which accrued, as stated in the petition herein, before the adoption of the constitution, do not submit their rights to said board for adjudication when proceedings are had under the provisions of the act by the board of control for the adjudication of the rights of the stream out of which said claimants take their water, are they then concluded or estopped by such adjudication? Fifth. Do the provisions of the statute providing for publication of notice and notice by mail, and without actual citation or service of summons, constitute due process of law, whereby the titles of persons to water rights for beneficial uses may be determined? Sixth. Does the answer or defense to which the demurrer was interposed constitute a sufficient answer or defense to plaintiff's complaint, under the law?"

In this state the doctrine prevails that a right to the use of water may be acquired by priority of appropriation for beneficial purposes, in contravention to the common-law rule that every riparian owner is entitled to the continued natural flow of the waters of the stream running through or adjacent to his lands. The appropriation consists in a diversion of the water by some adequate means, and its application to a beneficial use. *Moyer v. Preston*, 6 Wyo. 308, 44 Pac. 845. It is doubtful if any questions of graver importance than those affecting water rights are presented for judicial consideration. Notwithstanding the settlement of the fundamental doctrine, and its recognition by our constitution and statutes, the law respecting it, in many of its phases, may be said to be still in course of development; and, compared with other questions which are likely to arise relating to this general subject, it is probable that none will exceed in importance those involved and submitted for determination in this controversy. They strike at the root of the system adopted in this state for the supervision and distribution of the appropriated waters. As introductory to the discussion of the reserved questions, we will undertake a very brief survey of the leading features of local legislation and conditions existing anterior to the framing and adoption of the constitution, and the enactment of the statute out of which the contentions in the case at bar arise.

Legislative attention was first directed to this subject in 1875. The act of that year declared that those having a possessory right or title to land "on the bank, margin, or neighborhood of any stream" should be entitled to the use of the water thereof for the purpose of irrigation, and to a right of way

over the lands of others for the construction of irrigating ditches. Provision was also made for the just and equitable allotment of water in times of scarcity through the agency of commissioners, who, when appointed and required to act, were to make the apportionment for the interest of all parties concerned, and with due regard to the legal rights of all. At the time of the passage of the act of 1875 the territory was very sparsely settled, and, comparatively, but little had been accomplished towards the cultivation of the soil. It is a fact, nevertheless, that, from the earliest settlement of the territory, irrigation, although in a limited degree, had been practiced by means of the diversion of the water of natural streams, and land had thereby been brought under successful cultivation; and in certain portions of the territory water rights had been acquired for the purposes of mining, and possibly in aid of other industries. It is safe to say, however, that while irrigation had been resorted to sufficiently to demand legislative recognition as early as 1875, and the right to appropriate water for beneficial uses had been from the beginning continually asserted and recognized by prevailing custom and usage, it had not then attained such proportions as to exact much public interference or regulation. With the increasing settlement of the public lands, and the impetus furnished to their reclamation through the enactment by congress in 1877 of the desert-land act, water appropriations and irrigation works were rapidly augmented in number and value, until in 1886 many valuable water rights had been acquired, and title to considerable public land had been secured by patent from the general government in consequence of such settlement and reclamation. The settlement of the public lands, with but few exceptions, if any, although the entry may have been made under the homestead or pre-emption laws, was expedited, if, indeed, it was not solely rendered possible, by the facilities afforded by nature, the customs and laws for the irrigation thereof. Thus, the cultivation and even the occupation of the lands within the territory had been attended with the expenditure of much capital and labor, and the very existence of the homes of a large class of citizens, as well as the productiveness of the soil, depended upon the security to be afforded the appropriations of water which had been made; and in view of the many rights already accrued, and the inception of new ones which would necessarily accompany the continued growth of the territory, the welfare of the entire people became deeply concerned in a wise, economical, and orderly regulation of the use of the waters of the public streams. It was realized that more adequate laws were demanded, to duly protect this important industrial interest, give stability to its values, assist in a desirable conservation of the waters, and avoid confusion and difficulty in their distribution. A

striking advance along these lines was made by an act of the territorial legislature of 1886, although the imperfections of that law soon asserted themselves. It is no part of our purpose to dwell in detail upon the provisions of that act, for they do not concern the present inquiry, except in so far as, together with other legislation, they tend to illustrate the development of our existing system, and the influences which led to the constitutional expressions, and the inauguration of the scheme incorporated in the act of 1890-91. Succinctly stated, the act of 1886 embraced a declaration that the water of every natural stream was the property of the public, and dedicated to the use of the people, subject to appropriation; the division of the territory into irrigation districts, not as public corporations, but as including specified territory, within each of which districts a water commissioner was to be appointed, with general authority to divide the water in the streams in his district among the several ditches according to their respective prior rights; the creation of a special proceeding for the adjudication of the priorities of rights upon the same stream within the same district, in the particular district court vested by the act with jurisdiction therein, the districts within the jurisdiction of each district court being designated; and a provision requiring every claimant to a water right to file a statement of claim thereof, under oath, with the county clerk and clerk of court, on or before September 1, 1886, and every subsequent claimant to so file a similar claim before commencing the construction of his diverting works. See Rev. St. 1887, §§ 1331-1361. The special proceeding for adjudication was purely statutory, and the only reason for its creation is to be found in the inability of the ordinary procedure and processes of the law to meet the necessities pertaining to the segregation by various individuals or companies of water from the same stream by separate ditches or canals, and at different points along its course, under rights by appropriation to so divert and use the water. A similar proceeding in Colorado has been held to be based upon, or to grow out of, the police power of the state. *Farmers' Independent Ditch Co. v. Agricultural Ditch Co.*, 22 Colo. 513, 45 Pac. 444; *White v. Reservoir Co.*, 22 Colo. 191, 43 Pac. 1028. See, also, *Louden Irrigating Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 110, 43 Pac. 535. The persons instituting the proceeding were not required to allege any injury to them or their property, nor any facts necessary to constitute a cause of action at law, or ground for relief in equity. The purpose of the adjudication was a decree settling the various priorities of right from the same stream, and the issuance thereunder of a certificate to each appropriator represented; showing his relative priority, and the quantity of water to which he should be found entitled. The decree could be reopened at any time within

two years, and could be reviewed with or without reargument or additional evidence, and an appeal could be taken to the supreme court. The proceedings were largely informal, and it was permitted the court or judge to appoint a referee to take the testimony. The same legislature provided by another act for an official survey of the several ditches or canals connected with the appropriation of water, by county surveyors, at the expense of the owners. The certificate of the surveyor, showing the result of the survey, was required to be filed with the proper clerk of court. Rev. St. 1887, §§ 1362-1365. It is known that a few adjudications, but not many, occurred under proceedings afforded by the act of 1886. In 1888 the office of territorial engineer was created, with general power of supervision of the diversion and division of the public waters, and of the work of the water commissioners. It was exacted of that officer that he measure and ascertain the carrying capacity of any ditch, at the request of an interested party, and furnish a certificate thereof, and measure and calculate the flow of the waters of each stream drawn upon for irrigation purposes. He was further required to collect facts and make reports as to a system of reservoirs, become conversant with the water ways of the territory, and to suggest from time to time the amendment of existing or enactment of new laws, as his information and experience should suggest. A copy of all decrees in the special proceedings under the law of 1886 was required to be forwarded to the engineer, recorded in his office, and the particulars thereof furnished the appropriate commissioner. Laws 1888, c. 55. The act of 1888 also declared the waters of the natural streams to be public, and dedicated to the people, subject to appropriation, and made new regulations (largely a repetition of the former) as to the recording of claims, but discarded the office of clerk of court as a place for such record. Another act of the same assembly repealed the provisions relating to a survey of ditches by county surveyors. We might be justified in adverting to other interesting particulars of the laws of 1886 and 1888, but we apprehend that sufficient reference to those laws has been made to show the conditions existing when the constitution was adopted, and to illustrate what we conceive to be the fact,—that, in the progress of our legislation in respect to the use of water for irrigation and other beneficial purposes, the significant feature of the changes and additions from time to time has been the principle of centralized public control and regulation. One can hardly fail to be impressed with the gradual tendency exhibited in the various acts towards the greater effectiveness of public supervision.

The expressions of the constitution relating to irrigation and water rights are as follows: "Water being essential to industrial prosperity, of limited amount, and easy

of diversion from its natural channels, its control must be in the state, which, in providing for its use, shall equally guard all the various interests involved." Article 1, § 31. "The waters of all natural streams, springs, lakes, or other collections of still water, within the boundaries of the state, are hereby declared to be the property of the state." Article 8, § 1. "There shall be constituted a board of control to be composed of the state engineer, and superintendents of the water divisions; which shall, under such regulations as may be prescribed by law, have the supervision of the waters of the state and of their appropriation, distribution and diversion, and of the various officers connected therewith. Its decisions to be subject to review by the courts of the state." Id. § 2. "Priority of appropriation for beneficial uses shall give the better right. No appropriation shall be denied except when such denial is demanded by the public interests." Id. § 3. "The legislature shall by law divide the state into four (4) water divisions, and provide for the appointment of superintendents thereof." Id. § 4. "There shall be a state engineer who shall be appointed by the governor of the state and confirmed by the senate; he shall hold his office for the term of six (6) years, or until his successor shall have been appointed and shall have qualified. He shall be president of the board of control, and shall have general supervision of the waters of the state and of the officers connected with its distribution. No person shall be appointed to this position who has not such theoretical knowledge and such practical experience and skill as shall fit him for the position." Id. § 5.

Pursuant to the constitutional requirements, the first state legislature, by an act entitled "An act providing for the supervision and use of the waters of the state," approved December 22, 1890, created the state board of control, divided the state into four water divisions, and provided for the appointment of a superintendent for each division. The office of water commissioner is retained, who becomes the local official charged with the duty of dividing the waters in his district among the several claimants according to their respective priority of rights, under the general supervision of the board, superintendents, and state engineer. Water districts are required to be established by the board of control as priorities of appropriation are adjudicated. The duty was devolved upon the various county clerks to transmit to the state engineer within 30 days a transcript of all claims to appropriations of water on file in their respective offices, and, where an original record thereof was contained in books kept for that purpose, the original records of claims were to be transmitted, instead of an abstract. The clerks of court were likewise required to forward to the engineer the certificates of county surveyors on file in their respective

offices, showing the measurements of ditches. Thereafter, before any person should commence the construction, enlargement, or extension of any distributing works, or performing any work in connection with an intent to appropriate any of the public waters of the state, it was and is exacted of him that he apply to the president of the board of control for a permit to make such appropriation. Complete regulations controlling the action of the engineer in approving or rejecting the application are embraced in the act, including provisions for an appeal from the action of the engineer in rejecting an application to the board, and from the order of the board thereon to the district court. By the act in question, also, a system of procedure to be inaugurated and conducted by the board is established, wherein and whereby the board is directed and empowered to ascertain, adjudicate, and determine the priorities of rights of the various claimants from the same stream, and the former legislation authorizing such adjudication by a special proceeding in the district court is repealed. It was provided, however, that all cases in such special proceeding then pending in the courts might be retained therein, and proceed to final determination in accordance with the laws in force at the time of their inception, or that such cases, or any of them, might be transferred, on the application of the interested parties, to the board of control. The jurisdiction and authority of the board of control to make the determination as required by the act, and the power of the legislature to confer that authority upon the board, are contested in the case at bar, and the several questions reserved for the decision of this court depend for their solution upon a consideration of the validity and effect of that portion of the act making provision for the adjudication. The act of December 22, 1890, is, as amended in some particulars immaterial to the present inquiry, contained in the Revised Statutes of 1890, and in sections 859 to 887, inclusive. Sections 859 and 860 are as follows:

"Sec. 859. It shall be the duty of the board, at its first meeting, to make proper arrangements for beginning the determination of the priorities of right to the use of the public waters of the state, which determination shall begin on the streams most used for irrigation, and be continued as rapidly as practicable, until all the claims for appropriation now on record, shall have been adjudicated.

"Sec. 860. The board of control shall decide at their first meeting the streams to be first adjudicated, and shall fix a time for beginning of taking of testimony and the making of such examination as will enable them to determine the rights of the various claimants."

Concerning the proceedings preliminary to an order of determination, it will sufficiently

answer our purpose to state that notices are required to be published and sent by registered mail to each person having a recorded claim to waters of the stream or streams embraced in the adjudication proceedings, showing when the engineer will begin a measurement of the stream and the several diverting works, and the time and place when the superintendent will commence the taking of testimony. Accompanying the notice, there is required to be sent to the claimant a blank form, on which the claimant is required to present in writing, under oath, certain specified facts relating to his appropriation. Upon the completion of the testimony the same is to be opened to public inspection at a time and place mentioned in a notice thereof to be previously published and sent by mail to the several claimants. An opportunity is provided for any interested party to contest before the superintendent and the board the claim of any other persons who may have submitted their proof. Upon the completion of the evidence in the original hearing, and in all contests, the same is required to be transmitted to the board of control. In the meantime the engineer or his assistant is required to make an examination and measurement of the stream and the works diverting water therefrom, as well as of the irrigated lands, or lands susceptible of irrigation from the various ditches or canals taking water from the stream then under consideration, and to make a map or plat showing the course of the stream, the location of each ditch, and the lands irrigated or susceptible of irrigation therefrom. Sections 872 and 873 are as follows:

"Sec. 872. At the first regular meeting of the board of control, after the completion of such measurement by the state engineer, and the return of said evidence by said division superintendent, it shall be the duty of the board of control to make, and cause to be entered of record in its office, an order determining and establishing the several priorities of right to the use of waters of said stream, and the amounts of appropriations of the several persons claiming water from such stream, and the character and kind of use for which said appropriation shall be found to have been made. Each appropriation shall be determined in its priority and amount, by the time by which it shall have been made and the amount of water which shall have been applied for beneficial purposes: provided, that such appropriator shall at no time be entitled to the use of more water than he can make a beneficial application of on the lands, for the benefit of which the appropriation may have been secured, and the amount of any appropriation made by reason of an enlargement of distributing works, shall be determined in like manner: provided, that no allotment shall exceed one cubic foot per second for each seventy acres of land for which said appropriation shall be made.

"Sec. 873. As soon as practicable after the determination of the priorities of appropriation of the use of waters of any stream, it shall be the duty of the secretary to issue to each person, association or corporation represented in such determination, a certificate to be signed by the state engineer, as president of the board of control, and attested under seal by the secretary of said board, setting forth the name and post-office address of the appropriator; the priority number of such appropriations; the amount of water appropriated; and if such appropriation be for irrigation a description of the legal subdivisions of land to which said water is to be applied. Such certificate shall be transmitted by said state engineer, or by a member of the board of control in person or by registered mail, to the county clerk of the county in which such appropriation shall have been laid, and it shall be the duty of the county clerk upon the receipt of the recording fee, which fee shall be seventy-five cents, to record the same in a book specially prepared and kept for that purpose, and thereupon, immediately transmit the same to the respective appropriators. Said recording fee of seventy-five cents shall be paid to the division superintendent, at the time of the submission of testimony and proof of appropriation of water by each such appropriator or claimant before the said division superintendent as provided by law, and shall be by him, or the state engineer, transmitted with each certificate of appropriation to the county clerk of the county in which said certificate is to be recorded and his receipt taken therefor, which said receipt shall be filed in the state engineer's office."

Provision is made for an appeal, by any party feeling himself aggrieved, from the decision of the board to the district court, and from that court to the supreme court.

Counsel for the plaintiff contend that the act of December 22, 1890, is unconstitutional, in so far as it confers upon the board of control authority to determine the priorities of rights to the use of water. Several reasons are urged in support of such contention. In the first place, it is insisted that the act is in conflict with section 24 of article 3 of the constitution, which provides that "no bill, except general appropriation bills and bills for the codification and general revision of the laws, shall be passed containing more than one subject which shall be clearly expressed in its title; but if any subject is embraced in the act which is not expressed in the title such act shall be void only as to so much thereof as shall not be so expressed." It is argued that the provisions for adjudication of water rights are not included in the word "supervision," employed in the title, and that in this respect the act is broader than the title, and contains more than one subject. The general principles which should control in a question of this kind are laid down in the case of *In re Fourth Judicial Dist.*, 4

Wyo. 133, 32 Pac. 850, where the whole subject is elaborately discussed. It was there said that "it is not essential that the title shall specify particularly each and every subdivision of the general subject." If but one general and comprehensive subject is contained in the act, and all the provisions are germane to that subject, then the act cannot be said to violate either the spirit or letter of the constitutional provision referred to. The title of an act in Colorado was, "An act to regulate the use of water for irrigation and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation and use." Gen. St. Colo. 1883, §§ 1738, 1739. Certain provisions of the act relating to the establishment of maximum rates to be charged by carriers of water were assailed as void, upon the ground that the title contained more than one subject, and the matter of fixing rates was not clearly referred to therein. The court, in discussing the title, said: "In our judgment, the same must have been sufficient, had it read, 'An act to regulate the use of water for irrigation.' This is the controlling purpose of the law. The rest of the title refers to nothing not germane to the subject thus expressed. Incidental to a proper regulation of the use of water diverted from natural streams in this state is a determination of the priority of rights in connection therewith. * * * And it requires no argument to demonstrate that a general law intended to fully regulate the use of such water would almost of necessity touch upon the subject of priority of right thereto." *Canal Co. v. Bright*, 8 Colo. 144, 6 Pac. 142. We think it is not to be reasonably doubted that the one general subject of the act was the supervision of the waters of the state. And we are clearly of the opinion that the matter of determination of the priorities of rights to such waters is a part of the general subject, and germane to it.

Another ground urged against the validity of the act is that judicial power is attempted to be conferred upon the board of control, in violation of section 1 of article 2 of the constitution, dividing the state government into three distinct departments, and of section 1 of article 5, vesting the judicial power in certain specified courts. This raises a question of vital importance, especially when we consider that, during the nine years intervening since the creation of the board, it has proceeded, in pursuance of the statute, to determine the priorities of claimants upon numerous streams, and that its certificates issued therein constitute the evidence of title to a large number of water rights. That fact is not to preclude a careful investigation of the serious question presented, nor to control in its disposition, except possibly in so far as it is entitled to weight as showing the construction of the law on the part of the adminis-

trative or executive department, and further, perhaps, in connection with the elementary principle that a statute is to receive every presumption in favor of its validity, and is not to be overthrown by the courts unless it is clearly unconstitutional. The provisions of the constitution now invoked in opposition to the statute are as follows: "The powers of the government of this state are divided into three distinct departments: the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as in this constitution expressly directed or permitted." Article 2, § 1. "The judicial powers of the state shall be vested in the senate, sitting as a court of impeachment in a supreme court, district court, justice of the peace, courts of arbitration and such courts as the legislature may by general law establish for incorporated cities or incorporated towns." Article 5, § 1. The position maintained by counsel is that a determination of the priorities of rights to the use of water involves solely a judicial inquiry into rights to property as between private parties, and that the jurisdiction to undertake such an investigation and adjudicate therein can be constitutionally lodged only in some court which is by article 5 of the constitution vested with judicial power. The statute nowhere attempts to divest the courts of any jurisdiction granted to them by the constitution to redress grievances and afford relief at law or in equity under the ordinary and well-known rules of procedure. A purely statutory proceeding is created, to be set in motion by no act or complaint of any injured party, but which in each instance is to be inaugurated by order of the board,—a proceeding which is to result, not in a judgment for damages to a party for injuries sustained, nor the issuance of any writ or process known to the law for the purpose of preventing the unlawful invasion of a party's rights or privileges; but the finality of the proceeding is a settlement or adjustment of the priorities of appropriation of the public waters of the state, and is followed by the issuance of a certificate to each appropriator, showing his relative standing among other claimants, and the amount of water to which he is found to be entitled.

At the outset, however, it is strenuously insisted that the declaration contained in the constitution, that the waters of the natural streams, etc., are the property of the state, is meaningless and of no force and effect. It is argued that the state no more than an individual can acquire property by a mere assertion of ownership, and that the United States, as the primary owner of the soil, is also primarily possessed of title to the waters of the streams flowing across the public lands. This contention demands more

than a passing notice. So far as any proprietary rights of the United States are concerned, the question would seem to be settled in favor of the effectiveness of the declaration by the act of admission, which embraces the following provision, "and that the constitution which the people of Wyoming have formed for themselves, be, and the same is hereby, accepted, ratified and confirmed." *McCornick v. Telegraph Co.*, 25 C. C. A. 35, 79 Fed. 449. In that case the circuit court of appeals for the Eighth circuit of the United States held that, under a similar provision in the act of congress admitting Utah, all the provisions of the Utah constitution were invested with all authority conferred by any act of congress.

But is there not a further and deeper reason for upholding the validity and force of the constitutional declaration? Under the doctrine of prior appropriation, it would seem essential that the property in waters affected by that doctrine should reside in the public, rather than constitute an incident to the ownership of the adjacent lands. Such waters are, we think, generally regarded as public in character. By the civil law the waters of all natural streams were *publici juris*, and, according to Bracton, that was the rule anciently in England. *Kin. Irr.* § 53; *Gould, Waters*, § 6. At the modern common law, public waters are generally confined to those which are navigable, and public rights therein to navigation and fishery, and privileges incident thereto. In the arid region of this country another public use has been recognized by custom and laws, and sanctioned by the courts,—a public use sufficient to support the exercise of the power of eminent domain. *Irrigation Dist. v. Bradley*, 164 U. S. 112, 160, 17 Sup. Ct. 56, 41 L. Ed. 369. This use and the doctrine supporting it are founded upon the necessities growing out of natural conditions, and are absolutely essential to the development of the material resources of the country. Any other rule would offer an effectual obstacle to the settlement and growth of this region, and render the lands incapable of continued successful cultivation. The waters for the reclamation of the desert lands must be obtained, in a very large measure, from the natural streams and other natural bodies of water. The common-law doctrine of riparian rights relating to the use of the water of natural streams and other natural bodies of water not prevailing, but the opposite thereof, and one inconsistent therewith, having been affirmed and asserted by custom, laws, and decisions of courts, and the rule adopted permitting the acquisition of rights by appropriation, the waters affected thereby become, perforce, *publici juris*. It is therefore doubtful whether an express constitutional or statutory declaration is required in the first place to render them public. In a country where the doctrine of prior appropriation has at all times been recognized and maintained, an expression by con-

stitution or statute that the waters subject to appropriation are public, or the property of the public, would seem rather to declare and confirm a principle already existing, than to announce a new one. But, however this may be, we entertain no doubt of the power of the people, in their organic law, when existing vested rights are not unconstitutionally interfered with, to declare the waters of all natural streams and other natural bodies of water to be the property of the public or of the state. Nor do we doubt that the legislature may make a like declaration, when in that particular unrestrained by the constitution. If any consent of the general government was primarily requisite to the inception of the rule of prior appropriation, that consent is to be found in several enactments by congress, beginning with the act of July 26, 1866, and including the desert-land act of March 3, 1877. Those acts have been too often quoted, and are too well understood, to require a restatement at this time, at the expense of unduly extending this opinion. It has been held that the act of July 26, 1866, was rather a voluntary recognition by congress of pre-existing rights, constituting valid claims to a continued use, than the establishment of new rights. *Broder v. Water Co.*, 101 U. S. 274, 25 L. Ed. 790. By these various acts "the obvious purpose of congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law, which permitted the appropriation of these waters for legitimate industries," and "a state may change the common-law rule, and permit the appropriation of the flowing waters for such purposes as it deems best." *U. S. v. Rio Grande Dam & Irrigation Co.*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136. If, as has been said, the title of the general government to the public lands is that of proprietor, rather than sovereign (*Kin. Irr.* § 145), it would seem that its rights as such are not greater to the waters of the streams flowing across the lands than those of an individual owner. In Arizona and Nevada the statutes declare the ownership of the public in the waters of the natural streams. *Clough v. Wing (Ariz.)* 17 Pac. 453; *Kin. Irr.* § 407. The effect of such a declaration has been determined by the courts of Colorado, whose constitution declares that the unappropriated waters of the streams within the state are the property of the public. In the case of *Wheeler v. Irrigation Co.*, 10 Colo. 582, 17 Pac. 487, Mr. Justice Helm, in delivering the opinion of the court, said: "Our constitution dedicates all unappropriated water in the natural streams of the state to the use of the people, the ownership thereof being vested in the public. We shall presently see that after appropriation the title to this water, save, perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to

its use, unless forfeited, continues in the appropriator." Again, in *Ft. Morgan Land & Canal Co. v. South Platte Ditch Co.*, 18 Colo. 1, 30 Pac. 1032, in the opinion delivered by Mr. Chief Justice Hayt, it is said: "Under our constitution, the water of every natural stream in this state is deemed to be the property of the public. Private ownership of water in the natural streams is not recognized. The right to divert water therefrom and apply the same to beneficial uses is, however, expressly guaranteed. By such diversion and use a priority of right to the use of the water may be acquired." There is to be observed no appreciable distinction, under the doctrine of prior appropriation, between a declaration that the water is the property of the public, and that it is the property of the state. It was said in *McCready v. Virginia*, 94 U. S. 391, 24 L. Ed. 248, in discussing the subject of tide waters: "In like manner, the states own the tide waters themselves. * * * For this purpose the state represents its people, and the ownership is that of the people in their united sovereignty." See, also, *Martin v. Waddell*, 16 Pet. 410, 10 L. Ed. 999; *Gould, Waters*, § 32; *Kin. Irr.* §§ 51, 53; *Bell v. Gough*, 23 N. J. Law, 624. "The sovereign is trustee for the public." 3 Kent. Comm. 427; *Miller v. Mendenhall (Minn.)* 44 N. W. 1141, 8 L. R. A. 89. The ownership of the state is for the benefit of the public or the people. By either phrase, "property of the public" or "property of the state," the state, as representative of the public or the people, is vested with jurisdiction and control in its sovereign capacity.

The constitutional declaration was not intended to interfere with previously accrued rights to use the public waters of the state, and it does not conflict with such rights. It was, however, by all the constitutional expressions, undoubtedly intended that such rights and all appropriations should be regulated upon the basic principles therein enunciated. That the constitutional provision did not impair rights already accrued is apparent, not only from the accompanying provisions, but from the nature of such rights. Although an appropriator secures a right which has been held with good reason to amount to a property right, he does not acquire a title to the running waters themselves,—except, it may be, to such quantity as shall from time to time have been lawfully diverted, and after diversion may be running in his ditch or lateral. The title of the appropriator fastens, not upon the water while flowing along its natural channel, but to the use of a limited amount thereof for beneficial purposes in pursuance of an appropriation lawfully made and continued. The appropriation is made in the first place upon the basis of public ownership of the water, and is protected, instead of impaired, by the constitutional declaration. There can hardly be any controversy over the power of

the state to regulate prior as well as subsequent rights of appropriation. In reference to conflicting deeds to the same tract of land, and the validity of recording acts, it was held in a leading case by the supreme court of the United States that, even where a state has originally granted the land to the first individual owner, there is no contract on the part of the state that the priority of title shall depend solely upon the principles of the common law, or that the state shall pass no law imposing on a grantee the performance of acts not necessary to the legal operation of his deed at the time of its delivery. "It is within the undoubted power of state legislatures to pass recording acts by which the elder grantee shall be postponed to a younger if the prior deed is not recorded within the limited time, and the power is the same whether the deed is dated before or after the passage of the recording act." *Jackson v. Lamphire*, 3 Pet. 280, 7 L. Ed. 679. All rights acquired by appropriation partake of the same general characteristics; differing essentially only in priority and quantity, and possibly in purpose. Where various rights are connected with the same stream or body of water, a subsequent claim cannot be successfully regulated without including in the regulations all rights. The water to which the use of each attaches is public, and the people as a whole are intensely interested in its economical, orderly, and inexpensive distribution. It is a matter of public concern that the various diversions shall occur with as little friction as possible, and that there shall be such a reasonable and just use and conservation of the waters as shall redound more greatly to the general welfare, and advance material wealth and prosperity. In a Colorado case it was said: "From the very nature of the business, controversies with reference to the use of water naturally led to unseemly breaches of the peace; and, to avoid these, it was found expedient and necessary to provide complete rules of procedure governing the taking of water from the public streams of the state, and regulating its distribution to those entitled thereto. Authority for such regulations may properly be based upon the principle that, when private property is affected by a public interest, it ceases to be *juris privati* only." *White v. Reservoir Co.*, 22 Colo. 191, 43 Pac. 1028, 31 L. R. A. 828. From any standpoint, we think it is clear that the declaration that the waters subject to appropriation for beneficial purposes are the property of the state is valid and effectual.

The other fundamental principles expressed in the constitution are that control of the public waters must be in the state, which, in providing for their use, shall equally guard all the various interests involved. Such control shall consist in a supervision of the waters, their appropriation, distribution, and diversion, by a board of control, to be com-

posed of certain designated officers, with an officer of technical and practical knowledge and experience at its head; and priority of appropriation shall give the better right. Let us inquire into the nature and subject of the supervisory power of the board. In the first place, the scheme of state control does not necessarily require the construction or operation on the part of the public of irrigating or diverting works; nor is there necessarily involved in that scheme the idea that the state shall become, through its own works, carriers of water to consumers. It is evident that it was intended that the supervision by the board should operate upon and in relation to individual appropriations and diversions, and hence there was contemplated a control and supervision of the diversion by private appropriators, and a distribution to and between them. It is equally clear that the supervision comprehends official action, administrative rather than judicial in its fundamental character, although as a necessary incident thereto, as will presently be shown, there is involved quasi judicial authority. It was argued with much force that the word "supervision," employed in the constitution, does not, according to its most extensive definition, include adjudication, wherefore it was contended that power to act judicially and determine the rights of claimants is not conferred by the constitution. The question, however, is broader than that suggested by such an argument. We are to consider whether all the constitutional authority of the board, applied to the peculiar subject-matter within its operation, is of such a nature as to authorize the legislature to confer upon the board jurisdiction to determine the relative rights of the various claimants, as a power necessary to the effectual exercise by the board of its important administrative duties. It has already been suggested that the supervision of the board affects individual appropriations, and concerns the distribution of water to individual claimants. Any effort to supervise and control the waters of the state, their appropriation and distribution, in the absence of an effective ascertainment of the several priorities of rights, must result in practical failure in times when official intervention is most required. In fact, that had been demonstrated under our former system. In the development of the irrigation problem under the rule of prior appropriation, perplexing questions are continually arising, of a technical and practical character. As between an investigation in the courts and by the board, it would seem that an administrative board, with experience and peculiar knowledge along this particular line, can, in the first instance, solve the questions involved, with due regard to private and public interests, conduct the requisite investigation, and make the ascertainment of individual rights, with greater facility, at less expense to interested par-

ties, and with a larger degree of satisfaction to all concerned. In the opinion of an able law writer upon this subject, the powers of the board of control in this respect constitute one of the most praiseworthy features of our legislation. He says: "In the state of Wyoming, at least, there will no longer be the ludicrous spectacle of learned judges solemnly decreeing the right to from two to ten times the amount of water flowing in a stream, or, in fact, amounts so great that the channel of the stream could not possibly carry them; thus practically leaving the questions at stake as unsettled as before." *Kln. Irr.* § 403. The board is not required to await the occurrence of controversies, but is to proceed, on its own motion, to ascertain the various rights, conflicting or not, and thereupon see that the water is properly divided. The supervision of the board affects the water of natural streams, the title to which, while flowing in its accustomed channels, remains in the state or public, and of such a peculiar character that public control is demanded, to insure its orderly, economical, and fair distribution. The determination required to be made by the board is, in our opinion, primarily administrative rather than judicial in character. The proceeding is one in which a claimant does not obtain redress for an injury, but secures evidence of title to a valuable right,—a right to use a peculiar public commodity. That evidence of title comes properly from an administrative board, which, for the state in its sovereign capacity, represents the public, and is charged with the duty of conserving public as well as private interests. The board, it is true, acts judicially; but the power exercised is quasi judicial only, and such as, under proper circumstances, may appropriately be conferred upon executive officers or boards. The jurisdiction bears some resemblance to that of the land department of the government concerning the disposal of the public lands. That department is not regarded as a court, or as a branch of the judicial department; nor is its jurisdiction upheld upon the basis of any authority residing in congress to establish courts. It is considered as an administrative department, and its powers are held to be quasi judicial only. *Orchard v. Alexander*, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737. There exists the same partial resemblance to the state board of land commissioners of our own state. *State v. State Board of Land Com'rs*, 53 Pac. 292, 7 Wyo. 478.

We are not persuaded that the act is void, as conferring judicial power upon the board in violation of the constitution. That the board was expected to exercise quasi judicial functions is apparent from that provision of section 2 of article 8 of the constitution requiring its decisions to be subject to review by the courts. An examination of the proceedings and debates of the constitutional convention convincingly discloses that the

precise method and system adopted by the statute was within the purpose of the convention. The committee on irrigation, in reporting the provisions upon the subject of water, its use and control, had before it, and caused to be read to the convention, a paper, prepared by the territorial engineer, showing the evils of the system of regulation then existing, and suggesting certain principles to be embodied in the constitution and to control future legislation. The representative of the committee, on the floor of the convention, stated that the system reported by the committee was the opposite of the one then in force, and that the elemental error in the former system consisted in submitting to the courts a matter about which they had little official or practical knowledge. The paper of the engineer enlarged upon the same proposition, and outlined a method of public supervision, including a determination of rights, practically the same followed by the existing statute. The president of the convention (a lawyer of much ability and experience) said, in the course of the discussion: "Leave it to the board of control to say what equities enter into this matter of the use of water, and let them consider every question that arises in connection with its appropriation, and then say, under all the equities of the case, who shall be entitled to the use of that water." And again: "When we appoint a board of control to manage this water system that we say belongs to the state, let us give them authority to control it for the highest and best uses of the people of the state." *Const. Debates*, p. 503.

The third reserved question inquires whether claimants whose rights had accrued anterior to the constitution and the enactment of the present statute are required to submit proofs of their rights in the adjudication proceedings, and the fourth question relates to the effect of a failure on the part of such a claimant to submit his proofs. It follows from what has already been said that in this regard there exists no difference between claimants whose rights accrued prior to, and those acquiring rights after, the adoption of the constitution and the statute in question. The statute itself, in that respect, makes no distinction between claimants. The same duty to submit proofs is imposed alike upon all who claim a right to the use of water by priority of appropriation. It is certainly a mistaken notion that the legislature is powerless to require an owner of a property right, however long that ownership may have subsisted, to submit his claims to a legal tribunal, in an authorized proceeding, upon due and proper notice, for determination, as between him and others claiming interests in the same subject-matter. When the subject of the right is water, and the right is confined to its use, the water itself belonging to the public, which assumes to control its appropriation and distribution, the legislature may undoubtedly require all parties to sub-

mit their claims for determination, that the evidence of the right may consist in the decision of a legally constituted tribunal, instead of the assertion of the individual consumer, so far as the public records are concerned, and that the interests of the public and all interested parties may be protected. With any jurisdiction to determine the rights of claimants to the use of the public waters, the board would be greatly hampered in its supervision if the jurisdiction did not extend to and cover all claims, independently of the date of their inception. The supervisory power of the board unquestionably embraces all public waters, as well as all appropriations thereof, and the distribution and diversion of all such waters. The legislative power of regulation must be and is equally as comprehensive. If, as necessary to the complete and ample supervision of the matters within the operation of the board's authority, a power of adjudication is essential, appropriate, and valid, such a power, conferred without restriction as to claimants, must be held to be co-extensive with the supervisory control of which it is an incident. We are therefore of the opinion that all claimants are required to appear and submit their proofs. The effect of a failure, upon due notice, of any party to do so, presents, in the present condition of the statute, a more intricate question. It is to be observed that the statute imposes no express penalty upon a claimant in case of his neglect or refusal to give evidence of his appropriation. Neither is there any express limitation in such cases upon a further assertion of rights by legal proceedings, or in some manner, if any, authorized by law. Doubtless, reasonable penalties may be imposed, or limitations even rigorous in terms placed, upon a subsequent assertion of such rights, in the event of a disregard by a party of the reasonable requirement that he appear and submit proof of his claim. It is significant, however, that no such penalty or limitation is contained in the statutory provisions. It is perhaps true that, as an implied penalty, a claimant remaining unrepresented in the proceeding and determination may be without standing in a subsequent division of the waters under a decree of adjudication by the water commissioner. But nowhere is it provided that a claimant failing to appear shall be barred or estopped from subsequently maintaining or asserting his claim. Possibly the provision for a rehearing in the proceedings before the board may be susceptible to the construction that one not originally heard may apply for a rehearing within the limited period of one year; but even then, should such a one not take advantage of that privilege, no penalty seems to be imposed. Independent of penalty or limitation, it is clear that the claimant would not be estopped or barred, unless upon the principle of *res judicata*. It may be assumed that, in the absence of fraud or collusion, any matter actually and legally de-

termined by the final decree of the board becomes *res judicata*,—at least, as to the public and the parties participating in the proceedings. See *Louden Irr. Canal Co. v. Handy Ditch Co.*, 22 Colo. 102, 43 Pac. 535; *Boulder & W. C. Ditch Co. v. Lower Boulder Ditch Co.*, 22 Colo. 115, 43 Pac. 540; *Colorado Milling & Elevator Co. v. Larimer & W. Irr. Co.* (Colo.) 58 Pac. 185. We are led to inquire, therefore, in this connection, whether the rights attempted to be enforced by the plaintiff entered into the determination of the board, and thereby became finally disposed of, under the operation of the doctrine of *res judicata*, and, generally, whether an adjudication of the board which allots no water to an existing nonappearing and nonparticipating claimant amounts to a determination and disposition of his rights. We are disposed, in deciding the reserved question, to confine its scope to the facts shown by the pleadings in the pending case. It is only upon those facts that the question arises, and in so far only as it relates to those facts need it or ought it to be decided. Although the answer herein avers that, by the decree of the board of control, no amount of water was awarded the plaintiff, it is not alleged that the latter's rights now set up were considered; and we assume that they were not considered, but were entirely omitted from the board's determination. That seems to be the effect of the pleadings. It may not be improper to say that it is our understanding that, under the practice adopted by the board, it eliminates from its consideration and decrees the appropriations of claimants neglecting to come in and submit proofs.

In an earlier part of this opinion we had occasion to allude to some of the particulars wherein the statutory proceeding differs from an ordinary suit in the courts. Affirmative relief in favor of one party as against another is not its object. Adversary pleadings, as they are commonly employed and understood, are not involved. Indeed, in the strict sense, except in case of contest, it is doubtful if the various claimants can be regarded as adversaries. In many instances they are not adversary in fact. In the very nature of a priority of right to the use of flowing water, an appropriator is unable to identify specific water to which he is entitled, unless, indeed, his appropriation extends to all the water of the stream. Hence it is possible that a number of appropriators with diverse interests may be respectively entitled to the use of a portion of the water of the same stream, without having a conflict occur in the exercise of their several rights, owing to the volume of water in the common source of supply, or other natural conditions. So in Arizona it was held that, when there is sufficient water in the river to supply all parties, there can be no such thing as adverse use of the water to start the statute of limitations running; that it is only in times of scarcity, when all parties cannot be

supplied, and one appropriator takes water which by priority belongs to another, that there is an adverse use. *Egan v. Estrada* (Ariz.) 56 Pac. 721. The proceeding before the board is not a part of the process by which an individual appropriation is completed; for that occurs upon a lawful diversion of water open to appropriation, and its application to a beneficial use. But the proceeding is instituted by the board, in an official capacity, representing the public, for the purpose of ascertaining the precise rights and priority of each appropriator, to the end that the public records may be furnished an accurate and defined statement thereof, and as an aid to adequate and effective state control of the public waters. A part of the object, also, is public recognition of an appropriation previously made, and the issuance of documentary evidence of title. It does not necessarily follow from the establishment of the priorities of certain appropriators that there are no others entitled to divert water from the same stream. The awarding of definite amounts of water to one or more claimants does not ipso facto amount to a denial of the rights of others, nor depend upon a negation of such rights. In the final determination of the board it may be decreed that a certain claimant did duly appropriate at a certain time a specified amount of water for a certain purpose, without considering at all whether there are prior or subsequent appropriations, also. It is therefore manifest that a determination of the rights and priorities of several claimants does not necessarily involve the denial of all rights or claims of every other person not mentioned. If the proceeding was one wherein the parties represented in the decree were seeking to quiet their respective titles as against every other person, the result might be altogether different. Then, indeed, a party duly summoned and failing to appear might well be held concluded. It is true that the certificates issued upon the decree number each appropriation according to its proper order. While this furnishes a convenient mode of reference, we do not deem the provision sufficient of itself to bar a nonparticipant from subsequently asserting his claims, nor as conclusively indicating a purpose to forever estop him from doing so. The number assigned to each established priority must be regarded as having relation naturally only to those included in the enumeration, and, as between them, as defining their relative status, respectively. Hence, on the ground alone that, while several priorities were established, no amount of water was awarded to a particular existing claimant who did not participate in the proceedings, by appearance, submission of proofs, or otherwise, we are unable to say that the decree of the board is res judicata as to him and his rights. We are therefore constrained to hold that an existing claimant is not concluded as to his water right by a determination

of the board of control in adjudication proceedings under the statute, wherein they have not been considered, and by a decree which is perforce silent respecting them. It is probably true that public and private interests will be more securely preserved by a determination in a single proceeding of the rights and priorities of every existing claimant; and a law so framed as to effectuate that object, and render the decree conclusive of every accrued claim, would doubtless subserve a useful and salutary purpose. That matter, however, is for legislative cognizance. The district court is, by the constitution, vested with original jurisdiction, both at law and in equity. The jurisdiction of equity to entertain suits for quieting title to the use of water is well settled. The legislature has not attempted to divest the courts of that jurisdiction, and we do not think it could successfully do so. Although in the statutory proceeding for the determination of water rights the courts obtain jurisdiction only by way of appeal from the decisions of the board of control, all the ordinary remedies known to the law, pertinent to the use and appropriation of water, are open to all interested in such rights, equally with all other persons in respect to any other kind of right or property. The courts possess ample jurisdiction to redress grievances growing out of conflicting interests in the use of the public waters, and to afford appropriate relief in such cases. Nothing can be plainer, it seems to us, than that, in the absence of a previous determination by the board or in the courts of the priorities or rights of claimants upon a particular stream, an interested party may resort to the courts to obtain such relief as he may show himself to be entitled to. The jurisdiction of the courts remains as ample and complete after as well as before an adjudication by the board. But the principle applies here, as in other cases, that a party may not relitigate a question which has passed into final adjudication. And the courts will not assume, in an independent action, to determine anew the rights of parties, which, as between themselves, have been settled by the decree of the board of control,—at least, in the absence of fraud, or a showing of facts sufficient to vitiate a judgment. Under the statutes now in force, there being no provision expressly barring or estopping a claimant failing to participate in the adjudication proceedings, and the decree not being res judicata of the undetermined rights of such a claimant, he is at liberty to assert and maintain those rights in the courts, through the regular medium of some form of procedure recognized by the law for the redress of grievances, or the granting of appropriate relief.

The fifth reserved question inquires whether the provision of the statute for publication of notice, and notice by mail, constitutes due process of law. The phrase found in the question, "and without actual citation or

service of summons," is not happily employed. It assumes, before it is decided, that the service by mail is not actual citation and service. It is contended that the notice provided for does not amount to due process of law. A discussion of the question whether the proceeding is one in rem, or not, might be interesting. In our view, it would seem to partake more largely of the nature of a proceeding in rem than of one in personam. But we deem it sufficient to say that, in our opinion, it is of such a character and affects a species of rights which would authorize a notice such as is provided for by publication, coupled with a service thereof upon known claimants. The only question, therefore, which we care to discuss at all, is whether the notice by mail will satisfy the constitutional requirement as to due process of law. In Massachusetts it has recently been held that a notice sent by mail as required by law is sufficient. We cannot do better than adopt a portion of the language of the opinion of that able court in the case referred to. In delivering the opinion of the court upholding an act providing for the registration of land titles, containing the provisions known as the "Torrens System," Mr. Chief Justice Holmes said: "As to claimants living within the state, and known, the question seems to come down to whether we can say that there is a constitutional difference between sending notice of a suit by a messenger and sending it by the post office, besides publishing in a newspaper, recording in the registry, and posting on the land. It must be remembered that there is no constitutional requirement that the summons, even in a personal action, shall be served by an officer, or that the copy served shall be officially attested. Apart from local practice, it may be served by any indifferent person. It may be served on residents by leaving a copy at the last and usual place of abode. When we are considering a proceeding of this kind, it seems to us within the power of the legislature to say that the mail, as it is managed in Massachusetts, is a sufficient messenger to convey the notice, when other means of notifying the party, like publishing and posting, also are required." *Tyler v. Judges (Mass.)* 55 N. E. 812. See, also, *Town of Hinckley v. Kettle River R. Co.*, 70 Minn. 105, 72 N. W. 835. Now, our statute requires the notice to be sent by registered mail, thus insuring more certainly its reaching the proper party, and as well, in most instances, securing personal delivery, and in all cases the return of a card indicating its receipt. We can perceive no reasonable objection to that manner of sending notice to known claimants in the character of proceeding we are considering,—at least, where publication is also required.

Agreeably to the custom established in the consideration of reserved questions, we do

not think it necessary to answer the sixth question, which asks whether the answer is sufficient to constitute a defense to the suit of plaintiff. That must be decided by the district court, upon the principles herein laid down, so far as it is affected by the other reserved questions. We believe it to be unnecessary to attempt to return a categorical and specific answer to each of the reserved questions. We apprehend that our views concerning them have been set forth in the course of the opinion with sufficient distinctness, and that nothing further is required to indicate our decision upon the questions, and the reasons therefor.

CORN and KNIGHT, JJ., concur.

NIPPERT et al. v. WARNEKE et al.
(S. F. 2,042.)

(Supreme Court of California. June 1, 1900.)

In bank. For majority opinion, see 61 Pac. 96.

BEATTY, C. J. I dissent from the order denying a rehearing in this case because a question presented by the record and argued by counsel, and which, in my opinion, is of controlling importance, is left undecided. The foundation wall which is held to have been a party wall was entirely concealed from ordinary observation. The original owner of the lot and builder of both houses made the first sale to the grantor of plaintiff, and afterwards sold the other house to the grantor of defendant. As between the plaintiff and the original owner, I should have no hesitation in holding that she could claim a grant by implication of an easement in the remaining lot of a party wall. But I should very seriously doubt whether the original owner could, under the circumstances, assert a similar easement against her. The question here, however, is whether she can claim, as against a subsequent grantee of the original owner, an easement in the adjoining lot which she could have asserted against her grantor. There was nothing to advise the subsequent grantee of the Warneke lot that it was bound by any servitude to the owner of plaintiff's lot. The wall was invisible, and no mention of an easement was contained in the recorded deed. As against a grant by implication of the easement in question by the previous grant of plaintiff's lot, did not the want of notice or means of knowledge of the existence of a common foundation wall have the same effect as the failure to record a grant in case of a subsequent grant of the same premises to a bona fide purchaser for value? Upon this question I find that there is at least a serious conflict of authority, and, since it is vital to the case, I think it should be decided.

128 Cal. 586

SCANLAN v. SAN FRANCISCO & S. J. V.
RY. CO. (Sac. 303.)(Supreme Court of California. May 14, 1900.)
RAILROADS—CONSTRUCTION OF EMBANKMENT
—MEASUREMENT—EVIDENCE—NEW TRIAL.

1. In an action to recover the contract price for the construction of a railway embankment, the court accepted the measurements of the cubic contents testified to by an engineer called by plaintiff, who made his measurements three months after the completion of the embankment, and when it was well settled. The method of measurement used by such engineer was not according to the formula insisted on by defendant, but it was shown to be sufficiently accurate for practical purposes, and was admitted by defendant to be used by some engineers under a claim that the difference between such method and that contended for by defendant was not sufficient to pay for making the extra calculation. *Held*, that the court was justified in accepting the computations of such engineer.

2. The field notes of a survey are not admissible in evidence where there is no competent evidence of their correctness, and the surveyor who made them is not present to testify to such fact.

3. Where defendant is advised before trial of the materiality of the testimony of a witness, but goes to trial without him because his location is unknown, and neglects to move for a continuance on such ground, he is not entitled to a new trial on discovering the witness, on the ground of newly-discovered evidence.

In bank. Appeal from superior court, San Joaquin county.

Action by A. V. Scanlan against the San Francisco & San Joaquin Valley Railway Company for a balance due for the construction of an embankment. From a judgment for plaintiff, defendant appeals. Affirmed.

E. F. Preston and Woods & Levinsky, for appellant. Frank H. Gould, for respondent.

PER CURIAM. This is an action brought by a contractor for the construction of a railway embankment to recover the contract price for the alleged cubic contents of the embankment. The defendant had paid to the plaintiff what it claimed to be the whole amount earned, except about \$20, which it brought into court. The plaintiff had judgment for the balance claimed by him, and the defendant appeals.

The contract, among other things, contained the following provisions: "On embankments a percentage for shrinkage must be added to the fill, and said percentage will be specified and marked out by the engineer [of the company], but will in no case exceed ten per cent. of height of bank." "Material will be measured in embankment, but no measurement will be made of the material added for shrinkage, nor payment made for same."

It is conceded by appellant that there is no conflict by testimony, but it is insisted that the evidence does not sustain the findings of the court. Plaintiff called as a witness an engineer of the name of Compton, whose qualifications as an expert were not questioned. He made measurements of the embankment three months after its completion, and when, as he testified, it was well settled. He

found the cubical contents to be 53,113 yards. This was the amount in gross, making no deduction for material added for shrinkage. The witness Gorlinsky, a civil engineer, called for the defendant, testified that he placed the grade stakes to show the contractors how high to build the bank, and in setting the grade stakes allowed 5 per cent. on the fill for shrinkage. "That is, I made the grade 5 per cent. higher than what it was established at, allowing for settlement, and that earth was put in." The court accepted the measurement of the cubical contents testified to by Compton, and, deducting from the 53,113 cubic yards 5 per cent. for shrinkage and settlement, found that plaintiff was entitled to payment for 50,591 cubic yards, an error of 8 yards from the true calculation, which would be 50,583 cubic yards.

The principal attack made upon the finding is that the evidence of Compton was not sufficient as a basis for estimating the amount of material in the embankment, and it is insisted that the prismoidal formula is the only one which will give accurate results in the measurement of embankments such as this. Plaintiff's witness, measuring, as he did, after the embankment had been constructed, did not know the original condition of the ground, and did not employ this formula; but he testified that the method which he employed was sufficiently accurate for practical purposes, and testified that it would be a false refinement to employ the prismoidal formula. He described the method which he actually used, and testified to its correctness, and to the correctness of the result reached thereby. In addition to this, appellant's counsel conceded that the method which Mr. Compton employed was "ordinary, and not unprofessional," insisting merely that there was a closer and more accurate method; while Mr. Storey, the chief engineer of defendant, testified that the method employed by Compton was known as the "approximate" method; "it was used by some engineers under a claim that the difference between the correct way of doing it and this way is not sufficient to involve enough to pay for making the extra calculation." In view of this evidence, we think the court was justified in accepting the computations of plaintiff's engineer. Nor can appellant justly insist that the finding of the court fixing the amount of earth placed in the embankment at 50,591 cubic yards was unwarranted. As has been said, the court deducted 5 per cent. from Compton's estimate for settlement and shrinkage, notwithstanding the fact that there was abundant testimony showing that at the time Compton made his measurements the work was well settled, and there is no question in the case but that the embankment was constructed in a workmanlike manner, and accepted by defendant's engineers.

Appellant also insists that the court erred in rejecting the offered evidence of the field notes made by a surveyor of defendant. The engineer who made them was not present at

the trial to testify to their correctness. There was no competent evidence of their correctness given, and it was not error to exclude them.

Additionally, appellant insists that the court erred in refusing it a new trial upon its affidavits of newly-discovered evidence. Donaldson, who made the survey and field notes in question, had left defendant's employ, and his whereabouts had been discovered too late to produce him at the hearing of the case. A new trial was sought, and Donaldson's testimony was urged as the newly-discovered evidence, but it appears from the affidavits that this evidence was in no sense newly discovered. Defendant's engineers had knowledge through their attorney of the materiality of Donaldson's testimony before the trial, and took certain steps to find him and procure his attendance. At the time of the trial they had not discovered him. Knowing of the importance of his testimony, defendant should have moved for a continuance, and, failing to do so, it must be held that it entered upon the trial at its peril. *Berry v. Metzler*, 7 Cal. 418. The judgment and order appealed from are therefore affirmed.

(128 Cal. 663)

READY v. McDONALD. (L. A. 668.)

(Supreme Court of California. May 31, 1900.)
LIMITATION OF ACTIONS—ACCOUNT STATED—FINDINGS—REVERSIBLE ERROR.

1. Where a stated account, apparently barred by limitation, is not intended as a separate cause of action, but as a part of a subsequent stated account, not barred, which is made the basis of the action, the first account is not affected by limitation, where it was not barred when included in the subsequent account.

2. The court's failure to find on a plea of limitation is not reversible error, where it finds facts showing that the action was not barred.

Commissioners' decision. Department 1. Appeal from superior court San Luis Obispo county.

Action by P. F. Ready against John McDonald on a stated account, and for labor performed. From a judgment for plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Graves & Graves, for appellant. W. H. Spencer, for respondent.

COOPER, C. Appeal from judgment and order denying new trial. The appellant urges two assignments of error: (1) That the court should have sustained the demurrer to the first cause of action set forth in the complaint; and (2) that the court failed to find on the plea of the statute of limitations. The complaint contains what purport to be three causes of action: First, a balance due upon a stated account of May 2, 1895, for the sum of \$237.15; second, a balance due upon a stated account of January 2, 1897, for the sum of \$326.25; third, for \$26.27 for labor performed by plaintiff for defendant between January 2, and September 1, 1897. If the

first alleged cause of action were standing alone, it would appear upon its face to be barred by the statute of limitations, and the demurrer should have been sustained; but it was not intended by the pleader to be a cause of action, but a statement showing that the stated account of May 2, 1895, was carried into, and became an item in, the stated account of January 2, 1897. This is apparent by the way in which it is pleaded, and by the prayer of the complaint, which is for the amount of the second and third causes of action, \$352.79. The judgment was only for the amount named in the last two causes of action. The pleading is not a model, but, when liberally viewed, with the intent to arrive at the intention of the pleader, it stated only two causes of action, and the demurrer was properly overruled. The item of \$237.15 in the first account was not barred by the statute on January 2, 1897, and therefore properly became a part of the second account stated. The amount being due on the last-named date, and not barred by the statute, could be included in the last account stated, in precisely the same manner as any other indebtedness. As said by Chief Justice North in an early case (*Farrington v. Lee*, 1 Mod. 270): "If, after an account stated, upon a balance of it a sum appear due to either of the parties, which sum is not paid, but is afterwards thrown into a new account, it is now slipped out of the statute again." See *Auzerais v. Naglee*, 74 Cal. 68, 15 Pac. 371; *Ang. Lim. § 151*.

The court did not find in direct language that the action was not barred by the statute, but it found facts which show that it was not so barred. It found that on January 1, 1897, there was an account stated, in which was included the amount due in the account stated May 2, 1895. It was not necessary that the facts as found should be in any particular form, or follow the pleadings. If the truth or falsity of each material allegation in issue can be demonstrated from the findings, the law is complied with. *Clary v. Hazlett*, 67 Cal. 289, 7 Pac. 701; *Water Co. v. Richardson*, 72 Cal. 601, 14 Pac. 379. We advise that the judgment and order be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(128 Cal. 661)

SEPULVEDA v. SEPULVEDA et al.
(L. A. 610.)¹

(Supreme Court of California. May 31, 1900.)
DISMISSAL AND NONSUIT—SUFFICIENCY OF EVIDENCE.

A nonsuit in an action for recovery of realty conveyed by deed alleged to have been obtained by fraud and undue influence is properly granted where plaintiff fails to show any fraud or undue influence connected with its execution.

¹ Rehearing denied July 3, 1900.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by Alejandro F. Sepulveda against Maria de Jesus Alvarado de Sepulveda and others to recover an interest in realty alleged to have been purchased with the proceeds of his father's estate. From a judgment on motion for nonsuit, plaintiff appeals. Affirmed.

Smith, McNutt & Hannon, for appellant.
H. A. Barclay, for respondent.

COOPER, C. At the close of plaintiff's testimony the court, on motion of defendants, granted a nonsuit, and judgment was accordingly entered. This appeal is from the judgment.

The plaintiff is the son of defendant Maria de Jesus Alvarado de Sepulveda and of Juan Maria Sepulveda, her deceased husband, and is a brother of the other defendants. The father of plaintiff, Juan Maria, died prior to 1872, leaving an interest in certain real estate in the name of his brother Jose del Carmen de Sepulveda. Early in 1872 the real estate was sold by Jose del Carmen, and the portion of the proceeds of the sale due to the widow and children of Juan Maria, deceased (the parties to this suit), was \$8,000. After Jose del Carmen de Sepulveda sold the property, he desired to leave the state for a time, and he called defendant Maria, the widow of his deceased brother, and said to her, "Sister, I am going to Sonora, and I want to leave you this eight thousand dollars so you will take care of my brother's little children." The money was paid to said Maria, or her agent, and Jose said: "Now my sister-in-law is safe. I go away, and she have enough money to support the little ones." This money so left to Maria, the widow of Juan, has been from time to time invested, and the real estate and property described in the complaint has been purchased with the said \$8,000 and its income. The said Maria raised and cared for her children, including this plaintiff, and also made such frugal use of the money as to preserve the original capital and increase it in investments. It seems that some question had been raised about the title or right of defendant Maria to the proceeds of the \$8,000 and to the title to the property purchased with it. Accordingly, in August, 1887, this plaintiff and all the other defendants, except Maria, joined in a deed to their mother, Maria, of all the estate and property of every kind and all claim to the estate of their deceased father, Juan Maria de Sepulveda. It is alleged in the complaint that plaintiff joined in the execution of this deed, but it was obtained without consideration, and by means of fraud and undue influence.

We think the motion for nonsuit was properly granted. The evidence offered by plaintiff does not even tend to show any fraud or undue influence connected with the execution of the deed. Francisco, the brother of plain-

tiff, testified that in 1883 or 1884 the plaintiff agreed to and did make a deed of his interest in the property for \$150; that witness paid him the money, procured the deed, and gave it to their mother, Maria. In regard to the deed of August, 1887, the witness was asked: "Q. What representations, if any, or what influence did your mother use or exercise to induce you to make the deed of 1887? A. None. We all agreed to give mother this deed to all this property." The burden was upon plaintiff to prove undue influence or fraud. Instead of proving it, he proved that there was none. He did not even testify in his own behalf. The plaintiff, in order to avoid the statute of limitations, alleged discovery of the fraud and undue influence within two years. The evidence shows that plaintiff knew all the facts he ever knew in 1887, some 10 years before the suit commenced. The judgment should be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

131 Cal. 132

McCLAIN v. HUTTON et al. (Sac. 712.)

CONTINENTAL BUILDING & LOAN ASS'N
v. SAME.

(Supreme Court of California. May 19, 1900.)

MECHANICS' LIENS—NOTICE—SUFFICIENCY—
PARTNERSHIP CLAIM ON INDIVIDUAL CONTRACT—
CONTRACT WITH STATUTORY AGENT—
LIABILITY OF OWNER—MORTGAGES—
PRIORITY OF LIENS.

1. Where two actions for the foreclosure of mortgages covering in part the same real estate are tried together, and cross complaints for the foreclosure of building liens in respect to property common to both mortgages are filed in each of the actions, and separate judgments are rendered in each case, the judgment foreclosing the senior mortgage should be confined to an order of sale under the mortgage alone, with directions to pay the surplus, if any, into court, to abide the result of the other action.

2. Where the evidence shows that an unspecified and undeterminable portion of the materials mentioned in a notice for a building lien were furnished for property other than that against which the notice is filed, the claimant is not entitled to a lien for any part of the materials furnished.

3. A notice for a building lien, alleging that it was agreed that a specified portion of the materials for which a lien is claimed were to be paid for in 60 days, will not entitle the claimant to a lien, where it appears on the trial that no specific agreement as to time of payment was made.

4. A partnership cannot claim a building lien for materials furnished under contract with an individual member of the firm, nor can such member indirectly claim a lien as a member of the firm.

5. Where, in an action for the foreclosure of a building lien, the court finds that one W. was the agent of the owner of the building, and authorized to employ labor and purchase materials, but the complaint alleges that the building was erected under the contract of W., and that the work was done and materials furnished for him as

contractor, the finding of the court will be construed as meaning that the contract for labor and materials was made by the owner through W., acting as statutory agent only, and therefore was insufficient to support a personal judgment against the owner under Code Civ. Proc. § 1183, giving those who furnish labor or material in the construction of a building for the owner or his agent a lien thereon, and providing that every contractor, subcontractor, builder, or other person having charge of the construction, alteration, or repair of any building shall be held to be the agent of the owner for the purposes of the chapter in relation to mechanics' liens.

6. Under Code Civ. Proc. § 1186, providing that building liens are preferred to liens "which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished," the lien of a mortgage recorded before the commencement of labor or the furnishing of materials for a building is senior to the building liens for such labor and materials.

Commissioners' decision. Department 2. Appeal from superior court, Solano county.

Actions by Mary El. McClain against Charlotte A. Hutton and others and by the Continental Building & Loan Association against same defendants for the foreclosure of certain mortgages. From a judgment for plaintiff in each action, defendants appeal. Reversed.

Jordan & Coghlan, for appellants R. Barcar and others. M. B. Harrison and John M. Gregory, for respondent McClain. R. Barcar, for respondent Continental Building & Loan Ass'n.

SMITH, C. Appeals from two judgments for foreclosure of mortgages and building liens on lands of the defendant Mrs. Hutton. In the junior mortgage the mortgaged land is a triangular tract in Vacaville, bounded by three streets, and known as "Block 17"; in the older mortgage, a lot 25 by 50 feet, known as "Lot No. 1," and forming a part of the larger lot above described. This lot was purchased from the plaintiff McClain by the defendant Hutton August 15, 1897, and a mortgage given on it to secure the purchase money. This is one of the mortgages sued on. The other was executed by Mrs. Hutton to the plaintiff the building and loan association September 15, 1897. In the McClain case the judgment was for the sale of the mortgaged premises, and the payment, out of the proceeds, first of the mortgage, and then of various building liens in a specified order, and for the docketing of a personal judgment against Mrs. Hutton for any deficiency either on account of the mortgage or liens. The building and loan association was a party to this suit, but does not answer; nor is it named in the judgment. In the building and loan association case—to which Mrs. McClain was not a party—the judgment was for the sale of the mortgaged premises, and the payment out of the proceeds, first, of the same building liens (with three others), and afterwards of the mortgage, and for a

similar deficiency judgment against Mrs. Hutton. The cases were tried together, and by stipulation separate judgments were rendered. This has resulted in a confused and voluminous record, and in several errors. The various cross complaints of the lien claimants are the same in both cases, except that there are three in the case of the building and loan association that do not appear in the McClain case; and there are thus two judgments against Mrs. McClain for each lien. The judgment rolls in the two cases—each constituting about a third of the record—are almost identical, differing only with regard to the mortgage liens; and to the same extent, the same questions are presented by the two records, and in a similar form. It will be sufficient, therefore,—with regard to the questions relating to the liens,—to confine our attention to one of the records; and to this end one of the cases may be conveniently disposed of before entering upon those questions. In the McClain case the judgment provides for the sale, in satisfaction of the building liens, of the mortgaged premises,—constituting only a part of the lands covered by the liens. This was error. *Steam Mills Co. v. Kremer*, 94 Cal. 206, 29 Pac. 633. And, as all the questions relating to the liens are involved in the other suit, the judgment should be modified as hereinafter indicated so as to confine it to the foreclosure of the mortgage, and to securing any surplus that may result from the sale for the benefit of the other lienholders. The several questions involved in the appeal from the judgment in the case of the building and loan society relate—First, to the validity of the several liens; second, to the validity of the personal judgment against Mrs. Hutton; and, third, to the relative priority of the building liens and the lien of the mortgage. The preliminary point is also made that, for want of proper specifications, the evidence cannot be reviewed. But, according to the view we take of the case, it will be unnecessary to look beyond the judgment roll, and the objection, therefore, need not be considered. The other questions will be considered in the order stated.

1. As we are of opinion that the case should be reversed on other grounds, we will not examine the sufficiency of the evidence to sustain the findings as to the several building liens, but will confine our attention to the objections made to their introduction in evidence, which were overruled, and exceptions taken. The claim of Waggoner Bros. is objected to on the grounds: First, that the claimants are not entitled to any lien under the statute; second, that the notice fails to truthfully state the terms of the contract; * * * fourth, that the evidence shows that a portion of the goods were used in and upon property not involved in the suit, and that these cannot be segregated from the general aggregate. These objections appear to be well taken. With regard to the

fourth, it appears from Waggoner's own testimony that an unspecified and undeterminable portion of the materials were furnished to Mrs. Hutton for property other than the property in question, and used thereon. With regard to the second objection, there is a variance as to the terms of the contract between the evidence, the notice of lien, and the finding. Waggoner himself testifies that there was no specific agreement as to the time of payment. The notice says it was agreed that a specified portion of the materials were to be paid for in 60 days; the finding, that all of them were to be paid for in that time. With regard to the first point, it appears that the firm of Waggoner Bros. consisted of George E. Waggoner (the contractor) and his brother. But by the provisions of the statute the contract is void, and the contractor is not entitled to a lien; nor can he indirectly assert a claim of lien as a member of the firm of Waggoner Bros. Indeed, it appears fairly from the evidence that the materials were furnished by him as contractor. His claim must, therefore, be disallowed, at least as it appears in the present record. The objections to the other claims (omitting those that relate to the sufficiency of the evidence to support the findings) are to the effect, in each case, that the notice of lien fails to state truthfully the name of the person to whom the materials were furnished, or by whom the claimant was employed, or the terms, time given, or conditions of the contract. But, as we are of the opinion that the case should be retried, and in connection with the evidence there are other points to be considered, we do not deem it advisable to pass upon these objections.

2. The ground of the personal judgment against Mrs. Hutton is the finding that Waggoner was her agent "in and for the construction of the building," and, as such, authorized for her to employ all the necessary labor, and to purchase materials and agree upon terms, etc., and that as such agent he employed labor and purchased materials, agreeing upon the price and other terms, etc. It is not expressly said that all the labor was employed and materials purchased by Waggoner as agent; but in this and other parts of the findings this is plainly implied, and, upon referring to the evidence set out in the bill of exceptions, becomes clearly apparent. Unless the findings are thus construed, they will fail to find on this material point, and will thus be too indefinite to sustain the judgment. There are also findings with reference to each and all of the liens that the labor was performed or materials furnished "at the special instance and request" of Mrs. Hutton, and that she "then and there undertook and agreed to pay for the same." In some cases it appears, either in the findings or pleadings, that the employment was through Waggoner as agent; but in general it is not said whether the party was employed by her personally, or by Waggoner as her agent.

But from the fact that it is explicitly found in each case that Waggoner was her agent for all purposes relating to the building, it is to be inferred that the latter was intended, and this is rendered certain by reference to the evidence in the bill of exceptions. Nor does it appear from any of these findings whether Waggoner acted as a conventional, or merely as a statutory, agent; and the findings will be equally true whichever of these two constructions be placed upon them. But in five of the cross complaints—namely, those of Chandler, of Vacaville W. & L. Co., of Holt, of Waggoner Bros., and of Corlett Bros.—it is expressly alleged that the building was constructed under contract of Waggoner, which was void for want of filing with the recorder; and that the work was done or materials furnished under contract with Waggoner as contractor. With reference to these claims, therefore, we must construe the finding—which is the same in all the cases—as meaning simply that the contract for labor or materials was made by Mrs. Hutton through Waggoner, acting as her statutory agent; for otherwise it would conflict with these allegations of the pleadings and notices of lien. So the construction of the language of the court in these cases must, unless the contrary appears, be extended to the same language as used with reference to the other claims. "It is a familiar principle of construction that a word (or words) repeatedly used in a statute will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is another meaning intended." *Pitte v. Shipley*, 46 Cal. 160; *End. Interp. St.* §§ 41, 53; *Bish. Writ. Laws*, § 95a. And the same rule will apply to other writings. "Nor should an interpretation be admitted, if avoidable, which will render one clause repugnant to another, but all should stand." *Id.* § 882. The finding must, therefore, be thus construed, or be regarded as indefinite in failing to find upon this material point; and hence as insufficient to support the personal judgment against Mrs. Hutton, for a contract made for her by a statutory agent could not render her personally liable. *Code Civ. Proc.* § 1183; *Trading Co. v. Kendall*, 120 Cal. 182, 52 Pac. 304; *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109; *Kellogg v. Howes*, 81 Cal. 170, 22 Pac. 509, 6 L. R. A. 588; *Lumber Co. v. Schmitt*, 74 Cal. 625, 16 Pac. 516.

3. With regard to the priority allowed to the building liens over the mortgage of the building and loan association, it will be observed that the date of the record of the mortgage was September 15, 1897, and that the building was commenced on the 21st day of May, 1897; from which it was concluded that the mortgage lien of the building and loan association was subsequent and subordinate to the building liens, without regard to the time when the work was done, or the materials commenced to be furnished. *Code Civ. Proc.* § 1186. But this, we think, results

from a misconstruction of the statute. The provision is that building liens are preferred to liens "which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished," etc. Under this provision the cases must be divided into two categories, distinguished by the existence or nonexistence of a valid contract. In the former case the priority of the liens is to be determined by the date of the commencement of the building; in the latter by the time the work was done, or the materials commenced to be furnished. *Lumber Co. v. Gottschalk*, 81 Cal. 642, 22 Pac. 860; *Avery v. Clark*, 87 Cal. 619, 25 Pac. 919; *Insurance Co. v. Fisher*, 106 Cal. 236, 39 Pac. 758. Examined by this test, neither the allegations of the cross complaints nor the findings (which follow them) are sufficient to sustain the conclusion of the court that the mortgage of the building and loan association is subsequent and subject to the building liens. In many, if not in most, of the cases it appears affirmatively that the furnishing of the materials commenced after the record of the mortgage; in the others it is alleged that the work or furnishing of materials commenced "on or about" some specified date, or "between" specified dates,—the last post-dating the mortgage. In none of them does it appear any work was done or materials furnished prior to the record of the mortgage. We therefore advise that the judgment in the case of *Mary E. McClain* against *Charlotte A. Hutton* and others be modified by striking therefrom all the provisions as to the liens set up by the cross complainants, and inserting in lieu thereof simply a provision requiring any surplus on the sale of the mortgaged premises over what may be necessary to satisfy the judgment in favor of *Mrs. McClain* to be paid in court to abide the result in the case of the *Continental Building & Loan Association* against *Charlotte A. Hutton* and others, and that the judgment in the latter case be reversed, and the cause remanded for a new trial.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment in the case of *Mary E. McClain* against *Charlotte A. Hutton* and others is modified by striking therefrom all the provisions as to the liens set up by the cross complainants, and inserting in lieu thereof simply a provision requiring any surplus on the sale of the mortgaged premises over what may be necessary to satisfy the judgment in favor of *Mrs. McClain* to be paid in court to abide the result in the case of the *Continental Building & Loan Association* against *Charlotte A. Hutton* and others, and that the judgment in the latter case be reversed, and the cause remanded for a new trial.

128 Cal. 617
DARVILLE v. MAYHALL et al. (L. A. 649.)
 (Supreme Court of California. May 19, 1900.)
CONSTABLES—LEVY ON PROPERTY OF STRANGER—LIABILITY ON BOND—JUSTIFICATION—EVIDENCE.

Where an officer, who is sued upon his bond, for an unlawful seizure under an execution, seeks to justify the taking against one who is a stranger to the writ, or to show that the transfer to plaintiff was fraudulent and void as to the execution creditor, he must prove, not only the issuing of the execution and a levy in behalf of a creditor, but also the rendition of a judgment, and that the execution was issued upon the judgment.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county.

Action by *Elizabeth B. Darville* against *C. R. Mayhall* and others, upon a constable's official bond, for the value of certain personal property. From a judgment for plaintiff, defendants appeal. Affirmed.

G. A. Webster, for appellants. G. F. Witter, Jr., for respondent.

COOPER, C. This action was brought to recover of defendant *C. R. Mayhall* and the other defendants, who are sureties on his official bond as constable, the value of certain personal property described in the complaint, and which property is alleged to have been wrongfully taken from the possession of plaintiff by defendant, as constable, under a writ of execution against one *S. W. Darville*. After trial, findings were filed and judgment entered for plaintiff. Defendants have appealed from the judgment, on the judgment roll and a bill of exceptions.

Defendants' argument is directed to the contention that the plaintiff is the wife of one *S. W. Darville*, and that the property was transferred to her by her said husband; and it is claimed that such transfer was not accompanied by an immediate delivery, nor followed by an actual and continued change of possession, and for this reason the transfer is fraudulent and void. The defendants have not alleged or proven that *C. R. Mayhall*, in taking the property, represented any creditor. It is not shown that any judgment existed, nor that an execution was ever issued upon any judgment. The property was in the possession of plaintiff, who was a stranger to the writ of execution. In order for an officer to justify the taking of property under an execution against another who is a stranger to the writ, or to show that the transfer of the property by the execution debtor was fraudulent and void as to the execution creditor, he must prove, not only the issuing of the execution, the levy, and that he was a creditor, but also the rendition of a judgment upon his debt, and that the execution was issued upon the judgment. *Thornburgh v. Hand*, 7 Cal. 562; *Paige v. O'Neal*, 12 Cal. 495; *Bickerstaff v. Doub*, 19 Cal. 112; *Leszinsky v. White*, 45 Cal. 279; *Kane v. Desmond*, 63 Cal. 465. The answer contains only a general denial.

No attempt at justification is made therein. Not only this, but there is no proof of any indebtedness, of any judgment, nor of the issuing of any execution upon any judgment. The bill of exceptions shows that it was admitted that the property was seized "by virtue of an execution issued out of the justice court of his said township in an action entitled, 'S. W. Darville vs. Gilbert Middagh.'" This does not show any indebtedness nor any judgment. The defendant, therefore, cannot question the transfer to plaintiff, nor its validity, in any respect. It follows that the judgment should be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

128 Cal. 619

MERCHANTS' AD-SIGN CO. v. LOS ANGELES BILL-POSTING CO. et al.
(L. A. 715.)

(Supreme Court of California. May 21, 1900.)

JUDGMENTS—DEFAULT—VACATION TIMES—DISCRETION OF COURT—AFFIDAVIT OF MERITS—SUFFICIENCY—DEFENDANT'S RIGHT TO ANSWER.

1. A motion to set aside a judgment by default, for want of answer, was accompanied by an affidavit of defendants' attorney that an arrangement had been made with plaintiff's attorney that nothing should be done in the case pending the latter's investigation into the plans of defendants, and that he might take all the time he wanted to answer, as the case could not be tried until after vacation; that affiant was taken ill, and was confined to his bed, before his time to answer expired; and that he continued so until after entry of the default. Defendants' application was made within a reasonable time, and the order setting aside the default required defendants to pay plaintiff \$125. *Held*, that no abuse of discretion was shown in setting aside the default.

2. When the affidavit, in support of a motion to set aside a default, asserts a meritorious defense on the part of one of several defendants only, but tenders in support thereof the verified answer of all defendants, which denies the material allegations of the complaint, and sets up affirmative matter, which if true is a complete defense to the action, and the answer is served with the notice of the motion, and is made a part of the moving papers, the affidavit of merits is sufficient as to all defendants.

3. Where notice of an application to set aside a default states that same will be made on affidavits and a verified answer, and the order setting aside the judgment directs that the cause be reopened, and that the parties be permitted to take such further proceedings as they may see fit, defendants are entitled to file an answer, though the notice does not state that leave therefor will be asked, and the order does not expressly authorize it.

4. The court having imposed payment of money to plaintiff, as a consideration for setting aside the default, plaintiff cannot complain on appeal that payment was made to the clerk of the court instead, where it subsequently notified defendants' attorney that it would not accept the money.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by the Merchants' Ad-Sign Company against the Los Angeles Bill-Posting Company and others to restrain defendants from pursuing their business and for damages for breach of a contract of sale. From an order setting aside a judgment by default, plaintiff appeals. Affirmed.

Fuller & Burnett, for appellant. Davis & Rush, for respondents.

COOPER, C. This is an appeal from an order vacating the default of defendants, and setting aside a judgment against them through such default. It is claimed that the court abused its discretion, and that the facts were not such as to justify the court in making the order. The facts disclosed were such that the court might well have denied the motion. But we do not possess the discretion that is necessarily vested in the trial court, and, although we might have differed from the court in the conclusions reached if we had passed upon the evidence in the first instance, here we must determine whether or not the court abused the legal discretion vested in it. It is only in cases of the abuse of such discretion that we would be justified in reversing an order of this kind. The attorney for defendants filed and read his own affidavit, in which he stated that, prior to the expiration of the time for answering, he had a conversation with one of the attorneys for the plaintiff, in which he stated to said attorney that two of the defendants, Campbell and Sterling, had ceased carrying on the business of bill posting, and Sterling intended to leave for Mexico, and Campbell to go into another line of business; that several such conversations were had by defendants' attorney with plaintiff's attorney about a proposed dismissal of the case; that plaintiff's attorney said he would investigate, and if he became satisfied that Campbell and Sterling had quit the business of bill posting and advertising in Los Angeles he would dismiss the case, and that defendants' attorney need not do any more work or go to any more trouble in relation to the case until he was notified of the decision as to the proposed dismissal, and that the attorney for plaintiff said, "Let the matter rest as it is for a while, and I will inquire into the matter, and discuss it with my client, and let you know our decision." And the affidavit further states that in speaking about time for answering the attorney for plaintiff said: "Oh, take all the time you want; we can't try the case until after vacation anyway." The affidavit further states that the attorney for defendants became ill, and was confined to his bed before his time for answering had expired, and continued to be ill and confined to his room most of the time for several days after the entry of default. These matters were nearly all denied by the attorney for plaintiff in a counter affidavit. It was the peculiar province of the judge of

the court below to determine the truth from the conflicting statements in the affidavits. He may have believed that the affidavit of the defendants' attorney stated the truth fully as to the conversations.

The judge in making the order took into consideration the nature of the action, that it was brought to restrain defendants from following a lawful occupation, and for damages based upon a contract for the sale of the good will of a business. He imposed the payment of \$125 by defendants to plaintiff as terms in granting the motion. The rule is well settled that the power of the court should be liberally exercised to mold and direct its proceedings so as to dispose of cases upon their merits and without unreasonable delay, regarding mere technicalities as obstacles to be avoided rather than as principles to be given in derogation of substantial right. *Roland v. Kreyenhagen*, 18 Cal. 455. Where the circumstances are such as to lead the court to hesitate, the doubt will be resolved in favor of the application, so as to secure a trial and judgment upon the merits. *Wolff & Co. v. Canadian Pac. Ry.*, 89 Cal. 332, 28 Pac. 825. The application was made within a reasonable time after the default, the plaintiff does not appear to have been at any great expense, and the terms imposed were for the purpose of preventing loss to the plaintiff. The plaintiff is deprived of no right, but yet has its day in court, and upon a trial on the merits we must presume that justice will be done. We therefore hold that there was not such abuse of discretion as would justify us in reversing the order.

It is, with apparent earnestness, contended that the affidavit of merits was not sufficient as to any of the defendants, and that there was no affidavit of merits as to the defendants other than the defendant corporation. The affidavit was made by the attorney for defendants, and stated: "Affiant further states that he is personally familiar with the facts relating to and connected with the transactions and matters upon which this action is brought, and affiant verily believes that defendant the Los Angeles Bill-Posting Company has a complete, full, meritorious, and legal defense to this action. And affiant, in support thereof, hereby offers in support of said claim the verified answer of defendants." The verified answer was served with the notice of motion, and became a part of the moving papers. It contained specific denials of the material allegations of the complaint, and also affirmative matter which, if true, was a complete defense to the action. It was "duly verified," and was an answer for each and all the defendants. It was therefore of itself a sufficient affidavit of merit. *Fulweller v. Mining Co.*, 83 Cal. 126, 23 Pac. 65.

The notice of motion did not state that defendants would ask for permission to file an answer, and the order made did not give such permission. For this reason the claim is

made that the order was erroneous, as it only inconveniences plaintiff, and does not give defendants any right to answer. If this contention is true, then the plaintiff is given \$125, and defendants have received no benefit, which would appear to be a costly experiment for defendants. But we do not think we are called upon to place such a narrow and technical construction upon the statute. The notice stated that it would be made "upon the affidavits and verified answer, copies of which are herewith served." The order setting aside the judgment directed that the cause be reopened, "and the parties thereto permitted to take such further proceedings in said cause as they may see fit and proper." The default and judgment being set aside, it follows that defendants had the right to answer. Whether this right be recognized by silence in allowing the answer on file to stand, or by a formal application to the court for leave to file, it can make no difference to plaintiff. If there were no answer on file at the time the order was made, and the defendants did not within proper time file or ask permission to file one, the plaintiff could have applied for default, and his rights would no doubt have been protected.

Objection is made to the \$125 being paid to the clerk, and not to plaintiff, as directed by the order. If this objection were plausible, plaintiff is not in a position to urge it, for the reason that the attorneys for plaintiff immediately after the money was paid to the clerk notified the attorneys for the defendants that they would not accept it. In any event, if the terms of the order were not complied with, the remedy of the plaintiff would have been by motion in the lower court. We would not set aside the order without application first having been made to the lower court. We advise that the order be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

128 Cal. 633

HIBERNIA SAVINGS & LOAN SOC. v.

CHURCHILL et al. (S. F. 2,147.)¹

(Supreme Court of California. May 24, 1900.)

PROCESS—SUMMONS—ERRONEOUS DATE—MOTION TO DISMISS—EXTRINSIC EVIDENCE—INTERVENTION—DEFAULT JUDGMENT.

1. A summons was issued March 5, 1898, but the clerk inadvertently inserted the date as February 5th. The summons was served February 15, 1899. On a motion of defendant to dismiss the action for the reason that no summons had been served within one year from the commencement of the action, the court found that the summons was in fact issued March 5, 1898, and denied the motion. *Held*, that the date is no part of a summons issued in civil actions, under Code Civ. Proc. § 407, and the motion was properly denied.

2. Code Civ. Proc. § 387, provides that any person may intervene in an action before the trial. After a judgment of foreclosure in default had been entered against an adminis-

¹ Rehearing denied June 20, 1900.

tratrix, an heir at law obtained leave *ex parte* to intervene in the action. Plaintiff moved to dismiss the complaint in intervention, and the motion was sustained. *Held*, that the intervention was made too late, and, as leave to file same was given *ex parte*, the action of the court dismissing intervenor's complaint was proper.

Department 2. Appeal from superior court, city and county of San Francisco.

Action to foreclose a mortgage by the Hibernia Savings & Loan Society against Mary F. Churchill, administratrix of the estate of William H. Churchill, deceased, and others, and Robert P. Churchill, intervenor. From an order overruling defendants' motion to vacate a judgment entered against defendants by default, and sustaining plaintiff's motion to dismiss intervenor's complaint, defendants and intervenor appeal. Affirmed.

A. Boyer, for appellants. Tobin & Tobin, for respondent.

McFARLAND, J. Action upon notes and mortgage executed to plaintiff by William H. Churchill in his lifetime. Judgment went for plaintiff. There are two appeals from the judgment; one by defendant Mary F. Churchill, administratrix, and the other by Robert P. Churchill as intervenor. It is not contended by either appellant that the mortgage was not a perfectly valid one for the amount of money which it purports to secure; but it is contended that, for certain legal reasons, technical in their nature, respondent should be precluded from enforcing its lien for the recovery of its loan.

1. The contention of appellant Mary F. Churchill is that the judgment is void because no summons was issued thereon within one year after the commencement of the action. The facts as to this contention are these: The action was commenced on March 5, 1898, and summons was issued on that day. It was served on the appellant Mary F. Churchill on February 15, 1899, and, as she made no response to the summons, her default was duly entered on March 10, 1899; but when the clerk issued the summons on March 5, 1898, he inadvertently dated it "February" 5th, instead of "March" 5th. Afterwards appellant made a motion to vacate the default and dismiss the action on the ground that no summons had been issued, and that more than a year had elapsed since the commencement of the action; and on the hearing of this motion the above facts appeared, and the court found them in the decree. The motion was properly denied. The whole contention of appellant rests on the proposition that the date of the summons on its face is conclusive proof that it was issued before the commencement of the action, and for that reason was void; and this proposition cannot be maintained. It was clearly shown that, as a fact, the summons was not issued before the commencement of the action, but that it was issued and served within a year thereafter. The sum-

mons was not void on account of its date, for a date is no part of the form of a summons prescribed by the Code. Code Civ. Proc. § 407. The summons in the case at bar fully conformed to the requirements of the Code. The appellant did not ask to be allowed to answer to the merits, or to answer at all. The judgment, as to this appellant, must be affirmed.

2. The other appellant—the intervenor, Robert P. Churchill—claims to be heir at law of the deceased mortgagor; and, after the administratrix had suffered default, as above stated, he obtained leave *ex parte* to file, and did file, what is called a "complaint in intervention," the prayer of which is that "plaintiff's complaint be dismissed." Afterwards, on motion of respondent, his "complaint in intervention" was dismissed, and he appeals from this judgment of dismissal. Respondent makes many points in support of the order of dismissal. It is argued that the intervention shows that appellant was not "joining the plaintiff in claiming what is sought by the complaint," nor "uniting with the defendant in resisting the claims of the plaintiff," because defendant, by default, had admitted all of plaintiff's claims; nor "demanding anything adversely to both the plaintiff and the defendant"; and that, therefore, he is not within any of the provisions of section 387 of the Code of Civil Procedure. It is also argued that under section 1582, *Id.*, and *Bayley v. Muehe*, 65 Cal. 348, 3 Pac. 467, 4 Pac. 486; *Monterey Co. v. Cushing*, 83 Cal. 512, 23 Pac. 700; *Collins v. Scott*, 100 Cal. 452, 34 Pac. 1085; and other decisions cited,—respondent had the right to sue the administratrix alone, and that the heir at law cannot intervene; and, further, that under any view the complaint in intervention does not state facts constituting any cause of action or defense. But, waiving these questions, the appellant, under the facts above stated, had no absolute right to intervene; and, even assuming that the court, in its discretion, might have countenanced the intervention notwithstanding the condition of the case, it certainly did not abuse its discretion. It is the general rule that an intervention will not be allowed when it would retard the principal suit, or require a reopening of the case for further evidence, or delay the trial of the action, or change the position of the original parties. *Van Gorden v. Ormsby*, 55 Iowa. 664, 8 N. W. 625; *Boyd v. Helne*, 41 La. Ann. 393, 6 South. 714; *Ragland v. Wlsrock*, 61 Tex. 391; *Cahn v. Ford*, 42 La. Ann. 905, 8 South. 47; *Mayer v. Stahr*, 35 La. Ann. 57. In order to prevent the intrusion of strangers after the issues between the original parties have been determined, our Code expressly provides that an intervention must be "before the trial"; and a default by which all of the issues tendered by the complaint are admitted in favor of plaintiff is the equivalent of a trial when the case is litigated. In *Henry v. Elevator Co.*, 42 Iowa, 33, it was

held that there could be no intervention after an agreement for settlement between the original parties, although no judgment had been entered, and the court said: "The intervention must be made before the trial commences. After the verdict all would admit it would be too late to intervene. But the voluntary agreement of the parties stands in the place of a verdict, and, as between the parties to the record, as fully and finally determines the controversy as a verdict could do. * * * It is not the intention of the statute that one not a party to the record shall be allowed to intervene, and open up and renew a controversy which has been settled between the parties to the record either by verdict or voluntary agreement." The same principle applies where the controversy has been settled by default. And that a default is the equivalent of a trial when the case is litigated was expressly held in *McCallon v. Waterman*, 1 Filip. 651, Fed. Cas. No. 8,675. The question there was as to the right to remove a case, after default, from a state to a federal court under a statute which provided for a removal "at any time before the trial or final hearing of the cause," and it was held that it could not be done. The court said: "A default has practically the same effect as a verdict. Until set aside, it is a final determination of the matters set up in the declaration. * * * The default, which is an admission of the plaintiff's case, stands in the place of a trial in a litigated case, which is only a determination of the issues made by the pleadings of both parties." The judgment is affirmed as to both appellants.

We concur: HENSHAW, J.; TEMPLE, J.

6 Cal. Unrep. 432

STEWART v. CALIFORNIA IMP. CO. et al.
(S. F. 1,544.)¹

(Supreme Court of California. May 21, 1900.)
PERSONAL INJURIES—NEGLIGENCE—MASTER
AND SERVANT—CITY.

A city hired from an improvement company the use of a steam roller and engineer. The city had full control over the movements of the steam roller, and directed its engineer where to operate it. The company paid the salary of the engineer, and had the power to discharge him. The roller, being directed to operate where the ground was too soft to hold it up, sank in the mud, and the engineer, in a proper exercise of his duties, put on full steam, and extricated the roller from the mud. The steam then escaped with a loud noise, and frightened the horse of a traveler, who was permitted by the city's superintendent to approach without warning, injuring him. *Held*, that the city was liable therefor, and not the company.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county.

Action for injuries by M. G. Stewart against the California Improvement Company and others. From a judgment in favor of plaintiff, defendants appeal. Reversed.

¹ Reversed in banc. See 68 Pac. 177, 131 Cal. 126.

Edward J. Pringle and Wm. B. Pringle, for appellants. Chickering, Thomas & Gregory and B. C. McFadden, for respondent.

CHIPMAN, C. The trial was by the court without a jury. The court found that defendant Conger was, on March 4, 1896, employed by his co-defendant, the company, "as engineer to manage a steam roller then owned by said company, and used by it in rolling and leveling streets. The said steam roller was then in the use of the city of Oakland; the same, with the engineer in charge, having been hired by the city of Oakland from the defendant," the company. The company "had selected the said engineer, his services were paid for by said company, and said company had the right to remove him. The relation of master and servant existed between the defendant California Improvement Company and the defendant Conger, and not between the city of Oakland and the defendant Conger." Appellant contends that, if there is any liability for the accident, it is from the city of Oakland, and not from the company. As this question lies at the threshold of the case, it should first be determined. The evidence on the subject was as follows: The witness Miller, superintendent of streets for the city of Oakland, testified: "The roller was in the employ of the city of Oakland the day of this accident. It was hired from the California Improvement Company. Mr. Sherman, my foreman, had charge of the work, together with myself." On cross-examination the following question and answer occurred: "Q. Did Mr. Sherman assume to have such control over the roller as to affect the engine,—affect the movements of the engine?" Defendant objected as irrelevant, immaterial, and incompetent, and called for the conclusion of the witness. The objection was overruled, and the witness answered: "I think not." The witness, continuing, said: "Nothing was said in the lease of the engine to the city about discharging the engineer. I secured the engine under the authority of the board of public works. We had to have a roller, and this was the most available one. * * * We said nothing about anybody to run it, or about pay. The understanding was that the machine, with the fuel and engineer, should be supplied at so much per day. Q. As a matter of fact, this roller, while operating upon that street, was entirely under the direction of yourself or foreman, was it not? A. Yes, sir. We controlled to the extent of notifying what portion of the street we wanted rolled. I exercised the judgment as to when the road was rolled enough and when it was not. I did not stipulate as to any particular engineer." Witness Conger, one of defendants, testified that he had been working for the city works for five days previous to March 4th; that the company gave him no directions about the manner in which the streets should be rolled, "or as to the control of the engine. The roller was left on the street at night, and was not

taken back to the company's house. Mr. Sherman, the foreman of Mr. Miller, gave me directions regarding the manner in which the streets were to be rolled, and I obeyed them. The superintendent of streets directed me to change from one side of the street to the other, and that I should stop rolling on the north side, and continue work on my south side. It was on this south side that I got into the hole in which the roller was stuck. Mr. Sherman was present all the time I was working. He had four or five men there, to my recollection, employed in spreading the rock on the street. I was appointed to my position by Mr. Gunn, superintendent of the California Improvement Company, and was paid by check of the California Improvement Company at the expiration of each month." This is all the evidence introduced upon this point. The learned trial judge seems, by the findings, to have based his conclusion that the relation of master and servant existed between the engineer, Conger, and the company, upon the facts found that the company selected the engineer, paid for his services, and had the right to remove him. There is no direct evidence that the company reserved the right to remove the engineer, but the fact may be assumed to be as found. It would probably follow from the fact that the company was to furnish the engineer. It is well settled, and respondent concedes the rule, that the question of liability does not depend upon the fact that the servant is in the general employ of a third person. *Cotter v. Lindgren*, 106 Cal. 602, 39 Pac. 950; cited by both parties; *Whart. Neg.* § 173. Something more than the right of selection and removal on the part of the principal is essential to the relation. The right must be accompanied with the power of subsequent control in the execution of the work to be done. *Boswell v. Laird*, 8 Cal. 469. Nor do we think it would follow from the fact that the company selected the engineer, and might remove him, and was to pay his wages, that the company had control over him for the particular employment in which he was engaged. "The understanding was that the machine, with the fuel and engineer, should be supplied at so much per day." When these were supplied, the outfit passed under the control of the city to do its work, and was so engaged under the directions of the proper officer of the city when the accident occurred. "As a matter of fact this roller, while operating upon the street, was entirely under the direction of the superintendent," as he testified. The evidence was that the engineer was directed to cross to the south side of the street, and roll the broken stone that had been placed there. An unknown soft place in the street disclosed itself, and the roller began to sink into a hole, from which it became necessary to extricate it, and to do so the engineer was compelled to increase the steam pressure in order to supply the engine with sufficient power to lift itself out of this depression. Some little time was

consumed in this effort, during which passing teams were halted to await the result, and, among others, plaintiff's horse and cart, in which he was riding. Finally, by increasing the steam, the engineer got his machine out of the hole on firm ground, and backed it to the side of the street so that the teams could pass. At this moment, and while the steam was on under high pressure, plaintiff started to pass, and, at the same time, as the court found, the steam escaped from the safety valve, and so frightened plaintiff's horse that he turned suddenly around, and threw plaintiff to the ground, thus injuring him. The court found that it was necessary to generate all the steam which the engine could safely carry, but that the engineer was guilty of negligence in not warning plaintiff that there was danger of the escape of steam through the safety valve. It clearly appears, without conflict, that Conger went where he was directed to go by the superintendent; that the soft place in the street was not discovered until the roller got on to it, and began to sink; that it was necessary to increase the steam at once, or the roller would have continued to sink, and be beyond the power of extricating itself; that all the steam the engine would carry became necessary, and, finally, after much effort, the machine lifted itself out. The accident resulted from the necessity of increasing the steam in the boiler, and this became necessary because the roller had been directed to work where the ground was too soft to hold it up. There is no pretense that the engineer was unskillful in managing the engine in the effort to extricate it. The roller and engineer had been working for the city for five days previously without complaint as to the fitness of the roller or skillfulness of the engineer, and the complaint now made is not as to the facts just mentioned, but that the engineer was at fault in not warning plaintiff that a high pressure was on the boiler, and the safety valve was liable to let the steam escape. It seems manifest to us that the accident resulted while the engineer and the roller were under the direction and control of the city superintendent, and that for the time being the company had no control whatever in the matter, and for that particular work was not the engineer's master. Respondent suggests that there is no evidence tending to show that the engineer was released from the service of the company. The evidence on this point showed only that the engineer was paid for his services by the company, and this is entirely consistent with the right of the city authorities to direct where and how the work was to be done after it had taken him and the roller into its employ. A city had leased from a railroad company an engine and train of cars to carry gravel to its waterworks, and the company agreed to furnish a conductor, engineer, fireman, and brakeman to manage the train, all of whom it paid, and also furnished necessary fuel for the engine. The conductor had general

charge of running the train, but received his instructions as to the performance of his work from the city employes. The plaintiff was injured by the negligence of the engineer in running at an unlawful speed. It was held that the city was liable. The court said: "It is well settled that one who is the general servant of another may be lent or hired by his master to another for some special service, so as to become, as to that service, the servant of such third party. The test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master, or becomes subject to that of the party to whom he is lent or hired." *Coughlan v. City of Cambridge*, 166 Mass. 268, 44 N. E. 218. An agreement was made by a railroad company with H. & Co., by which the latter were to construct a branch road, the railroad company "to furnish all motive power and cars, and operate the construction trains." H. & Co. had control over the laying of the track. It was sought to hold the railroad company for the negligent conduct of the engineer in running the train over the unfinished track at a dangerous rate of speed without keeping a lookout ahead. It appeared that H. & Co. had the right to direct where to place the train, to unload, stop, or start it; and it was held that the fact that the crew were retained on the railroad company's pay rolls did not tend to show that the railroad company retained any control of the movements of the train. The railroad company was held not liable. *Miller v. Railway Co.*, 76 Iowa, 655, 39 N. W. 188. Much to the same effect are the following cases: *Byrne v. Railroad Co.*, 9 C. C. A. 666, 61 Fed. 605; *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691. Respondent cites in reply: *Coyle v. Pierrepont*, 37 Hun, 379; *Huff v. Ford*, 126 Mass. 24; *Ames v. Jordan*, 71 Me. 540; *Gerlach v. Edelmeyer*, 88 N. Y. 645; and *Du Pratt v. Lick*, 38 Cal. 691. In the case reported in Hun a stevedore was employed by the owners of a vessel to unload it at docks owned by defendants. Defendants hired to the stevedore a portable engine, with an engineer to run it, to furnish power to hoist the cargo from the vessel and lower it on the wharf. By the negligence of the engineer an employe of the stevedore was injured. It was held that defendants, as masters, were responsible for the engineer's negligence. It does not appear from the report of the case that the stevedore exercised any control over the engineer. The defendants agreed to furnish power; and we cannot discover that any directions were given by the stevedore to the engineer. We do not think the case necessarily conflicts with the principles upon which the present case must rest, and, if it does, we cannot follow it. Appellant cites, contra, *Donovan v. Syndicate* [1893] 1 Q. B. 629, where in a similar case the lessee gave directions as to the working of the crane used in unloading the vessel. The lord chief justice

said: "The key to the whole case is that Jones & Co. were loading the ship, and not the defendants. The crane was being used for Jones & Co.'s purposes, and not for those of the defendants, and the former must, for that particular job, be considered as Wang's masters." *Huff v. Ford* was the case of a horse, wagon, and driver hired to the city, and the injury was to plaintiff's window. The driver struck the horse a violent blow, causing it to kick a loose shoe through the window. The case seemed to turn upon defendant's duty to see that his horse was properly shod. The case would be analogous if the injury in the present case had resulted from defects in the engine, which is not claimed to have been the case. We do not find that any of the cases cited by plaintiff necessarily conflict with the views we have expressed. We are of opinion that the court erred in its finding and conclusion as to defendant's liability, and for that reason the judgment and order should be reversed. It is not necessary to notice the other points in the case.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

128 Cal. 668

In re STROCK. (L. A. 617.)

(Supreme Court of California. May 31, 1900.)

APPEAL—SPECIFICATIONS—INSUFFICIENT EVIDENCE—CONSIDERATION—INSOLVENCY—IN-VOLUNTARY INSOLVENCY—SALE OF PROPERTY—PAYMENTS—INSTRUCTION—ACTUAL FRAUD—LEGAL FRAUD—PREFERENCE OF CREDITORS.

1. A specification that evidence is wholly insufficient to justify or sustain a verdict, and shows the verdict should have been in favor of the other party, is insufficient, and will not be considered.

2. On application of creditors for an adjudication of insolvency of a debtor on grounds of sale of property, when insolvent, in fraud of creditors, and payments made in contemplation of insolvency, as authorized by Insolvent Act 1895, § 9, it was not error to refuse to instruct that actual fraud was not necessarily involved, and that the transfer might be void though the debtor acted with honesty and good faith, the question involved being one of legal fraud rather than fraud of the creditor, since actual fraud was necessarily involved.

3. It was not error to instruct the jury that the debtor, though insolvent, might prefer a creditor, provided he did not do so to hinder, delay, or defraud creditors, or in contemplation of insolvency, since preference of creditors is authorized by Civ. Code, § 3132.

Commissioners' decision. Department 1. Appeal from superior court, Riverside county.

Petition by creditors for an adjudication of insolvency of H. K. Strock. From a judgment in favor of respondent and an order denying a new trial, petitioners appeal. Affirmed.

Dillon & Denning and E. B. Strong, for appellants. Purlington & Adair, for respondent.

SMITH, C. Petition for involuntary insolvency of respondent. The grounds alleged are sale of property by respondent, being insolvent, with intent to delay, defraud, and hinder his creditors, and a payment made in contemplation of insolvency. Insolvency Act 1895, § 9. Verdict and judgment for respondent. The appeal is from the judgment and an order denying a new trial. The grounds are insufficiency of the evidence to justify the verdict, and errors in refusing or giving instructions.

1. The only specification of insufficiency of evidence is that "the evidence is wholly insufficient to justify or sustain said verdict, and, on the contrary, the evidence shows that said verdict should have been in favor of the petitioners." This is manifestly insufficient as a specification, and the objection on the score of insufficiency of the evidence must therefore be disregarded.

2. The court, at the instance of petitioners' attorneys, gave the instruction written below, but refused other instructions: "Where a retail merchant, when insolvent, or in contemplation of insolvency, within one month before the filing of a petition in insolvency by or against him transfers his entire stock in trade, such transfer is out of the ordinary course of business; and if such transfer is made by him with a view to giving any creditor of the debtor, or any person holding a claim against him, a preference, such transfer, under the insolvency law of this state, is prima facie evidence of fraud." One of the instructions refused was to the effect that "in a case like the present there is no element of actual fraud necessarily involved. The debtor may have acted with entire honesty and good faith, and still the transfer be void. The question involved is one of legal fraud rather than fraud in fact. It is fraud upon the insolvency law rather than fraud upon the creditors." This instruction was rightly refused. The case of *Matthews v. Chaboya*, 111 Cal. 435, 44 Pac. 169, cited in support of it, was an essentially different case. There the question related to the validity of a sale under section 55 of the insolvency act of 1890 (corresponding to section 59 of the present act), and the suit was against the purchaser. In such case the transaction might be void without actual fraudulent knowledge or intent on the part of the purchaser. Here actual fraud is necessarily involved in the charges against the respondent. This is manifestly the case with regard to the charge of "intent to hinder, delay, and defraud creditors," and equally so with regard to the charge that a payment was made "in contemplation of insolvency." To hold otherwise would be to regard the deliberate violation of the law, and of the rights of other creditors under the law, as a morally innocent act. The other instructions asked for involve each the same error.

3. In instructions 1, 3, 5, and 10—all of which are objected to—the court, in effect,

instructed the jury that a debtor, whether insolvent or not, might prefer any one of his creditors, provided he did not do so to hinder, delay, or defraud his creditors, or in contemplation of insolvency. This is a correct statement of the law. Civ. Code, § 3432; Insolvency Act 1895, §§ 9, 59; *In re Muller*, 118 Cal. 432, 50 Pac. 660. The second instruction, which is also objected to, consists of a definition of insolvency which is taken substantially from the definition given in *Sacry v. Lobbree*, 84 Cal. 47, 23 Pac. 1088, and the cases therein cited, and is correct. In the fourth instruction, which is also objected to, the jury were instructed that if they believed from the evidence that the respondent was not insolvent within the meaning of the insolvency law of the state at the time of the filing of the petition, and did not contemplate insolvency prior to that date, they should find in his favor; which is but a corollary from the principle stated in the instructions first above referred to, and therefore correct. The judgment and order denying a new trial should therefore be affirmed.

We concur: HAYNES, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

123 Cal. 637

ARNOLD v. PRODUCERS' FRUIT CO.

(Sac. 731.)

(Supreme Court of California. May 25, 1900.)

WAREHOUSEMEN—DAMAGES—SEVERAL ACTION—EVIDENCE—FRUIT PACKING—CONTENTS OF BINS—NEGLIGENCE—CARE OF FRUIT—USUAL METHODS—APPEAL AND ERROR—RECORD—OMISSION OF TESTIMONY—PRESUMPTIONS—CONVERSION—TRIAL—GENERAL OBJECTIONS.

1. Under a contract, signed by a fruit company and a number of fruit growers, providing that such growers might deliver prunes to the company to be weighed, separately dried, and, after being graded into several sizes, weighed again to the respective owners, after which it might be mingled with other fruit in the bins used for the purpose, and that a receipt should be given to the owner calling for so many pounds in bulk, the contract, as between the fruit growers, was not joint, but several, and one of such growers was entitled to sue the company for damages to him under the contract.

2. In an action for injury to prunes which the plaintiff had delivered to defendant under a contract that the prunes should be prepared for market, and then dumped into bins containing prunes belonging to defendant and other prune growers, and that a receipt for so many pounds in bulk should be issued to plaintiff, evidence as to the bad condition of the fruit in the bins and as to the causes of deterioration was admissible to show negligence on the part of defendant as affecting plaintiff's interest in such fruit.

3. Evidence tending to show negligence in the drying process before the fruit was mingled with the common lot in the bins, though it did not refer to plaintiff's fruit in particular, was competent as affecting plaintiff's interest in the fruit in the bins.

4. In an action for injury to prunes which

plaintiff had delivered to defendant under a contract that the same should "be carefully handled and marketed in the most approved manner," testimony that more men in the state of California who handle and dry large quantities of prunes do not adopt the process of green grading than those who do was competent as showing what was "the most approved manner" of grading prunes generally required by the contract.

5. An action was brought by a fruit grower against a fruit company for money received for fruit sold by it on contract, and not paid over. It was admitted that defendant was entitled to the amount allowed it in the contract for its services in handling the fruit, and that the controversy should be confined to certain specified items charged by defendant, not within the apparent terms of the contract. Plaintiff testified that an amount, being the aggregate of such items, was due him, but on cross-examination stated that such amount was simply the balance given him by an accountant, and that he had no personal knowledge of the matter. The transcript on appeal did not contain all the evidence. *Held*, that the court cannot say that the error in admitting the testimony of plaintiff as to the amount due was harmless, in view of the admissions, for the reason that the testimony omitted from the record might have shown a custom or other circumstance permitting the charges which were outside the apparent scope of the contract.

6. In an action for conversion of food delivered to a warehouseman to be dried and graded, evidence that defendant hauled refuse fruit away from its cannery was inadmissible for the purpose of proving the conversion, since, under the terms of the contract, defendant was entitled to reject refuse fruit.

7. Where evidence was inadmissible for any purpose, an objection that the same was incompetent, irrelevant, and immaterial was sufficient.

Commissioners' decision. Department 1. Appeal from superior court, Colusa county.

Action by D. H. Arnold against the Producers' Fruit Company to recover for fruit sold and for conversion thereof. From a judgment in favor of plaintiff, defendant appeals. Reversed.

B. F. Howard and W. G. Dyas, for appellant. E. T. Crane and U. W. Brown, for respondent.

SMITH, C. Action for breaches of contract between plaintiff and defendant of date June 17, 1897, by which, as alleged, "said defendant agreed to receive from said plaintiff at the town of Colusa * * * certain fruit, to wit, prunes, and to dry, cure, pack, carefully handle, and market the same in the most approved manner, for the account of the said plaintiff, for the compensation in said contract provided, and by which said contract said plaintiff agreed to pay to said defendant the certain compensation for said services in said contract specified." Three breaches of the contract by the defendant are alleged in as many counts, namely: (1) Lack of "due diligence, skill, and care in drying, curing, packing, and handling * * * fruit" delivered by plaintiff to defendant under the contract; (2) failure to pay over part of the money received from sales; and (3) the conversion by defendant of fruit delivered under the contract. The verdict was

for the plaintiff, on the first count for \$716, on the second for \$153, and on the third count for \$100. There was also a fourth count, but the verdict on this was against the plaintiff. The appeal is from an order denying a new trial. The points of error assigned are: (1) Nonjoinder of parties plaintiff; (2) erroneous rulings on evidence; and (3) erroneous instructions.

1. The first point turns on the construction of the contract between plaintiff and defendant. The contract is signed by the plaintiff and 24 other fruit growers, and it is claimed by the defendant that it is a joint contract, and that, consequently, all the parties of the second part should have been joined as plaintiffs. On this point the material portions of the contract are as follows: "Memorandum of agreement made and entered into this 17th day of June, A. D. 1897, by and between the Producers' Fruit Company, of Sacramento city, California, a corporation, party of the first part, and the undersigned fruit growers of Colusa county, parties of the second part, witnesseth: That the said parties of the first part will receive at the Colusa Cannery, located at Colusa, California, for drying purposes, peaches, apricots, pears, and prunes, and agree to dry the same for the parties of the second part, and charge therefor the actual expense of drying, curing, and packing said fruit. It being understood and agreed that such expense for drying, curing, and packing as aforesaid shall not exceed two and one-half (2½) cents per dried pound for peaches and apricots, one-half (½) cent per dried pound for prunes, and two (2) cents per dried pound for pears. The said party of the first part hereby agrees to advance all money necessary for drying, packing, and handling said fruit, and charge the same against the fruit delivered and dried, deducting the same pro rata from the sales of the fruit according to the amount of dried fruit each individual may have, as compared to the total amount dried, including a commission of five per cent. on the gross sales of such fruit when sold, and interest as hereinafter provided. In consideration of the foregoing, the parties of the second part hereto hereby agree and bind themselves to deliver to the said party of the first part, at the Colusa Cannery and drying grounds aforesaid, in good condition, and suitable for drying, all their peaches, apricots, prunes, and pears for the season of 1897. The parties of the second part further agree that all said fruit shall be placed in the hands of the parties of the first part for sale, and marketed through said party of the first part, within sixty (60) days after the same is cured and ready for market, reserving, however, the right to any fruit grower to sell his own fruit, within the time above specified: provided such sale shall be made through the Producers' Fruit Company, who shall receive five per cent. commission thereon. * * * It being understood and agreed by and be-

tween the parties hereto that, unless otherwise specifically instructed by the owner, said Producers' Fruit Company shall have the selection of packages in which fruit shall be marketed. * * * The Producers' Fruit Company shall be entitled to interest at the rate of eight per cent. per annum for all advances made by it for drying, packing, and handling said fruit from the date of such advances until repayment or sale of fruit shall have been made. * * * The Producers' Fruit Company further agrees that all fruit delivered to it for drying and marketing as aforesaid shall be carefully handled and marketed in the most approved manner." Signed by Producers' Fruit Company and by 25 parties of the second part, including plaintiff. In the years 1897 and 1898 the plaintiff and others of the parties of the second part delivered to the defendant their several crops of prunes to be disposed of as provided in the contract. The fruit, as delivered by each party, after being weighed, was dried separately, and then, after being graded into several sizes, weighed again to the owner, after which it was mingled with the other fruit in the bins used for the purpose, and a receipt given to the owner, calling for so many pounds in the bulk. From the above statement it is clear that the contract is several. For not only is a separate accounting with each of the parties of the second part required, but the ownership of each of the growers of the fruit delivered by him, or of his portion of the common bulk after commingling, is recognized throughout the contract. 17 Am. & Eng. Enc. Law, p. 566, and cases cited; *Hall v. Leigh*, 8 Cranch, 50, 3 L. Ed. 484; *Shipman v. Mining Co.*, 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1051. The commingling of the fruit had no effect upon the title of the several owners other than simply to convert it into an ownership in common. Civ. Code, § 1030; Abb. Law Dict. tit. "Confusion of Goods."

2. The evidence objected to relates principally to the first cause of action. With reference to this, witnesses testified as to the bad condition of the fruit in the bins, and to the causes of the deterioration; the purpose and effect of the evidence being to show negligence on the part of the defendant. The plaintiff was the owner of about a third of this fruit only, and it was objected that evidence of the condition of the fruit in general was not competent to prove negligence in the handling of plaintiff's fruit. But as plaintiff's interest, at the times referred to, was an undivided interest in the whole, the testimony was clearly admissible. The same objection was interposed to other testimony tending to show negligence in the drying process, which took place before the commingling of the fruit; and this testimony referred, not to plaintiff's fruit in particular, but to the fruit of all the parties generally. But, as it was contemplated that the fruit should be commingled, or, at least, as it was in fact

commingled, with the knowledge and consent of the parties, the same rule must apply; for it is clear that, whatever may have been the difference of negligence or of damage with reference to the fruit of the several parties before commingling, this would become common to the mass when commingled, and thus the damage to each would be simply his proportion of the aggregate damage. The agreement of the defendant required that all fruit delivered to it under contract should "be carefully handled and marketed in the most approved manner," and as bearing on this point two of the plaintiff's witnesses (Gray and Paul) were asked, in effect, whether better results would be had from green grading or not green grading prunes, and both testified in effect that the former is the best process. This testimony was objected to by the defendant "as incompetent, irrelevant, and immaterial." The witness Paul was then asked by defendant's counsel whether it was not "a fact that more men in the state of California, who handle and dry large quantities of prunes, do not adopt the process of green grading than those who do," and on objection this was ruled out by the court, on the ground that "a majority cannot decide whether it is the best method or not." Green grading, it will be understood, is a process by which the prunes are run through a machine, and the smaller separated from the larger ones before they are put out to dry. These rulings of the court involve a construction of the contract which cannot be maintained. The provision that the fruit should be handled and marketed "in the most approved manner" refers simply to the methods most generally used by competent men in the trade of fruit drying, and these may or may not be the best methods attainable, or necessarily the methods that will produce the best results. The rulings objected to are therefore erroneous, and it is very clear that they may have very seriously influenced the jury in arriving at their verdict.

With regard to the second cause of action, it appears from the pleadings that plaintiff's fruit had been sold by defendant for the sum of \$3,074.09, and that plaintiff had received on account \$1,023.48, leaving a balance of \$1,450.51, which had been charged against him by defendant for expenses. Of this it was admitted the sum of \$1,144.50 was a legitimate charge, and "that the only other expenses paid and incurred by the defendant for plaintiff on said fruit were the following items, to wit: For dry-grading said fruit after the same was dried, and before it was put in the bins, and before packing, \$72.31; for redipping in January, 1898, after the fruit had been put into the bins, and just before it was packed, \$136.32; and for shoveling said fruit after it was put into bins, and before it was packed, \$30.50; and that the only issue between the parties under the second cause of action was whether the said last-mentioned items of \$72.31, \$136.32, and \$30.-

50 were properly chargeable by defendant against plaintiff under the terms of said contract, in addition to the charge of \$723.31, * * * being the limit of one-half cent per dried pound for drying, curing, and packing said prunes, chargeable under said contract." Under this state of the issues the plaintiff testified generally that there remained due to him from the defendant the sum of \$311.38, but on cross-examination it appeared that this was simply the balance given him by an accountant, and that he had no personal knowledge of the matter. Defendant's counsel then moved to strike out the testimony, and the motion was overruled and an exception taken. This was clearly error, but it is claimed by plaintiff's counsel that the facts stipulated were sufficient to support the verdict of the jury, and the error was, therefore, immaterial. The claim is that the three items mentioned in the stipulation all come within the provision of the contract fixing a limit of one-half cent per pound for "the actual expense of drying, curing, and packing said fruit." But, as the transcript does not contain all the evidence, we cannot say as a matter of law that these items are thus included; for though, in the absence of any evidence of custom or other circumstances bearing upon the question, we might be inclined to hold that these items, or some of them, come within the provision of the contract alluded to, we cannot say that a different meaning might not be put upon them by such evidence. Nor can we tell on which of these items the verdict of the jury is founded; and one of them at least, namely, the first, may be a proper charge. We cannot say, therefore, that the error is immaterial.

With reference to the third cause of action the allegations are, in effect, that fruit was delivered to the defendant under the contract, and that of the fruit thus delivered a certain quantity was unlawfully converted by the defendant to its own use. On this point witnesses for plaintiff were asked, in effect, whether they knew of any of the fruit being taken away by any parties, or hauled away from the cannery building, and answered in the affirmative. This fruit, it appeared from questions asked the witnesses and their testimony, was rejected from the cannery building in the process of curing as refuse. The evidence was objected to as immaterial, irrelevant, and incompetent. But the defendant was clearly authorized, under the terms of the contract, to reject refuse fruit; and, if this power was rightly exercised, there was no conversion. The mere fact that some fruit was rejected on this account was, therefore, incompetent as proof of conversion, and the evidence should, therefore, have been excluded; and, as the evidence was inadmissible for any purpose, the general objection to it was sufficient.

The objections to the instructions complained of are principally based upon the theory of the defendant that the contract is joint;

but, as we have concluded that this is not the case, it follows that the objections are untenable. We therefore advise that the order denying the motion for a new trial be reversed, and the cause remanded for further proceedings.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the motion for a new trial is reversed, and the cause remanded for further proceedings.

GANS v. STEELE, Judge.

(Supreme Court of Idaho. May 19, 1900.)

WRIT OF REVIEW—FILING OF PETITION—COURTS OF RECORD—APPEAL—ORDER AFTER JUDGMENT—JURISDICTION—DEFECTIVE WRIT.

1. Application and affidavit were presented to district judge at chambers for writ of review. Writ was issued on November 21, 1899. Application filed December 6, 1899. *Held* sufficient, as there is nothing in the statute requiring the application to be filed before the writ is granted.

2. The law does not confine the issuance of writs of review to courts of record, but that a writ may issue to any inferior tribunal, board, or officer exercising judicial functions upon proper showing in cases where there is no plain and speedy remedy.

3. The statute does not provide an appeal from an order of a probate court made in a proceeding supplemental to execution, and the only means of reviewing such order is by writ of review.

4. Section 3890, Rev. St., gives a district judge at chambers jurisdiction to issue writs of review.

5. A writ issued, defective upon its face, does not affect the jurisdiction of the judge, and such defect must be reached by demurrer or motion to quash.

(Syllabus by the Court.)

Application by Hamilton Gans for writ of review against Edgar C. Steele, judge. Writ denied.

Isham N. Smith and Geo. W. Tannahill, for plaintiff. James W. Reid, for defendant.

SULLIVAN, J. This is an application for a writ of review to review the action of the district judge of the Second judicial district of this state in the issuance of a writ of review to review the action of the probate court of Nez Perce county in a matter wherein said probate judge made an order directing a garnishee to pay into court or to the sheriff holding an execution certain money in the hands of such garnishee belonging to the execution debtor. It appears that said execution debtor claimed said money as exempt under the provisions of subdivision 7, § 4480, Rev. St., and acts amendatory thereof. The question of said exemption was tried some time after judgment had been entered in the action, which trial or proceeding was supplemental to execution. The judge held that said money was not exempt, and ordered the

garnishee to pay it over to the sheriff, to be applied in satisfaction of said execution. The writ of review issued by the judge of the district court was to review said action of the probate judge, and it is contended that the district judge had no jurisdiction to issue the same:

1. For the reason that there was no proceeding pending upon which the issuance of the writ could be predicated, as the writ was issued November 21, 1899, and the petition therefor not filed until December 6, 1899. There is nothing in the law requiring the petition or affidavit to be filed before the writ shall issue. The application was made to the judge. He examined it, issued the writ, and the application was filed thereafter. That was sufficient.

2. It is contended that the district judge had no jurisdiction to issue the writ of review to the probate court, as that court, in the matter complained of, was acting as a justice of the peace; hence was not a court of record. This contention is without merit, for the reason that section 4962, Rev. St., provides that a writ of review may issue to an inferior tribunal, board, or officer exercising judicial functions when such tribunal, board, or officer has exceeded its or his jurisdiction, and there is no plain, speedy, and adequate remedy. The issuance of such writ does not depend on the fact whether the tribunal is a court of record or not. While it is true the writ requires the record of the proceedings complained of to be certified up, yet the law does not confine the issuance of such writs to courts of record. Inferior tribunals, boards, and officers exercising judicial functions keep records of proceedings had before it or them, and the record that is kept in such cases is the record referred to in the provisions of the statute applicable to writs of review.

3. It is contended that there is a plain, speedy, and adequate remedy given by appeal from the order complained of, made by the probate judge after judgment in said matter supplemental to execution. Our statutes provide for an appeal from all orders made after judgment by the district court, but fail to make any provisions for appeal from orders made after judgment by the probate court in proceedings supplemental to execution. Therefore the only method of reviewing such orders is by writ of review. No doubt the district court might be given jurisdiction to hear appeals from justices of the peace from orders made after judgment, but the legislature has failed to authorize by statute appeals from such orders.

4. It is contended that the district judge has no jurisdiction to issue a writ of review; that the court only has that power. Section 3890, Rev. St., confers jurisdiction on a district judge to issue such writs.

5. It is contended that the writ issued by the judge is void on its face, for the reason that it is process, and does not run in the name of the state nor of the people of the

state. If the writ is defective in form, that does not affect the jurisdiction of the court to issue the writ. A writ defective in form may be reached by demurrer or motion to quash. Section 4968, Rev. St., provides that the writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer. We hold that the district judge had the authority to issue a writ of review in said matter, and his action therein is affirmed, and the writ of review issued by this court is quashed. Costs are awarded to defendant.

HUSTON, C. J., and QUARLES, J., concur.

FIRST NAT. BANK OF LEWISTON v. HAYS et al.

(Supreme Court of Idaho. May 19, 1900.)

UNLAWFUL DETAINER—EJECTMENT—IN- STRUCTIONS—JUDGMENT—LIEN— PARTIES AND PRIVIES.

1. One who takes title by conveyance from a judgment debtor takes it subject to the lien of the judgment, and especially is that so when the conveyance excepts from the covenants in the deed judgments of record.

2. M. being the common source from whom appellants and respondents procured title to certain land, a sheriff's deed was executed, the basis of which was a judgment against M., and which judgment was a lien on said land at the date of the conveyance to respondents. *Held*, that said respondents were bound by the recitals in said deed, and are privies to said judgment.

3. The court charged the jury that this was an action in ejectment, and that the recitals in the sheriff's deed did not bind respondents. The giving of said charges *held* to be prejudicial error.

(Syllabus by the Court.)

Appeal from district court, Nez Perce county; Edgar C. Steele, Judge.

Action by the First National Bank of Lewiston against W. J. Hays and others. Judgment for defendants, and plaintiff appeals. Reversed.

Isham N. Smith and Geo. W. Tannahill, for appellant. James W. Reid, for respondents.

SULLIVAN, J. This is an action of unlawful detainer, and was brought in the probate court of Nez Perce county. The answer of defendants set up title to the land in controversy, and the case was certified to the district court. The answer also set up an equitable defense, and, before the trial, motion was made by counsel for defendants (who are respondents here) for judgment on the pleadings. After hearing argument of respective counsel, the court denied said motion, and declined to try the equitable defense upon the ground that it did not constitute an equitable defense. Thereupon the action was tried by the court with a jury upon the issues thus made, and verdict and judgment were entered in favor of defendants. This

appeal is from the judgment and order denying a new trial.

The appeal was submitted on the brief of appellants, with permission to counsel for respondents to file brief within 10 days thereafter. No brief has been filed on behalf of respondents. The following facts, among others, appear from the record: The appellant claimed title deraigned as follows: On March 9, 1894, in the district court of the Second judicial district, in an action there pending wherein Mrs. R. Saux & Co. were plaintiffs and John H. Morrison and others were defendants, such proceedings were had that a judgment was rendered and entered against said defendants and in favor of said plaintiffs. Thereafter execution was issued thereon, and levied upon the land in dispute. Said land was sold thereunder, and certificate of sale thereof was issued to one W. E. Timberlake, which certificate was by him thereafter assigned to one Ralston Vollmer on July 18, 1896. Thereafter a sheriff's deed was issued under said certificate, and the lands in controversy were conveyed thereby to said Vollmer, and thereafter, by quitclaim deed, he conveyed said land to the appellant. The appellant also obtained a quitclaim deed from said Morrison conveying to it said land. The respondents claimed title through deed of conveyance from said Morrison dated the 12th day of August, 1895, which deed excepted from the covenants thereof "mortgages and judgments of record." As the judgment under which the grantor of the appellant procured title was entered March 9, 1894, said conveyance excepted said judgment from its covenants; and, as said judgment was of record in the records of the district court of Nez Perce county, it was a lien upon said land at the date said judgment debtor, Morrison, conveyed said land to the respondents, and he could not divest it of said lien by a conveyance thereof to respondents. Morrison was a party to the action in which said judgment was rendered, and his grantees got no greater interest in said land than he had at the date of his conveyance to them. They might have redeemed from the sheriff's sale within the time allowed by law for redemption, but, as they failed to do so, they lost the equity of redemption by lapse of time, and the title passed to the holder or owner of the sheriff's certificate of sale. The judgment became a lien on said land on the date of its entry, March 9, 1894; and the sheriff's deed by relation dated back to the date when the lien of said judgment attached to said land, and cut off all subsequent liens. As Morrison was defendant and judgment debtor in said suit, and as the respondents claim title under conveyance from him made subsequent to the entry of said judgment and subsequent to the time that said judgment became a lien upon said land, they are privies to said judgment, and are as conclusively bound thereby, so far as the title to said land is concerned, as Morrison himself. And,

besides, the deed under which respondents claim title from Morrison especially excepts said judgment from its covenants. A judgment debtor cannot divest his land of a judgment lien or lien made by sheriff's sale by transferring the title to another person.

We are at a loss to know why this case was tried upon the theory that it was an action in ejectment. The complaint does not contain the allegations required in a complaint in ejectment, and only prays for a restitution of the premises, and for damages for the detention thereof. The answer denied the material allegations of the complaint, and set up title in the respondents. It also set up an equitable defense by way of cross complaint. The court, however, declined to try the equitable defense upon the ground that the allegations did not constitute an equitable defense. The court charged the jury that this was an action in ejectment, and the party showing the better title must recover. The court also charged the jury that the sheriff's deed to Vollmer would not bind respondents, because they were not parties to said judgment, and for that reason the recitals in the sheriff's deed were insufficient as to them. Whatever title either the appellant or respondents had to said land was procured through Morrison. He was the common source of title claimed by both appellant and respondents. The respondents took their title from Morrison subject to said judgment lien, and were privies thereto, and were bound by said sheriff's deed and the recitals contained therein as firmly as was Morrison. The instructions referred to were erroneous, and it was prejudicial error to give them. As the record clearly shows that the appellant is the legal owner of said land, and entitled to the possession thereof, it would be useless to remand the case for a new trial. The judgment is reversed, and the cause remanded, with instructions to enter judgment in favor of the appellant for the restitution of said premises as prayed for, without damages and for costs of suit. Costs of appeal are awarded to appellant.

HUSTON, C. J., concurs. QUARLES, J., did not sit in the case, and took no part in the decision.

STATE v. TAYLOR.

(Supreme Court of Idaho. May 19, 1900.)

MURDER—EVIDENCE—REMARKS OF COURT.

1. Where, on the trial of a defendant upon a charge of murder, a witness testified that after the shooting, and when the defendant was some distance from the house where the shooting took place, "he [the defendant] took a shot at me [the witness]," in overruling an objection to the evidence the court remarked that "the object of the admission of that testimony is to show the character, disposition, and action of the defendant at that time, as being evilly disposed towards some one." *Held*, that both

the admission of the testimony and the remarks of the court were error.

2. The coroner, being upon the witness stand, was asked by the prosecution if he held an inquest over the deceased; and, the question being objected to by defendant, the court remarked, in sustaining the objection: "I sustain that. There was nothing mysterious about it. People knew who shot him. A coroner's inquest is only to find out how a person comes to his death. If shown otherwise, they do not hold one." *Held* reversible error.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; A. E. Mayhew, Judge.

Walter Taylor was convicted of manslaughter, and appeals. Reversed.

W. W. Woods, for appellant. S. H. Hays, Atty. Gen., for the State.

HUSTON, C. J. The defendant was convicted of manslaughter, and appeals from the judgment of conviction, and also from the order of the court denying the motion for a new trial.

Briefly stated, the facts in the case, as they appear from the record, are about as follows: The defendant, one Barnhart, and one Mabel Meade were engaged in some dispute or altercation upon the porch of the house occupied by the said Mabel Meade as a house of prostitution, in the town of Wardner. While this altercation was going on, the deceased came out of the house, onto the porch, and engaged in the controversy. Almost immediately upon the appearance of deceased, he and Barnhart engaged in what is termed by the witness a "scuffle." They clinched, and in their scuffle they passed from the porch into the hall of the house, and from the hall into the front room or parlor; and as they passed into the front room or parlor a shot was fired, and the deceased fell, expiring almost instantly. When deceased and Barnhart passed from the hall into the front room, they were clinched. The woman Mabel Meade testifies that when the shot was fired she had hold of Barnhart's arm, and that he and deceased were clinched. She did not see the defendant after the scuffle commenced between Barnhart and deceased, "until she saw him going down the alley after the shooting." The only other person in the room at the time of the shooting was the woman Susie Wilson, who testifies that she did not see the defendant at all, and that, had he been in the room, she must have seen him. The physician who examined the body of the deceased immediately or very soon after the shooting testifies as follows: "I could determine the point of entrance, on account of a powder stain or powder mark covering an area of, perhaps, two inches in diameter. The hair was singed right down to the scalp, showing that the gun was in close proximity to the body when the shot was fired. Q. Describe to the jury, in your opinion, how far the gun was from the head of Leroy. A. When he was shot, approximately, I should say anywhere from two to

six feet." No witness testified to seeing the defendant inside the house when the shooting took place. The witness Mabel Meade was permitted, over the objection of defendant, to testify that after the shooting, and while defendant was going from the house down an alley, he "took a shot at her." Defendant's counsel moved to strike out this testimony, which motion was denied by the court; the court saying, "The object of the admission of that testimony is to show the character, disposition, and action of the defendant at the time, as to being evilly disposed toward some one. That is the proposition." To all of which defendant excepted. We think the admission of this testimony was error. It was not admissible as a part of the *res gestæ*, and the reason given by the court for its admission is still more erroneous. In the trial of a criminal case, and more especially one in which the life of the defendant is involved, the trial court cannot be too careful in refraining from any act or expression which can possibly tend to prejudice the case of the defendant with the jury. 2 Thomp. Trials, § 2297; *People v. Buster*, 53 Cal. 612; *People v. Williams*, 17 Cal. 142.

On the trial, one Hugh France, the coroner, and the physician first called to see defendant after the shooting, testified as follows: "Q. Did you hold any coroner's jury over the death of Ed Leroy? A. I did not. Q. State to the jury why you did not. Mr. Evens (counsel for defendant): We object as immaterial, irrelevant, no part of the *res gestæ*. The Court: I sustain that. There was nothing mysterious about it. People knew who shot him. A coroner's inquest is only to find out how a person came to his death. If known otherwise, they do not have to hold one." To the above remarks of the court, defendant excepted. There can be no question but that the remarks of the court were not only improper, but were manifestly prejudicial to the defendant, and constitute reversible error. We cannot agree with the attorney general in his contention that this is not a proper matter to be brought here by bill of exceptions. It was error,—prejudicial error,—and was duly excepted to, and properly embodied in the bill of exceptions. The court had an opportunity to direct the jury not to regard it, but did not do so; and, even if he had, the error would not have been cured thereby. The witness France also testified that while defendant was under arrest, and shortly after the shooting, he (witness) heard defendant say that "he [defendant] fired the shot that killed Leroy [the deceased]." This is the only direct testimony connecting the defendant with the shooting. The only witnesses present in the room at the time the shot was fired, and who testified on the trial, to wit, Mabel Meade and Susie Wilson, state that the defendant was not in the room when the shot was fired. Inasmuch as the cause must be sent back for a new trial, we do not deem it necessary to

consider the question of the insufficiency of the evidence to support the verdict.

We have carefully examined the instructions given and refused, and we cannot say that any substantial error appears therein. While some of the instructions asked by the defendant, and refused by the court, state the law correctly, we think the subject-matter of them was contained in the instructions given by the court. The judgment of the district court is reversed, and a new trial ordered.

SULLIVAN, J., concurs. QUARLES, J., was absent at the hearing of this case, on account of sickness.

RICE et al. v. RIGLEY et al. (MOORE et al., Interveners).

(Supreme Court of Idaho. May 18, 1900.)

GRUB-STAKE CONTRACT—MINING CLAIMS—EVIDENCE—WEIGHT—RESULTING TRUST—SPECIFIC PERFORMANCE—COMPETENCY OF WITNESSES.

1. To establish a resulting trust in land, the evidence must be so clear and certain as to leave no well-founded doubt upon the subject.

2. In an ordinary equity suit, the allegations of the complaint may be established by a preponderance of the evidence, but to establish a trust in land, and to obtain a decree for specific performance, the contract sought to be enforced must be fully and clearly proved. A mere preponderance of evidence is not sufficient.

3. Under the provisions of subdivision 3, § 5957, Rev. St., in an action against an administrator to establish a resulting trust in land, the plaintiff in such action is disqualified from being a witness as to matters of fact occurring before the death of such deceased person. *Nasholds v. McDonell* (Idaho) 55 Pac. 804, overruled on that point.

4. The term "claim or demand," as used in said section 5957, embraces all rights of action for the establishment of a trust in land, as well as claims or demands for debts or damages against the estate of a deceased person.

(Syllabus by the Court.)

Appeal from district court, Idaho county; Edgar C. Steele, Judge.

Action by Jacob N. Rice and Perry Mallory against B. R. Rigley and others. John C. Moore and others intervene. Judgment for plaintiffs and defendants appeal. Reversed.

James E. Babb and W. N. Scales, for appellants. Albert Allen and Vic Bierbower, for respondents. Stoll & Macdonald, for interveners Gliddens. Ried & Worth, for intervenor John C. Moore.

SULLIVAN, J. This action was brought by the respondents Jacob N. Rice and Perry Mallory to enforce the specific performance of an alleged oral prospecting or grub-stake contract, and to compel a conveyance to them of an undivided one-half interest in and to the Big Buffalo, Merrimac, and Oro Fino mining claims, situated in Buffalo Hump or Robbins mining district, in Idaho county, which mining claims, it is alleged, were located by appellants and defendants B. R. Rigley and

C. F. Robbins in pursuance of said alleged oral grub-stake contract. After the commencement of the action, and before the trial, the defendant Robbins died, and one Dell Butterworth was appointed administrator of the estate of said deceased, and was substituted as a party defendant, and is an appellant here. The deceased, Robbins, during his lifetime, conveyed an interest in said mining claims to the defendant and appellant A. F. McKenna, and thereafter the defendants Dell Butterworth and Michael Green acquired an interest in said mining claims through said McKenna, and said defendants Butterworth and Mrs. Florence Young acquired interests in said mining claims through the defendant Rigley; and it is alleged that said interests so acquired by defendants Butterworth, McKenna, Green, and Young were acquired with full knowledge of the rights and claims of plaintiffs. The interveners (respondents) John C. Moore, Harry M. Glidden, and Margaret P. Glidden claim an interest in said mining claims, the former through the plaintiff Mallory, and the Gliddens through the plaintiff Rice. The interveners are respondents on this appeal.

The allegations of the complaint, so far as material on this appeal, are: That the respondent Mallory had, before the location of said mining claims, acquired knowledge of the whereabouts of the ledges of quartz on which said claims were located, and that such knowledge was of great value to one seeking to locate mining claims. That on or about the 30th day of July, 1898, the respondent Mallory informed his co-respondent Rice and appellant Rigley and said Robbins, now deceased, of said quartz ledges, and advised them that it would be (liable to be) a good enterprise to go and locate the same. That thereupon, on said 30th day of July, the respondents Mallory and Rice and defendants Rigley and Robbins entered into an agreement of co-partnership for the purpose of locating said ledges or veins. That by the terms of said agreement it was mutually agreed that said Mallory was to furnish a description of the locality of said veins or lodes so as to enable Rigley and Robbins to find and locate them, and the respondent Rice was to furnish the supplies or grub necessary to sustain Rigley and Robbins while going to and locating said veins and returning therefrom, and tools with which to do the necessary work; and that said Rigley and Robbins, in consideration of said information furnished by Mallory, and of the supplies, tools, and materials furnished by said Rice, agreed to proceed at once to the locality of said veins, and, if possible, to locate the same in the names of Mallory, Rice, Rigley, and Robbins for their joint benefit, share and share alike. That in pursuance of said agreement of co-partnership information and supplies were furnished, and said Rigley and Robbins located said mining claims, but located them in the names of said Rigley and Robbins only,

and denied any right, title, or interest of said Mallory and Rice therein. That thereafter Rigley and Robbins conveyed an undivided interest in said mining claims to McKenna, Butterworth, and Young, as above stated. Said McKenna conveyed an interest therein to Butterworth and Green, and it is alleged that said conveyances were given and received with full knowledge of the alleged rights of Rice and Mallory in and to said mining claims, and that said grantees are made parties for that reason. The material allegations of the complaint were put in issue by the answer. The Gliddens filed a complaint in intervention, alleging that said Rice had entered into a contract with them for a transfer of a share of his alleged interest in and to said mining claims, and prayed for an enforcement thereof. Rice and Mallory defaulted to said complaint in intervention. The appellants Rigley, Butterworth, McKenna, Green, and Young answered, and put in issue the allegations of the complaint in intervention. J. C. Moore also filed a complaint in intervention setting up an alleged agreement with said Rice whereby said Rice agreed to transfer to the intervenor Moore a certain share of the alleged interest of said Rice in and to said mining claims. Said Rice, Gliddens, and the defendants (appellants) answered Moore's complaint in intervention, and put the material allegations thereof in issue. The action was tried by the court without a jury upon the issues made, and judgment and decree were entered in favor of the plaintiffs; also in favor of the intervenors Mr. and Mrs. Gliddens and against the intervenor Moore. The defendants moved for a new trial, which motion was denied by the court. This appeal is from the judgment and order overruling the motion for a new trial.

This is an action for the specific enforcement of an alleged oral prospector's grubstake contract, and the following facts appear from the record: One J. E. Berryman had, about the year 1861, discovered a placer mine within 12 or 15 miles, as he believed, of the mountain known and designated as "Buffalo Hump," in what is now Idaho country. That since his discovery of said placer mine he had made six or seven trips into the Buffalo Hump region for the purpose of again finding said placer mine. In the latter part of June, 1898, while on another trip to the Buffalo Hump region to find said lost placer mine, he met the respondent Mallory and three others, to wit, Percival, Strong, and Cotter, at Craig's Mountain; and from near Denver, on Camas Prairie, they traveled together to Florence, and on to Meadow creek. Berryman stopped there in a cabin that he had erected in 1870 or 1871. Mallory and his party went on a few miles further, and camped, but returned to Berryman's camp in four or five days. Berryman was waiting for two men by the names of Montgomery and Fuller, who had promised to meet him there. While waiting for Mont-

gomery and Fuller, Berryman and the others prospected there a little. Finally, on the 3d day of July, 1898, Montgomery and Fuller arrived at Berryman's cabin, but were not ready to proceed on the intended trip in search of said lost placer mine. Berryman had told Mallory of the object of his trip in search of the lost placer mine, and Mallory expressed a desire to accompany him on said trip. Berryman informed him that he would be very glad to have him go, as in that region there was plenty of country and plenty of room. So, on the morning of July 5th, Berryman, Mallory, and said Percival, Strong, and Cotter started on the intended trip. Montgomery and Fuller, not then being ready to proceed, followed the Berryman party, and overtook them on that day. The party arrived at Wind river, which is about 15 miles from the town of Florence, on the way to the Buffalo Hump country, and did some prospecting there. Some, if not all, of the parties,—Mallory among them,—made partial locations of quartz claims there. Those partial locations were made on July 8th. The party broke camp at Wind river on the 9th of July, and on the 10th or 11th of July arrived at Buffalo Hump, and camped in the saddle of the Hump until the 13th day of July. In the meantime prospecting was done, and search for the lost placer mine was made. While camped at Buffalo Hump, they camped in the immediate vicinity of, if not on, the Big Buffalo ledge. That ledge was a very prominent one, and there were large quartz boulders all around their camp. No locations, however, were made on said ledge. On July 13th the party broke camp, and returned to Florence, and arrived there on the evening of the 14th of July, and camped near there, at Meadow creek. Berryman camped in the cabin above referred to, and Mallory and others near by. Berryman testified that while he was standing in the door of the old cabin the appellant Rigley drove up, and commenced to talk to him about the location of the country, and inquired if witness "knew of any place where there was likelihood of gold quartz mines," etc. Mr. Berryman informed him that the country in east of there was a likely country, and that he had been hunting a placer mine that he had seen many years before. Rigley camped there for the night, and in the evening Mr. Berryman described the Hump country to him, and told him about the placer claims he had once seen, and had just been hunting, and told him in a general way what portion of the country he thought they could be found in, and also informed him of the quartz they had seen on their trip, and that he believed said placer claims were within 10 or 15 miles of the Hump, down the hill south or southeast therefrom. Mallory was present, and took part in the conversation between Berryman and Rigley in the evening. This conversation lasted three or four hours, and was in regard to the trip Berry

man had just returned from, and of the country he had seen. Mr. Berryman testified as follows: "Mr. Rigley was asking questions about quartz, and we were telling him about the quartz Mallory and I had seen on the trip." The next morning after that conversation Mr. Berryman started for his home in the state of Washington. It appears that Mallory had a conversation with Rigley about that large vein of quartz that they had seen at Buffalo Hump, and that, after they moved to Sand creek, he showed him some of the specimens. He further testified: "I had a number of conversations with him before we made the contract. I told him of those big ledges, and the number of ledges, and this one in particular,"—the last-mentioned being the one on which said mining claims are located. After Berryman left them, Rigley, Mallory, and a man by name of Cotter removed their camp to Sand creek. There they met the defendant Robbins and a man by the name of Mitchell. In a day or two thereafter Robbins and Mitchell moved their camp to Meadow creek, and Rigley and Mallory also went there to look for placer ground, and to see where Robbins and Mitchell were camped. Rigley and Mallory located a placer claim there, and took Robbins and Mitchell in said location. They then prospected that location until about the 20th of July. It did not prove to be of any value, and they abandoned it. Rigley and Cotter returned to their camp at Sand creek, and left Mallory with Mitchell and Robbins on Meadow creek. Mallory next saw Rigley on July 22d, when the latter was on his way to Grangeville. Rigley returned from Grangeville about July 27th. In the meantime he had sold a span of horses for \$150, taking a check for \$100 and a promissory note for \$50. He thereafter got the check cashed. After his return he camped on Meadow creek, and, with Mallory, Robbins, and Mitchell, prospected a placer claim for a day or two, which they did not find profitable, and abandoned it. Mallory testified that they then broke up their partnership arrangements, and all started for Florence.

It appears that some conversation had been had between Rigley and Robbins in regard to going and looking for the placer ground that Berryman had told Rigley about. Mallory had talked to them about his going to Wind river, and doing the necessary work on the claims staked by him there, to complete the location thereof. They proceeded on their way to Florence, and camped near there on the 28th of July. Rigley testified that his intention was to go and look for placer ground, and, if he ran on anything else, he would stake it. On the 29th day of July Rigley went into Florence, and purchased \$6.20 worth of provisions, and took them to his camp, with the intention of completing the bill the next day to be used by himself and Robbins on their intended prospecting trip to

the Buffalo Hump country. On the morning of July 30th Rigley, Robbins, and Mallory went to Florence. When they arrived there, Mallory received a letter from his wife, requesting him to come home. He showed the letter to Robbins and Rigley, and told them he would have to go home. As to what was said in that conversation Mallory and Rigley do not agree. Mallory testified that he told them he would like to do something with the two ledges that he had staked on Wind river, and the one he had seen at their camp in the saddle of the Hump, and, as he would have to go home, wanted to know what kind of an arrangement he could make with them to go over there and "look after those ledges." Rigley's testimony is to the effect that Mallory wanted to know what arrangement he could make with them to do the necessary location work on the Wind river claims, as he had to go home. They told him they would do the work for him, and that, if he made anything out of the claims, and wanted to give them anything, all right; and, if they did not make anything out of them, it was all right any way. Rigley then requested Robbins to complete the grub bill, and that he did so by adding to what Rigley had purchased the day before. After the bill was completed, and the amount of the bill ascertained, Rigley was about to take the amount out of his pocket, to hand to Robbins, to make the purchase, when Mallory said: "No, no; not much; you don't do that. I have given Jake Rice a quarter interest in these two claims to pay for grub and tools, and, if you boys do the work, that is enough. He gets a quarter interest for the grub and tools, and you do the work, and that is all I ask of you." Mallory thereafter went to see Rice, and returned, and said it was all right; and a son of Mr. Rice purchased provisions amounting in value to \$9.20. Rigley testified as follows: "During these conversations when getting this grub ready to start out there to do the work on Mallory's claims on Wind river, nothing at all was said by any person about our going on to do any work under any arrangement with Rice or Mallory in the way of locating claims at Buffalo Hump." All of the direct evidence contained in the record in regard to the terms of said contract is from Mallory and Rigley. Mallory testified that the grub was furnished for the purpose of completing the locations on Wind river and the location of the ledge at the Hump, while that of Rigley is to the effect that it was furnished as the consideration for the work to be done, and which was thereafter done, by Rigley and Robbins on the Wind river claims. Mallory accompanied Rigley and Robbins to the Wind river claims, and remained with them one day, and thereafter Rigley and Robbins did the required work on said claims, and delivered the location notices to the son of Mr. Rice. They did not claim any interest in said locations for doing the work. Rice had no conversation with Rigley

or Robbins in regard to said agreement or arrangement. The evidence on the part of Mr. Rigley shows that Mallory was intending to go to Wind river, and complete the location of some quartz claims there; that when they went into Florence on the morning of the 30th day of July, and up to the time he received the letter from his wife, that was his expressed intention, and it was also the intention and purpose of Rigley and Robbins to go prospecting into the Buffalo Hump country, ostensibly for the purpose of searching for the placer ground of which Berryman had told them, and for anything they might find; that Mallory was quite anxious to complete said locations by doing the 160 cubic feet of work thereon required by law. From the testimony of Mallory it is evident that up to the time of the receipt of the letter from his wife no grub-stake contract had been suggested or entered into. Mallory accompanied Robbins and Rigley to the Wind river claims, and remained there one day, and after he left for home Robbins and Rigley did the work on the Wind river claims, and delivered the location notices to a son of Mr. Rice. They did not locate themselves in said claims, or claim any interest therein for doing said work. The record shows that when the Berryman party, of which Mallory was one, discovered any ledge on said trip that they thought of sufficient value, they located it, as on Wind river. They camped on or very near the Big Buffalo ledge for two or three days, with large quartz boulders all around their camp, and evidently neither of them thought said ledge worth locating. The record shows that Mallory did not consider said ledge of any value. R. J. McLean, apparently a disinterested witness, testified that he called Mallory's attention to the ledge on which the mines in dispute were subsequently located, and had a talk with Mallory about it. He testified: "I had some talk with Mr. Mallory about it [said ledge]. He came to our camp one night, and I says, 'There is a big ledge down there, if you want to locate it,—a quartz ledge.' He said that it was 'bull quartz,' and there wouldn't be a dollar in 160 acres of it." If that conversation did occur, it would show Mallory's opinion of said ledge, and would rebut the idea running through Mallory's testimony that he was constantly talking about said ledge. His testimony shows that he took a piece of quartz from said ledge, and carried it to Florence with him, but that he did not think enough of it to have it assayed or tested, and did not show it to Rigley until they moved to Sand creek, if at all. The evidence shows that up to the 30th day of July he was much more anxious about the claims that he had discovered on Wind river than about the big ledge at the Hump. He was going to complete those locations, and went to Florence on the 30th of July for the purpose of getting grub to sustain him while doing the necessary work thereon. Robbins and Rigley went

to Florence on that day to complete the purchase of a bill of grub (a part of which they had purchased the day before) that they contemplated taking with them for use on a prospecting trip to the Buffalo Hump to search for Berryman's lost placer mine, and whatever else they might find. Mallory, on his arrival in Florence, received a letter from his wife, requesting him to come home. The record fails to show, up to that time, that there was any intention on the part of Robbins and Rigley to go prospecting with Mallory on his and their joint account. It appears that Robbins, Mallory, Rigley, and one Mitchell together had been prospecting some placer ground just prior to July 28, 1898, and Mallory testified that they prospected a little the morning of the 28th, "and that they then broke up their partnership arrangements, and all started for Florence that evening." The trial court found that Mallory remained with Rigley and Robbins while they did said work, but the testimony of both Mallory and Rigley is to the effect that he remained there one day, and that they did a little prospecting, and the next day he left for home, and after that Rigley and Robbins did the location work on said claims. As to the terms and conditions of said contract, there is a direct conflict in the testimony of Mallory and Rigley, they being the only persons present when the contract was made, except Robbins, now deceased. There is some evidence in the record that tends to corroborate Mallory and some other that tends to corroborate Rigley. The affidavit made by Mallory in which he swears that Rice had no interest in the alleged grub-stake contract, his statements to numerous witnesses to the same effect, and other matters revealed by the record indicate that the utmost confidence cannot safely be placed in his veracity and truthfulness. The evidence, viewed as a whole, indicates that both respondents and appellants have done things and acts that look suspicious, and which show that they have shuffled to gain a point or avoid a responsibility in this matter. But, to give the most favorable view possible to all of the evidence for the respondents, the terms of the alleged contract are left in doubt and uncertainty, and for that reason specific performance cannot be decreed. Therefore the first error assigned by the appellants, which goes to the sufficiency of the evidence to support the facts found by the court, must be sustained.

As to the law of the case, counsel for appellants contend that, as respondents are seeking to hold the appellants as trustees of an undivided one-half of said mining claims, and to enforce the specific performance of an alleged prospector's or grub-stake contract, respondents cannot have a decree upon a bare preponderance of the evidence, and that they are not entitled to a decree unless their case has been clearly and satisfactorily proven, and all doubts cleared up; while counsel for respondents contend that in this

class of cases the rule is well established that a mere preponderance of the evidence is all that is required. The trial court held that a preponderance of evidence was all that was necessary to establish plaintiffs' case. Counsel for appellants cite and quote from a large number of authorities in support of their contention. Counsel for respondents contend that nearly every case cited by appellants was an action to reform a written deed or instrument, or to have a trust declared contrary to the specific terms of a written instrument, and are not applicable to the case at bar. Counsel, however, concede that the cases of *Proudfoot v. Wightman*, 78 Ill. 556, and *Dewey v. Land Co.* (Wis.) 73 N. W. 566, require explanation, and those cases are explained by counsel by suggesting that the decisions in those cases are "simply the opinion of the court as to what the rule ought to be." We think, however, the correct rule is stated in those cases. After a most thorough examination of this question, and of the authorities cited, we conclude that the rule is well settled in a case like the one at bar that something more than a bare preponderance of the evidence is required to entitle the plaintiff to a decree declaring a resulting trust and for specific performance. In the first case above cited the court says: "In an ordinary chancery case a complainant is required to establish the allegations of the bill by a preponderance of the evidence, but in a case of this character * * * something more than a bare preponderance should be required." In *Dewey v. Land Co.*, supra (which was a case to enforce specific performance of an oral agreement to convey land), it is said: "Specific performance is not a matter of strict right, but rests in the sound discretion of the court, and the contract sought to be enforced must be fully and clearly proved in all its parts. A mere preponderance of evidence is not sufficient." It is held in *Printup v. Mitchell*, 17 Ga. 567, that a parol contract for land, like the reformation of a deed by parol proof, should be made out so clearly, strongly, and satisfactorily as to leave no reasonable doubt as to the agreement. In *Johnson v. Quarles*, 46 Mo. 423, the plaintiff attempted to establish a resulting trust in land, and the court used the following language as to the evidence introduced, to wit: "While admitting such evidence for the purpose of creating this resulting trust, the chancellor has always required that it be clear and unequivocal." "The insecurity of titles, and the temptation to perjury, among the chief reasons demanding that contracts affecting lands should be made in writing, also imperatively require that trusts arising by operation of law should not be declared upon any doubtful evidence, or ever upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon." See, also, *Ringo v. Richardson*, 53 Mo. 385; *Barbour v. Barbour*, 51 N. J. Eq. 271, 29 Atl.

148; *Association v. Brewster*, 51 Tex. 263; 2 Pom. Eq. Jur. § 1040. As to the evidence necessary to establish a resulting trust in land, the court, in *Reynolds v. Caldwell*, 80 Ala. 232, said: "The rule is that a trust of this nature, sought to be ingrafted upon lands by parol evidence, and such as result by operation of law must be supported by testimony not only entirely satisfactory, but clear and undoubted." In the case at bar plaintiffs are attempting to ingraft a resulting trust by oral evidence upon mining ground, the title to which, as against every one except the government of the United States, is admitted to be in the defendants, who are appellants here; and to contend that the rule herein laid down only applies to written instruments, and does not apply to titles to mining land acquired by location under the laws of the state and the United States, is attempting to point out a distinction in a matter where in fact no difference exists. The appellants' title rests on discovery and proper location, filing for record a proper notice of location, and complying with the law therein. The title results from a compliance with the law. The title is in appellants. Respondents seek to ingraft thereon a resulting trust, whereby they may be decreed to be the owners of an undivided half interest of, in, and to said three mining claims, and pray a specific performance of an alleged "grub-stake and information contract," for the alleged contract sued on is not alone a "grub-stake contract." As applied to respondent Rice, it is, but, as applied to Mallory, it is not, for it is alleged in the complaint that Mallory furnished "information" as his part of the consideration for said contract, and Rice furnished "grub" for his. If there is any authority that holds that a greater weight of evidence is necessary to ingraft a resulting trust on land acquired by location than on land acquired by deed, we have been unable to find it, and counsel for respondents have not called our attention to it. In either case the evidence must be satisfactory, clear, and convincing. It must be so clear and certain as to leave no well-founded doubt in the mind of the court. The evidence of the respondents, when tested by that rule, will not entitle them to a decree. The admission of the testimony of Mallory and Rice as to the conversation with Robbins at the time of making said alleged contract and prior to his death is assigned as error. Counsel for appellants contend, under the provisions of subdivision 3, § 5957, Rev. St., that Mallory and Rice were not competent witnesses to testify to any matter of fact occurring before the death of said Robbins. Said section, *inter alia*, provides as follows: "The following persons cannot be witnesses: * * * (3) Parties or assignors of parties to an action or proceeding or persons in whose behalf an action or proceeding is prosecuted, against an executor or an administrator, upon a claim or demand

against the estate of a deceased person, as to any matter of fact occurring before the death of such deceased person." Counsel for appellants contend that this suit is founded on a claim or demand against the estate of Robbins, deceased, while counsel for respondents contend that it is not, but that it is an action to enforce a trust against the estate of said deceased, and is not a claim or demand against said estate. Section 1880, Code Civ. Proc. Cal., is the same as section 5957, Rev. St., above cited, and under the provisions of said section the supreme court of California has held in *Myers v. Reinstein*, 67 Cal. 89, 7 Pac. 192, that an action to establish and enforce a trust against the estate of a deceased person is not a "claim or demand" against such estate. *Tyler v. Mayre* (Cal.) 27 Pac. 160, sustains *Myers v. Reinstein*. But on rehearing (30 Pac. 197) the opinion consists of but eight lines, and states that the court is satisfied with the conclusion reached in 27 Pac. 160, but in the syllabus it is stated that *Tyler v. Mayre* (Cal.) 27 Pac. 160, is overruled. In *Moore v. Schofield* (Cal.) 31 Pac. 532, which was an action to enforce a trust, the supreme court apparently discredited the rule laid down in *Myers v. Reinstein*, supra. The court said, "It would, indeed, seem to be a claim or demand against the estate." However, in *Poulson v. Stanley* (Cal.) 55 Pac. 605, the case of *Myers v. Reinstein* is cited with approval. In that case the court says: "In *Myers v. Reinstein*, 67 Cal. 89, 7 Pac. 192, it was held that this provision of the statute did not render the plaintiff incompetent in an action to establish a resulting trust in certain property held by an estate. The court therefore did not err in permitting the witness to give testimony." In that case *Moore v. Schofield*, supra, is not referred to. If the supreme court of California intended in *Moore v. Schofield* to discredit *Myers v. Reinstein*, it evidently removes that discredit in *Poulson v. Stanley*, supra. The supreme court of Utah, in *Wood v. Fox* and *Whitney v. Fox*, 32 Pac. 49, under a statute the same as the above cited, held that an action to establish a resulting trust against the estate of a deceased person was a "claim or demand" against such estate,—which case was carried to the supreme court of the United States, and is reported in 17 Sup. 713, 41 L. Ed. 1145. In that case the plaintiff sought a decree declaring him to be the equitable owner of one-eighth of the Mansion House, situated in Detroit, Mich., and entitled to rents, issues, and profits thereof, as well as a part of 3,000 shares of mining stock and dividends thereon. The supreme court of the United States said, speaking through Justice Harlan: "We cannot doubt that the claims as asserted in this suit by *Whitney* are, within the meaning of the Utah statute, claims or demands against the estate of a deceased person. * * *

The supreme court of Utah properly rejected the suggestion that such claim or demand

was not against the estate of Lawrence. To say that the only issue here was whether the real property and stock described in the petition constituted a part of Lawrence's estate, and that no claim or demand was asserted against the estate, would be to defeat what, it seems to us, was the manifest object of the statute. While, as said by this court in *Coulam v. Doull*, 133 U. S. 216, 10 Sup. Ct. 253, 33 L. Ed. 596, it is the ordinary rule to accept the interpretation given to a statute by the courts of the country by which it was originally adopted, the rule is not an absolute one, to be followed under all circumstances. We concur in the interpretation placed upon the Utah statute by the supreme court of Utah as one required by the obvious meaning of its provisions, and we do not feel obliged by the above rule to reject that interpretation because apparently the highest court of the state from which the statute was taken has in a single decision taken a different view." In that decision the supreme court of the United States declares that the interpretation placed upon said statute by the supreme court of Utah is the one required by the obvious meaning of its provisions, and refuses to follow the narrow, restricted, and technical construction placed upon said section by the supreme court of California. In *Myers v. Reinstein* the decision proceeds upon the theory that the letter of the statute must control, and leaves out of sight that beneficent rule laid down in the statutes of California—the rule of the common law that statutes in derogation thereof are to be strictly construed—which it is held has no application to the statutes of that state, and that their provisions, and all proceedings under them, are to be liberally construed with a view to effect their objects and promote justice. And to hold, under the provisions of said section 5957, Rev. St., that this action is not a claim or demand against the estate of said Robbins, deceased, and permit respondents to testify as to a contract alleged to have been made with deceased during his lifetime, would defeat the manifest object and purpose of said statute. Under the law the legal title to an undivided interest in said mining claims was in the deceased at the time of his death, and was a part of his estate; and the respondents now claim to be the equitable owners of an interest therein by reason of said alleged oral contract. Robbins, being dead, cannot testify as to the alleged contract, and said statute is intended to and does disqualify the respondents Rice and Mallory as witnesses to said contract. In the case of *Nasholds v. McDonell*, 55 Pac. 894, this court held that the provisions of said section 5957 did not apply to an action brought to establish a trust against the estate of a deceased person. On that point the only case cited in briefs of counsel was the case of *Myers v. Reinstein*, supra, and, as that point was not seriously controverted by the counsel for appellant,

this court considered that case decisive on that point under the ordinary rule to accept the interpretation given to a statute by the courts of the state from which it was adopted. But upon a careful examination of that question we find that said statute became a law in this then territory June 1, 1875,—long before the decision of the case of *Myers v. Reinstein*, and some months prior to the decision in *Blood v. Fairbanks*, 50 Cal. 420. Hence the California decisions do not come within the rule above stated, and are only precedents, and have no more binding force upon this court than the decisions of the supreme court of Utah and that of the supreme court of the United States, both of which are in accord with the spirit and intent of the provisions of said statute. In *Moore v. Schofield*, 31 Pac. 532, the supreme court of California said that the decisions under said statute were upon the principle that "the letter of the statute must control." Under our system the spirit must control, and the statutes must be liberally construed with a view to effect their objects and promote justice. The object of said statute was to prevent the decimation and confiscation of a deceased person's estate upon the testimony of parties or assignors of parties to an action or proceeding, or persons in whose behalf an action or proceeding is prosecuted against an executor or administrator upon a claim or demand against the estate of a deceased person as to matters of fact occurring before the death of such person; and to hold that a claim for a resulting trust does not come within the intent of said statute would be to give that term a narrow and restricted meaning, much narrower than was given to it by Lord Coke and other eminent jurists since his time. Lord Coke said that the word "demand" is the largest word known to the law, save only the word "claim," and "a release of all demands discharges all rights of action." *Gray v. Palmer*, 9 Cal. 636. Chief Justice Nelson said in *Re Denny and President, etc., of Manhattan Co.*, 2 Hill, 223: "The term 'demand' is of much broader import than 'debt,' and would embrace rights of action belonging to the debtor, beyond those which could appropriately be called debts." Applying to the words "claim or demand," as used in said section, the definition or meaning of said term as given to them by Lord Coke and Chief Justice Nelson, and the plaintiffs in this case have no right of action if they have no claim or demand against the estate of the deceased, for "claim" embraces rights of action, and, as said by Lord Coke, a release of all demands discharges all rights of action. Therefore, if plaintiffs had no claim or demand against the estate of said deceased, they cannot evade the intent and purpose of said statute by attempting to ingraft a trust thereon whereby they can secure a large share of said mining claims, the legal title to which is in the name of said deceased.

The court erred in permitting said Mallory and Rice to testify in regard to conversations that they had with said Robbins, deceased, and that part of the opinion in *Nasholds v. McDonell*, supra, which holds that the provisions of said subdivision 3, § 5957, does not apply to an action brought to establish a trust is hereby overruled. However, in that case there was competent testimony to establish the trust alleged. As the record shows that no one was present at the time said alleged contract was made except appellant Rigley and Robbins, now deceased, and Mallory, and that the plaintiffs have produced all of the evidence that they could produce in support of the allegations of their complaint, we conclude that no benefit can result to the respondents by a retrial of the case, and therefore reverse the judgment and decree of the court below, and remand the case, with instructions to the trial court to enter judgment in favor of the appellants and against the respondents in accordance with the views expressed herein, dismissing said action. Costs of this appeal are awarded to the appellants.

HUSTON, C. J., concurs. QUARLES, J., did not sit at the hearing of this case, and took no part in the decision thereof.

(22 Utah 73)

SKEEN et al. v. MARRIOTT.

(Supreme Court of Utah. April 21, 1900.)

TRUST—HOW DECLARED—IN PERSONAL PROPERTY—IN REAL PROPERTY—EXPRESS TRUST—INTENT—EXECUTED AND EXECUTORY TRUSTS—TRUST AND DECLARATION—HOW REGARDED IN EQUITY—WHO MAY DECLARE A TRUST—TRUST RESTING IN PAROL—WHEN NOT REVOCABLE—VOLUNTARY CONVEYANCE—AGREEMENT TO RECONVEY—OBLIGATION—ESTOPPEL—DELIVERY OF PERSONALTY—VESTING OF TITLE.

1. A trust in personal property may be declared, admitted, or created by parol declarations, and may be proved by parol evidence, and as to such trusts the statute of frauds does not apply; but a trust relating to real property must be declared and proved by some writing executed by the parties creating the trust.

2. Where an express trust is sought to be established by an instrument in writing, the intention to create the trust must appear upon the face of the instrument.

3. When the legal estate or equitable title passes in the creation of a trust, the trust is executed; but when the trust is to be perfected in the future, by settlement or conveyance, it is executory, and in the latter case the same rules govern both trusts of realty and trusts of personalty.

4. The trust being regarded by a court of equity as the property, and the declaration of trust as the disposition of property, it is essential that the language employed in the creation of a trust should be such as to leave no room for reasonable controversy as to the intention of the donor.

5. In general every person competent to make a will, enter into a contract, or hold the legal title to property has the power to create a trust, even in himself, and dispose of his property in that way; but to fasten a trust upon personalty by parol the language used must

amount to a clear and explicit declaration of trust, for, if the terms and object of such a trust be left in doubt or confusion, a court cannot enforce it.

6. When once a trust has been effectually created by parol, it cannot afterwards be altered or revoked by the person who created it.

7. Where a conveyance is made in contemplation of a criminal prosecution and to avoid seizure, no existing rights of third parties being disturbed thereby, and there is a verbal understanding between the parties that the property would be reconveyed in the future, the moral obligation to reconvey is the same as if the agreement had been in writing, and a reconveyance will effectually divest such grantee of all title to the property, and estop him from thereafter claiming under the original conveyance.

8. The law is not so inequitable and unjust as to prevent a person from fulfilling his obligations of good faith and honor.

9. Where circumstances are such that reconveyance of property would revest the title in the original grantor, and the property is sold by the grantor, and conveyed by the grantee to a third person, without objection, the delivery of a note, which represented a portion of the purchase price, to the original grantor, vested the title to it in him, unless valid conditions were imposed at the time of delivery.

10. Where the evidence offered to sustain a trust resting on parol is indefinite, uncertain, and equivocal, and consists substantially of nothing more than statements of admissions and declarations of defendant's intention to provide for his first wife's children at some time in the future or at his death, and proof of the admissions and declarations depends entirely upon the uncertain recollection of the witnesses as to the exact language used by the alleged trustee at a time long anterior to the giving of the testimony, the court will receive the evidence with great caution, and such evidence alone must be held to be insufficient to establish an express trust.¹

(Syllabus by the Court.)

Appeal from district court, Second district; C. H. Hart, Judge.

Action by Martha I. Skeen and others against John Marriott. Judgment for defendant, and plaintiffs appeal. Affirmed.

This action was brought to have declared and established an express trust in favor of plaintiffs Martha I. Skeen, Rebecca Hodson, Benjamin Marriott, and John Marriott, Jr., in a certain alleged fund of \$4,000, which, it is claimed, was delivered to defendant, John Marriott, by the plaintiff Trezer Southwick. So far as is material to the consideration of this case, the complaint, which was filed August 24, 1898, charges, in substance, that on February 15, 1888, one Trezer Southwick delivered to the defendant \$4,000, to be held by him in trust for his own use and benefit during his lifetime, and for the use and benefit of the four plaintiffs first above mentioned at his death; that the defendant has wholly disregarded his trust, and invested a part of the fund in sheep, and expended the remainder thereof for his use and benefit, and has sold all of the sheep, except about 1,292 head, which are still in his possession; that he disavows and repudiates the trust, and claims the sheep

as his individual property; that the plaintiffs did not know of the trust in their favor until March, 1898; that the defendant is old and infirm, and afflicted with weakness of mind and loss of memory; and that he is unduly influenced by various parties, and is incompetent to administer the trust. The prayer is for the establishment of the trust, for the appointment of a receiver, and for other relief. The answer consists of a general denial of all the allegations of the complaint.

From the evidence it appears that the defendant was a polygamist, having had four wives, only three of whom were living at the time, it is claimed, the alleged trust was created, his first wife having died prior to that time, and prior to the year 1886. The first wife's name was Susan, the second Elizabeth, the third Trezer, and the fourth Margaret. All had children, the first wife having left six surviving her. The four plaintiffs first above mentioned are children of the first, or legal, wife. The plaintiff Trezer Southwick was the defendant's third wife. In 1886, the defendant, expecting and fearing arrest and prosecution for unlawful cohabitation, conveyed his property to his wives then living, but none of it to the children of his first wife. His estate was worth about \$16,000. To Trezer Southwick he conveyed a corner lot on Twenty-Third street and Washington avenue, in Ogden city, on which lot she resided with her children, and 21 acres of land on Salt creek, and gave her 100 head of sheep. Shortly thereafter, in January, 1887, he was prosecuted, and sentenced to six months in the penitentiary for unlawful cohabitation. It appears that he so disposed of his property without consideration, but with the understanding that, when he returned from the penitentiary, it was to be transferred back to him; and some of it was returned to him after he had served his term in prison. The plaintiff Trezer Southwick, respecting the conveyance to her, testified as follows: "I did not know anything about the deed till it was brought and put in my hands. He says, 'This deed is to protect you and your children, and when I come back again I expect all these deeds to be turned over to me, and this property to be deeded back to me,'—that is, when he came back again from the penitentiary. He simply came unexpected, and handed me the deed. He was expecting to go to the penitentiary pretty soon over his marriage relations. I never asked him for the deed. I offered him the deed back time and time again, and would have deeded every bit of property over to him, but he didn't want to take it." The defendant, on this point, testified likewise. Asked why he turned over to his wives all his property, he said: "So I would have something when I came out. When I came out I received the means the same as I gave it. I told them all that. I told them, after I came out of

¹ Chambers v. Emery, 45 Pac. 192, 13 Utah, 374.

the penitentiary I wanted those notes and these deeds all to be given back to me. My first wife was dead when I went to the penitentiary, and I didn't turn anything over to her children." And again he said: "I provided for the other three wives and their families by giving them a certain proportion of my property, which they have had ever since. I didn't make any provision for the first wife's children at that time because I didn't think it was my duty to do so until my death. I didn't talk at that time of giving them the place on the corner of Twenty-Third street. I didn't talk about giving them 25 feet of it, that I remember of. I might have mentioned it, of course. The deeds I made to my wives I expected them to deed back to me after I came from the penitentiary. I didn't want the government to come down on my property if I went to the penitentiary. I wanted something left." After the defendant had returned from the penitentiary, the corner on Twenty-Third street and Washington avenue was sold, and the \$4,000 out of which this controversy arose was a portion of the sum received therefor. Respecting that sale, E. T. Woolley, a witness for the plaintiffs, testified in part as follows: "I commenced negotiations with John Marriott to buy that corner, because I understood that he was the owner. I made the bargain with John Marriott. Agreed to pay \$80 per front foot. He made the terms with me. I went down to Marriott's one day, when Ellsworth was there talking to him about it. I didn't understand at the time that the title was standing on the records in the name of Trezer Southwick. In closing the deal I met Trezer. I was representing the Co-op. Wagon & Machine Company at the time. I knew I would have to get the title from Trezer Southwick, and told John Marriott so. I made a visit to her house, and met her to see if she was perfectly agreeable to the deal, and to see whether she would sign the deeds, and all that sort of thing. She said she would. That she wanted to reserve herself a home from the property. She signed the deed before I gave her this check of \$2,400. I made arrangements for the company to retain the \$4,000 for a year with John Marriott. I do not recollect that any interest on that note was paid to Trezer Southwick. Mr. Marriott desired the note payable to him, but I said I thought it would be better to make it out to her, inasmuch as the property stood in her name, and then she could indorse it over to him. Mr. Marriott called for the first collection, and I requested him to bring the note." Charles Ellsworth, a witness for the defendant, and who, at his request, it appears, informed plaintiff Trezer Southwick that the defendant was thinking of selling the place, among other things testified: "She told him that she had raised a family of children there, and felt like it was her home, and she didn't want to give it up

unless she was going to get another, and he promised her he would buy another place out of the proceeds of that. She said she was willing to sell on those conditions. She got a home on Twenty-Second street out of the proceeds of that sale." It appears the property was sold for \$6,600, of which \$2,600 was paid in cash, and the balance, by agreement with defendant, was secured by note payable in one year. Respecting the disposition of the proceeds of sale, the plaintiff Trezer Southwick testified: "I knew Mr. Marriott let Mr. Woolley have some money. The other money was to buy me a home. Q. Was \$2,600 turned over to you? A. No. Mr. Marriott had some of it. I believe he bought a wagon and some machinery out of it. He turned over to me just what bought my home, \$2,100. Then I went to my new home in the fall." The note was executed to Trezer Southwick, dated February 15, 1888, was afterwards indorsed by her, and, it seems, the amount thereof paid to the defendant. The last payment on the note, it appears, was made to the defendant on April 1, 1889. Respecting what occurred between herself and the defendant as to the \$4,000 for which the note had been given, the witness Trezer Southwick testified: "He said, 'I want you to give me four thousand dollars.' Q. Why didn't you take and give it to somebody else to keep for the children? A. Because I thought the father was the right one to have it. Q. Up to that time you didn't demand of him the entire sixty-six hundred in cash? A. No, sir. Q. You never did? A. No, sir. Q. You didn't instruct Mr. Woolley that when sixty-six hundred dollars was paid to pay it all into your hands? A. Never said anything to Mr. Woolley about it. Q. You were willing that Mr. Marriott should claim it? A. Yes, sir." And on the question of the trust the witness also said: "If you will allow me, I will explain it all. Mr. Marriott said to me, after I had sold my place, 'I want you to give me \$4,000 of that money for my first wife's children.' I said, 'Now, which of these children do you mean?' He said, 'Mrs. Susy has had her share,' and, says he, 'I want this money for the other four children.' He asked me, 'Can you give me that money for those children?' and I did so, thinking that he would keep that money for those children,—he would reserve it. That is the very word he used, 'I will reserve it for my four children.'" The witness further stated, in substance, that the defendant said to her he would keep that money and reserve it for his first wife's children at his death, but, if he could make anything out of it, he would do so; that he named the four children plaintiffs herein as those who were to have the money, and excluded the other two children of his first wife, because they had already had their share; that she had nothing to do with naming the beneficiaries of the trust; that she left the matter of the provision for

those children entirely to him, believing that he would do what was right; and that she was willing to protect them. The plaintiff Benjamin Marriott, respecting a conversation with the defendant in 1888, testified as follows: "Mrs. Skeen, my sister, and myself—Martha I. Skeen and myself—concluded to go to Marriott settlement to see my father, to see if he had made provision for his first family, as we had already heard that he had done by his others. She approached the subject, and was asking him if he had made any provision, and he said he had not. She asked him if he intended to. He said that he did, and his intention had always been to do so. We insisted that he should set the time when he would provide for his children. Q. She insisted, or he? A. We insisted that he should set a time when he would make provisions for his first family of children, and he said he would within a month, somewhere abouts. She did most of the talking; and she had some of the conversation with him out at the yard, I think, I did not hear. That is the answer that he gave us at that time." The same witness further testified: "I had another conversation with father in 1897, at Moroni Marriott's, in Marriott settlement. Moroni Marriott was present at the time, and did the talking. Moroni asked if he could not—if he did not think it was right to—provide for his first wife's family, as he had already done by the others; and he said yes, he thought it was right, and he intended to. * * * In that conversation he says: 'Well, there is something I would like to tell you, boys,' he says. 'I have already told the women folks, and thought of telling you a great many times,' he says. 'That is this: This property that I hold in my sheep belongs to my first family of boys.' I said, 'Father, do you mean your first family of boys only?' He said, 'No, sir; I mean my first family of boys and girls too.' Had another conversation with him at Ellsworth's, in Warrent precinct, in 1897. I just asked father if he had fixed and arranged for his first family, and he said he would, but he said he hadn't, but would soon do it. We—Moroni Marriott and myself—went down on purpose to see if we could fix this. He said he hadn't; that it was his intention to fix it; he would do it right away. Moroni was persuading father that it was right, and he there agreed again that he would fix it."

Interrogatories and answers appear in the testimony given by the defendant, as follows: "Q. When you got this \$4,000, or this note for \$4,000, from Mr. Woolley, do you remember whether you said anything about keeping it for your first wife's children? A. No, sir. It was mine. I could do as I liked with it. Nobody to say I shouldn't. Of course, Trezer said it was hers. I don't know who told her that. It was not me. Q. When did it first come to your ears that

it was claimed that Trezer had turned this property over to you, and you had to give it to your first wife's children—trust? A. I guess about four years, if I am not mistaken." There is some evidence to the effect that on numerous occasions the defendant said the four children mentioned should have the property in question at his death, and that he would fix it so they would get it. It appears that nothing was said to the alleged beneficiaries about the trust until March, 1898. When the cause was tried the defendant was 82 years of age, and feeble, and a short time thereafter he died. Thereupon Margaret Marriott, the administratrix of his estate, was substituted as defendant. At the trial the court held that the evidence failed to establish the existence of a trust, and dismissed the action. Thereafter, a motion for a new trial having been overruled, this appeal was prosecuted.

George Halverson and W. L. Maginnis, for appellants. Richards & Allison, for respondent.

A statement of the case having been made as above, BARTCH, C. J., delivered the opinion of the court.

It is obvious that the principle and decisive question presented on this appeal is whether an express trust was created by the transactions disclosed by the evidence, for, if the plaintiffs are at all entitled to recover in this action, it must be because of such a trust. If a trust was created in this instance, it must rest on parol, for there is no writing on which it can be based. There is no doubt, however, that a trust in personal property may be declared, admitted, or created by parol declarations, and may be proved by parol evidence. Pom. Eq. Jur. § 1008. The statute of frauds does not apply to trusts of personalty created by word of mouth, although this is otherwise as to trusts of realty. Trusts are enforced in equity, and are distinct from the legal estate in so far as they are merely fiduciary interests. In this respect they are what uses were before the statute. In principle, it seems, there was no difference between the ancient use and the modern trust, but there was a wide difference in the application of them. By a more liberal construction of those principles, and greater care against abuse, trusts are now made to answer, in general, all the beneficial ends in uses, without their inconvenience or frauds. 2 Bl. Comm. 337. An express or direct trust is usually created by an instrument in writing, which specifies distinctly the person, property, and purposes of the trust. In such case the intention to create the trust must appear upon the face of the instrument. Since the statute, it is the generally accepted law of the country that, where the trust relates to the disposition of real estate, it must be declared and proved by some writing executed by the person creating the trust. 4

Kent, Comm. 305. It has been held, however, that if a person procure the conveyance of land to him upon the assurance that he will hold it in trust for another, the trust may be established by parol testimony of the grantor, and that, if the land be sold by the grantee, the cestui que trust may sue for the price. *Miller v. Pearce*, 6 Watts & S. 97. A trust may be either executed or executory in kind. When the legal estate, or if the equitable title passes, in either case it is executed; but when the trust is to be perfected at some future time by settlement or conveyance it is executory, and the same rules which govern trusts of realty govern trusts of personalty. 1 Perry, Trusts, § 16. In the application of principles a court of equity regards the trust as the property, and the declaration of trusts as the disposition of the property; and a disposition of property by way of a trust is as effectual and binding upon the parties as if the property be disposed of by any other means of absolute conveyance. It is, therefore, essential to the establishment of a trust that the person who creates it be the real owner of the property which is to constitute the trust or fund. So it is essential that the language employed in the creation of a trust should be such as to leave no room for reasonable controversy as to the intention of the donor. In general, every person competent to make a will, enter into a contract, or hold the legal title to and manage property, may dispose of it as he chooses, and, *sui juris*, has the power to create a trust, and dispose of his property in that way; but in doing so he must use language showing that such disposition is intended by him. To fasten a trust upon personalty by parol, the same as where a trust of realty is created, the language used must amount to a clear and explicit declaration of trust. The declaration relied upon must point out with reasonable certainty not only the property or subject-matter of the trust, but also the purposes thereof, and the person or persons for whose benefit the trust is created. Indefinite, vague, and equivocal expressions are not sufficient; nor are declarations of a purpose to create a trust, or mere voluntary promises to give property to a person or persons, or to dispose of it in the future for the benefit of such person or persons, when such promises remain unfulfilled, sufficient to create a trust, or any right which a court of equity will enforce. Nor is a mere intention or mere voluntary agreement to create a trust, where the owner of the property contemplates some further action by him to make it effectual, sufficient to establish the trust. It is absolutely essential that the evidence to establish a trust resting on parol should be clear, unequivocal, and explicit, and not conflicting in character as to material points; for, if the terms and object of such a trust be left in doubt or confusion, a court cannot enforce it. No particular form of words, however, is requisite in the

creation of a trust, nor for a person to declare himself a trustee. If the owner of personal property transfers it to one person for the use of another in definite and positive terms, or if such owner unequivocally declares, in writing or orally, that he holds it in presenti in trust for another person, in either case the trust will be upheld. In either of such cases the trustee is liable, and must account to the cestui que trust; and, when once effectually created by parol, the trust cannot afterwards be altered or revoked by the person who created it, the same rules governing as where a trust is created by writing. "If the trust is perfectly created, so that the donor or settler has nothing more to do, and the person seeking to enforce it has no need of further conveyances from the settler, and nothing is required of the court but to give effect to the trust as an executed trust, it will be carried into effect at the suit of a party interested, although it was without consideration, and the possession of the property was not changed." 1 Perry, Trusts, § 98. In *Beach, Trusts & Trustees*, § 52, it is said: "In the creation of a trust in personalty, as well as in real estate, the language employed must be definite and positive. The property which is the subject-matter of the trust must be clearly and definitely described; the purposes of the trust must be plainly indicated, and as well the person or persons who are to be the beneficiaries. Ambiguous or vague and indefinite expressions will not be held to create a trust. In addition to this, the proof of the trust must be unequivocal. The declaration of a purpose to create a trust is of no value, and a promise to make a donation at some future time, where there is no consideration, at best is only an imperfect gift, and will not be upheld as a trust." 1 Perry, Trusts, §§ 24, 77, 86, 97, 252; 2 Pom. Eq. Jur. §§ 997, 998, 1009; 27 Am. & Eng. Enc. Law, 54, 55; *Hamilton v. Hall's Estate*, 111 Mich. 291, 69 N. W. 484; *Harris v. Bratton*, 34 S. C. 259, 13 S. E. 447; *McGinnis v. Jacobs*, 147 Ill. 24, 35 N. E. 214; *Roche v. George's Ex'r*, 93 Ky. 609, 20 S. W. 1039; *Beaver v. Beaver*, 117 N. Y. 421, 22 N. E. 940, 6 L. R. A. 403; *Chambers v. Emery*, 13 Utah, 374, 45 Pac. 192; *Crissman v. Crissman*, 23 Mich. 217; *Dalton v. Dalton*, 14 Nev. 419; *Harrison v. McMenno-my*, 2 Edw. Ch. 251; *Stone v. Bishop*, 23 Fed. Cas. 154; *Allen v. Withrow*, 110 U. S. 119, 3 Sup. Ct. 517, 28 L. Ed. 90.

The question remains whether, in the light of the foregoing well-settled principles, the evidence in the case was sufficient to show that a trust had been established in favor of the plaintiffs, who are children of the defendant and his first wife. The appellants contend that the note of \$4,000 was the property of Trezer Southwick, and that on February 15, 1888, she delivered it to the respondent for the use and benefit of those children, and thereby created an irrevocable trust. For the respondent it is maintained that the note be-

longed to the defendant, Marriott, and that he never received it, or the money which it represented, in trust for his children; and it is further insisted that, even if it were assumed that Trezer Southwick was the absolute owner of the note or money, still there was no creation of a trust, nor the conferring of any power the exercise of which the court could enforce. After careful examination of the testimony, we are compelled to concede that the position of the respondent is well founded. The evidence shows that the defendant, Marriott, owned the property out of which the fund was realized, and in the year 1886, fearing that he would be prosecuted, and sent to prison, as he afterwards was, conveyed it to Mrs. Southwick, his plural wife, with the parol agreement or understanding between the parties that when he returned from the penitentiary the property was to be reconveyed to him. After his return, both parties, it appears, recognized and treated the property as belonging to him; and the vendee repeatedly, in accordance with their understanding, offered to reconvey, but for some reason, not appearing, this was not done, and, finally, the defendant sold the property to a stranger, who arranged with him to retain \$4,000 of the purchase price for a year, and, because the title stood in the name of Mrs. Southwick, it was thought best to execute the note, which was dated February 15, 1888, to her, and then she could indorse it over to the defendant,—all of which was done. Afterwards the defendant collected the money, and used it in the purchase of sheep and otherwise. Counsel for the appellants insist that the parol agreement to reconvey the real estate was void under the statute of frauds; that, if the conveyance was made with intent to defraud the United States government, the title passed absolutely between the parties; and that, therefore, the property belonged to Mrs. Southwick. Suppose we accept it as true that the conveyance passed the title to the vendee absolutely, as between the parties, and that she was under no legal obligation to reconvey because of the parol agreement, can it be said that, under the circumstances, there was no moral obligation for her to perform that agreement? The conveyance was made to her without consideration, and she knew all about the reasons why it was so made, and accepted the instrument, knowing what the understanding or agreement was, without protest. The circumstances in evidence disclose no imposition, oppression, or undue influence. The arrangement seemed to be entirely satisfactory to the vendee. While the conveyance was made to her in contemplation of a criminal prosecution, and probably to avoid seizure of the property, there were then no existing rights of any third party disturbed thereby. She was, therefore, under the same moral obligation to perform the agreement, and restore the property, as she would have been if the agreement had been in writing, and there

had been no question of fraud connected with the transaction; and, if she had reconveyed under the agreement and circumstances, she would have effectually divested herself of all title to the property, and would thereafter have been estopped from making any claim thereto because of the original conveyance to her. If she had made a reconveyance, the law would not, in the absence of interposition on the part of a creditor, assist her to recover the property back. The law is not so inequitable and unjust as to prevent a person from fulfilling his obligations of good faith and honor. Such a reconveyance, under the circumstances disclosed, would not have fallen within the statute of frauds, but would have vested the title in the defendant as effectually, in law and equity, as any other conveyance from what source soever. In *Wait, Fraud. Conv.* § 398, it is said: "Though a reconveyance cannot be enforced, the fraudulent vendee is said, in some of the cases, to be under a high moral and equitable obligation to restore the property. The law is not so unjust as to deny to men the right, while it is in their power to do so, to recognize and fulfill their obligations of honor and good faith; and until the creditors of the vendee acquire actual liens upon the property they have no legal or equitable claims in respect to it higher than or superior to those of the grantor. It has been contended that the transfer only made visible an ownership which already existed, though secretly. While the fact that title to real estate was put in one to hold for another with intent to defraud creditors might be a defense by the trustee in an action to establish the trust, yet, where the trust has been completed by a conveyance to the equitable owner, the principle has no application." In *Association v. Roll*, 137 Ill. 205, 27 N. E. 184, Mr. Justice Bailey said: "While a fraudulent grantee is under no legal obligation to reconvey, he is under a moral obligation to do so; and where, in fulfillment of his moral obligation, he actually makes a reconveyance, such act will be valid and binding on him, and, if the rights of no innocent third parties have intervened, the fraudulent grantor will become reinvested, both at law and in equity, with the title previously conveyed to his grantee. Such reconveyance is not within the condemnation of the statute of frauds, but vests in him to whom it is made a title which the courts will recognize and protect precisely as they would a title derived from any other source." *Bump, Fraud. Conv.* § 448; *Wait, Fraud. Conv.* § 399; *Fargo v. Ladd*, 6 Wis. 106; *White v. Brocaw*, 14 Ohio St. 339; *Mahan v. State*, 10 Ohio, 232; *Wolford v. Farnham*, 47 Minn. 95, 49 N. W. 528; *Wait v. Day*, 4 Denio, 430; *Starr v. Wright*, 20 Ohio St. 97. If, as we have seen, a reconveyance of the property would have bound Mrs. Southwick, and revested the title in her grantor, then, as no reconveyance was made, but the property was sold to a third party, without objection on her part, she simply ex-

pressing a desire that another home be purchased for her out of the proceeds, which was done, the delivery of the note, which represented the remaining portion of the purchase money, to him, was binding upon her, and vested the title to it in him, unless she imposed some valid conditions as to such delivery; for precisely the same principles are involved in either case. "Had Summer W.," says Mr. Chief Justice Gilfillan, in *Wolford v. Farnham*, 44 Minn. 150, 46 N. W. 295, a case cited by the appellants, "upon the sale of the third interest in the Hennepin Island property, paid or transferred the purchase money to Eunice E. in performance of the parol trust, that act would have been binding, and the money would have become hers as between the two." In this case, the note, which evidenced a portion of the purchase price or proceeds of sale, was delivered to the grantor, under the parol agreement, by the grantee, and the money collected and appropriated by such grantor. It therefore remains to be seen, assuming, but not admitting, that Mrs. Southwick was the owner of the property, whether the delivery was made upon valid conditions; or, in other words, whether she delivered it in trust, as claimed. The evidence on this point shows that, because the title to the property stood in her name, the note was executed to Mrs. Southwick, and that she indorsed it over to the defendant. She testified that after he sold the place he said to her, "I want you to give me \$4,000 of that money for my first wife's children;" and that she did so, "thinking that he would keep that money for those children." She further stated that he said he would reserve the money for those children at his death; that she did not name the beneficiaries; that she left the matter of provision for those children entirely to him, and was willing to let him protect them. It is shown in evidence that he claimed and treated the property and proceeds of sale as his own, and Mrs. Southwick, in her testimony, stated that he was the right one to have it, and was willing that he should claim it. Asked, on the witness stand, whether he said anything about keeping the \$4,000 for his first wife's children, the defendant said: "No, sir. It was mine. I could do as I liked with it." The record contains other similar expressions and statements, and there is much conflict in the evidence as to what was actually said between the parties as to the \$4,000. It may thus be seen that the language relied upon for the creation of the trust by Mrs. Southwick is ambiguous, indefinite, and equivocal; and when such language is considered in connection with the fact that years have elapsed since the transaction, and with the further fact that the person who delivered the money named no beneficiaries, and served no notice of the trust, during all those years, until shortly before the commencement of this suit, upon any of those who it is claimed were named as cestuis que trustent by the donee,

it is impossible to conclude that a trust was established by her which a court can enforce. Evidently Mrs. Southwick, having been provided with another home out of the proceeds of sale, in accordance with her insistence, and feeling the moral obligations resting upon her because of the parol agreement, indorsed and handed to the defendant the note as his own property, and, as she says, was willing that he should claim it, and to leave the matter of providing for his children entirely to him.

Mrs. Southwick having created no trust, the next and remaining inquiry is, did the defendant declare an express trust, and constitute himself a trustee to hold the money, or the sheep and other property purchased therewith, for the use and benefit of his four children, plaintiffs in this case? The defendant himself testified at the trial that ever since the sale in 1888 he claimed the \$4,000, and property he purchased with it, as his own, and claimed the right to do with it as he pleased. There is evidence showing that he used the money and managed the other property as an owner. Then there is also evidence showing, among other things, that from time to time he promised to give the property to four of his first wife's children, naming those who are plaintiffs herein; that he stated that he expected to reserve the fund for them; that he was going to give it to them at his death; and that on numerous occasions he promised to fix the matter up so that they would get the property at his death. Other similar testimony appears in the record, and, as to material facts, it is conflicting. Some of the witnesses attempted to state the exact language used in conversation by the alleged trustee, notwithstanding the great lapse of time intervening since such conversation had occurred. The evidence is too indefinite, uncertain, and equivocal. Stripped of useless and immaterial matter, it consists substantially of nothing more than statements of admissions and declarations of his intention to provide for his first wife's children at some time in the future or at his death, and the proof of the admissions and declarations depends entirely upon the uncertain recollection of the witnesses as to the exact language employed by the alleged trustee at a time long anterior to the giving of the testimony. Such proof is frequently of a most unreliable and dangerous kind; and while, as we have seen, an express trust may be established by parol evidence, still when, as here, it is sought to establish such a trust, and divest a person of the title to his property, and of its use and enjoyment, by proof of admissions and declarations of the owner, the court will receive and consider the evidence of the same with great caution. Respecting such testimony, this court, in *Chambers v. Emery*, 13 Utah, 374, 45 Pac. 192, said: "Evidence of this class depends wholly upon the uncertain recollection of witnesses, who, through lapse of time, or mistake, or imperfect understanding, or improper or cor-

rupt motives, may represent the deceased as having expressed an idea precisely the reverse of what was intended by him. Often, too, the slightest variation by the witness from the language employed by the deceased, or a different intonation or inflection, may impart an entirely different thought from that in the mind of the speaker at the time of the declaration. Reflection upon the inaccuracy of ordinary witnesses in the use of language, upon their want of original comprehension of a conversation, their liability to connect subsequent facts and circumstances with the original transaction, the impossibility of their recollecting, translating, and reproducing the exact terms employed in a conversation, especially after a considerable lapse of time, must impress upon every lawyer and jurist who has had experience in the trial of causes the danger of placing substantial reliance upon this class of testimony." 1 Greenl. Ev. § 200. It is true, here the alleged trustee testified, but he was very old, and feeble in mind and body, and died shortly after the trial. There was no writing to show that he had disposed of his property in trust for his children. It all rests on parol. For us to hold that the proof in this case is sufficient to establish an express trust would be to open the door to fraud, and endanger the titles of individuals to their property. While, however, we are clearly of the opinion that the proof is wholly insufficient to establish a trust, there is evidence in the record tending to show that the defendant provided in his lifetime equitably, out of his estate, for all his families and children, except the four who are plaintiffs herein; that he intended also to provide for those four before his death; and that the property here in controversy in justice ought to belong to them as their proportionate share of their father's estate. If these things be true, then the unavoidable misfortune which will come to those children upon the announcement of this decision must be attributed to the neglect (unintentional, doubtless) on the part of the owner of the property to declare an effectual trust, and to the infirmity of human law to reach such a case. In such event, ourselves powerless, we can but hope and trust that the love and affection which ought to exist in every household and the ties of consanguinity will be strong enough to do that justice which the security of title to property forbids us to do. While, in such a case, under such evidence, a trust can neither be established nor enforced by a court, yet, as we have seen, the law is not so unjust as to prevent the parties themselves from discharging obligations of good faith and honor. Having thus decided the case upon its merits, it becomes unnecessary to pass upon or discuss any of the other questions presented, although they have not escaped our notice. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

(21 Utah, 207)

CACHE COUNTY v. JENSEN.

(Supreme Court of Utah. March 28, 1900.)

LICENSE—IMPOSITION—POLICE POWER—PROHIBITORY LICENSE—WHEN VOID—POWER TO LICENSE—REVENUE FROM LICENSE—STATUTE GIVING POWER—CONSTRUCTION—COUNTY COMMISSIONERS—POWERS—REV. ST. 1898, § 511, subd. 11—TAX ON PARTICULAR INDUSTRY—WHEN VOID—DISCRIMINATION—DUE PROCESS OF LAW.

1. A mere tax imposed upon a business or occupation is not a license, unless the levy confers a right or privilege as to the business which would not otherwise exist.

2. License, in general, implies privilege and regulation, and the imposition of it falls within the police power of the state; but the charge of a license fee against a business or occupation, commendable and necessary for the public good, which, in effect, is prohibitory of such business or occupation, is void as an unlawful exercise of such power.

3. The power to license, conferred by Rev. St. 1898, § 511, subd. 11, is "for purposes of regulation and revenue." This does not mean for "revenue" alone, but when proper authority has once determined that public interests will be best subserved by requiring a certain business, commendable and useful in itself, to be conducted under proper regulations, such authority may impose a license, fix the rate, and provide for the collection, provided such business be carried on in the county, "outside the limits of incorporated cities."

4. In proper cases, where a license is fixed, while the fee is designed to defray the expenses of regulation, it is no objection to the license that incidentally a revenue is also obtained, if the license be uniform and equal as to all subjects engaged in the business, and, under the circumstances, not wholly unreasonable.

5. The power to license must be the subject of a direct grant. It cannot be implied. A statute giving such power must be construed with great strictness, and any doubt or ambiguity arising out of the language employed must be resolved in favor of the public.

6. Rev. St. 1898, § 511, subd. 11, does not confer authority upon boards of county commissioners to impose a license for revenue only, without regard to regulation, but does confer authority to impose licenses, on the subjects referred to in the statute, for regulation and revenue.

7. Neither the constitution nor the statute (Rev. St. 1898, § 511, subd. 11) authorizes an ordinance by a board of county commissioners which singles out the one industry of sheep raising, and, under a pretense of licensing the business, imposes a certain tax per thousand upon sheep, so that he who has 4,000 head pays as much as he who has 4,999 head, and there is no protection afforded by the ordinance to those engaged in the business, nor anything to indicate that any such regulation or protection is required, and the record shows that the business has been conducted in the same manner as before the passage of the ordinance.

8. Unjust and illegal discrimination between persons, in taxation, and the denial of equal justice, are within the prohibition of the constitution of this state and of the United States. No person can be deprived of his property without due process of law.¹

Baskin, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, First district; Charles H. Hart, Judge.

¹ City of Ogden City v. Crossman, 53 Pac. 985, 17 Utah, 68, and Judge v. Spencer, 48 Pac. 1097, 15 Utah, 242, cited.

Action by Cache county, by Hopkin J. Matthews, county clerk, against Joseph M. Jensen. Judgment for plaintiff, and defendant appeals. Reversed.

This action was brought to recover of the defendant the sum of \$600, alleged to be due as a license tax imposed, by virtue of an ordinance passed and approved May 7, 1898, by the board of county commissioners, upon the defendant because of his business of raising and herding sheep. The ordinance reads as follows:

"The board of county commissioners of the county of Cache ordain as follows:

"Section 1. Every person, company or corporation, engaged in the business of raising, grazing, herding or pasturing sheep in the county of Cache, state of Utah, must annually procure a license therefor from the county clerk of Cache county, and make therefor the following payment: First. Those owning or having in their possession and under their control five thousand or more sheep, constitute the first class, and must pay two hundred and fifty dollars per annum for the first five thousand sheep, and for every additional thousand sheep the sum of fifty dollars. Second. Those owning or having in their possession and under their control four thousand sheep and less than five thousand, constitute the second class, and must pay two hundred dollars per annum. Third. Those owning or having in their possession and under their control three thousand sheep and less than four thousand, constitute the third class, and must pay one hundred and fifty dollars per annum. Fourth. Those owning or having in their possession and under their control two thousand sheep and less than three thousand, constitute the fourth class, and must pay one hundred dollars per annum. Fifth. Those owning or having in their possession and under their control fifteen hundred sheep and less than two thousand, constitute the fifth class, and must pay seventy-five dollars per annum. Sixth. Those owning or having in their possession or under their control one thousand sheep and less than fifteen hundred, constitute the sixth class, and must pay fifty dollars per annum. Seventh. Those owning or having in their possession and under their control less than one thousand sheep, constitute the seventh class, and must pay five cents per head per annum.

"Sec. 2. Every person who shall engage in the business of raising, grazing, herding or pasturing sheep, or be so engaged within the county of Cache, state of Utah, without first obtaining a license therefor, shall be guilty of a misdemeanor.

"Sec. 3. It shall be the duty of the county clerk of said county to collect the license provided for by this ordinance, and he may enforce the collection thereof by an ordinary action at law.

"Sec. 4. The said clerk shall collect a fee of one dollar for each license issued, which

shall be paid by him into the salary fund of said county.

"Sec. 5. All moneys collected for license under the provisions of this ordinance shall be paid over to the county treasurer and placed to the credit of the general fund of said county.

"Sec. 6. It shall be the duty of the county attorney to prosecute all actions arising under the provisions of this ordinance.

"Sec. 7. This ordinance shall take effect and be in force on and after fifteen days from its passage, and all ordinances or parts of ordinances in conflict herewith are hereby repealed."

It was alleged in the complaint that the defendant was engaged in the business referred to in the ordinance in Cache county from May 22 to July 20, 1898, without obtaining any license therefor; that during such time, and within the county, he was raising and herding 12,500 sheep; and that he refused to comply with the provisions of the ordinance. At the trial the defendant admitted that during a portion of the time alleged he had 2,000 sheep in Cache county. The balance of his sheep had been leased to other parties, and were grazed in Cache and other counties. There is nothing to show that any police protection or regulation of any kind is required because of the carrying on of the business in question in Cache county. It was also admitted that the sheep had been regularly assessed for the year 1898, having been valued at \$1.50 per head, and that the total county taxes amounted to $7\frac{1}{4}$ mills on the dollar. From the evidence it appears that the defendant owned in all about 13,000 sheep. Their range for grazing during the year includes Toole, Box Elder, Weber, Cache, Rich, and Summit counties. From November until May they graze upon the desert in Toole and Box Elder counties on small sage brush, depending upon snow for water, there being no springs or streams of water there. About April the herders begin to move eastward with their herds as the snow disappears, and continue to so move as necessity demands, until they get into the high mountains in Cache, Rich, and Summit counties, where their summer range is. There they remain grazing through the several counties, until the snows of autumn compel them to again seek the low lands of the desert. Thus the business is carried on from year to year, upon lands wild and untillable, which form part of the public domain. The business of raising and herding sheep is a lawful, laudable, natural, and indispensable industry. During the year 1898 there was no other license ordinance, except the one in question, in Cache county, although among the other chief industries of that county are the raising of cattle and horses and farming. At the trial the court entered judgment in favor of the plaintiff for \$100 and costs, in accordance with the provisions of the ordinance. This appeal is from the judgment.

James H. Moyle, Brown & Henderson, and D. H. Wells, Jr., for appellant. Frank K. Nebeker, for respondent.

BARTCH, C. J., after stating the case as above, delivered the opinion of the court.

It is contended, in the first instance, on behalf of the appellant, that the passage of the ordinance in question by the board of county commissioners was an attempt to tax an occupation for revenue purposes, and that any delegation of such authority on the part of the legislature to such boards or quasi municipalities was without effect, because a violation of sections 2, 3, 5, 12, art. 13, Const. Utah. These several sections of the constitution were considered in *City of Ogden City v. Crossman*, 17 Utah, 66, 53 Pac. 985, and received a construction adverse to appellant's contention. It was there, by Mr. Justice Miner delivering the opinion of the court, said: "Sections 2 and 3 of article 13 of the constitution were controlled and limited by sections 5 and 12, above quoted, in so far as the power is granted to the legislature to empower municipalities to assess and collect taxes for all the purposes of such corporation, and in providing for a tax upon income, occupation, licenses, franchises, or mortgages. Under the power, the legislature could properly grant municipalities the rights conferred by sections 89 and 287, above referred to. Under the constitution, taxation is clearly a legislative prerogative, and may be conferred upon a municipality to such an extent and for such purposes as may be deemed expedient, so long as the limits and restrictions of the organic law are observed. When the legislature delegated the power to the municipality, under section 3, 'to provide by law a uniform and equal rate of assessment and taxation of all property in the state according to its value in money,' it had reference to the levy of an ad valorem or direct tax upon property, and does not apply to licenses imposed upon privileges, business, and occupations." Section 89, referred to in connection with section 287, in the above quotation, is subdivision 89, § 1755, Comp. Laws Utah 1888, and reads as follows: "To raise revenues by levying and collecting a license fee or tax on any private corporation or business within the limits of the city, and regulate the same by ordinance. All such license fees and taxes shall be uniform in respect to the class upon which they are imposed." In accordance with this provision, Ogden City, by ordinance, imposed a license tax of five dollars per annum on each telephone instrument operated by the defendant, the Rocky Mountain Bell Telephone Company, in that city, and the court held the tax a valid exercise of legislative power under the constitution and statute. Whether or not that case was correctly decided, and whether we would now, upon further consideration, place the same interpretation upon those sections of the constitution, are questions immaterial here, under

the view we have taken of this case. For all purposes herein, it may be admitted that the principles stated in that case, with reference to an ordinance passed by a city, apply with equal force to one passed by a county, and that the legislature has plenary power to authorize a board of county commissioners to impose a license upon occupation for revenue only, even in the absence of any regulation, police or otherwise, of the business. If, for the purposes of this case, such be the admission, which is certainly as broad as could in reason be contended for, then the material questions decisive of this case are, did the legislature confer such power in this instance? and is the ordinance, under consideration herein, a proper exercise of the power conferred?

To determine the first of these inquiries, reference must be had to section 511, Rev. St., which, in subdivision 11, authorizes the board of county commissioners in each county, under such limitations and restrictions as are prescribed by law, "to license, for purposes of regulation and revenue, all and every kind of business, not prohibited by law, transacted and carried on in such county, and all shows, exhibitions and lawful games, carried on therein outside the limits of incorporated cities, to fix the rates of license tax upon the same, and to provide for the collection thereof, by suit or otherwise." "License," in common parlance, implies permission to do something which may not be done without a license. In this sense we are to understand the word was used in the constitution and statutes, unless the context indicates a different or more comprehensive meaning. "The object of a license," says Mr. Justice Manning in *Chilvers v. People*, 11 Mich. 43, "is to confer a right that does not exist without a license." A mere tax imposed upon a business or occupation, therefore, is not a license, unless the levy confers a right or privilege as to the business which would not otherwise exist. So, a right to license a business or occupation does not imply a right to exact a tax merely for revenue, and where the object is revenue the power to license for that purpose must be conferred in unequivocal terms. *Cooley*, Const. Lim. 242. "License," in general, implies privilege and regulation, and the imposition of it falls within the police power of the state. That power may be exercised, and license taxes are frequently imposed, with a view to discourage business and occupations which are injurious in their tendencies and prejudicial to the public good, but, "to justify a restrictive license, the business must of itself be of such a nature that its prosecution will do damage to the public, whatever may be the character and qualifications of those who engage in it." *Tied*, Lim. p. 278. The license, in cases where the business is unlawful and detrimental to public morals, may be, and frequently is, imposed as a prohibitory measure. A charge of a license fee, however, against a

business or occupation, commendable and necessary for the public good, which, in effect, is prohibitory of the carrying on or pursuing of such business or occupation, is void as an unlawful exercise of power. This is especially so when such a license fee is imposed by a municipality or board which has no inherent power to issue a license, and to require the payment of a license fee. 13 Am. & Eng. Enc. Law, p. 532; Cooley, Const. Lim. 244; Kitson v. Mayor, etc., 26 Mich. 325; People v. Jarvis (Sup.) 46 N. Y. Supp. 596. A municipality can exercise such power only as has been conferred upon it. This is strictly so as to license. "The grant of a license," says Judge Cooley, "may be made by the state directly, or it may be made indirectly, through one of the municipal corporations of the state. Of the indirect grant, it is to be observed that a municipal corporation as such has no inherent power to grant licenses or exact license fees; it must derive all its authority in this regard from the state, and the power must come by direct grant, and cannot be taken by implication." And again he says: "It is perhaps impossible to lay down any rule for the construction of such grants that shall be general and at the same time safe; but, as all delegated powers to tax are to be closely scanned and strictly construed, it would seem that, when a power to license is given, the intentment must be that regulation is the object, unless there is something in the language of the grant, or in the circumstances under which it is made, indicating with sufficient certainty that the raising of revenue by means thereof was contemplated." Cooley, Tax'n, 597. Referring to employments and occupations which are harmless, and useful for the public weal, Mr. Tiedman says: "They not only do not threaten any evil to the public, but their prosecution to the fullest measure of success is a public blessing. Instead of placing trades in general under restraints and police regulations, in which a license would be required, the utmost freedom can best attain the greatest good to the public. When, therefore, we see municipal corporations requiring licenses for the prosecution of all kinds of occupations and employments, if their action can be justified at all, it must rest upon some other grounds than as a police regulation. It can only be justified as a tax upon the profession or calling. Having the natural, inalienable right to pursue a harmless calling, he cannot be required to take out a license before he can lawfully pursue it." Tied. Lim. § 101.

In the light of these principles, can it be said, with any degree of certainty, that the legislature, in the enactment of the provision of the Revised Statutes above quoted, intended to confer power upon the board of county commissioners to single out and impose a license upon a harmless and useful business, for the sole purpose of raising revenue, without regard to regulation for such business? Is it reasonable, in the face of constitutional

provisions, containing ample power to raise revenue for all governmental purposes, to impute to the legislature such an intentment, in the absence of language conferring such authority in clear and unequivocal terms? We think not. The power to license, conferred by subdivision 11, is "for purposes of regulation and revenue." This does not mean for "revenue" alone, but when it has once been determined, by proper authority, that the public interests will be best subserved by requiring a certain business, however commendable and useful in itself, to be conducted under proper regulations, such authority may impose a license on the business, and fix the rate of the license tax or fee, and provide for collection of the same, provided that such business be carried on in the county "outside the limits of incorporated cities." In such event, while the fee is designed to defray the expenses of regulation, it is no objection to the license that incidentally a revenue is also obtained, if the license tax, under the circumstances, be not wholly unreasonable, and be uniform and equal as to all subjects engaged in the same business. That the legislature intended "regulation" to be a principal element of every license, under the statute, is manifest from the context; for, as will be observed, "every kind of business," and all shows, exhibitions, and games, not prohibited by law, are made the subjects of license. Here are manifestly included many objects which render regulation important, for the purpose of protection to the public, and to guard individuals against fraud and imposition. If the legislature had intended to delegate to such boards, through the medium of a license, the power to raise revenue, without reference to regulation, it was within its province to do so in unmistakable terms. Any doubt or ambiguity arising out of the language employed in the statute must be resolved in favor of the public. The power must be the result of a direct grant, and cannot be implied. Such a statute must be construed with much strictness. Suth. St. Const. § 365; Joyce v. City of East St. Louis, 77 Ill. 156; Commissioners v. Mighels, 7 Ohio St. 109; City of St. Louis v. Boatmen's Insurance & Trust Co., 47 Mo. 150. The arbitrary power contended for, by virtue of subdivision 11, being in derogation of the natural rights of the individual, will not be aided by judicial interpretation. "Such interference with the natural right of acquisition and enjoyment guaranteed by the constitution can only be justified when public necessity clearly demands it. Being a sovereign power, it can only be exercised by the general assembly when delegated by the people in the fundamental law. Much less can it be exercised by a municipal corporation without a further unequivocal delegation by the legislative body. The power can be delegated by the legislature, but only in plain, unambiguous words. Statutes for that purpose will be construed strict-

ly, and they must be closely pursued. A departure in any material part will be fatal." *Suth. St. Const. § 365.* Our conclusion on this point is that the legislature did not in subdivision 11 confer authority upon boards of county commissioners to impose a license for revenue only, without regard to regulation, but that they may impose licenses on the subjects referred to in the statute for regulation and revenue.

The remaining material question is whether the ordinance in controversy is in harmony with the statute, and is, under the circumstances in evidence, a proper exercise of delegated authority. Turning to the ordinance, it will be observed that under its terms a license is imposed solely upon the business of raising, herding, and pasturing sheep. An examination thereof also shows that the charges for the license are unequal; for, according to its terms, the person who owns and pastures 5,000 sheep pays the same sum as the one who has 5,999, and pays \$50 more per annum than a person who has 4,999. Likewise, he who has 4,000 must pay the same as he who has 4,999, and \$50 more than a party who happens to have one sheep less than 4,000. So, likewise, similar unequal rates appear as to all other classes, except the seventh class, which exacts a fee or tax of five cents per head per annum. What induced the adoption of a scale of rates so manifestly unfair and unjust is difficult to determine. Certainly, if a charge of five cents per head, as in the seventh class, had been imposed upon all sheep, it would have been more in harmony with the principle of uniformity and equality declared in the constitution with reference to the subject of taxation. According to that instrument, every species of property is to bear its just proportion of the burden of maintaining the government. In *Judge v. Spencer*, 15 Utah, 242, 48 Pac. 1097, this court, considering the constitutional provisions respecting taxation, said: "The framers of the constitution, however, evidently intended that no property should be relieved from the burden of taxation, except such as was defined and specified for exemption by that instrument. Such intent appears to be emphasized in section 3 of the same article, which directs that 'the legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property,' and then provides for a deduction of debts from credits, and specifies certain classes of property which shall be exempt from taxation, but no reference is made to mortgages. This provision made it incumbent upon the legislature to provide a uniform system by which every species of property within the state, not exempt by

the organic law, should equally and ratably bear its due proportion of the public burden, and the legislature had no power to exempt property not exempt under the constitution." How, then, can it be said that an ordinance is valid which is not only oppressive, and tends to prohibit the carrying on of a legitimate business, but which may, in practice, as will more clearly appear hereinafter, become an instrument for exempting property not exempt under the provisions of the constitution from bearing its just share of the public burden? The law abhors inequality and lack of uniformity in taxation, whether the burden be imposed by license or by levy and assessment.

But, referring further to the ordinance in question, how the amount of the charge, in each case, is to be determined, whether the owner or the herder is to state the number of sheep he is pasturing, or who is to count them, or when or where they are to be counted, does not appear therefrom. The county clerk is to collect the license, and pay the money to the county treasurer, and is also to collect one dollar for each license issued, and pay the same into the salary fund. The county attorney is to do the prosecuting. The ordinance does not even contain a hint as to regulation of the business, nor that the business requires any regulation, nor that the county will afford protection of any kind to the persons engaged in the business, nor that it is of such a character as to require regulation or protection. The business may be conducted by those engaged therein where and how they will. No intention to regulate it is manifest from the context or otherwise. The ordinance imposes no restrictions as to the manner the business shall be carried on, and grants no lawful privilege that was not previously enjoyed. In direct violation of the provision of the statute, which excepts incorporated cities from the authority of the board of commissioners, the ordinance grants a license which includes within its scope such cities. Evidently, the efforts of the board resulted, not in the imposition of a license upon a business, but in the levy of an unequal and unjust tax upon property. The thing provided for by this instrument is not a license, within the terms of the statute, but by design a prohibitive tax, in violation of the statute and constitution. Nor do the facts and circumstances disclosed by evidence allunde throw any other or different light upon the subject, by showing that in practice the thing evolved is a license, and has no tendency to prohibit the business on which it is imposed. There is nothing in the testimony to show that the board of commissioners in practice prescribed or enforced any regulations for raising and herding sheep, or that it afforded any protection to those engaged in the business. Nor is there anything to indicate that any such regulation or protection is re-

quired. So far as shown by the record, the business has been conducted in precisely the same manner since as before the ordinance was passed. The sheep now, the same as they were before the license was required, are grazed upon lands forming a part of the government lands of the United States,—in winter time upon the low untillable lands of the Western desert, where no other stock can be pastured with profit; in the summer season in the high mountain ranges. It is shown that they must necessarily, because of climatic conditions, be pastured during the year in five different counties; the storms being too severe in the mountains in the winter, and the heat and drought too great in the desert in the summer. They must therefore be pastured to and fro, as necessity requires.

Without further specific reference to the evidence, suppose each of the five counties in which the business is thus carried on should impose a license tax of 5 cents per head on each sheep, or suppose, as was offered to be shown to be the case in Rich county, each of those counties were to exact a license of 10 cents per head per annum, and this, too, in addition to the regular taxes which other industries are required to pay; could the sheep industry long survive? Could an owner of sheep pay 25 or 50 cents per head per annum, or even more, if such legislation were to be sanctioned, and prosper? Would not such a burden, under the conditions existing in this state, mean ruin to the business in question? Yet sheep raising is one of the chief industries of this commonwealth, and there appears to be no other known use to which the vast areas of our Western desert lands can be so profitably put. The business does not belong to that class of occupations which are demoralizing in their tendencies. It is useful, commendable, and ancient as civilization itself. From time immemorial it has been regarded as indispensable to the comfort of the public. Why, then, single out this particular business to burden it with a tax which, under existing conditions, must be regarded as prohibitory, and permit the raising of cattle and horses and every other occupation to be carried on without any license? Counsel for the respondent suggests that the business of sheep raising needs some degree of regulation, and doubtless this is true; for where large bands of sheep are herded the public welfare, in all probability, requires that there be regulation and protection, but the answer to the suggestion is that the ordinance provides for neither. If it had been designed to regulate and protect, it would possess some merit; but it was manifestly intended for no such purpose. Whatever may have been the intention of the board of commissioners, their enactment is one for revenue only, and is so unequal and oppressive that it cannot be upheld. The fee exacted is a tax,

not a license; and, if the power thus attempted to be exercised were to be sanctioned, it is perceived that regulation would not long be necessary; for the tendency would be to drive the business out of the county, and out of the state, if the other counties would follow the example and exercise the power.

When it is considered that such a power of taxation would be in the hands of but a few men in each county, whose action might proceed from prejudice towards a particular business, from favoritism or animosity, or from other improper motives or influences, easy of concealment and difficult of detection, it becomes unnecessary to suggest the injustice which might be done under cover of the power, because that becomes apparent upon a moment's reflection. Under such a power, as is contended for by counsel for the respondent, the sheep industry, or one particular industry, in some of the counties of this commonwealth, might be taxed for more than the cost of maintaining the government, to the practical exemption of all other kinds of business from contributing their share of the burden. Private rights cannot thus be arbitrarily invaded or annihilated, under the mere guise of a license. One class of citizens cannot thus be compelled to bear the burdens of government, to the advantage of all other classes. The law, as we have seen, will not permit it. Neither the constitution nor the statute authorizes boards of county commissioners to enact ordinances, as in this instance, to tax citizens arbitrarily and unjustly, by license which confers no privilege that was not previously enjoyed, and which has no view to regulation. Unjust and illegal discrimination between persons, in taxation, and the denial of equal justice, are within the prohibitions of the constitution of this state and of the United States. No person can be deprived of his property without due process of law. The ordinance under consideration, not being within the power granted, is void. *Tied. Lim.* § 102; *Coolsey, Tax'n*, 169; *City of St. Paul v. Traeger*, 25 Minn. 248; *State v. Camp Sing*, 18 Mont. 128, 44 Pac. 516, 32 L. R. A. 635; *State v. Glavin*, 67 Conn. 29, 34 Atl. 708; *City of Brooklyn v. Nodine*, 28 Hun. 512; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; *In re Jacobs*, 98 N. Y. 99; *City of New York v. Second Ave. R. Co.*, 32 N. Y. 261; *In re Yot Sang (D. C.)* 75 Fed. 983; *Railway Co. v. Ellis*, 165 U. S. 150, 17 Sup. Ct. 255, 41 L. Ed. 666; *Commonwealth v. Stodder*, 2 Cush. 563; *People v. Jarvis (Sup.)* 46 N. Y. Supp. 596.

Counsel for the respondent cites and relies on several California cases where ordinances similar to the one in question herein were held valid. It does not appear, however, from these decisions, that the conditions under which sheep raising is carried on in California are similar to those under

which the business is conducted in this state. Nor are the provisions of the California constitution on the subject of taxation the same as those in our constitution. But if, in both states, all these things were similar, we should not be inclined to follow those decisions. The case of *State v. Camp Sing*, supra, accords more nearly with our views on the subject herein considered. Having taken the view that the ordinance is invalid, it becomes unnecessary to consider any other question presented. The case must be reversed, with costs, and the cause remanded, with directions to the court below to set aside its judgment herein, and enter judgment in favor of the defendant for costs. It is so ordered.

MCCARTY, District Judge, concurs. BASKIN, J., dissents.

**FORRESTER et al. v. BOSTON & M.
CONSOL. COPPER & SILVER
MIN. CO. et al.**

(Supreme Court of Montana. June 8, 1900.)

RECEIVER—DISCHARGE — REFUSAL—APPEAL
—REVERSAL—DISPOSITION ON APPEAL.

Where a corporation illegally transfers all its stock and property to another corporation, and a receiver is appointed at the suit of minority stockholders, and on motion to vacate the receivership the two corporations offer that the second shall reconvey to the first in such manner as to afford plaintiffs entire relief, and an order refusing to vacate is reversed on account of this offer, the motion to vacate will not be ordered to be reheard in the court below, but direction will be given to that court to render judgment for plaintiffs in conformity to the offer, and thereupon to vacate the refusal to discharge the receiver.

Modification of former opinion. 60 Pac. 1088.

PER CURIAM. Upon further consideration, we are satisfied that no necessity exists for a new hearing in the court below of the application to vacate or discharge the order of December 15, 1898, appointing a receiver for the Boston & Montana Consolidated Copper & Silver Mining Company of Montana. By acceptance of the offer quoted in the opinion, the plaintiffs will obtain all the redress to which they are entitled. Although the deed of conveyance and the bill of sale should have been admitted in evidence, yet the error committed in excluding them does not require the court below further to examine the merits of the application; for the offer made subsequently to the ruling by which the muniments of title were rejected conceded, and still concedes, to the plaintiffs the right to recover a judgment awarding to them the substantial relief for which they prayed, and obviated the need of continuing the receivership. The duty of the court below was plain and unmistakable. When the offer was made the court should have ordered a judgment to be enter-

ed conformably to the terms of the offer, and then discharged the order of appointment. No reason exists for the retention of the receiver, the order appointing such officer having fully performed the purposes to subserve which it was granted. The last paragraph of the original opinion is therefore amended so as to read as follows: "The order refusing to vacate the order of December 15, 1898, is reversed, and the cause is remanded, with directions to the district court to render and cause to be entered a judgment and decree in favor of the plaintiffs and against the defendants in conformity to the offer made, and thereupon forthwith to vacate or discharge the order appealed from; such vacation or discharge to take effect as of the date of such judgment so to be rendered and entered, but without prejudice to any right of the receiver to be reimbursed out of the trust estate for any amounts he may have properly expended or become liable to pay, and to be compensated for his services." Reversed.

WORD, J., takes no part in the foregoing decision.

STATE ex rel. BAKER v. SECOND JUDICIAL DISTRICT COURT OF SILVER BOW COUNTY et al.

(Supreme Court of Montana. May 31, 1900.)

CERTIORARI—REVIEW OF JUDGMENT—PRESENTATION OF APPLICATION.

1. Certiorari will not lie to correct errors committed within the court's jurisdiction, though relator avers inability to furnish an appeal bond.

2. The parties or their counsel, and not the clerk, must present application for writs of certiorari to the supreme court.

Application for certiorari by the state, on relation of B. L. Baker, against the Second judicial district court for Silver Bow county, and William Clancy, the judge thereof. Denied.

J. E. Healy, for relator.

PER CURIAM. This is an application for a writ of certiorari to review the proceedings of the district court of Silver Bow county in an action wherein one W. G. Pfouts is the plaintiff, and the relator herein the defendant. The affidavit in support of the application shows that on the 21st day of December, 1896, a complaint was filed in the action mentioned, stating that the defendant was indebted to the plaintiff in the sum of \$449.40, the balance of an account for goods, wares, and merchandise sold and delivered by the plaintiff to the defendant between the 21st day of December, 1889, and the 29th day of December, 1891, which remained unpaid; that the answer contains a plea of the statute of limitations, which was put in issue by the reply; that at the trial the defendant moved the court for judgment upon the

ground that the cause of action alleged was barred by the provisions of subdivision 1 of section 514 of the Code of Civil Procedure; that the motion was denied, and that the court rendered judgment for the plaintiff; that the relator "has attempted to appeal from said judgment, but has been unable to furnish the necessary bonds or security on appeal, the said W. G. Pfouts excepting to the sufficiency of the sureties of relator." The purpose of the present application is to set aside the judgment, the relator asserting that the district court was without jurisdiction.

The relator contends that the district court exceeded its power when, as is alleged, it refused to follow the decision of this court in *Gulterman v. Wishon*, 21 Mont. 458, 54 Pac. 566. That the district court had jurisdiction of the subject-matter of the action and of the person of the defendant is apparent. It possessed the right to hear and determine the cause, and to render the judgment now attacked. Although the court may have erred, yet it regularly pursued its authority. The right to hear and determine necessarily carries with it the power to decide wrong as well as right. It did not exceed its jurisdiction. The inability of the relator to furnish an undertaking on appeal with sufficient sureties does in no wise affect or impair the authority of the district court or make void the judgment. Certiorari may not be used to correct errors committed within the jurisdiction of the court. These principles have been often enunciated by this court. The application in the case at bar has not even the semblance of merit.

The application is brought to the attention of this court by its clerk, who does so at the request of the relator. This is improper practice. Parties or their counsel, not the clerk, should present applications for writs. Hereafter we shall refuse to entertain such motions when made through the medium of the clerk. The application is denied, and judgment ordered dismissing the proceeding. Denied.

HUNT, J., being absent, takes no part in the foregoing decision.

BURKHALTER et al. v. NUZUM et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

APPEAL AND ERROR—NECESSITY OF OBJECTION—WITNESSES—IMPEACHMENT—LEASE OF ALLOTTED LANDS—INSTRUCTIONS—CONTRACT—POSSESSION OF CROPS—OWNERSHIP OF PROPERTY.

1. An allegation of error in the admission of evidence will not be considered on appeal where the question was not objected to, and no motion was made to strike out the answer.

2. Where an impeaching question is not on any material issue, and it does not tend to contradict any prior statement made by the witness, an objection thereto should be sustained.

3. The evidence showed that R., holding allotted lands on an Indian reservation, made a

contract with a third person to raise and crib corn on such lands, and afterwards transferred her interest in the crops to plaintiff, who exercised control thereover. The crops were afterwards levied on by defendant as the property of R. Held, that it was not error to refuse to instruct that the lands were allotted, and that plaintiff never had legal possession thereof, and that his contract was void, when an instruction was given that such contract was void as a lease, because allotted lands could not be leased without the consent of the secretary of the interior, and such consent was not shown.

4. An instruction, in an action for crops raised on allotted lands, that the possession of crops by one holding allotted lands under a contract with the person to whom the lands were allotted, which has not been approved by the secretary of the interior, cures such defect, is not erroneous.

5. Where corn in the possession of plaintiff was levied on by defendant as the property of a third person, and sold, the defendant cannot defeat an action for restitution by showing that the property did not belong to plaintiff, but it must appear that it belonged to the judgment debtor.

Error from district court, Brown county; R. M. Emery, Judge.

Action by George Nuzum and another against George H. Burkhalter and another. From a judgment in favor of plaintiffs, the defendants bring error. Affirmed.

A. S. Brewster and Ryan, Davis & Reeder, for plaintiffs in error. Jas. Falloon, for defendants in error.

PER CURIAM. The substantial controversy in this case is as to the title to certain corn raised during the season of 1897 on the land of Anna E. Richardson in the Iowa Indian reservation in Brown county, said land having been allotted to her under the provisions of an act of congress to provide for the sale of the Sac and Fox and Iowa Indian reservations in the states of Nebraska and Kansas (Act March 3, 1885; 23 Stat. 351). The plaintiff in error George H. Burkhalter claims title to the corn in controversy by reason of a levy and sale thereof under a judgment of the district court of Doniphan county against the said Anna E. Richardson and her husband, and this claim is valid if the owner of the land was at the time of the levy entitled to the crops then being grown thereon. The facts claimed to constitute the defendant in error Nuzum's title to the corn is as follows: On April 2, 1897, Anna E. Richardson made a written contract with Hugh Ryan to raise and crib the corn on her land described for 10 cents a bushel. On May 1, 1897, this contract was assigned to George Nuzum in the following language: "White Cloud, Kansas, 5-1-1897. In consideration of ten hundred and thirty-two dollars, the receipt of which is hereby acknowledged, I hereby sell, assign, set over to George Nuzum all my right, title, and interest in and to the within agreement. The said George Nuzum to have all the corn raised on said land, and said George Nuzum is to pay Hugh Ryan his ten cents per bushel for raising said corn. I hereby guar-

anty said George Nuzum peaceable and full possession of all of the land mentioned in this contract. Anna E. Richardson. George Nuzum. Witness this May 1st, 1897. C. W. Richardson." This transfer was agreed to by Ryan, and he proceeded, under the direction of Nuzum, to plant and raise the crop. The evidence is conclusive that from the time of the assignment Nuzum had the possession of the land upon which the crop was raised, and that Ryan raised it under his direction, and was in the full control of the premises as the employé of Nuzum until part of the corn was hauled off by the plaintiffs in error, except whatever constructive possession the sheriff may have had by reason of his levy, or the purchaser by reason of the sale.

There are 17 assignments of error set out and urged in their brief by the plaintiffs in error. The last five of these are founded upon the errors alleged in the others, and will require no special notice. In relation to the first allegation of error it is sufficient to say that the question was not objected to, and there was no motion to strike out the answer; besides, the objection to the answer was without merit, as the witness had previously testified that he had given direction about getting in the corn. The so-called "impeaching question" was not upon any material issue in the case, and we fail to see that it tended to contradict any prior statement made by the witness. The objection to the question on page 65 of the record was properly sustained. The fourth allegation of error is, in substance, that the court refused to instruct the jury that the lands upon which the corn was raised are allotted Indian lands, and that under the evidence in this case the plaintiffs never had legal possession of the same, and that the contracts attached to plaintiffs' petition are absolutely void. We do not think that the court erred in refusing to give instruction. The law upon this question was correctly given by the court in its seventh instruction, which is as follows: "You are further instructed that the undisputed evidence shows the lands on which the corn was raised to be on the Iowa Indian reservation, and allotted lands, and any such lands cannot be leased or disposed of without the approval of the secretary of the interior, and there is no evidence of such approval, and such contract, so far as it purports to be a lease of the premises, is void and of no effect between the parties." The third instruction asked by the defendant below was properly refused. The fourth instruction asked for was given with the addition of the words "except as hereafter stated," and this evidently refers to instruction No. 12 as given by the court, the giving of which is the subject of the tenth allegation of error. The substance of instruction No. 12 is that possession of personal property cures the alleged defect in the chattel mortgage and

contracts, and this view is authorized by Bank v. Sargent, 20 Kan. 578. Under the seventh allegation of error the plaintiff in error says: "The corn levied on and sold, and at gathering time defendant Burkhalter had taken possession of part of it when this suit was brought. His purchase and possession was good as against all the world except the true owner. If it was not the property of the plaintiff, it made no difference whether or not it was the property of Anna E. Richardson at the time of the sale." In this, we think, they are in error. The corn, as claimed by the defendant in error, and as found by the jury, was in the possession of the defendant in error, and was raised and cribbed by him or under his direction, and, unless the title passed to the plaintiffs in error by the sale, his taking was wrongful, and the party from whom he wrongfully took it was entitled to restitution. The criticism of the sixth instruction given by the court is groundless. We see no reversible error in giving instructions Nos. 10, 13, or 16. It seems to us that the case was fairly tried in the court below, and substantial justice done between the parties, and we see nothing in any of the allegations of error that would entitle the plaintiffs in error to a new trial. The judgment of the district court is affirmed.

(9 Kan. App. 347)

WILSON et ux. v. WOLF et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

RECEIVER—APPOINTMENT.

In a suit to foreclose a mortgage on the homestead of the mortgagor after sale and confirmation, a failure to pay taxes that have accrued thereon before sale is not sufficient to warrant the appointment of a receiver with directions to take and rent the property, and apply the rents so collected to the discharge of such tax lien.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Mary J. Wolf and another against E. G. Wilson and wife to foreclose a mortgage. J. B. McAbee was appointed receiver, and defendants bring error. Reversed.

Edwin A. Austin and E. G. Wilson, for plaintiffs in error. Vance & Campbell, for defendants in error.

MAHAN, P. J. The plaintiffs in error appeal from an order of the district court appointing a receiver in a case of foreclosure of mortgage on real estate, made after the decree, sale, and confirmation. The ground upon which the motion for the appointment of a receiver is predicated is that the defendants in possession have allowed the premises to go to waste, the buildings and improvements to be out of repair, and greatly damaged by reason thereof; that the defend-

ant mortgagor has not paid the taxes, and has permitted the land to be sold therefor, and is not occupying the premises in good faith for the purpose of redemption, but for the purpose of wasting the same; and that, unless a receiver is appointed, the premises will go to destruction, to the great loss and damage of the plaintiffs. The only proof offered in support of this application for a receiver is the affidavit of the agent of the plaintiffs that the property had been sold for the taxes of 1896, giving the amount, and that the taxes of 1897 were not paid, and the affidavit of the attorney for the plaintiffs, who states that he had examined the county records, and that they show the property had been sold for the taxes of 1897, giving the amount. On behalf of the defendants, in opposition to the motion, and by the affidavit of the mortgage, it appears that the property was not suffered to become out of repair, but has been by him very much improved; so that the only ground for the appointment of a receiver is that the taxes have not been paid. The Code provides that in cases of foreclosure a receiver may be appointed where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the conditions of the mortgage have not been performed, and that the property is probably insufficient to discharge the mortgage debt. There was some evidence upon the question of the value of the property, and it would seem therefrom that the property is of abundant value to discharge the mortgage debt and taxes. It is a rule of equity that a receiver will not be appointed to protect property where the law affords another safe, expedient, and speedy remedy. See High, Rec. § 10. And it is universally conceded that it is a peremptory measure, to be exercised with great care, and, doubtfully, that it is a serious interference with the right of a citizen with the possession of his property. Section 2, c. 109, Laws 1893, provides for the redemption of real estate, and contemplates that the holder of the certificate may pay the taxes, and that the redemptioner, whoever he may be, must, in addition to the debt, interest, and costs, discharge the taxes paid. So he has an adequate and proper remedy in this direction. Section 24 provides "that the court may when required to protect the premises against waste appoint a receiver and place him in charge thereof, and that he shall hold the premises until such time as the purchaser is entitled to a deed, and he shall be entitled to rent, control, and manage the property, but that the income during such time, except what is necessary to keep up repairs and prevent waste, shall go to the owner or defendant in execution, or the owner of the legal title." This is the only provision of the statute of this state providing for the appointment of a receiver after decree and sale, and the facts of this case do not bring it within the provis-

ions of the law. Further, in this case the premises were the homestead of the mortgagor, and are and were occupied by him for a home, and had been for several years. We are of the opinion that the authority was exercised without the law, that the receiver ought not to have been appointed, and that the mortgagor and his family should not have been turned out of possession. The order appointing the receiver is reversed.

(9 Kan.App. 344)

DOLMAN v. BOARD OF COM'RS OF SHAWNEE COUNTY.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

STATUTES—REPEAL—SALARY OF PROBATE JUDGE.

That part of section 2, c. 163, Laws 1887, which provides for a salary for the probate judge of \$15 per annum for each 1,000 inhabitants in such county, was repealed by chapter 131, Laws 1897.

(Syllabus by the Court.)

Error from district court, Shawnee county; Hazen, Judge.

Action by Lewis S. Dolman against the board of county commissioners of the county of Shawnee. Judgment for defendant, and plaintiff brings error. Affirmed.

Garver & Larimer, for plaintiff in error. Jetmore & Jetmore and W. E. Fagan, for defendant in error.

WELLS, J. The plaintiff in error, who was also the plaintiff in the district court, brought this action to recover the sum of \$758.73 as salary for services rendered under the prohibitory liquor law, as probate judge, during the year 1898, under the provisions of section 17, c. 101, Gen. St. 1897. The defendant denied liability therefor, for the alleged reason that the statute under which the claim was made was repealed by chapter 131, Laws 1897. This is the only question in the case.

At the November, 1880, election the so-called prohibitory amendment to the constitution of the state was adopted, and, to make the amendment effective, the legislature of 1881 passed "An act to prohibit the manufacture and sale of intoxicating liquors except for medical, scientific and mechanical purposes, and to regulate the manufacture and sale thereof for such excepted purposes." Laws 1881, p. 233. This act, as was said by the supreme court in *Intoxicating Liquor Cases*, 25 Kan. 760, cast upon the probate judge the duties of a "commissioner of licenses," and made provision for his compensation for the duties performed thereunder by fees to be paid by the parties requiring his services. This act was amended and supplemented by chapter 163, Laws 1887, which provided for the collection of certain fees for services thereunder, and that the same should be turned over to the county, and then provided: "The pro-

bate judge shall receive no fees for his services under this act, except a salary of fifteen dollars per annum for each one thousand inhabitants in such county, the number to be determined by the last annual census return of such county, but in no case shall such salary exceed the sum of one thousand dollars per annum, to be paid by the county commissioners as other salaries." This is the provision of law under which the plaintiff in error claims, while the defendant in error contends that chapter 131, Laws 1897, repeals it. Section 1, c. 131, Laws 1897, reads: "That the officers and persons herein mentioned shall be entitled to receive for their services the fees and compensation herein allowed, and no other, except as may be otherwise provided by law." The provisions of section 12, so far as they have any bearing on the issues herein, are as follows: "The probate judge of each county shall receive for his services the following fees: [Here follows a list of items of services and the fees allowed therefor.] For any other services required by law, the same fees as are prescribed for the clerk of the district court for like services. In addition to the fees herein provided, the probate judge shall be entitled to receive such fees as are or may be provided by law for such services under the prohibitory law: provided, further, that the probate judge in counties having the following population, may retain all fees collected as hereinafter specified: In counties having a population of more than 45,000, \$2,400 per annum, and if, in any year the fees charged shall be more than the sums above specified in their respective counties, the said probate judge shall pay to the county treasurer of their respective counties one-half of such excess when collected, taking duplicate receipts therefor, one of which they shall file with the county clerk, and such money shall become a part of the general fund of the county." Section 23 reads as follows: "All acts and parts of acts heretofore passed, general or special and now in force, that conflict with the provisions of this act, are hereby repealed." To summarize the legislation upon this subject, we may say: In 1881 additional duties were assigned to the probate judge, and his compensation therefor was to be made by fees to be paid by the parties requiring his services. In 1887 the fees were to be turned over to the county, and the probate judge was to receive a salary for the services under the prohibitory law. In 1897 the probate judge was allowed to retain all fees collected, including such as are or may be provided by law for services under the prohibitory laws, up to \$2,400, and one-half the amount over said sum. It seems clear to us that the intention of the legislature in 1897 was to make the office of probate judge a fee office exclusively, as with it originally was coupled a provision that one-half the excess over a specified sum

should go to the general fund of the county. The judgment of the district court is affirmed.

DOUGLASS v. LIEBERMAN et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

On rehearing. Reversed.

For former opinion, see 57 Pac. 251.

John C. Douglass, pro se. John H. Atwood and William W. Hooper, for defendants in error.

PER CURIAM. This case is before the court upon rehearing. The defendants in error interposed a motion to dismiss the petition in error for the reasons: (1) That there is no petition in error filed as required by law; (2) that the case-made was not served; (3) that the case-made is not properly authenticated; (4) the proceedings in error were not commenced within one year after the rendition of judgment. The motion to dismiss will be denied. The court adheres to its former opinion. Douglass v. Lieberman, 57 Pac. 251. The judgment of the district court setting aside the affidavit, service, and judgment as to Anderson is reversed, and the court is directed to overrule the motion therefor.

McELROY, J., dissents.

WESTERN CONTRACTING & BUILDING ASS'N et al. v. RETTIGER et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

APPEAL—REVIEW.

Where the largest sum that could be allowed under the pleadings and evidence is materially less than that found by the jury, the judgment will be reversed.

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by David Rettiger and P. J. Morton against the Western Contracting & Building Association and others. Judgment for defendants, and plaintiffs bring error. Reversed.

David Overmyer and G. A. Huron, for plaintiffs in error. Eugene Hagan, for defendants in error.

PER CURIAM. The defendants in error, who were plaintiffs in the trial court, sold and delivered to the Western Contracting & Building Association, one of the plaintiffs in error, certain stone to be used in the erection of a hospital for the Atchison, Topeka & Santa Fé Hospital Association in the city of Topeka. Said stone was delivered to said building association between the 31st day of October, 1894, and June 8, 1895, and the value of the same amounted in the aggregate

to \$517.91. Upon this amount the plaintiffs below, in their petition, admitted the payment of \$87.33 on March 1, 1895, and \$35 on March 8, 1896, and upon the trial the receipt of \$32.91 from E. Wilder on the account was admitted. The plaintiffs in error claim that the entire account has been paid, and proved payments sufficient, if applied to this claim, to liquidate it; but the plaintiffs below insist that all of these payments except the sums admitted as above mentioned were properly applied to the payment of other accounts. This claim seems to have been sustained by the jury. Approved by the court, of the correctness of this we have serious doubts; but, as the amount of the verdict and judgment cannot be sustained by any legal theory upon the pleadings and evidence giving them the most favorable construction possible, a new trial will be awarded, and it is not necessary to carefully scrutinize the evidence to see if it justified a verdict for the plaintiff in any sum. There is nothing in the pleadings or evidence that would justify the allowance of interest until the date of the last charge, June 8, 1895; and the largest sum that could be allowed under the pleadings and evidence is materially less than that found by the jury, and for this reason the judgment will be reversed. The judgment is reversed, and a new trial directed.

(9 Kan. A. 835)

HALE v. HOAGLAND et ux.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

JUDGMENT—VACATING.

Gen. St. 1897, c. 95, § 73, provides that judgments rendered on notice by publication may be set aside by pursuing a certain procedure, which includes the filing of a full answer. On an application to set aside a judgment canceling a mortgage, the answer so filed contained a general denial, and allegations that the mortgage was made to secure a loan, made by a building and loan company of which defendant was a receiver, and that it was to be paid in monthly installments, and that it was partially paid, but that there was \$1,000 due and unpaid. *Held*, that the answer was sufficient as a defense, and that it was error to refuse to open up the judgment, the statute being complied with in other respects.

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Suit by Nelson Hoagland and Carrie Hoagland, his wife, against William D. Hale, receiver of the American Savings & Loan Association, to cancel a mortgage and quiet title. From an order overruling an application to open up a judgment, defendant brings error. Reversed.

John H. Crain, for plaintiff in error. True & True, for defendants in error.

PER CURIAM. Nelson Hoagland and Carrie Hoagland brought this action against the plaintiff in error in the district court of Wyandotte county to cancel a mortgage on real estate and quiet title. Judgment was

rendered upon constructive service only, without the appearance of defendants. Within the statutory time the defendants below made an application, under section 78, c. 95, Gen. St. 1897, to open up the judgment and be let in to defend. The only question in this case is as to whether the answer and cross petition state a defense and cause of action. The plaintiff in error filed an answer and cross petition: (1) A general denial. (2) Setting out the corporate capacity of the American Savings & Loan Association; the appointment of the plaintiff in error as receiver by the courts of Minnesota, of which state he and the corporation were residents; that on July 21, 1888, Nelson Hoagland made a written application to become a member of said association; that he subscribed for and received 20 shares of its capital stock, of the par value of \$100 per share, upon which he agreed to pay 60 cents per share monthly until the stock matured; that thereafter, on August 27, 1888, Hoagland made application for a loan of \$1,000 as an advancement on this stock, and bid the sum of \$50 per share as a premium therefor; that the application was accepted; that on December 10, 1888, he executed, together with his wife, a bond in the sum of \$2,000, secured by a real-estate mortgage, to be paid within nine years, with 6 per cent. interest on \$1,000, or if he paid \$12 dues on the stock monthly, and the monthly installments of interest, until the stock should become matured, and then surrendered the stock for cancellation, the note and mortgage were to be canceled. It is alleged that Hoagland, under these separate contracts, paid the monthly dues and interest until and including December, 1895, aggregating \$1,438; that there was due and unpaid upon the indebtedness the sum of \$1,000, with interest. The plaintiff in error, as defendant below, complied with all the requirements of the statute in making his application to open up the judgment. The answer and cross petition, taken together, without any denial or explanation, constitute a defense to the cause of action set out in the petition. The court, therefore, erred in refusing to open up the judgment, and in refusing to permit the defendant, upon such terms as it deemed reasonable, to defend in the action. The judgment of the trial court is reversed, and the cause remanded for further proceedings.

(9 Kan. A. 303)

SWIFT & CO. v. CREASEY.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

INJURY TO EMPLOYE—PLEADING—EVIDENCE.

1. Petition for personal injury examined, and *held* to state a cause of action.

2. Evidence examined, and *held* to show a prima facie cause for a recovery for personal injury.

3. Error in the admission of incompetent testimony will not be regarded as reversible error,

where it is not reasonable that such testimony could prejudicially affect the party complaining. (Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; W. B. Holt, Judge.

Action by Henry T. Creasey against Swift & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Amos H. Kagy and Hutchings & Kepingler, for plaintiff in error. Getty & Hutchings and Meservey, Pierce & German, for defendant in error.

McELROY, J. This action was brought by Creasey, defendant in error, to recover damages for personal injuries sustained by him while in the employ of plaintiff in error, Swift & Co. The plaintiff, in his petition, alleged, in substance: (1) That said defendant is a corporation engaged in the business of operating a packing house in Wyandotte county. (2) That, in operating the packing house, defendant used great power,—an engine room, several steam engines, boilers, furnaces, and other machinery necessary to operate the same; that plaintiff was in the employ of the defendant as an ash wheeler, and his duties consisted in hauling out ashes from said engine room, and in cleaning the flues in said boilers. (3) That about 10 o'clock on the night of August 6, 1896, while plaintiff was engaged in his usual employment, a fire broke out in room 15 in the smoke house, in another part of said defendant's plant, located about 250 feet from the engine room. The smoke house was a large, four-story brick building, used by said defendant for smoking meat. (4) That at the time there were hanging above room 15 about 50,000 pounds of meat, which were undergoing the process of smoking. That one John Joss was in charge of the work of keeping up the fires at said time on said day, and had two men to assist him, whose duty it was, under said Joss' supervision, to put wood on said fires, and keep up the smoke. That said Joss had charge of said work at night, and one Hugh Jackson had charge thereof in daytime, and was said Joss' superior. That on that evening Jackson had retired, and Joss had charge. He was instructed by Jackson to rush the fires in room 15, and, in accordance with instructions, Joss caused a very large and hot fire to be kept up,—much larger than usual or safe. (5) Immediately upon the alarm of said fire being given as heretofore alleged, plaintiff was directed by defendant's night foreman of said engine room, one Malcom Stewart, under whom plaintiff was employed, to proceed to the aforesaid smoke house and assist in putting out the said fire. Upon receiving said instructions, plaintiff, the foreman, Stewart, and one Felch, procured fire hose, attached the same to a water plug, and laid a line thereof to said smoke house, and thereupon, notwithstanding said defendant well knew that said brander was located

as heretofore alleged, and that the heat of the aforesaid fire was liable to and would cause an explosion, and that the unusual heat in said room 15 would cause the grease to run down and become ignited and intensely hot, and that the sudden throwing of cold water thereon was exceedingly dangerous to anyone standing near by, on account of the explosive effect, said plaintiff was carelessly and negligently ordered and directed by said Stewart to take the end of said hose and go into said building for the purpose of putting out said fire. In obedience to said instructions, and without any knowledge of the danger thereby incurred, plaintiff, accompanied by Stewart and Felch, entered said smoke house through the aforesaid alley on the north side. That after plaintiff and his companions had gone 60 feet into said building, and were near room 15, said Stewart returned to see why the water was not turned on, and carelessly and negligently directed said plaintiff to remain and fight the fire; and shortly thereafter, water having been turned into the hose, plaintiff entered through the doorway from said alley into room 15, where the fire was burning, and turned a stream of water from the hose which he held onto the burning wood and grease, when there was a quick and loud explosion, and great sheets of flame and clouds of smoke were forced down, around, and against said plaintiff, and he was hurled a long distance from where he was standing, and knocked insensible, and there remained, inhaling the overheated air and smoke, and surrounded by the burning debris, for several minutes, and until dragged out by his associates. (6) That by reason of said explosion, and the forcing down, around, about, and against plaintiff the fire and smoke, as heretofore alleged, plaintiff's neck, face, arms, and chest were burned and blistered, and plaintiff was compelled to, and did, breathe large quantities of overheated air and smoke, and thereby was made sick and sore, and suffered and still suffers great pain and agony, and his head and lungs were and are still affected, and plaintiff is slowly becoming deaf, and will be compelled during the remainder of his life to suffer great pain and inconvenience, all to his damage, etc. The defendant answered: (1) A general denial, and alleging, further, that the injury to plaintiff, if any, was the result of his own carelessness and negligence directly contributing thereto, which carelessness and negligence are more particularly and specifically stated as follows; (2) That plaintiff voluntarily left his place of safety, and went into the place which he alleges was dangerous, and thereby exposed himself, and whatever damage he may have sustained, if any, was the result of such voluntary act on his part. (3) That plaintiff voluntarily assumed the danger, if any, which arose in going from a place of safety to assist in extinguishing the fire in defendant's smoke house. (4) That whatever danger, if any,

plaintiff was subjected to, was obvious and well known to him, and he voluntarily assumed the same. (5) That plaintiff was injured, if injured at all, by the carelessness and negligence, if any, of a fellow servant. Wherefore defendant prayed judgment for costs. The plaintiff's reply was a general denial. A trial was had before the court and jury, which resulted in a verdict and judgment for plaintiff in the sum of \$1,000 and costs. Defendant's motion for a new trial was overruled. The defendant, as plaintiff in error, presents the case to this court for review, and alleges error in the proceedings of the trial court.

1. That the court erred in overruling the demurrer to the evidence: The contention here is that the demurrer should have been sustained, for the reasons that the petition does not state facts sufficient to constitute a cause of action; that the servant assumes whatever risk there may be in the performance of his duty, if he has knowledge of the danger incurred, or if the circumstances surrounding the service are such as to raise the presumption of knowledge; that the injury, if any, sustained, was the result of the negligence of his fellow servant, Joss or Stewart; that the evidence fails to show a prima facie case upon which plaintiff could recover; and that the judgment is wholly unsupported by the evidence. The contention is that the petition does not charge a want of knowledge of the danger on the part of Creasey. He alleges "that he was carelessly and negligently directed by Stewart to take the end of the hose and go into the building for the purpose of putting out the fire; that, in obedience to instructions, without knowledge of the danger thereby incurred, he entered the smoke house." The defendant in the trial court interposed no objection to the petition, but filed its answer. The allegations of the petition in this regard are sufficient. The servant assumes whatever ordinary risk there may be in the performance of his duty, if he has knowledge of the danger, or if the circumstances surrounding the service are such as to raise the presumption of knowledge. If a person accept a giver service, he assumes the ordinary risk of such dangers as he is acquainted with or as are obvious to him. In the case at bar, Creasey had never been in the smoke house before the night he received the injury. It was dark. He could not tell anything about the surroundings or construction of the building at the time he went into it. He was a common laborer. It was not shown, nor is it reasonable to presume, that he had any information or special knowledge on the subject of extinguishing fires. He knew nothing of the construction of the building, magnitude of the fire, or the extent of the result which would follow the turning on of water. The packing company knew, or is supposed to have known, all

of these things. Stewart was the foreman whose instructions Creasey was bound to obey, and Joss was foreman in another department. We do not think that either of these parties were the fellow servant of Creasey, in the ordinary acceptation of the term. It is the duty of the master not to expose an inexperienced servant, at whose hands he requires a dangerous service, to such danger, without giving him warning. The master must give him such instructions as will enable him to avoid injury, unless both the injury and the means of avoiding it are apparent. The master cannot exempt himself in this regard by delegating his power to another, and then call such party a "fellow servant." We think both Joss and Stewart were vice principals. The testimony shows a prima facie cause of action, and the judgment is supported by sufficient evidence. The demurrer to the evidence was properly overruled.

2. That the court erred in the admission of testimony: Complaint is made that the plaintiff was permitted to show that water, when heated, expands 1,728 times its original volume. Is the effect resulting from water and fire being brought together a matter of common knowledge, or is it a matter of scientific knowledge? If the former, it was error to admit the testimony. If the latter, the testimony was properly admitted. We take it that it is a matter of common knowledge that an expansion occurs by heating water, but the extent of the expansion is a matter of scientific knowledge. In either event, the testimony could not prejudicially have affected the substantial rights of the plaintiff in error.

3. That the court erred in giving and in refusing instructions. The court properly instructed the jury as to the law applicable to the cause on trial. Hence it follows that the instructions submitted by plaintiff in error were properly refused. The judgment must be affirmed. All the judges concurring.

STATE v. CRAWFORD

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

INTOXICATING LIQUORS—EVIDENCE OF THE QUALITY OF LIQUOR—TRIAL—CLOSING CASE BEFORE THE ARRIVAL OF WITNESSES.

1. Where, on the trial of defendants for the illegal sale of intoxicating liquors, the sale of the liquors, as specified in the information, was admitted, and the defense was that they were not intoxicating, it was not error to permit other witnesses to testify to the intoxicating effects of such liquors, even if the liquor drank by such witnesses was not charged in the information as being illegally sold.

2. A trial for the illegal sale of liquor was set for a certain day, and defendant subpoenaed certain witnesses for such time, but the trial did not commence till the following day, and the witnesses did not appear. The defendant stated that he was ready for trial. When defendant rested his case he announced that he did so

with the understanding that the testimony of such witnesses should be taken if they arrived before the testimony was closed. The witnesses did not appear till the testimony was closed. *Held*, that it was not error to close the case without waiting for their arrival.

Error from district court, Johnson county; John T. Burris, Judge.

William J. Crawford was convicted of the unlawful sale of intoxicating liquors, and from the judgment and an order denying a new trial he brings error. Affirmed.

Ogg & Scott and C. L. Randall, for plaintiff in error. A. A. Godard, Atty. Gen., and F. N. Hamilton, Co. Atty. (J. W. Parker, of counsel), for the State.

PER CURIAM. The county attorney of Johnson county, on January 16, 1899, filed an information in the district court of that county charging the appellant, William Crawford, Jr., with the unlawful sale of intoxicating liquors. The information contained four counts, alleging sales on October 15, 1898, September 29, 1898, January 7, 1899, and January 12, 1899. The defendant was arraigned, and pleaded not guilty. The cause was tried at the September, 1899, term of court, before a jury. The trial resulted in an acquittal of the defendant upon the first, third, and fourth counts of the information, and his conviction upon the second count. The defendant filed his motion for a new trial, which was overruled. The court sentenced the defendant to the common jail of the county for a period of 30 days, that he pay a fine of \$100, and the costs of the prosecution, and that he be committed to jail until the fine and costs were paid. The defendant, as appellant, prepared and filed his bill of exceptions, and presents the record to this court for review, alleging errors in the proceedings of the trial court, which we will examine in order:

1. That the court erred in permitting witnesses McCarthy, Graham, and McCreary to testify on rebuttal to sales other than those stated in the information. The appellant is mistaken as to the rebuttal evidence of these witnesses. The state did not upon rebuttal attempt to prove any specific sales. The questions objected to were not as to sales, but related to the drinking of the liquors in question and its effect. The purpose of this testimony was to show that the stuff sold by appellant was intoxicating, not that he had made sales. The sales were admitted by the defendant, but he sought to show that the articles sold were not intoxicating. The evidence of the state showed sales of drinks and bottled liquors, some of which were labeled "Amberline" and "Original Amberline," but the witnesses thought it was beer. The defendant then admitted the sales, but introduced a large number of witnesses, whose testimony tended to show that the stuff handled was not beer, but "Amberline," "Tonic," "Claffery," and "Malt Mead," and that these drinks were not intoxicating. Many of the witnesses also testified that de-

fendant kept no intoxicating liquors about his place. In answer to this, upon rebuttal, the state offered the testimony of McCarthy, Graham, and McCreary, of which complaint is made, to show that the articles sold under these various names were intoxicating. This testimony, under the circumstances, was proper rebuttal.

2. That the court erred in refusing to hold the case open until defendant's witnesses Seckinger and Hale could be brought into court. The case was set for trial September 13th, but was not called for trial until the 14th, at which time the witnesses had not put in an appearance, although they had been served by leaving process at their usual place of residence. The defendant announced ready for trial. The trial began without objection,—without any showing or request for a postponement or a continuance. There was not a word of objection to commencing the trial in the absence of these witnesses. The first time that the defendant called the attention of the court to the fact that the witnesses were absent was when he rested his case. He announced that he rested, with the understanding that, if the witnesses arrived before the taking of the testimony was finally closed, they should then be examined. They did not appear until after the testimony was closed. The court did not abuse its discretion in closing the case without waiting for the arrival of the witnesses. The motion for a new trial was properly overruled. The judgment is affirmed.

(9 Kan.App. 325)

CITY OF KANSAS CITY v. WYANDOTTE GAS CO.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

MUNICIPAL CORPORATIONS—CONTRACTS—ULTRA VIRES.

1. The plea of ultra vires, when interposed for or against a corporation, ought not to be permitted to prevail when it would not advance justice. Where a city has lawful authority to make a contract, makes the same, and accepts the benefits accruing, it ought not to be allowed to withhold payment for benefits accrued.

2. A city containing more than 40,000 inhabitants is not authorized, under chapter 250, Laws 1895, to repudiate its indebtedness for the lighting of its public streets and alleys, under a valid contract entered into prior to the passage of such act.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by the Wyandotte Gas Company against the city of Kansas City. Judgment for plaintiff. Defendant brings error. Modified.

F. D. Hutchings and T. A. Pollock, for plaintiff in error. Alden, McFadden & Alden, for defendant in error.

McELROY, J. This action was commenced by the Wyandotte Gas Company,

plaintiff, against the city of Kansas City, defendant, to recover a balance due on the monthly bills of the gas company for gas furnished to the defendant city. The gas company alleged that it is a corporation organized under the laws of the state of New York; that the city is indebted to it in the sum of \$1,337.32, for gas furnished from April 1, 1895, to July 1, 1897, as shown by statements of account attached to the petition. The company asked for judgment for the amount claimed, but made no demand for interest.

The defendant city answered: "(1) That it denies each and every material allegation in said petition contained and set out, except that said defendant city is a city of the first class, as in the petition alleged; and defendant further alleged that, at the time of the incurring of the pretended indebtedness and accruing of the pretended cause of action sued on herein, the defendant was such city, and had a population of over 40,000 inhabitants. (2) That if there is any liability on the part of the defendant, which defendant denies, then defendant alleges that in 1895, 1896, and 1897 the assessed valuation of all the property, both real and personal, in said Kansas City, Kan., was \$7,616,957, and that by chapter 259 of the Session Laws of 1895, approved March 7, 1895, the levy of Kansas City, Kan., for the lighting of its streets and other places in said city by electricity and gas, was limited to 2¼ mills on the dollar, and that the levy for such purposes was at all times duly made to the full limit allowed by law, and the same was levied during each of the years 1895, 1896, and 1897 for such purposes based upon such valuation, and amounted in the aggregate to the sum of \$51,414.45, and that during said years 1895, 1896, and 1897 the total cost of lighting the streets and other public places of said city amounted to the sum of \$68,552.60, under existing contracts and contracts made prior to 1896; that said sum of \$51,414.45, so levied as aforesaid, was paid under contracts during said years for lighting of the streets and other public places of said city pro rata to the plaintiff herein and the Kansas City Consolidated Electric Light & Power Company; that there was paid to the plaintiff during said time, as its pro rata share, the sum of \$4,011.96, and that there has been paid during said time to said Consolidated Electric Light & Power Company, as and for its pro rata share of said levy, for lighting the streets and other public places of said city by gas and electricity, the sum of \$47,402.45, and that said sums so paid to plaintiff and the Kansas City Consolidated Electric Light & Power Company are equal only to about 75 per cent. of the bills for the lighting of said streets and other public places of said city of Kansas City, Kan., by electricity and gas. (3) That said city, by reason of the premises aforesaid, does not owe, and has had no

power since April, 1896, and prior thereto, to contract, a debt to said plaintiff company for more than the sum of \$4,011.96, which sum this defendant avers has been or was before the commencement of this action fully paid to said plaintiff." And prayed judgment for costs.

The plaintiff replied: "(1) That it denies each and every allegation and averment contained in said defendant's amended answer which are inconsistent with allegations of plaintiff's petition. (2) That prior to the passage of the act of the legislature of the state of Kansas, to wit, chapter 259 of the Session Laws of 1895, referred to in defendant's amended answer, the plaintiff and defendant entered into a contract whereby and under the terms of which the indebtedness set out in plaintiff's petition accrued and became due, and which contract is still in force and effect; that said contract was and is in the form and nature of a certain franchise duly granted to said plaintiff by said defendant city by an ordinance duly and regularly passed, the same being Ordinance No. 406, passed in council on the 19th day of June, 1883, and on said day approved by the mayor of said city, and duly published according to law. (3) That afterwards, and prior to the enactment of said chapter 259 of the Session Laws of 1895, said franchise, together with the rights and privileges thereunder, was by Ordinance No. 1212 of said defendant city, duly passed in council, January 14, 1890, and approved by the mayor thereof January 21, 1890, and duly published according to law, extended to and throughout the limits of said defendant, the city of Kansas City, Kan. (4) That afterwards, and prior to the enactment of said chapter 259 of the Session Laws of 1895, said franchise above referred to, together with the extensions thereof as above stated, was further extended by an ordinance of said defendant city, which ordinance is No. 1907, and duly passed in council, November 7, 1890, and approved November 8, 1890, and duly published according to law; all of which said ordinances are in full force and effect, and are herein referred to and made a part of this reply as fully as though herein set out. (5) That said chapter 259 of the Session Laws of 1895, each and every part thereof, is unconstitutional and void, and of no effect, in so far as the rights of the parties hereto are concerned."

A trial was had upon the pleadings and evidence. The court found generally in favor of the gas company, and rendered judgment against the city for the sum of \$1,524.36, principal and interest. The defendant duly excepted, and filed its motion for a new trial upon all of the statutory grounds, which was overruled. The defendant, as plaintiff in error, prepared its case-made, and presents the record to this court for review, alleging error in the proceedings of the trial court as follows: That the court erred in rendering

judgment in favor of the defendant in error and against the plaintiff in error; that the judgment is contrary to the law and the evidence; that the court erred in allowing interest upon the accounts, and in rendering judgment for the sum of \$1,524.38; that the court erred in overruling the motion of the plaintiff in error for a new trial.

At the trial the parties made the following admissions: "(1) That, if anything is due to the plaintiff from the defendant under the law in this case, then, and in that case, the items of the account herein sued on are correct, and that there is a balance due and unpaid upon said account, as stated in the petition. (2) It is admitted by the plaintiff herein that on and prior to the incurring of the indebtedness herein sued upon the city of Kansas City, Kan., was a city having a population of over 40,000 inhabitants; that for the years 1895, 1896, and 1897 the assessed valuation of all the property in said city, both real and personal, was \$7,616,957. (3) That the tax levy of $2\frac{1}{4}$ mills on the dollar for street lighting of said city upon such assessed valuation during such years of 1895, 1896, and 1897 amounts in the aggregate to the sum of \$51,414.45. (4) That during said years of 1895, 1896, and 1897 the total cost for lighting the streets and other public places of said city, under existing contracts with the plaintiff and the Kansas City Consolidated Light & Power Company, and under contracts made prior to said year 1895, amounted to the sum of \$68,552.60. (5) That said sum of \$51,414.45, so levied and collected as taxes upon the total taxable property of said city as aforesaid, was paid under contracts for lighting the streets and other public places of said city of Kansas City during years of 1895, 1896, and 1897, of which sum the plaintiff was paid an amount equal to about 75 per cent. of its bills for lighting the streets and public places of the city, that being its pro rata share of said sum of \$51,414.45, the balance of said sum being paid to the Kansas City Consolidated Electric Light & Power Company under its contract with the city in the same ratio of 75 per cent. upon the bills rendered by said last-mentioned company."

The admissions above set out, together with the ordinances described in the reply of plaintiff, constitute all the evidence in the case.

1. The plaintiff in error contends that the provisions of the ordinances which defendant in error claims constitute the contract between the gas company and the city are ultra vires and void. It appears that the contract for lighting the city was made prior to 1895; that at all times prior to the commencement of this action the city treated the contract as a valid existing contract. It permitted, without objection, the execution of the same on the part of the gas company, and accepted the benefits accruing to it by reason of the contract. At the time the contract was made the city had full power and authority to pro-

vide for lighting streets and public places. Gen. St. 1897, c. 32, § 88, subds. 13, 23; Id. § 90; *Stewart v. Town Co.*, 50 Kan. 553, 32 Pac. 121; *State v. City of Hiawatha*, 53 Kan. 477, 36 Pac. 1119. The amount sought to be recovered is admitted to be that agreed upon by the parties, and, in the absence of any showing to the contrary, we must presume was a reasonable charge for the lights furnished. It was admitted that, if anything was due from the city to the plaintiff, the amount due and unpaid upon the account was correctly stated in the petition. The city in this case had accepted the benefits accruing to it, but seeks to avoid the liabilities under the contract. A legal liability springs from a moral duty to make restitution. The city, in a legal aspect, ought to be bound to pay a reasonable price for the benefits accruing to it under the contract, and the reasonableness of the charge is not questioned. *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659. The contention of the plaintiff in error is not supported by reason nor by authorities. The plea of ultra vires ought not to be permitted to prevail when interposed for or against a corporation, when it would not advance justice. *Waterworks Co. v. City of Columbus*, 48 Kan. 99, 28 Pac. 1007.

2. The next contention is that the city had no power to contract an indebtedness for the cost of lighting in excess of the amount of revenue derived from the $2\frac{1}{4}$ mill levy authorized by chapter 259 of the Laws of 1895. The contract for lighting the city was made long prior to the passage of that act, and in no way conflicts with its provisions, unless we construe the conflict to exist by reason of the fact that the levy of $2\frac{1}{4}$ mills did not produce an amount of money sufficient to pay for lighting according to the terms of the contract. At the time the contract was made, the city had authority to provide for and regulate the lighting of its streets. Section 59, c. 100, Laws 1872: "The council may provide for and regulate the lighting of the streets, and the erection of lamp posts, and the council shall have power to make contracts with, and authorize any person, company or association to erect gas works in said city, and give such person, company or association the exclusive privilege of furnishing gas to light the streets, lanes and alleys of said city for any length of time not exceeding twenty-one years." This statute authorized the council to contract for the lighting of the streets, public places, and buildings in such manner as in their judgment is most advisable, for any term not exceeding 21 years. Under the contract in question the gas company erected, has maintained, and operated gas works, furnished the light stipulated to be furnished to the city, and has performed all of the conditions of the contract on its part to be performed up to the commencement of this action. The city had power to contract an indebtedness for lighting at the time the contract was made. It may

be that, after the passage of the act of 1895, the city could repudiate the contract so far as it exceeded the 2¼-mill levy authorized, but it appears to us that so long as the city, without objection, accepted the benefits of the contract it should bear the burdens.

3. That the judgment is excessive. The court erred in rendering judgment for interest upon the account. The plaintiff in the trial court, upon the petition and evidence, was not entitled to recover interest. The judgment will be modified by striking out the amount allowed for interest, so that the judgment as modified will be for \$1,337.32. The judgment as modified is affirmed. All the judges concurring. The costs are equally divided.

(9 Kan.App. 318)

BROKAW et al. v. BARTLEY.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

PLEADING—AMENDMENT.

The filing of an amendatory or supplemental pleading rests largely within the discretion of the trial court. It must be upon notice, and by permission of the court.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by S. J. Bartley against George W. Brokaw and others. Judgment for plaintiff, and defendants bring error. Affirmed.

J. T. Ward, for plaintiffs in error. Jetmore & Jetmore, for defendant in error.

McELROY, J. The defendant in error, S. J. Bartley, on March 22, 1897, commenced her action in the district court of Shawnee county against George W. Brokaw, Jr., and Lewis Brokaw, as co-partners under the firm name of Brokaw Bros., for a recovery upon several promissory notes of \$25 each, and for the foreclosure of a chattel mortgage. J. W. Brokaw was also made a party defendant. The defendants answered, admitting the execution of the notes and mortgage, setting up various accounts as counterclaims and set-offs in the sum of \$160.79, and prayed judgment for any balance due. For reply the plaintiff filed a general denial. The plaintiff below, on the 21st day of June, also filed a supplemental paragraph to her petition, setting up that on January 8, 1890, Brokaw Bros., being indebted to Eli Ulamprel in the sum of \$445 upon promissory note, executed and delivered their certain first mortgage upon the property in question to secure the payment thereof; that on March 6, 1897, there was due thereon the sum of \$43.60, and Brokaw Bros. caused Ulamprel's note and mortgage to be assigned to her as a further security for the payment of the amount due; and she prayed, in case her mortgage hereinbefore set out should, for any reason, be held invalid, that she be subrogated to the rights of

Ulamprel under the last-named mortgage. When the case was called for trial, the defendants asked leave to file their supplemental answer, setting up a judgment in the sum of \$125 as a set-off. This judgment was rendered in favor of George Brokaw on August 26, 1897, in an action pending before A. F. Chesney, a justice of the peace for the city of Topeka, wherein George Brokaw was plaintiff and S. J. Bartley was defendant. The court refused to permit the supplemental answer to be filed. To all of which defendants excepted. A trial was had before the court and a jury, which resulted in a verdict and judgment for the plaintiff in the sum of \$113.25. Motion for a new trial was overruled, and the defendants, as plaintiffs in error, present the record to this court for review, and allege error in the proceedings of the trial court.

The court erred in its instructions to the jury that the facts set forth in the petition do not state a cause of action, that the court erred in refusing to permit plaintiffs to file their supplemental answer, and that the judgment is contrary to the evidence and the law. It will be observed that the action of the court below in overruling the motion for a new trial is not assigned as error. Therefore we cannot examine the alleged errors occurring at the trial. The record presents but one question: Did the court err in refusing to permit plaintiffs in error (defendants below) to file their supplemental answer? The filing of an amendatory or supplemental pleading rests largely within the discretion of the trial court. Section 144, c. 95, Gen. St. 1897. "Either party may be allowed, on notice and on such terms as to costs as the court may prescribe, to file a supplemental petition, answer or reply, alleging facts material to the case, occurring after the former petition, answer or reply." The filing of a supplemental answer under this statute must be upon notice, and by permission of the court. The record fails to show that notice was given. The application to file the supplemental answer was not made until the case was called for trial, and no notice appears to have been given of such application. We are of the opinion that the court did not abuse its discretion in refusing to permit the supplemental answer to be filed. The judgment of the trial court is affirmed. All the judges concurring.

DOUGLASS v. CRAIG et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

APPEAL—REVIEW.

Where defendant in error files no brief, the court will not search the record to find the theory upon which the judgment below can be sustained.

Error from district court, Leavenworth county; Louis A. Myers, Judge.

Action by John C. Douglass against R. B. Craig and Imogene Craig. Judgment for defendants, and plaintiff brings error. Reversed.

John C. Douglass, in pro. per. John H. Atwood and W. W. Hooper, for defendants in error.

PER CURIAM. In this case it seems from the brief of the plaintiff in error that the district court committed reversible error in sustaining the demurrer to the evidence, and in the exclusion of competent evidence offered by the plaintiff. The defendant in error has filed no brief in this court, and we have not the benefit of knowing what the theory advocated by the defendant and sustained by the court was; and in such cases we shall not carefully search the record to find a theory upon which the judgment of the court can be sustained. This court cannot spend its time in doing the work that the attorneys should do. To do this would not be just either to the court or to other litigants. See 3 Enc. Pl. & Prac. 729. The judgment of the district court will be reversed, and a new trial directed.

(9 Kan.App. 338)

ATCHISON, T. & S. F. RY. CO. v. CONLON et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

RAILROADS—FARM CROSSINGS.

A landowner, through whose farm a railroad runs, which practically divides the farm, has a reasonable right to maintain farm crossings at such places as the necessities of his farm demand, so that the same will not interfere with the paramount use of the right of way by the railroad; and the railroad company must keep and maintain gates, when necessary, in its right of way fence, for such use.

(Syllabus by the Court.)

Error from district court, Atchison county; W. T. Bland, Judge.

Action by the Atchison, Topeka & Santa Fé Railroad Company against Anna Conlon and James Conlon. Judgment for defendants, and plaintiff brings error. The judgment was revived in the name of James Conlon and others on the death of Anna Conlon. Affirmed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. Chas. J. Conlon and W. L. Bailey, for defendants in error.

McELROY, J. This action was brought by the Atchison, Topeka & Santa Fé Railway Company, in the district court of Atchison county, against Anna Conlon and James Conlon, as defendants, to perpetually enjoin and restrain them from entering upon the right of way and lands of plaintiff, and from removing, breaking, and opening the fences inclosing its right of way. The defendants filed an answer and cross petition as follows: (1) A general denial. (2) Ad-

mitted that the plaintiff owned and operated a line of railway across the N. E. $\frac{1}{4}$ of section 10, township 6, range 20, in Atchison county, and that James Conlon is the owner of the land adjoining on the north and south side of plaintiff's right of way; that defendants own the N. E. $\frac{1}{4}$ of section 10, township 6, range 20, Atchison county, together with other lands, to the extent of 200 acres, which lie adjacent and form a compact tract; that the land is used for agricultural and dairy purposes; that plaintiff's line of railway crosses the land from east to west, near the center, leaving 100 acres on the south of the right of way, and the same on the north; that the highway known as the "Monrovia Road" runs east and west parallel with the right of way of plaintiff's railway, and about 100 feet south of the right of way; that defendants' buildings, house, barn, and outbuildings are, and have been for 40 years, on the tract of land north of the right of way; that there is no highway along or upon the tract of land north of the right of way; that the only means of reaching the highway from the north 100 acres, and the only means of passing between the north and south 100 acres, of such farm, as divided by plaintiff's right of way, is by means of a private road from the dwelling house of defendants south across the right of way through to the highway known as the "Monrovia Road"; that this private roadway has been in open, notorious use for 27 years; that on May 4, 1897, plaintiff carried away the gates, tore up the plank upon the railway crossing, and left the same in an impassable condition. The defendants prayed judgment that plaintiff be required to keep and maintain a suitable crossing for defendants, including a proper and suitable gate for the convenience of those making use of the private roadway. The plaintiff filed a reply, admitting that defendants were the owners of a portion of the lands described, and that its right of way crossed the same; denied that defendants' tract of land consisted of a compact body, of 200 acres, but averred that the same had been divided by the road; that the lands of defendants lying south of the right of way were never cultivated, but were wild woodlands, and used for pasture; that at a certain distance from the defendants' house there were other public highways, by which defendants could reach the Monrovia road, and the portion of the farm south of the right of way; averred that about 1878 plaintiff fenced its right of way, put in gates for the convenience of defendants, and maintained the same; that the necessity for a private crossing had ceased to exist; that plaintiff had elected to close the same, and had closed it up, but that defendants had torn down the fence of plaintiff and opened the crossing as set out in the petition. The case was tried before the court without a jury. The

court found that defendants were the owners of, and entitled to, the right of way crossing the right of way of plaintiff at such private roadway, free from any obstruction by the plaintiff, except suitable gates in the railroad right of way fence. A motion for new trial was overruled, and judgment rendered in favor of defendants and against the plaintiff, that plaintiff be perpetually enjoined from placing any obstruction or impassable barriers in the way of defendants' free and uninterrupted use of said private way, or in any manner interfering with the free use thereof by defendants as a private way, except that suitable gates may be kept and maintained by the plaintiff across said way in the fence along the right of way of said plaintiff, and that plaintiff pay the costs in this action. Plaintiff excepted, prepared its case-made, and presents the record to this court for review.

Plaintiff in error avers that the trial court erred: First, in overruling and denying the application of plaintiff to perpetually enjoin and restrain the defendants from entering upon the land of plaintiff, and from removing, breaking, and opening the fence thereon; second, in perpetually enjoining and restraining the plaintiff from placing obstructions or impassable barriers in the way of defendants' free and uninterrupted use of the private way, or in any manner interfering with the free use thereof by defendants as a private way.

The principal facts appearing from the record are as follows: On the 11th day of February, 1859, the Atchison & Pike's Peak Railroad was incorporated under an act of the legislature of the territory of Kansas. In 1864 it condemned a right of way across the land in question, 100 feet wide, and thereafter it constructed a railroad thereon. The Central Branch Union Pacific Railroad became the successor of the Atchison & Pike's Peak Railroad Company, and acquired all of its rights. James Conlon became the owner of the land in question on December 14, 1870. In 1872 he and his wife conveyed the premises to one William Bowen. On July 26, 1872, Bowen conveyed the premises to Anna Conlon. In each of these deeds the right of way acquired by the Atchison & Pike's Peak Railroad Company was expressly excepted. On March 15, 1872, the Atchison, Topeka & Santa Fé Railroad Company acquired a portion of the right of way of the Atchison & Pike's Peak Railroad Company, to the extent of 42½ feet. This appears to be the only right of way acquired by the plaintiff upon the premises. That the right of way of plaintiff passes from the east to the west through defendants' land, and divides it, practically, in the middle. That, soon after plaintiff constructed its track and commenced to operate its road, it placed planks in the track to conform to the plank-

ing placed in the track of the Central Branch Union Pacific Railway. That the two roads paralleled each other across this quarter section of land, about 15 feet apart. That about 1882 plaintiff fenced its right of way, and placed gates for the use of the defendants and others using this private driveway. There is a portion of the farm on each side of the railway in cultivation, and other portions used for pasture. There is some testimony tending to show that the gates have at various times been left open, in consequence of which the plaintiff railway company suffered some annoyance and inconvenience; that prior to February, 1892, some cattle belonging to the Conlons were killed at this private crossing while being driven from the pasture across the railway track, litigation followed, and afterwards the plaintiff took out the gates and nailed up wires, to prevent further trouble; that these were by the defendants torn out as often as they were rebuilt. The defendants insist that they have a right to use this private way to reach the public highway, and also to reach the other portion of the farm. The railway company insists that the private crossing is not a necessity, or a matter of right to be enjoyed by defendants.

The general findings necessarily include all the special findings necessary and proper to support the judgment. This would necessarily include the findings that the private road had been used for such length of time that the plaintiff is estopped from questioning such use, or that the same is necessary for the use of defendants, to enable them to have access to the public highway and to the other portions of the farm. A railway company cannot arbitrarily and unnecessarily use its right of way so as to practically destroy the use of a material, substantial part of a farm through which the road runs; nor is it required to go to the expense of constructing and maintaining private farm crossings. But the landowner has a reasonable right to maintain farm crossings at such places as the necessities of his farm demand, so that they will not interfere with the paramount use of the railroad company. The necessities of the farm owned by the defendants seem to require a crossing as heretofore maintained, and the use of such private crossing does not appear to necessarily interfere with the paramount use of the right of way of the railroad company. The railroad company must, however, maintain gates, when necessary, in its right of way fence, for the use of the landowner in the enjoyment of his private roadway. *Railway Co. v. Allen*, 22 Kan. 285; *Railroad Co. v. Gough*, 29 Kan. 94; *Railroad Co. v. Kregelo*, 32 Kan. 608, 5 Pac. 15; *Railroad Co. v. Cosper*, 42 Kan. 561, 22 Pac. 634. The judgment must be affirmed.

(9 Kan.App. 201)

KAFFER v. WALTERS.

(Court of Appeals of Kansas, Northern Department, E. D. June 8, 1900.)

AGENT—ACCOUNTING—EVIDENCE—INSTRUCTION.

1. Upon the trial of an action for the alleged failure of an employé to account for goods sold and profits arising from the sale of goods, it is incompetent for one to testify to the usual profits arising from the sale of similar goods in another store in another city.

2. Alleged error in the giving and refusing instructions examined. *Held*, that the trial court committed no error in giving or refusing instructions.

(Syllabus by the Court.)

Error from district court, Atchison county; J. P. Adams, Judge.

This action was brought in the district court by George Walters against Charles F. Kaffer for the recovery of \$300, with interest, upon a nonnegotiable promissory note, and for the recovery of \$225, with interest, on an account. The defendant, Kaffer, in his answer, pleaded a general denial, admitted the execution and delivery of the note, denied the account and any indebtedness thereon, but admitted the receipt of the property named in the account, and liability therefor in the sum of \$30.80. By way of set-off and counterclaim he further stated that Walters, as manager, for hire, from October, 1889, to January, 1896, operated a store for defendant in the town of Cummings, in Atchison county; that at the time he was employed as manager he represented that he possessed the necessary ability and honesty to manage and conduct the store in an honest, businesslike, manner to the profit of the proprietor, and agreed to do so under the direction of the defendant; that he had the exclusive management of the store, subject to instructions as to the selling price of goods. Defendant further charged that Walters did, from time to time, wrongfully appropriate certain goods, or the proceeds thereof, by reason whereof defendant sustained large losses; further, that Walters during that time received goods to the value of \$14,437.10, remitted to defendant \$11,073.15, accounted for \$1,135.50, and that plaintiff sold goods to the value of \$2,097.98, for which he failed to account. The defendant further answered that on May 1, 1894, plaintiff and defendant executed a written contract, setting forth the responsibilities, privileges, and duties of the employer and employé as to the management of the store, as follows: "That the conditions of this contract obligatory upon Walters are as follows: First. To render faithful, efficient, and honorable service as such manager, and that in case of misconduct, or willful neglect, or such disability as may prevent him performing his duty as manager, the party of the first part (Kaffer) may annul this contract. Second. To serve as such manager for a period of three years from the above date. Third. To make full and correct reports of the business when requested

by the party of the first part, and to buy no goods except produce unless expressly authorized by the first party. Fourth. To sell goods only for cash, and to make remittances of such receipts once a week." And defendant averred that Walters, without his knowledge or consent, did sell goods on credit to parties who were wholly insolvent in violation of said contract, to the damage of defendant in the sum of \$346.13, and prayed judgment for the sum of \$2,097.98, with interest and costs of suit. The plaintiff, for reply, set up a general denial; denied that he was indebted to the defendant upon account, or in any other manner; and averred that, if he ever did owe defendant, the same had been fully paid, liquidated, and settled; that the goods referred to in defendant's answer as having been sold on credit were sold prior to the execution of the written contract, and that plaintiff had special verbal instructions from the defendant to sell certain customers goods on credit, and to use his discretion in granting credit to others; that the defendant, for his convenience, modified the conditions of the written contract by verbal instructions to the plaintiff from time to time in this respect. A trial was had before the court and a jury, which resulted in a verdict for the plaintiff for \$415.12. The defendant's motion for a new trial was overruled. The defendant, as plaintiff in error, presents the record to this court for review, and alleges error in the proceedings of the trial court. Affirmed.

W. L. Bailey, for plaintiff in error. Wollman, Solomon & Cooper, for defendant in error.

McELROY, J. (after stating the facts as above). The assignments of error are not numerous, and will be examined in order.

1. That the trial court erred in excluding competent testimony offered by the defendant. Under this assignment of error it is contended: (1) That the court erred in sustaining an objection to the following question asked witness Barkow: "Q. From the prices at which you buy goods, and from the prices at which you sell them, I will ask you to state what would be a reasonable average profit upon sales of boots and shoes, and such stock as is kept in a boot and shoe store, upon the cost price. I mean to fix the time on which or at which you make this estimate at the period between March 19, 1893, and December 1, 1895. What was a reasonable profit of boots and shoes sold during that period? I mean the gross profit." The testimony of this witness shows that he conducts a shoe store in the city of Atchison. Defendant sought to show by this witness what was the reasonable profits on boots and shoes sold during a portion of the time that Walters operated the store for him. It is not shown that this witness knew anything about the store or goods in question, or that he had

any other information than such as he gained by operating a boot and shoe store in the city of Atchison. We are inclined to think that the trial court properly refused to permit the party to inquire into the profits of witness' boot and shoe store. The testimony was properly excluded. It is contended: (2) That the court erred in sustaining objections to the following questions propounded to Kaffer while upon the witness stand: "Q. 1. I will ask you to state if you did not prepare, or, prior to the commencement of this suit—this trial—go through his book account showing sales, and check out item after item of dry goods and other goods which he had sold according to instructions which you had given him? Q. 2. Was not, taking from the estimate you have made from an examination of the books of Mr. Walters and of yourself, the great bulk of the goods sold there sold, under your instructions, at an excess of twenty-five per cent. profit of the price of the goods sold? Q. 3. I will ask you to state what amount of loss was sustained by the business from April 1, 1894, to September 30th, from September 25, 1893, to April 1, 1894; the actual loss,—the loss without figuring the profit. Q. 4. Mr. Kaffer, referring to the period of time from September 25, 1893, to April 1, 1894, you may state what was the amount of goods sold during that period. I believe you stated that the amount of goods sold during that period was \$2,288.80, at a profit of 20 per cent. upon such amount of goods. State what would be the gross profit. Q. 5. I will ask you to state if at that time, or about that time, you consulted any attorney as to any means to protect yourself. Q. 6. You understood that with a nonnegotiable note you could set up any defense you had against Mr. Walters as against any other owner of the note?" The plaintiff in error fails to point out the competency of the testimony sought to be introduced. It is not apparent to the court what useful purpose an answer to the questions under consideration would have subserved. The fourth question called for a conclusion of the witness,—a mere matter of computation. The first, second, third, fifth, and sixth questions relate to matters which appear to have been immaterial. No possible answer could have materially affected the final result of the litigation. We fail to see that an answer to all or either of these questions could in any manner enlighten the court or jury upon the issues of the case. If there was any error committed in rejecting this evidence, it was without prejudice.

2. That the court erred in instructing the jury. Complaint is here made that the trial court erred in instructing the jury as to the burden of proof upon certain issues presented by the answer of the defendant and as to certain elements of estoppel applicable to defendant's conduct. The court instructed the jury as to the burden of proof as follows: "That the burden of proof was on the de-

fendant to show, if such fact was true, that the plaintiff, as manager of the store, was not authorized to sell goods on credit prior to the 1st day of May, 1894, and that as to sales, if made on credit after that date, the burden of proof was upon the plaintiff to show that the terms of the written contract were modified by the defendant so as to authorize him to sell goods on credit." As to the question of estoppel the court instructed the jury that, if they found from the evidence that the defendant frequently visited the store, carefully examined into its management, examined the books, and thereby knew that the plaintiff was selling goods on credit; and if the jury further found that the plaintiff made frequent reports to the defendant of all transactions at the store which showed that goods were being sold on credit; and if the plaintiff and defendant at periods of about six months had an accounting, and defendant had full knowledge of the facts concerning the management of the store as conducted, and with full knowledge of the facts approved,—the management of the store and selling of goods on credit were ratified and approved by the defendant with a full knowledge of all the facts, and the defendant would be estopped from claiming in this action that the plaintiff was not authorized to sell goods on credit. The plaintiff conducted the store under the written contract for the defendant nearly three years, rendering an accounting by daily, weekly, and other reports, as requested by defendant. Settlements were had between the parties at about every six months, in which all accounts and property of the store were examined, checked, and apparently approved by the defendant. No intimation was given or expressed by the defendant of dissatisfaction with the conduct of the store. Apparently he approved all that was done in and about the management of the business. The plaintiff was paid a salary of \$30 per month for attending to the business. In the written article of agreement under which plaintiff operated the store it was provided "that, in case of misconduct or willful neglect, or such disability as may prevent him (plaintiff) from performing his duty as manager, the party of the first part (Kaffer) may annul this contract." We think the trial court properly instructed the jury in this respect.

3. That the trial court erred in refusing to instruct the jury as requested. Complaint is here made that the trial court refused to give instructions 16 and 17 as requested. These instructions were properly refused, if the instructions heretofore noted were properly given. There was no claim in the pleadings nor in the evidence that the plaintiff was insolvent, or unable to respond to any judgment rendered against him. A person of lawful age is presumed, in the absence of any showing to the contrary, to be solvent, and able to respond to any judgment rendered against him. With this presumption be-

fore the trial court, there was no occasion for the court instructing the jury as to plaintiff's maneuvers to prepare himself with set-offs and counterclaims.

4. There is nothing presented on the motion for a new trial except the errors already noted. From what we have said, it follows that the motion for a new trial was properly overruled. The judgment is affirmed.

(9 Kan.App. 298)

AIKINS v. STADELL.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

LANDLORD'S LIEN.

A removal of crops from the leased premises by the tenant, and sale thereafter to a purchaser with notice of the landlord's lien, do not defeat the lien.

(Syllabus by the Court.)

Error from district court, Jackson county; Louis A. Myers, Judge.

Action by John H. Aikins against S. L. Stadell. Judgment for defendant, and plaintiff brings error. Reversed.

Hayden & Hayden, for plaintiff in error.
James H. Lowell, for defendant in error.

MAHAN, P. J. The plaintiff in error sued the defendant in error to recover the value of corn purchased by the defendant from the plaintiff's tenant, upon which the plaintiff claims a landlord's lien for rent. At the conclusion of the plaintiff's evidence the defendant interposed a demurrer, which was sustained by the court, and thereupon judgment was entered for the defendant. The petition alleges the making of the lease, the growing of the crop of corn, the failure of the plaintiff to pay the rent stipulated for, and the sale of the crop of corn to the defendant, with notice of the plaintiff's lien. The answer is a general denial.

The question presented is, was there any evidence to go to the jury? The defendant, who was called as a witness on the part of the plaintiff, testified, in effect, that before he paid for the corn he was advised of the lien of the landlord, and that he reserved \$100 from the proceeds of the sale of the corn, with which to defend any litigation which he might incur. It is said in the brief of counsel for plaintiff that the contention upon the argument of the demurrer in the trial court was that the lien was lost after the corn was removed from the farm, and that the trial court sustained the demurrer upon this theory of the law. The brief of counsel for defendant, while not admitting this to be true, in a measure sustains his contention. It is said therein: "This particular corn was hauled from the farm of plaintiff, some seven miles distant. None of it was bought or negotiated for elsewhere than on Stadell's premises." The decision of the supreme court in *Scully v. Porter*, 57 Kan. 322, 46 Pac. 313, seems to be the basis

upon which this contention is rested. Justice Johnston, speaking for the court, says: "Had the property been removed by the tenant and sold on the market, other and different questions would arise with respect to notice than we have here. So long as the property remains upon the leased premises, it confers notice to all who deal with the tenant, and there is little risk of the loss of the lien." The third clause of the syllabus, to the same effect, holds that a purchase of the crop upon the premises is sufficient notice of the lien. Section 23 of the statute in relation to landlords and tenants says, "The person entitled to the rent may recover from the purchaser of the crop, or any part thereof, with notice of the lien, the value of the crop purchased to the extent of the rent due and damages." This contemplates a recovery after the crop has been removed and converted, whether bought upon the premises or elsewhere. But in such cases notice of the lien must be averred and proven. There was sufficient proof of every allegation to go to the jury, and sustain a verdict for the plaintiff,—not to the full amount claimed, but in the sum of, at least, \$297. It is contended by the defendant in his brief that the lien was waived, relinquished, and divested. While on cross-examination there was some evidence elicited, which, under proper instructions, might have been submitted to the jury for their determination as to whether the lien had been waived, yet, it did not establish such a conclusive waiver as justified the court in so saying upon the demurrer. The court erred in sustaining the demurrer to the plaintiff's evidence, and in denying the plaintiff's motion for a new trial. Judgment reversed, with directions to award a new trial.

(9 Kan.App. 338)

HUNT v. JETMORE et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

PLEADING—DEMURRER—LIMITATIONS.

1. A demurrer to a petition is properly sustained where the petition shows upon its face that all of the alleged causes of action were barred by the statute of limitations at the time the action was instituted.

2. A cause of action for an injury to the rights of another, not arising upon contract, is barred in two years. Subdivision 3, § 12, c. 95, Gen. St. 1897.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by J. H. Hunt against A. B. Jetmore and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Wm. R. Hazen, for plaintiff in error. Jetmore & Jetmore, for defendants in error.

McELROY, J. This action was brought by J. H. Hunt for the recovery of the amount alleged to have been paid as illegal and un-

lawful fees, which were wrongfully, illegally, and unlawfully charged and collected by Gardenhire as clerk of the district court of Shawnee county. The action was instituted on the 28th day of April, 1898, against Gardenhire, as principal, and Jetmore et al., as sureties, on his official bond. Gardenhire was not served with summons, nor did he enter his appearance in the action. The other defendants filed their demurrer to plaintiff's petition, which was sustained. The plaintiff elected to stand upon his petition, judgment was rendered against him for costs, and he presents the record to this court for review.

The plaintiff in error (plaintiff below) contends that the trial court erred in sustaining the demurrer, and in rendering judgment against him for costs. The defendants in error contend that the demurrer was properly sustained, that the several causes of action were barred by the statute of limitations, that plaintiff's only remedy was by motion to retax costs, and that the petition shows a voluntary payment with full knowledge of all of the facts, and hence there can be no recovery.

The plaintiff, for his first cause of action, alleges, in substance: That from the 1st day of January, 1893, to the 1st day of January, 1895, Gardenhire was the duly elected, qualified, and acting clerk of the district court of Shawnee county. That, as clerk, he filed his bond, which was approved, conditioned that he would faithfully pay over to the proper person or persons all moneys which should be by him received in his official capacity, as clerk, and faithfully discharge the duties of said office. The defendants Jetmore, Marburg, Turner, Willard, and Burgess were his sureties. A copy of the bond, with the indorsements thereon, is set out in the petition. That Gardenhire, as clerk, unlawfully, willfully, and knowingly taxed, charged, collected, and received of plaintiff certain excessive, illegal costs, claimed and represented by him to be lawful costs on account of services performed. That plaintiff was required to and did pay the excessive illegal costs, not knowing or understanding at the time that the costs, or any part thereof, were illegal or excessive. That plaintiff, relying upon the honesty and integrity of the clerk in performing his official duty faithfully, his special knowledge of what constituted legal costs, and his special knowledge of the services performed, paid the amount demanded, without notice or knowledge that any part of the amount was illegal or excessive. That Gardenhire willfully, unlawfully, and purposely taxed, charged, received, and extorted from plaintiff the illegal and excessive costs as aforesaid. That on or about the — day of May, 1895, Gardenhire left the state of Kansas, and has ever since been absent from said state, and a nonresident. That plaintiff has no means of knowing what said charges were for, except as the same appear upon the appearance docket. The plaintiff set out the items claim-

ed as excessive, illegal fees, and marked the same "Exhibit A." That Gardenhire has been guilty of a breach of his bond, and that by reason thereof defendants Jetmore, Turner, Willard, Marburg, and Burgess have become liable for the amount of the excessive, illegal costs so charged and collected as aforesaid, to the loss, injury, and damage of plaintiff. That the plaintiff, within one year before the commencement of this action, demanded the payment of the amount herein claimed, which defendants have failed, neglected, and refused to pay. That he has been unable to make a demand on the defendant Gardenhire, for the reason that he is a nonresident,—a resident of the state of New York,—since the payment of the costs as aforesaid. That plaintiff did not discover that the costs so collected were illegal and excessive until within one year prior to the commencement of this action. The plaintiff says that by reason thereof he has lost, and has been injured and damaged in, the sum of \$40, which is now due from defendants; that he paid the excessive, illegal costs on the 21st day of August, 1893, in an action wherein Hunt & Evans were plaintiffs and C. H. Titus et al. were defendants; that said costs were wrongfully, willfully, and knowingly withheld by Gardenhire out of money in his hands as such clerk, to which plaintiff was at the time entitled; that the partnership of Hunt & Evans has been dissolved; that plaintiff has succeeded to all the rights of the firm, and to the cause of action herein set out. There are 56 separate causes of action set out in the petition. The allegations of the first are applicable to 46 of the causes of action; the only difference being in the date on which plaintiff paid the alleged illegal costs. The dates vary from January, 1893, to December, 1894. All of the payments made by plaintiff are alleged to have been made on or prior to December 3, 1894. The payments were therefore made more than three years before the action was brought. The plaintiff, in substance, for his further cause of action, makes all the allegations of his first, together with Exhibit A, a part, and says, further, that on or about the 15th day of October, 1896, the costs were paid by him, and wrongfully, willfully, and knowingly withheld by Gardenhire out of money in his hands as clerk, to which plaintiff was at the time entitled in an action wherein Hunt & Evans were plaintiffs and James T. Best et al. were defendants; that, in addition to the items of excessive costs set out in the first cause of action, Gardenhire, in the last-named action, received and collected from plaintiff \$3.50 excessive and illegal costs, and by reason thereof the defendants are indebted to plaintiff in the sum of \$43.50; that prior to the time the costs were paid the defendant's term of office expired, but before the expiration of the term of office he taxed, charged, and set out upon the appearance docket the costs by him taxed and charged, and he directed Cockrell, as his suc-

cessor in office, to collect the costs so taxed and charged, and the same were collected as aforesaid. The allegations of this cause of action are applicable to the other 10. It is alleged that Gardenhire, prior to the expiration of his term of office, unlawfully, willfully, and knowingly taxed and charged upon the books of his office excessive, illegal, and unlawful fees, and that he directed his successor in office to collect the same. His term of office expired on January 1, 1895. Hence these wrongs were all done and perpetrated more than three years before the action was instituted. We take it that this is an action in tort; that the cause of action accrued at the time the unlawful acts were done which resulted in the injury and damage to the plaintiff. Under the first series of causes of action set out, the unlawful acts resulting in the injury to plaintiff's right accrued by reason of Gardenhire unlawfully, willfully, and knowingly taxing, charging, collecting, and receiving certain excessive, illegal costs. All of these acts were done and performed more than three years prior to the institution of the action. The unlawful act of Gardenhire in the last series of causes of action, which resulted in injury to plaintiff, was that prior to the expiration of his term of office he taxed, charged, and set out upon the books of his office illegal and unlawful costs, which were afterwards paid to his successor in office. All of the unlawful acts charged against him, which resulted in injury to plaintiff, were done and performed more than three years prior to the commencement of the action. A cause of action for the injury to the rights of another, not arising upon contract, is barred in two years. Subdivision 3, § 12, c. 95, Gen. St. 1897. It appears from plaintiff's petition that all of the alleged causes of action were barred at the time the action was instituted. With our view of the statute of limitations applicable to the several causes of action set out, it is unnecessary to examine further the other contentions. The demurrer was properly sustained. The judgment is affirmed. All the judges concurring.

(9 Kan. App. 301)

WALLER v. LEAVENWORTH LIGHT & HEATING CO.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

ELECTRIC LIGHT COMPANY—IMPLIED CONTRACTS.

Where one electric light company purchases the plant of another company and continues its business, it impliedly contracts with its customers and the public that it will use such appliances and care as are known to the business to protect them from harm, and it is liable to any one who suffers damage for its failure so to do; and, under the pleadings in this case, this question was sufficiently raised.

(Syllabus by the Court.)

Error from district court, Leavenworth county.

Action by Sophia Waller against the Leavenworth Light & Heating Company. Judgment for defendant, and plaintiff brings error. Reversed.

John T. O'Keefe, for plaintiff in error.
John H. Atwood and William W. Hooper, for defendant in error.

WELLS, J. The plaintiff in error, as plaintiff in the district court, brought her action against the Leavenworth Light & Heating Company to recover the sum of \$1,000 damages, alleged to have been sustained by her by reason of a fire caused by the negligence of the company. The defendant denied generally, and pleaded contributory negligence, to which a general denial was filed in reply. The cause was tried to a court and a jury, and upon the conclusion of the evidence each party asked that a verdict be directed in its favor. Thereupon the court refused the request of the plaintiff, and directed the jury to return a verdict for the defendant, which was done, and judgment rendered accordingly. To reverse this, the cause is brought to this court.

In considering this case, we shall assume that each party having requested the court to instruct the jury to direct a verdict in its favor, and neither party demanding that the facts be submitted to the jury, the verdict as directed has the same force and effect as if it had been found by the jury in the usual way, although upon this proposition the writer of this opinion has some doubts; and the only question is, does the evidence sustain the verdict? It seems to us reasonably well established by the evidence that the damage was caused by the negligence of the company, and there was no serious conflict of the evidence upon this question. We do not think it material whether Walker was superintendent or electrician. He was the person who was representing both companies at the respective times they had charge of the plant. Neither is it important to decide whether this action should be properly defined as an action *ex contractu* or an action *ex delicto*. When a company or a person engages in a dangerous business, it impliedly contracts with its customers and the public that it will use such appliances and care as are known to the business to protect the persons and property of its customers and the public from harm; and, no matter how many hands the business may pass through, each one succeeds to the same duty and obligations. As indicated by the brief of the defendant in error, the district court seems to have been of the opinion that the action was based upon the contract made at the time the lights were first furnished the plaintiff, which was a different entity from the one sued, and upon this basis this action could not be sustained. But we do not so understand the pleadings, but think that under our Code they are sufficient to raise the ques-

tion of the negligence of the defendant. The court should have directed a verdict for the plaintiff, and rendered its judgment accordingly. The judgment of the district court is reversed, and said court directed to award a new trial.

TESSENDORF v. LASATER et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

FRAUD—VERDICT ON PLEADINGS—ERROR.

Plaintiff filed a petition alleging title to land through a railway company, and that defendants took forcible possession under a pretended homestead entry, and by false representations secured a settlement whereby he gave them \$400 in cash and his note for \$600 to obtain a relinquishment of their title, and asked judgment for \$400. Defendants filed a general denial, and set up title to the land under their homestead entry. Plaintiff replied, attacking the bona fides of the homestead entry. *Held*, that a verdict for defendants on the pleadings was erroneous, since the plaintiff had a right to present to the jury the question of the good faith of the homestead entry.

Error from district court, Pottawatomie county; William Thomson, Judge.

Action by Michael Tessendorf against J. B. Lasater and another. From a judgment on the pleadings in favor of defendants, plaintiff appeals. Reversed.

Coddling & Challis, for plaintiff in error. James J. Hitt, for defendants in error.

PER CURIAM. The plaintiff in error, who was the plaintiff in the district court, began his suit therein by filing a petition alleging, in substance, that on October 21, 1896, and for a long time prior thereto, he was the owner of certain described lands, and in the peaceable possession thereof, said lands having been purchased by him of the Union Pacific Railway Company, who derived its title, through its predecessor, from the United States through act of congress; that in the night of October 20 or 21, 1896, the defendants took forcible possession thereof, representing to plaintiff that they had filed on the same under the homestead laws of the United States, that it was government land, and that plaintiff had no title thereto, but that defendants' title was paramount; that said representations were false, and were made for the purpose of cheating and defrauding said plaintiff, who was an old man, a German, and not well acquainted with the English language; and that by reason of such representations they induced the plaintiff to pay them \$400, and execute a promissory note for \$600 and asking judgment for the \$400 thus paid. For answer, the defendants filed a general denial, and, further, setting up the filing of homestead entries on said land, and taking peaceable possession thereof, and that in compliance of an agreement with plaintiff, and in consideration of said payment of \$400, they relinquished their right to said land, and that the co-partner and agent of the plaintiff, after

a full investigation of the facts, made a filing thereon. In reply the plaintiff filed a general denial; admitted that the defendants made a pretended homestead filing upon the land, but avers that said entry and filing were without authority of law; that said land was not subject to homestead entry, but was the property of the plaintiff, and that defendants made such pretended homestead filing upon said land for the purpose of speculation only, and not in good faith, with the intention of complying with the homestead laws of the United States, and by reason thereof the same was void. A judgment was rendered by the court upon the pleadings in favor of the defendants, and to reverse this case is brought here.

The law seems to be that where there is a bona fide controversy between parties, and a settlement thereof made without fraud, said settlement is binding upon the parties, regardless of the merits of the original controversy. It seems to us that in this case the bona fides of the asserted right of homestead was questioned by the pleadings, and the plaintiff had a right to go to the jury upon that question. The judgment of the district court is reversed, and a new trial directed.

(9 Kan.App. 309)

PARK et al. v. HETHERINGTON.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

TAX CERTIFICATE—ASSIGNMENT—FLOATING LIEN.

1. Chapter 114 of the Session Laws of 1881, known as the "Floating Lien Law," does not apply to a tax certificate assigned by a county to an individual, where the assignment is made less than one year prior to the expiration of three years from the date of sale.

2. There is no authority under our statute for a strict foreclosure of a lien for taxes or betterments.

(Syllabus by the Court.)

Error from district court, Atchison county; W. T. Bland, Judge.

Action by Richard A. Park and Horace M. Jackson against C. S. Hetherington. Judgment for defendant, and plaintiffs bring error. Modified.

Jackson & Jackson, for plaintiffs in error. Waggener, Horton & Orr, for defendant in error.

McELROY, J. This action was brought by Park and Jackson to recover from Hetherington the possession of lot 1 in block 36 in that part of the city and county of Atchison known and designated as "L. C. Challiss' Addition to the City of Atchison." The defendant, Hetherington, was in possession, and claimed title to the property by reason of a tax deed. The cause was tried to the court, a jury being waived. The court held that the plaintiffs were the owners of the real estate in controversy, and had a good

and sufficient title to the same, and that the tax deed did not confer a good title upon the defendant. The court adjudged the plaintiffs to be the owners of the real property in controversy, but that the defendant was entitled to a lien upon the same for the taxes, amounting to \$674.42, and for improvements in the sum of \$28.40. The court further adjudged that the plaintiffs were entitled to recover possession of the lot described in the petition; that said sum of \$707.82, with interest thereon from date at 6 per cent. per annum, be a first and prior lien upon the property, and, before plaintiffs should be let into possession thereof, they should pay to defendant the said sum of \$707.82, with interest thereon at the rate of 6 per cent. per annum from the date hereof; that unless said payment thereof was made on or before the 8th day of February, 1890, the plaintiffs should be forever barred, enjoined, and restrained from setting up or claiming any right, title, interest, lien, or estate in, to, or upon said described property, or any part thereof, and if said plaintiffs should, on or before said last above named date, pay to said defendant the sum so as aforesaid found due, then the said defendant should surrender possession of said property to the said plaintiffs, and said defendant should thereafter be forever barred, enjoined, and restrained from setting up any right, title, interest, lien, or estate in or to said described property adverse to the said plaintiffs herein. The plaintiffs presented their motion for a new trial, which was overruled, to all of which they excepted. They prepared their case-made, present the record to this court for review, and allege error in the proceedings of the trial court. The assignments of error present but two questions, which we will consider in order:

1. Does the floating lien law apply to tax certificates assigned by counties, where such assignment is made less than one year prior to the expiration of three years from sale? An answer to the first question presented involves an examination of chapter 114, Sess. Laws 1881, or, more particularly, sections 1 and 2 of this act:

"Section 1. No tax certificate issued for the sale of real estate for delinquent taxes to an individual for which no tax deed shall have been taken out, shall be a lien on such real estate after the expiration of four years from the date of such sale.

"Sec. 2. When any real estate is or has been bid off for delinquent taxes to cities or counties and the tax certificate assigned, the lien thereof shall not be valid without a tax deed taken thereon after the expiration of four years from the date of such sale to the city or county where such assignment is made, more than one year prior to the expiration of three years from the sale; and when such assignment is made three or more years from the expiration of said sale, the said lien shall expire in one year after

the date of such assignment, unless a tax deed be taken on such tax certificate within such time."

It is contended upon the part of the plaintiffs in error that under section 2 (being section 218, c. 158, Gen. St. 1897) the defendant at the time of the rendition of the judgment had no lien for taxes, and therefore the judgment should be reversed. The sale of the property in dispute was made to the county of Atchison September 2, 1890; the assignment of the certificate was made by the county August 3, 1893; and the tax deed was executed October 25, 1894. Does this bring the case within the terms of the section under consideration? The plaintiffs in error practically admit that it does not come within the express provisions of the section, but contend that the statute should be construed according to its spirit; that, so construed, it would avoid floating liens, while, if construed literally, it would have the effect, in cases like this, when assigned by the county during the third year after the sale, of not only preserving what it purports to make void, but would preserve the floating lien. This case does not come within the provisions of section 2 of the act under consideration. There is no provision in the section or act invalidating the lien for taxes under a tax deed where the assignment of the tax certificate is made by the county during the third year after the date of sale. The validity of this lien for the amount due the holder of a tax deed has been recognized by the supreme court in *Geer v. Thrasher*, 37 Kan. 657, 16 Pac. 94. Plaintiffs in error contend, however, that the *Geer* Case has been overruled by the decision in *Tweedell v. Warner*, 43 Kan. 597, 23 Pac. 603. We think counsel are mistaken in this contention. We find nothing in the latter case which is inconsistent with the former. If the language of the act was obscure, indefinite, or uncertain, there might be occasion for construction. Legislatures are presumed to express what the clear import of the language implies. Prior to 1881 there was no time limitation against the lien of tax-sale certificates. They might be held indefinitely without taking out a tax deed, and such delay did not affect the validity of the certificate holder's lien for taxes, nor did the lapse of time affect the validity of the deed issued thereon. *Estes v. Stebbins*, 25 Kan. 315. It is apparent from the entire act that it was as much to fix a period of time within which one could procure a valid deed, as to fix the time within which the tax-sale certificate would constitute a lien upon the real estate, that the act under consideration was passed. Section 4 of the act reads: "Nothing herein shall be construed to impair the lien for taxes on real estate deeded for delinquent taxes, in case the deed from any cause fail to pass a title to such property; nor to impair the lien on any real property bid off to any city or county and unassigned." There is no pro-

vision of the act by which the defendant is deprived of a lien for taxes or betterments.

2. Is a strict foreclosure of a lien for betterments or for taxes paid in the purchase of a tax-sale certificate, or for both such liens, authorized by the statute? It will be observed that the court, after rendering judgment that plaintiffs were the owners of the real property in controversy, and that defendant had a lien for taxes paid and for betterments, further adjudged that the plaintiffs were entitled to recover possession of the lot described in the petition; that said sum of \$707.82, with interest thereon from date at 6 per cent. per annum, be a first and prior lien upon the property, and before plaintiffs should be let into possession thereof, they should pay to defendant the said sum of \$707.82, with interest thereon at the rate of 6 per cent. per annum from date hereof; that unless said payment thereof is made on or before the 8th day of February, 1899, the plaintiffs should be forever barred, enjoined, and restrained from setting up or claiming any right, title, interest, lien, or estate, in, to, or upon said described property, or any part thereof, and if said plaintiff should, on or before said last above named date, pay to the said defendant the sum so as aforesaid found due, then the said defendant should surrender possession of said property to the said plaintiffs, and said defendant should thereafter be forever barred, enjoined, and restrained from setting up any right, title, interest, lien, or estate in or to said described property adverse to the said plaintiffs herein. The court erred in its judgment barring the plaintiffs in error from setting up any claim, right, title, interest, lien, or estate in the property in dispute if the lien of the defendant was not paid on or before the date fixed. This part of the judgment is, in effect, a strict foreclosure, and is erroneous. The plaintiffs should not be let into possession until they have paid the lien of the defendant for taxes, interest, and betterments, and the judgment of the trial court will be so modified. The judgment is affirmed as modified. The costs in this court are equally divided. All the judges concurring.

(9 Kan.App. 320)

OTT et al. v. ANDERSON et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

NOTE—EXTENSION—CONSIDERATION—ERROR
—WAIVER—NEW TRIAL.

1. A proposition for an extension of the time for the payment of a note by the payee, to be valid, must be for a valuable consideration, accepted by the payor, and relied upon by the payee.

2. Where a defendant in his verified answer inadvertently uses the word "mortgage" for "note," and the case is tried without the attention of the pleader or the court having been called to the error, it will be presumed that the inadvertence was waived by the plaintiff.

3. Before a motion for a new trial on the ground of newly-discovered evidence will be

sustained, it must appear that such evidence could not have been discovered before the trial by the use of reasonable diligence.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Simon S. Ott and George E. Tewksbury against Elizabeth Anderson and M. N. Anderson. Judgment for defendants, and plaintiffs bring error. Affirmed.

Wm. R. Hazen, for plaintiffs in error.
David Overmyer, for defendants in error.

McELROY, J. This action was brought by Ott & Tewksbury, as plaintiffs, against the defendants, for the recovery of the amount alleged to be due upon a promissory note, and for the foreclosure of a real-estate mortgage. The defendants pleaded and relied upon the statute of limitations. The action was tried before the court and a jury. The jury returned a verdict for defendants. The court rendered judgment upon the verdict against the plaintiffs for costs of suit. A motion for new trial was overruled, and the plaintiffs, as plaintiffs in error, present the record to this court for review. The plaintiffs in error allege that the court erred in failing to instruct the jury, in rendering judgment against the plaintiffs in error, and in overruling their motion for a new trial.

1. The note in suit was executed by Elizabeth Anderson and M. N. Anderson; is dated the 1st day of November, 1887, due five years thereafter, and secured by a mortgage on real estate. The interest payments were evidenced by coupons for \$64 each, payable on the 1st day of November of each year. The note, by its terms, matured on the 1st day of November, 1892, and would be barred by the statute of limitations after the 1st day of November, 1897, unless something intervened to take it out of the operation of the statute. The parties all agreed that there was an interest payment made in 1892. The plaintiffs in error contend that the payment was made by the defendants delivering to them a horse, which they were to sell, and apply the proceeds in payment of interest; that they sold the horse on December 15, 1892, for the sum of \$60, which was credited on the note. The defendants contend that the horse was delivered to plaintiffs on November 15, 1892, in payment of one of the interest coupons, amounting to \$64; that when the horse was delivered the interest coupon was canceled to them. This constituted the real contention between the parties at the trial. Upon this proposition the testimony was oral and conflicting. The jury found for the defendants. It has been so often decided by the supreme court and by this court that a verdict of a jury upon oral conflicting testimony will not be disturbed where there is evidence to support the finding, that it is unnecessary for us to further comment upon this proposition.

2. It is insisted that, for a valuable consideration, Ott & Tewksbury agreed in writing that the Andersons should have six months from the 16th of November, 1892, in which to pay interest accrued on the note, and the premium on insurance policy, and that, if the payments were so made, the agreement should operate as an extension of the indebtedness for the period of three years, and that the court should have so instructed the jury. This contention is based upon an article in writing introduced in evidence by the defendants, as follows: "Topeka, Kansas, Nov. 16, 1892. M. N. Anderson, Esq., City—Dear Sir: This is to certify that we will extend the note and mortgage on your house and lots for \$800.00 three years from Nov. 1st, 1892, at 7 per cent. interest, provided payment of delinquent interest due Nov. 1st, 1891, is made within 6 months from date, and the premium on insurance policy is paid, and interest regularly paid, as per terms of note and mortgage. Yours, truly, Ott & Tewksbury." Unfortunately for plaintiffs in error, this writing, in regard to the extension, is not available to them in this action. It appears that the alleged extension was not pleaded, that it was executed without any consideration, that it was not accepted by defendants, and that plaintiffs themselves never relied upon it. The plaintiffs in their petition aver "that said note became due on the first day of November, 1892, and has ever since remained due and unpaid." The trial court committed no error in failing to instruct the jury that this written memoranda took the note out of the statute of limitations. It is next contended that the court erred in refusing to instruct that the allegations of the execution of the note and the indorsement on the same had not been denied under oath. The defendants filed a verified answer containing: (1) A general denial. (2) Averred "that the alleged cause of action set forth in plaintiffs' petition accrued more than five years before the commencement of the suit; that the entry upon the back of the copy of the mortgage filed with the petition, which is in words and figures as follows, to wit: 'Dec. 15th, '92. (\$60.00) Sixty dollars. Paid in full of interest to date, Nov. 1, '92,'—is wholly untrue, erroneous, and false; that no such payment at that date was made, but the last payment made upon the indebtedness was in truth and in fact made on the 15th of November, 1892." The defendants inadvertently used the word "mortgage," instead of "note," in their answer. This is apparent even from a casual examination of the answer. The parties in the trial court all treated the pleadings as though defendants had used the word "note," instead of "mortgage." The case was tried upon the theory that the answer put in issue the indorsement upon the note. The court very properly refused to instruct the jury that the allegations of the petition

were not denied under oath, for they were in fact denied.

3. The only question necessary to discuss upon the action of the court in overruling the motion for a new trial is as to plaintiffs' alleged newly-discovered evidence. The plaintiffs were engaged in the real-estate and loan business. They had an office in the city of Topeka, and kept a set of books, bookkeeper, and stenographer. The newly-discovered evidence is that of John Wuerth, Etta Stauffenberg, and E. S. Greaser. The evidence of Wuerth, as set out, is all hearsay, and therefore incompetent. Stauffenberg appears to reside in the city of Topeka. She was a stenographer to plaintiffs in November, 1892. Her testimony is corroborative to that offered by the plaintiffs on the trial of the case. Greaser is a resident of the city of Topeka. He was in the employ of plaintiffs prior to November, 1892. The testimony of this witness appears to have little, if any, bearing upon the issues involved. It in no way contradicts any portion of the testimony of the defendants, nor is it decisive of any question raised in the trial of the case. There is an entire lack of any showing of diligence to procure this testimony. It appears that all of the newly-discovered evidence could have been had, with the exercise of ordinary diligence, before the trial. The motion for a new trial was properly overruled. The judgment is affirmed. All the judges concurring.

(9 Kan. A. 314)

McINTOSH et al. v. CRANE.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

APPEAL—HARMLESS ERROR—NEW TRIAL.

1. In order for the admission of incompetent testimony to constitute reversible error, it must appear that such testimony could in some manner prejudicially affect the substantial rights of the aggrieved party.

2. If a jury return a verdict against the clear weight of the testimony, it is the duty of the trial court to set it aside, and allow a new trial, but an appellate court has no such prerogative. The findings of the jury upon oral conflicting testimony are conclusive upon an appellate court if supported by competent evidence.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; W. B. Holt, Judge.

Action by Arethusa T. Crane against John S. McIntosh and James P. Peters. Judgment for plaintiff, and defendants bring error. Affirmed.

Morse & Morse, for plaintiffs in error. McGrew, Watson & Watson, and Arethusa T. Crane, for defendant in error.

McELROY, J. This action was brought by Arethusa T. Crane against McIntosh & Peters, a co-partnership, to recover \$515.55, a balance due on an account for corn, feed, and Kaffir corn sold by her to defendants, and delivered to defendants' cattle in the feed yard on her farm. The defendants an-

swered: (1) General denial; (2) admitting that they purchased, at an agreed price, certain field and Kaffir corn, denied the purchase of any other commodity, and averred that plaintiff was at the time indebted to defendants in excess of the purchase; (3) alleged a mutual settlement of accounts, and an agreement that plaintiff was indebted to them in the sum of \$95.95, for which they prayed judgment. The reply was a general denial. A trial was had, which resulted in a verdict and judgment for plaintiff in the sum of \$389.05. There are but two questions presented by the record: That the court erred in the admission of testimony, and in overruling the motion for a new trial. The grain, feed, and roughness purchased was for use in feeding defendants' cattle upon the plaintiff's farm, and was by plaintiff delivered in the feed yards. In the trial of the action there was no controversy about the purchase, the amount, the price, or delivery of the field corn. The defendants conceded also that they purchased such indefinite quantity of Kaffir corn as should become necessary to feed as roughness. The parties agree that defendants paid on account the sum of \$540.70 before the action was commenced. The court permitted the plaintiff to offer testimony tending to show the value of the Kaffir corn in the field; then to show how much, by the load, it was worth to haul and place the same in the feed yards. There was no contention but what the Kaffir corn was so delivered. Its value, as fixed by the plaintiff, was disputed; and the defendants contend that there is no allegation in the petition to support a finding or judgment for work and labor performed. The petition specially alleges "that defendants requested this plaintiff to feed a large portion of this corn to defendants' cattle." In the itemized account attached to the petition are these statements: "To work and labor in hauling the 17 loads with team, and feeding same to cattle, at 75 cts., \$12.75; to work and labor with man and team in hauling out and feeding the 85 tons of Kaffir corn to the cattle, at 50 cts., \$42.50." The usual manner of proving the value of this property and services would be to show what the Kaffir corn was worth delivered in the feed lot. The allegations of the petition are sufficient to authorize the proof of the value of the feed delivered. We cannot conceive how defendants were prejudiced by the introduction of the testimony the other way; that is, by showing first the value of Kaffir corn in the field, and then by showing what the services were reasonably worth for hauling. It seems to be a difference without a distinction. The trial court committed no reversible error in this respect.

The plaintiffs in error, in their brief, say: "But on the questions as to how much of the Kaffir corn was thus necessary to be used, how much was actually used, and what was the value thereof, as well as on the question

whether defendants had ever agreed to purchase anything but the field corn and a portion of the Kaffir corn, not only was there a decided conflict of testimony, but a merely superficial survey of the record will show that the verdict of the jury was squarely against the clear preponderance of the evidence. The important issue—in fact, as we claim, the only issue—raised by the pleadings in the case, was whether the defendants had purchased or agreed to purchase of the plaintiff all of the feed on her farm, or merely the field corn and such Kaffir corn as could be fed with it. Everything hinged on the determination of this question of fact." The record justifies this statement as to the contention of the parties. The only controversy in the trial court seems to have been as to whether McIntosh & Peters purchased of Crane all of the feed on her farm or merely the field corn, with such Kaffir corn and stalk field as could be used to advantage. The testimony was oral, and conflicting. The record indicates that the weight of the testimony was with defendants, plaintiffs in error, but the jury found otherwise. The verdict of the jury was approved by the trial court; was based on some competent evidence. This is conceded. The findings of a jury upon oral conflicting testimony are conclusive upon an appellate court. If a jury return a verdict against the clear weight of the testimony, it is the duty of the trial court to set it aside, and allow a new trial, but an appellate court has no such prerogative; the finding is conclusive. This proposition is so well settled in this state that a citation of authority is unnecessary. The judgment must be affirmed. All the judges concurring.

BURT et al. v. MOORE et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

MORTGAGE—ASSIGNMENT—FORECLOSURE.

Where a note, which a mortgage was given to secure, was, when an original assignment was made, but not recorded, bought by the assignee, and after the commencement of an action to foreclose the assignee obtained an assignment of the mortgage in due form and duly recorded it, he can recover thereon without proving his title to the paper by the original unrecorded assignment.

Error from district court, Wyandotte county. Henry L. Alden, Judge.

Action by David H. Moore and others against O. D. Burt and W. H. Bridgens. Judgment for plaintiffs, and defendants bring error. Affirmed.

Moore & Berger, for plaintiffs in error. T. P. Anderson, for defendants in error.

PER CURIAM. This case was heard upon an agreed statement of facts. It is said by counsel that there is but one question to decide; that is, does the failure of the defendant in error to have recorded the original as-

signment of the mortgage which he seeks to foreclose bar him of that right in this case upon the agreed statement of facts? It was stipulated that if it does the district court should render judgment against him; otherwise judgment should go for the defendants. It is doubtless true that his failure to have the assignment recorded would prevent him from introducing in evidence, and the court from considering, that assignment in support of his allegation of title. But it does appear by the statement of facts that the note which the mortgage was given to secure was, at the time this original assignment was made, bought by him, transferred to him, and that he has since the commencement of this suit obtained from the mortgagee an assignment in due form, acknowledged, and at the same time recorded, in conformity to the provisions of the statute governing such cases prior to its repeal; so that his recovery does not necessarily depend upon whether he will be permitted to use the original assignment in evidence or not. In other words, he did not need to prove his title to the paper by this unrecorded assignment in order to recover. Plaintiffs in error show no valid defense to this cause of action. The judgment is well supported by legal evidence, and is affirmed.

KEPLEY v. SHEEHAN.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

EXEMPTIONS—FEES OF OFFICERS.

The exemption of an officer's fees from seizure under process does not extend to fees to which he is entitled after his term of office has expired.

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Lawrence Sheehan against R. B. Kepley. From an order appointing a receiver and restraining defendant from disposing of certain fees, and an order overruling a motion to set aside such order, defendant brings error. Affirmed.

Edwin A. Austin, Otis E. Hungate, and Wm. H. Thompson, for plaintiff in error Fagan & Nichols, for defendant in error.

PER CURIAM. This proceeding was instituted by Lawrence Sheehan, in aid of execution, under chapter 95, Gen. St. 1897, in the probate court of Shawnee county. On September, 10, 1898, Sheehan recovered judgment before a justice of peace of Shawnee county for \$206.76 against Kepley, and costs of suit. He caused a transcript to be filed in the office of the clerk of the district court. An execution was issued, which was afterwards returned unsatisfied. Sheehan afterwards instituted proceedings in aid of execution, by filing an affidavit alleging that Kepley had property and choses in action liable for his debts, which could not be reached by execution. At the time he filed his petition pray-

ing for an order of the court commanding the judgment debtor to appear and answer concerning his property. An order was duly issued, and a hearing was had, which resulted in the appointment of a receiver to collect such fees as should be paid to the clerk of the district court for account of Kepley, and apply the same to the satisfaction of the judgment and costs, and enjoining the judgment debtor from selling, assigning, mortgaging or in any way interfering with the fees until the judgment and costs should be satisfied. The judgment debtor filed his motion for a new trial, which was overruled. He prepared his bill of exceptions, which was afterwards filed in the office of the clerk of the district court. Thereafter plaintiff in error filed his motion to set aside the order of the probate judge. A hearing was had, and the motion overruled. Time was given to make and serve a case-made, and the record is presented to this court for review.

The plaintiff in error contends that the fees of an ex sheriff are exempt from seizure. This is the only question presented. There are many decisions holding that a public officer's salary or fees are so exempt, on account of public policy. We know of no authority for holding that such exemption extends to the fees earned by an officer after his term of office has expired, but it seems more reasonable to hold that, as the reason for the rule exempting his fees has ceased to exist, the rule can no longer be available. In the case at bar the judgment debtor was no longer a public officer. His term of office had long since expired. The money sought to be appropriated was due for fees due him for services rendered as sheriff. The fees of a sheriff are due and payable as soon as the services are performed. The judgment must be affirmed.

CITY OF KANSAS CITY et al. v. BANKS.

(Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.)

DEDICATION—EVIDENCE—PAROL EVIDENCE AFFECTING WRITINGS—ADMISSIBILITY—APPEAL.

1. In an action to recover realty, evidence of an oral dedication by an agent of plaintiff's grantor is inadmissible, where it is not shown that the agent had authority to dedicate.

2. Where a deed reserves a temporary easement in the premises, parol evidence cannot be received to enlarge such reservation into an agreement to dedicate the property to the public use.

3. The supreme court will not disturb a finding of fact where there is evidence to sustain it.

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by A. Bleecker Banks against the city of Kansas City, Kan., and another. From a judgment for plaintiff, defendant city appeals. Affirmed.

E. D. Hutchings and T. A. Pollock, for plaintiffs in error. Bruno Hobbs, for defendant in error.

PER CURIAM. This is an action, under the Code, to recover the possession of real estate, brought by the defendant in error against the plaintiffs in error. There was a judgment for the plaintiff, and the defendant city appeals. The only question in the case was, did the plaintiff or her grantor, Eleanor Stevens, dedicate the tract to public use as a street, or part of a street, of Kansas City?

The first assignment of error is that the court erred in refusing to permit the city to prove an oral dedication, or agreement to dedicate, made between Stout, Eleanor Stevens' grantor, and Newman, who, it was claimed, was acting as the agent of Mrs. Stevens in the purchase of the property by her from Stout. The conversation which the city offered to prove was one that it is claimed occurred between Stout and Newman at the time Stout sold and conveyed the property to Mrs. Stevens. The evidence was incompetent, for two reasons: It was not shown that Newman had authority to agree to dedicate the property to public use for Stout's grantee. And, again, it was an attempt by oral evidence to limit or vary the terms of the deed of conveyance which was then being made and delivered. There was a reservation of temporary easement in the deed, reserved for the benefit of Stout, the grantee. The conversation which was offered was for the purpose of enlarging this reservation into an agreement to dedicate the same property for public use. In fact, it was all the property conveyed by Stevens to the plaintiff.

The second assignment of error is that the finding of the court for the plaintiff is not sustained by the evidence. The burden of proving the dedication was upon the city, and it wholly failed to prove any fact, statement, or conduct upon the part of either Eleanor Stevens or the plaintiff that would have warranted the court in finding that issue in favor of the city. It was, like any other question of fact, to be determined by the court or jury from all the evidence; and, if sustained by any evidence, this court ought not to disturb that finding.

The third assignment of error is that the plaintiff's motion for a new trial was overruled. This contention must fail, as it depends upon the others heretofore referred to. The judgment of the district court is affirmed.

(22 Utah 149)

BETZ v. PEOPLE'S BUILDING, LOAN & SAVING ASS'N.

(Supreme Court of Utah. Dec. 2, 1899.)

BUILDING AND LOAN ASSOCIATION—ACTION AGAINST—WITHDRAWAL VALUE—LOSSES—EVIDENCE—PROFITS—LOSSES—STOCKHOLDER—PROXY—ESTOPPEL.

1. In an action against a building and loan association for the withdrawal value of plaintiff's stock, where an exhibit introduced by plaintiff shows that at a stockholders' meeting

held prior to the giving of plaintiff's notice of withdrawal a resolution was passed reciting the losses and depreciation of property values suffered by the association, and making a reduction thereof of a fixed percentage of the credits of each member on the books of the association; that plaintiff's stock was represented at such meeting by proxy, and voted for the resolution; and it further appears from defendant's evidence that said resolution was immediately carried into effect by the board of directors,—a finding "that the defendant, at a meeting held in January, 1896, did not distribute losses against its stockholders; that it is not shown what losses, if any, were sustained by the defendant during the preceding year,"—is manifestly erroneous.

2. The real object of a building and loan association being the mutual and equitable benefit of all its members, and every member being entitled to share equally with every other member, in proportion to his holdings. In the profits of the enterprise, he is equally bound to stand his proportion of the expenses and losses incident to its management; and where a stockholder has, by proxy, voted for a resolution which resulted in charging his and other outstanding stock with a loss, he is effectually estopped from denying that the action of the directors, taken in obedience to the will of the stockholders, was warranted.

3. *Stilwell v. Association*, 57 Pac. 14, 19 Utah, 257, affirmed.

(Syllabus by the Court.)

Appeal from district court, Second district; H. H. Rolapp, Judge.

Action by George L. Betz against the People's Building, Loan & Saving Association. Judgment for plaintiff, and defendant appeals. Reversed.

Valentine Gideon, for appellant. Richards & Varian, for respondent.

BARTCH, C. J. The defendant is a building, loan, and saving association, organized and existing under and by virtue of the laws of New York. On or about December 1, 1890, it issued to the plaintiff a certificate of the series A of its capital stock, whereby he became the owner of 12 shares of the stock, each share being of the par value of \$100. The certificate, among other things, provided that, "In consideration of the entrance fee, together with agreements and full compliance with the terms and conditions printed on the back of this certificate, and the articles of association and by-laws adopted by the said association, all of which are hereby referred to and made a part of this contract, the said the People's Building, Loan and Saving Association agrees to pay said shareholder, or his heirs, executors, administrators, or assigns, the sum of one hundred dollars for each of said shares at the end of five years from the date hereof, or at maturity." Article 14, § 2, of the amendments to the articles of the association, adopted December 2, 1893, provides: "Members holding certificates in class A shall be entitled to withdraw the amount paid into the loan fund on the same: provided, such certificates have been in force for three years or more, and that they are in good standing on the books of the association at the time the application for withdrawal is made. Members holding certifi-

icates in class B and C shall be entitled to withdraw the amount paid into the loan fund on the same: provided, they have been in force for six months or more, and that they are in good standing on the books of the association at the time the application for withdrawal is made. Notice of 30 days may be required by the association from members wishing to withdraw the payments on such stock, and the time and manner of paying shall be the same as on stock at maturity: provided, that only one-half of the receipts of the association in any one month shall be applicable to the payment of such withdrawals." In section 3 of the same article it is provided: "Members withdrawing payments made on certificates in class A, as provided in section 2 of this article, shall be entitled to receive an interest of 6 per cent. per annum if they have been in force for more than three years and less than four years. If they have been in force for more than four years they shall be entitled to receive 7 per cent. per annum." As alleged in the complaint and admitted in the answer, the plaintiff, in February, 1896, made application for withdrawal, and, his claim not having been paid, on May 14, 1897, he brought suit by filing his complaint, wherein he asked for judgment against the defendant in the sum of \$1,035.53. At the trial, on March 31, 1899, the court entered judgment in favor of plaintiff for \$941.22, and thereupon the defendant appealed.

Among the assignments of error is one relating to the twelfth finding of fact, which reads: "That the defendant, at a meeting held in January, 1896, did not distribute losses against its shareholders; that it is not shown what losses, if any, were sustained by the defendant during the preceding year." To determine whether or not this finding was warranted, reference must be had to the proof. From plaintiff's Exhibit B, as shown by the transcript, it appears: That on January 11, 1896, the association held its eighth annual meeting of the stockholders. That at that meeting there were represented, either in person or by proxy, 10,175 $\frac{1}{4}$ shares of stock. That the whole number of shares in force at the close of the business on December 31, 1895, was 17,636 $\frac{3}{4}$ shares, and that at the same meeting a resolution was adopted as follows: "Whereas, it appears that by general shrinkage of land values throughout the country, and by numerous defaults in payment by shareholders of this association, and for other causes, that the fair market value of the assets of this association have depreciated 26 per cent. of their face value, and that in justice to each shareholder it is necessary that the book value of the stock of each member should be reduced according to the facts: Now, therefore, it is resolved that the board of directors of this association be, and they are hereby, directed to reduce the credits of each and every member upon the books of the association in accordance with the

above facts." That the plaintiff was represented by proxy, and his stock voted in favor of the resolution. It also appears from the exhibit that the assets of the association had greatly depreciated in value, that this caused the adoption of the resolution, and that the design of the stockholders voting for the resolution was to have all active stock charged with a proportionate share of the loss, including fully paid stock and stock for which notice of withdrawal had been given. From the evidence offered by the defendant and admitted by the court it appears that the board of directors at once proceeded to carry the resolution into effect. On this point the witness Whitney, as shown by his deposition, testified: "A loss of 23 per cent. was charged against the plaintiff's stock by action of the board of directors acting under authority of the resolution heretofore referred to adopted by the stockholders at their annual meeting held on January 11, 1896. This loss of 23 per cent. was charged against all stock outstanding at that time, including the plaintiff's." Further reference to the evidence would seem useless. It is difficult to see how, in the face of such proof, which appears uncontradicted, the court could find there were no losses distributed against the stockholders. The finding in question is manifestly erroneous, and must be attributed to an oversight of the court. The respondent, having, by his proxy, voted for the resolution which resulted in charging his and other outstanding stock with a loss, is effectually estopped from denying that the action of the directors, taken in obedience to the will of the stockholders, was warranted. He must be held to be bound by all the results which are the natural and necessary sequences of his own acts. Moreover, the real object of an association like the one at bar is, or ought to be, the mutual and equitable benefit of all its members, and, as every member is equally entitled with every other member to share equally and ratably in the profits of the enterprise, he is bound to contribute, in proportion to his interests in the concern, to the indebtedness of the corporation, and the expenses and losses incident to its management. Liability to such contribution is not affected by notice of withdrawal, although, as in other corporations, it is confined to the extent of his interest. "A member cannot, by withdrawing, evade his proportionate share in the expenses, losses, and debts of the association. The association has the right to deduct it from the amount otherwise coming to him upon legal notice of withdrawal. And the society has the right to retain from withdrawing stockholders their proportion of probable loss sustained by reason of the purchase of real estate sold on its mortgage, which has depreciated, even before the loss has been finally determined by the sale of the real estate, where it is evident there will be a loss. The society may have the property appraised by a committee, and fix the loss and assess the

same on each share of stock pro rata." *End.* Bldg. Ass'ns, § 78.

The appellant also insists that the court erred in holding section 2, art. 10, of amendments to the articles of association, and article 37 of the by-laws, null and void as to the respondent, because the same impaired the obligation of the contract. A similar question to the one here presented was discussed in the case of *Stilwell v. Association* (Utah) 57 Pac. 14, and for an expression of our views on this point we refer to that case, which we hereby reaffirm.

Since the case must be reversed, and a new trial granted, we shall refrain from expressing an opinion as to whether or not section 2 and article 37, above referred to, were lawfully enacted, as the facts pertaining thereto may be made more clear by further proof. Nor do we deem it important to discuss or decide any other question presented. The case is reversed, with costs, and the cause remanded, with directions to the lower court to grant a new trial.

MINER and BASKIN, JJ., concur.

(22 Utah 123)

SNOW v. RICH.

(Supreme Court of Utah. May 18, 1900.)

JUDGMENT—WHEN FINAL—APPEAL—TIME FOR—DECLARATIONS OF GRANTOR—LIMITATIONS—HOW PLEADED—CAUSE OF ACTION—CONTRACT TO CONVEY—BONA FIDE PURCHASER—HOW AFFECTED.

1. A judgment is not final while a motion for a new trial, made within the time allowed by law, is pending and undisposed of; and an appeal taken and perfected within six months from the date of overruling the motion for a new trial is taken in time.¹

2. Declarations of a grantor, made after having parted with his title, are not admissible to impeach his own conveyance, in the absence of any proof of collusion or of some fraudulent scheme between grantor and grantee.

3. An allegation in an answer that, "for a second defense, the defendant alleges that the said cause of action, if any, stated in said complaint, is barred by the provisions of sections 2850, 2830, et seq., Revised Statutes and Code of Civil Procedure," is a compliance with the requirements of section 2902, Rev. St. 1898, as to pleading the statute of limitations, and sufficient to authorize the introduction of evidence showing adverse possession.

4. Where there is an agreement between parties for a mutual exchange of lands, and each puts the other into possession of the lands so exchanged, and the agreement is subsequently violated by one of the parties, by mortgaging the land to be conveyed by him, the cause of action in the other arises when he discovers the violation; and a subsequent verbal agreement between parties to wait five years before executing deeds each to the other, while it would bind the violator of the contract personally, would not preclude a subsequent grantee, who in good faith went into possession under claim of right, and without notice or knowledge of the agreement, from successfully pleading the statute, provided the possession was peaceable, uninterrupted, continuous, open,

adverse, under claim of right, and known to plaintiff.

(Syllabus by the Court.)

Appeal from district court, First district; Charles H. Hart, Judge.

Action by Alviras E. Snow against John Y. Rich. Judgment for defendant, and plaintiff appeals. Affirmed.

This is an action in ejectment to recover a piece of ground of 23½ feet frontage by 8 rods deep; the same being a strip of land on the east side of the west half of lot 8, block 14, plat A, Brigham City survey. The complaint was filed July 1, 1898, and contains the usual allegations of ownership and right of possession on the part of the plaintiff, and the unlawful detention of the premises by the defendant. The defendant, by his answer, denies plaintiff's allegations of ownership and right of possession of the land, and, as a further defense, alleges that the cause of action was barred by the provisions of sections 2850, 2800, Rev. St. Utah. The facts in the case, as shown by the record, are as follows: On the 27th day of January, 1890, appellant, Snow, at Brigham City, Utah, entered into an agreement with one C. C. Loveland, who was at the time the father-in-law of Snow, by which Loveland was to give to Snow 100 acres of farming land, known as the "Deweyville Land," valued at \$21.25 per acre. As a part of the purchase price of said land, Snow was to give Loveland 106 feet frontage in said lot 8, which land includes the 23½ feet frontage in issue, and pay an indebtedness owed by Loveland to the Brigham City Co-op., amounting to about \$500. The balance of the purchase price was to be paid in cash. A memorandum of the agreement was signed by the parties, which is as follows: "Brigham City, January 27, 1890. 100 acres of Deweyville land, lying south and west of Brig. Burbanks. Purchasing price, \$21.25. A. E. Snow to pay amt. of C. C. Loveland debt at Co-op., the lot east of Loveland's house, valued at \$800.00, and to pay the balance in cash, less amt. due the R. R. Co. A. E. Snow to be responsible for mortgages on the eight hundred lot. [Signed] A. E. Snow. C. C. Loveland." The evidence shows that the \$21.25 mentioned in the agreement meant that Snow was to pay Loveland at the rate of \$21.25 per acre, or raise \$2,125 for the 100 acres of Deweyville land. Snow immediately put Loveland into possession of the town lot, and Loveland put Snow into possession of the 100 acres of Deweyville land. Each one paid the taxes on the land in his possession. Soon after the exchange of lands, Loveland, in making and giving a mortgage on other land adjoining, included the 100 acres of Deweyville land by mistake. The mortgage so given was for five years, and the land could not be released until the time had expired. Plaintiff testified that each agreed to wait until the release of the mortgage before executing deeds to each other for the lands so exchanged. Loveland died be-

¹ *Watson v. Mayberry*, 49 Pac. 479, 15 Utah, 285; *Orchard Co. v. Hanley*, 50 Pac. 611, 15 Utah, 506; *Stoll v. Mining Co.*, 57 Pac. 295, 19 Utah, 271.

fore the mortgage became due, and it was foreclosed after his death, and the 100 acres of Deweyville land sold to satisfy the debt secured by the mortgage. Plaintiff further testified that between the date of the agreement and the death of Loveland he (Snow) paid Loveland's indebtedness to the Co-op., of about \$500, and paid Loveland in cash about \$600 on the deal, taking receipts for \$544.39 only of the amount so paid. Loveland owned the land on the west adjoining the strip of ground in question. Early in 1890 Loveland gave to his daughter, Mrs. Janie L. Steed, the 23½ feet in question, and the adjoining land on the west; being the whole of the west half of said lot 8, block 14. Mrs. Steed immediately went into possession of the land, cut down the trees from the west half, which included the 23½ feet in dispute, and she and her husband the same year erected thereon a brick dwelling house at a cost of about \$7,000. During the time the house was in course of construction the ground in question was covered with building material for the house. No part of the house is on the 23½ feet of ground in dispute, but stands just west of and adjoining it, and the 23½ feet is used as a yard to the house. Mrs. Steed had the whole of this half lot, including the 23½ feet of land in question, inclosed with a substantial fence, plowed, cultivated, and sowed it to lawn grass, and planted thereon fruit and ornamental trees, and expended more than \$25 in digging ditches and making dams and embankments for watering it. The deed received by Mrs. Steed from her father to the land in dispute was not recorded until March, 1898,—about eight years after her father, C. C. Loveland, purchased it from plaintiff. In 1895 Mrs. Steed leased the premises, including the land in question, to one John T. Rich, who, as her tenant, occupied it until December 5, 1896, when he (Rich) purchased from Mrs. Steed the entire property. John T. Rich, after purchasing the property, continued in the open, notorious, peaceable, and uninterrupted possession of it until his death, which occurred in 1897. His son, John Y. Rich, the defendant, who had been living on the premises with his father, John T. Rich, continued in possession until the commencement of this suit. Mrs. Steed testified that during the time she was in possession of the land in question she paid all taxes assessed against it, and her claim of ownership and possession was open, notorious, uninterrupted, and peaceable, and known to the plaintiff, who visited at her house, and during said time frequently passed by it. The evidence also tended to show that plaintiff must have known of the sale and transfer of the land by Mrs. Steed to John T. Rich, and during the seven or eight years covering the occupation and claim of ownership of the land by these parties, and the transactions between them in relation to the land, he made no claim of ownership, either to Mrs. Steed or to John T. Rich; and some of the wit-

nesses in the case testified that Snow had disclaimed to them having any interest in the land in question. Plaintiff testified that before Steed and his wife commenced building this house a conversation was had between plaintiff and Loveland and Steed and his wife, and it was decided that the house should be built on the line, so that, in case of any trouble arising afterwards, no portion of the house would be situated on the ground in question. This testimony was contradicted by Mr. Steed and his wife, both of whom testified that they never knew or heard of plaintiff claiming any interest in or to the land. The issues were tried by a jury, who returned a verdict for defendant,—“No cause of action.” Judgment was entered on the verdict September 16, 1898. Plaintiff, within the time provided by law, served defendant with notice of intention to move for a new trial. On September 15, 1898, the court overruled the motion. An appeal was duly taken April 24, 1899,—7 months and 18 days after the entry of judgment, but less than 6 months after the motion for a new trial was overruled. The defendant now moves this court to dismiss the appeal on the ground that it was not taken within the time required by law.

S. P. Armstrong and J. A. Williams, for appellant. Henry L. Steed and R. H. Jones, for respondent.

McCARTY, District Judge, after stating the facts, delivered the opinion of the court.

This court has repeatedly held that a judgment is not final while a motion for a new trial, made within the time allowed by law, is pending and undisposed of, and that an appeal taken and perfected within six months from the date of overruling the motion for a new trial is taken in time. *Watson v. Mayberry*, 15 Utah, 265, 49 Pac. 479; *Orchard Co. v. Hanley*, 15 Utah, 506, 50 Pac. 611; *Stoll v. Mining Co.*, 19 Utah, 271, 57 Pac. 295. On the authority of those cases the motion to dismiss the appeal is overruled.

Plaintiff offered to prove that, just prior to the death of C. C. Loveland, he (Loveland) came to plaintiff, and took him to Steed's office, and while there asked him (Snow) for a deed to his wife for the land in question, and Snow stated to Loveland that he would not give a deed until he received a deed for the 100 acres of Deweyville land, to which offer defendant objected. The court sustained the objection, to which ruling the plaintiff excepted, and now assigns it as error. We think the court was right. It was not shown, or attempted to be shown, that either Mrs. Steed or John T. Rich was present at the time this alleged conversation took place; and the rule is well settled that the declarations of the grantor, made after having parted with his title, are not admissible to impeach his own conveyance, in the absence of any proof of collusion or of some fraudulent

scheme between the grantor and the grantee. 1 Jones, Ev. § 242, and cases cited in note. There is no evidence in this case that shows or tends to show any fraud on the part of either Mrs. Steed or John T. Rich, but it appears from the record that they acted in good faith in the transactions by which they acquired title to the land in question.

Counsel for the appellant objected and excepted to the testimony showing adverse possession on the part of Mrs. Steed and John T. Rich of the land in dispute, and alleges error because of the admission thereof, on the ground that adverse possession was not properly pleaded. We think the position of counsel on this point is untenable. Section 2092, Rev. St. 1898, provides that "in pleading the statute of limitations it is not necessary to state the facts showing the defense, but it may be stated generally that the cause of action is barred by the provisions of section (giving the number of the section in the Code of Civil Procedure relied upon, and of the subdivision thereof, if it is so divided), and if such allegation be controverted the party pleading must establish on the trial the facts showing that the cause of action is so barred." Defendant's answer contained the following allegation: "For a second defense, the defendant alleges that the said cause of action, if any, stated in said complaint, is barred by the provisions of sections 2859, 2860, et seq., Revised Statutes and Code of Civil Procedure." We think this allegation was sufficient to authorize the introduction of evidence showing adverse possession. It is certainly in compliance with the requirements of section 2092, above referred to. Section 2859 of our Code is identically the same as the provisions of the California Code on the same subject (Deering's Code Civ. Proc. § 318); and it has been repeatedly held by the supreme court of that state that, in an action to recover possession of land, a plea of the statute of limitations, in the form prescribed by the Code of Civil Procedure, and referring to the section relied upon, giving the number and subdivision thereof when the section is divided into subdivisions, is sufficient, and entitles the defendant to give in evidence every essential fact tending to establish the defense of the statute. Hagely v. Hagely, 68 Cal. 348, 9 Pac. 305; Webber v. Clarke, 74 Cal. 11, 15 Pac. 431; Manning v. Dallas, 73 Cal. 420, 15 Pac. 34; 2 Estee, Pl. & Prac. § 3321.

In his brief, counsel for plaintiff has elaborately and at considerable length discussed the question as to whether the cause of action was barred by the statute of limitations. He insists that the record conclusively shows that, after C. C. Loveland mortgaged the Deweyville land, they (Snow and Loveland) agreed to hold the contract for the exchange of lands in abeyance until the expiration of the mortgage, at which time they were to make conveyance each to the other, respectively, and that, as a proposition of law,

plaintiff is entitled to recover, and that the plea of the statute of limitations ought not to prevail. Plaintiff's cause of action accrued when he discovered that Loveland had violated his agreement by mortgaging the land in question, thereby rendering it impossible for him to comply with the contract to convey the land to plaintiff. The subsequent verbal agreement between the parties that they would wait five years before executing deeds each to the other for the lands mentioned, while it would deprive Loveland of the benefit of the statute of limitations, would not preclude the subsequent grantees of their land, who in good faith went into possession of the same under a claim of right, and without notice or knowledge of the agreement, from successfully pleading the statute, provided their possession was peaceable, uninterrupted, continuous, open, adverse, and under claim of right, and known to the plaintiff. There is a conflict in the evidence as to whether or not the subsequent grantees had notice of the verbal agreement referred to, but the great preponderance of the evidence on this point is decidedly in favor of the defendant. And even if Mrs. Steed did know of this agreement, but entered into possession of the property under a claim of ownership, and she and her grantees paid all taxes assessed against it, and continued in peaceful, open, notorious, and adverse possession under a claim of right for a period of seven years before the commencement of the action, and during said time the character of her claim and possession was known to Snow,—and the great weight of the evidence shows such to be the case,—she and her grantee acquired title by adverse possession under the statute. *Armstrong v. Risteau's Lessee*, 5 Md. 256; *Hale v. Gladfelder*, 52 Ill. 91; 2 Wood, Lim. Act. § 254; *Buswell, Lim.* § 230. We find no error in the record, and the judgment of the trial court is therefore affirmed; the costs of this appeal to be taxed against the appellant.

BARTCH, C. J., and BASKIN, J., concur.

(22 Utah 100)

KIRKMAN v. BIRD et al.

(Supreme Court of Utah. May 14, 1900.)

CHANGE OF REMEDY—OBLIGATION OF CONTRACT—EXEMPTION OF WAGES.

1. Any change or limitation of a remedy which does not materially abridge the right does not impair the obligation of the contract.

2. Section 7, p. 99, Sess. Laws 1899, which absolutely exempts to married men or heads of families their earnings for personal services rendered within 60 days next preceding the levy of execution, by garnishment or otherwise, being reasonable, and directed to the remedy, and not the right, does not impair the obligation of contracts entered into prior to its passage, and is not in violation of section 10, art. 1, Const. U. S.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by John M. Kirkman against William Bird, Jr. The Rio Grande Western Railway Company was garnished. Judgment for defendant garnishee, and plaintiff appeals. Affirmed.

Krebs & Hopough, for appellant. W. H. Bramel, for respondent. Bennett, Harkness, Howat, Sutherland & Van Cott, for garnishee.

BASKIN, J. There is no controversy in regard to the facts in this case, which are as follows: That on the 13th of May, 1896, the defendant was indebted to the plaintiff for goods and merchandise previously sold by the latter to the defendant; that on that day the plaintiff recovered on said indebtedness a judgment for \$285.47, and costs amounting to \$11.25; that on the 12th of December, 1899, an execution was issued on said judgment, and the Rio Grande Western Railway Company was garnished; that said company, on the 28th of December, 1899, answered "that it was indebted to the defendant in the sum of \$77.50 for services rendered from November 1 to December 12, 1899, inclusive, which was subject to the claim of plaintiff; that the same was exempt from execution; that the defendant was before and at the date of said garnishment, and had ever since been, a married man, with a wife and child dependent upon him for support; and that he and his wife and child were before and at the date of said garnishment, and ever since had been, residents of Salt Lake City, Utah." The respondent William Bird, Jr., also filed an answer, alleging the same facts set up by said company. A. L. Hopough, one of the attorneys for plaintiff, made and filed an affidavit admitting the facts alleged in the foregoing answers, except the conclusion that said earnings were exempt from execution, and stating that, at the time said goods and merchandise were sold and said judgment rendered, the said Bird had no property except his monthly earnings for personal services, and that one-half of said earnings at the last-named dates were, and ever since have been, subject to the execution of said judgment. It is also admitted that defendant has no property upon which execution can be levied, or out of which said judgment can be satisfied, if all of the earnings of said defendant are exempt from execution.

The respondents claim exemption under an act of the legislature approved March 9, 1899 (Laws 1899, p. 99, § 7), which exempts from execution "the earnings of the judgment debtor for personal services rendered within sixty days next preceding the levy of the execution, by garnishment or otherwise, if the judgment debtor be a married man, or with a family dependent upon him for support." The court below held that said earnings, under said provision, were exempt, and rendered judgment accordingly. The appellant contends that the legislature did not intend that said provision should have any re-

troactive effect, and that the judgment in this case giving it such effect is in violation of section 10, art. 1, of the constitution of the United States, and impairs the obligation of the implied contract between the parties which arose upon sale of the said goods and merchandise previous to the passage of said act.

At the date of the implied contract and the rendition of said judgment, under the attachment law then in force, garnishment of one-half only of the defendant's earnings for his personal services rendered within 60 days preceding service on the garnishee was permissible. 2 Comp. Laws 1888, p. 307, subd. 7; Laws 1896, p. 214, § 7. Section 7 of the act of 1899 did not abolish the remedy by garnishment, but simply amended the former act so as to exclude the whole of such earnings for services rendered during such period from the operation of that process, when the judgment debtor is a married man or has a family dependent upon him for support. So that the alleged injury complained of in this case is said limitation of the remedy by garnishment. Therefore the only question presented is whether this limitation impairs the obligation of the contract.

The remedy by garnishment is purely statutory, and not a common right. 9 Am. & Eng. Enc. Law, 809; Drake, *Attachm.* § 451a. In the case of *Sturges v. Crowningshield*, 4 Wheat. 200, 4 L. Ed. 550, Chief Justice Marshall said: "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct." In that case it was held that the remedy of imprisonment (which existed at common law) might be abolished without impairing the obligation of the contract. In the case of *Bronson v. Kinzie*, 1 How. 315, 11 L. Ed. 144, Chief Justice Taney in the opinion said: "Undoubtedly a state may regulate at pleasure the modes of proceeding in its courts in relation to past contracts as well as future. It may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or articles of necessity in household furniture, shall, like wearing apparel, not be liable to execution on judgments. Regulations of this description have always been considered, in every civilized community, as properly belonging to the remedy, to be exercised or not by every sovereignty, according to its own views of policy and humanity. It must reside in every state to enable it to secure its citizens from unjust and harassing litigation, and to protect them in those pursuits which are necessary to the existence and well being of every community. And, although a new remedy may be deemed less convenient than the old one, and may in some degree render the recovery of debts more tardy and difficult, yet it will not follow that the law is unconstitutional. Whatever belongs merely to the remedy may be altered according to the will of the state, provided the alteration does not impair the

obligation of the contract. But, if that effect is produced, it is immaterial whether it is done by acting on the remedy or directly on the contract itself. In either case, it is prohibited by the constitution." In the case of *Edwards v. Kearzey*, 96 U. S. 607, 24 L. Ed. 799, the court sums up its conclusions in this language: "The remedy subsisting in a state when and where a contract is made and is to be performed is a part of its obligation, and any subsequent law of the state which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the constitution, and is therefore void." Justice Clifford, in a concurring opinion in the foregoing case, on pages 603, 609, 96 U. S., and page 799, 24 L. Ed., said: "Beyond all doubt, a state legislature may regulate all such proceedings in its courts at pleasure, subject only to the condition that the new regulation shall not in any material respect impair the just rights of any party to a pre-existing contract. Authorities to that effect are numerous and decisive, and it is equally clear that a state legislature may, if it thinks proper, direct that the necessary implements of agriculture, or the tools of the mechanic, or certain articles of universal necessity in household furniture, shall, like wearing apparel, not be liable to attachment and execution for simple contract debts. Regulations of the description mentioned have always been considered in every civilized community as properly belonging to the remedy to be exercised or not by every sovereignty, according to its own views of policy and humanity." And Justice Hunt, in a concurring opinion in the same case (page 610, 96 U. S., and page 800, 24 L. Ed.), said: "I think that the law was correctly announced by Mr. Chief Justice Taney in *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143, when he said: A state 'may, if it think proper, direct that the necessary implements of agriculture, or the tools of a mechanic, or articles of necessity in household furniture, shall, like wearing apparel, be not liable to execution on judgments.'" In the case of *Tennessee v. Sneed*, 96 U. S. 74, 24 L. Ed. 612, Justice Hunt, in delivering the opinion of the court, said: "On the general subjects and for numerous illustrations reference is made to the following cases: *Bronson v. Kinzie*, 1 How. 311, 11 L. Ed. 143 (before quoted from), and *Von Hoffman v. City of Quincy*, 4 Wall. 553, 18 L. Ed. 403." In the latter case it was stated "that the right to imprison for debt is not a part of the contract. It is regarded as penal, rather than remedial. The states may abolish it whenever they think proper. They may also exempt from sale, under execution, the necessary implements of agriculture, the tools of a mechanic, and articles of necessity in household furniture. It is said: 'Regulations of this description have always been considered in every civilized community as properly belonging to the remedy, to be exercised by every

sovereignty according to its views of policy and humanity.' It is competent for the states to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances." See, also, *Fenniman's Case*, 163 U. S. 714, 26 L. Ed. 602; *McGahey v. Virginia*, 135 U. S. 632, 10 Sup. Ct. 972, 34 L. Ed. 304; *Parego v. Dodge*, 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 813; *Cooley*, Const. Lim. 346 et seq.; *Suth. St. Const.* §§ 477, 483. In *Suth. St. Const.* § 432, it is stated: "No person can claim a vested right in any particular mode of procedure for the enforcement or defense of his rights. * * * A remedy may be provided for existing rights, and new remedies added to or substituted for those which exist. Every case must to considerable extent depend upon its own circumstances. General words in remedial statutes may be applied to past transactions and pending cases, according to all indications of legislative intent, and this may be greatly influenced by considerations of convenience, reasonableness, and justice." Judge Cooley, in his work on *Constitutional Limitations* (page 346), says: "Such being the obligation of a contract, it is obvious that the rights of the parties in respect to it are liable to be affected in many ways, by changes in the laws, which it could not have been the intention of the constitutional provision to preclude. There are few laws which concern the general police of the state, or the government of its citizens, in their intercourse with each other or with strangers, which may not in some way or other affect the contracts which they have entered into or may thereafter form." Creditors as well as debtors are presumed to know that the legislature has an inherent power to enlarge, limit, alter, or repeal remedial statutes, provided that contracts are not directly impaired, and a remedy be left, though less convenient and less prompt and speedy, than the one so changed or repealed. Also to enact such laws as, "according to its own views of policy and humanity, it may deem necessary to protect the citizens of the state from unjust, merciless, and oppressive litigation and other evils detrimental to the common weal, and protect them in those pursuits of industry, and secure to them those privileges and rights, which experience has already shown, or in the future may be shown, to be necessary to the prosperity and strength of the state, although such necessary laws may in some way or other affect contracts previously entered into." Among such necessary laws are police regulations, exemptions from forced sales on execution of necessary implements

of agriculture, the tools of mechanics, necessary household furniture for the use of the family and their wearing apparel, exemption of a portion of the wages of laborers, etc. Parties making contracts, I think, should be charged with notice that the legislature has a right to make such necessary changes in the laws, and that it should be presumed that they intended their contracts to be subject to such reasonable and necessary changes. Judge Cooley, in his work on Constitutional Limitations (pages 707, 708), states the proposition thus: "The occasions to consider this subject in its bearings upon the clause of the constitution of the United States which forbids the states passing any laws impairing the obligation of contracts have been frequent and varied, and it has been held, without dissent, that this clause does not so far remove from state control the rights and properties which depend for their existence or enforcement upon contracts as to relieve them from the operation of such general regulations for the good government of the state and the protection of the rights of individuals as may be deemed important. All contracts and all rights, it is declared, are subject to this power; and not only may regulations which affect them be established by the state, but all such regulations must be subject to change from time to time, as the general well-being of the community may require, or as the circumstances may change, or as experience may demonstrate the necessity." In the *Dartmouth College Case*, 4 Wheat. 629, 4 L. Ed. 657, Chief Justice Marshall uses this language: "The framers of the constitution did not intend to restrain the states in the regulation of their civil institutions adopted for internal government, and that instrument they have given us is not to be so construed." Certainly, any change or limitation of the remedy which does not materially abridge the right does not impair the obligation of the contract. As stated in *Von Hoffman v. City of Quincy*, 4 Wall. 554, 18 L. Ed. 403, "every case must be determined upon its own circumstances." In the case at bar it is conceded that the defendant has a family dependent upon him for support, and that his only means of doing so is his wages. It is a matter of common knowledge that, at the time and previous to the passage of the act limiting the remedy by garnishment, many other citizens of the state were in the same situation as the defendant, and that, owing to the financial crisis which prevailed, it was a difficult task for the laborer to earn sufficient to properly support his family. In view of these facts, the limitation of the remedy of garnishment was reasonable and necessary, and is not such a change as impairs the obligation of the contract. It is ordered that the judgment of the court below be affirmed, and that the appellant pay the costs.

BARTON, C. J., and MINER, J., concur.

BLAIR v. BOSWELL, et al.

(Supreme Court of Oregon. June 11, 1900.)

INJUNCTION—MINES AND MINERALS—DAMS IN NONNAVIGABLE STREAM.

The owner of dams in a nonnavigable stream, and his predecessors in interest, had deposited tailings from the mine in the stream, and used the water thereof, for more than 20 years, to carry off the debris. The owner of a lower claim built dams in the stream, about 8 feet high from the bed of the stream, at a point where, owing to the fall of the stream, defendant's dam would have to be 70 feet high before it would back water on the premises of the upper proprietor. *Held*, that the upper proprietor cannot enjoin the maintenance of the dam constructed by the lower proprietor, since the probability of injury to the upper proprietor by its maintenance is too remote.

Appeal from circuit court, Malheur county; M. D. Clifford, Judge.

Injunction suit by Jed A. Blair against L. Boswell and another. Judgment for defendants, and plaintiff appeals. Affirmed.

This is a suit to enjoin the maintenance of dams constructed in a nonnavigable stream. The transcript shows that plaintiff's predecessors in interest built dams in Mormon Basin creek, in Malheur county, Or., and made an appropriation of the water of that stream, which was conducted in ditches, and used in separating gold from the baser materials in which it was imbedded, after which the water was returned to the creek, carrying with it the tailings from certain placer mines. These dams are provided with gates, which, being opened, liberate the accumulated water, permitting it to flow down and flush the creek, carrying with it the debris. The defendant John Turner thereafter constructed dams in said creek about three miles below plaintiff's dams, and a ditch therefrom whereby he diverted the water so returned, and used it in operating his placer claim. The plaintiff alleges that he is the owner of the water of said creek, and of the right to use the channel thereof from his dams to its mouth to carry off his tailings, and that the defendant unlawfully obstructed the flow of water therein, which will cause the bed of the stream to be filled with debris, and prevent the working of his mines. The answer having denied the material allegations of the complaint, a trial was had, resulting in a decree dismissing the suit, and plaintiff appeals.

M. L. Olmsted, for appellant. J. L. Rand, for respondents.

MOORE, J. (after stating the facts). The testimony shows that defendant's lower dam is about 8 feet high from the bed of the creek, and that the fall of water between plaintiff's and defendant's dams is 5.3 inches to the rod, so that, if it be assumed that the tailings from plaintiff's mine are arrested by defendant's dams, and settle hori-

zonally in the bed of the creek, the surface of the precipitation would extend back from the line of obstruction only 18.11 rods, when, the reservoir becoming filled, the sedimentary deposit would flow over the top of the dam. The defendant's ditch by which he diverts the water to his mine taps the creek at a point below a low brush dam and above his said lower dam, and, if the debris fills the creek to the top of the latter, the ditch will be rendered useless, to avoid which the lower dam is provided with a gate, which, being opened, will permit the tailings to be carried down the creek. The distance from defendant's dams to the lower line of plaintiff's placer claims is about one-half mile; and when the fall of the creek is considered, showing that a dam 70.66 feet in height would be required to back the water to plaintiff's lower line, the probability of his sustaining injury by the maintenance of a dam 8 feet high is certainly very remote.

It is contended that plaintiff and his predecessors in interest having deposited tailings in Mormon Basin creek, and used the water thereof, for more than 20 years, to carry off the debris, a right was thereby acquired to continue such use, and, this being so, the court erred in denying the relief demanded. A conflict of judicial utterance exists respecting the right of a prior appropriator to use the water of a nonnavigable stream to carry off tailings. Thus, in California it would seem that such right is recognized. *Stiles v. Laird*, 5 Cal. 120; *Irwin v. Phillips*, 5 Cal. 140; *Sims v. Smith*, 7 Cal. 148. In Montana, however, it has been held that prior locators of mining ground have no right to allow tailings to run free in a gulch, so as to render valueless the mining claims of subsequent locators below them. *Lincoln v. Rodgers*, 1 Mont. 217. Such, also, seems to be the rule in Idaho. *Ralston v. Plowman*, 1 Idaho, 595. Assuming, without deciding, that plaintiff has the right which he claims, a court of equity ought not to grant injunctive relief except when the right has been invaded in a manner which has resulted, or must inevitably result, in injury to the owner of the dominant estate, and, as the testimony shows that this cannot happen to plaintiff from the maintenance of defendant's dams as now constructed, no error was committed in denying the relief demanded; for, if plaintiff could insist upon the uninterrupted flow of the water in Mormon Basin creek because sediment from his mines had been carried down the stream by the current, he might with equal propriety enjoin the erection of dams in Willow creek, and in the Malheur, Snake, and Columbia rivers, into which each stream, respectively, flows, because it is possible that an atom of such sediment may reach the latter river. The plaintiff having failed to show that he has suffered or would necessarily sustain

any injury to his premises from the maintenance of defendant's dams, the decree is affirmed.

TURNER v. LOCY et al.

(Supreme Court of Oregon. June 11, 1900.)

NUISANCE—ABATEMENT—MINING—EVIDENCE—TRIAL.

1. Where defendant, the proprietor of a mining claim on a stream, destroyed plaintiff's dams, situated below defendant's, on the ground that they constituted a private nuisance to defendant's prior right of appropriation of the water, defendant is not entitled, in an action for injury to plaintiff's dams, to show the length of time he and his predecessors had used the water of the stream to carry off tailings from his mine or for flushing the stream, in the absence of evidence that defendant had been injured in any manner by the construction of plaintiff's dam, either by the backwater flooding defendant's premises, or obstruction to the stream.

2. The fact that the proprietor of a mining claim erects dams across a nonnavigable stream, whereby debris from the mines of an upper proprietor is arrested, does not constitute a private nuisance, entitling the upper proprietor to abate it, unless the dam backs the water on the upper proprietor's premises, causing him such injury that he can maintain an action therefor notwithstanding his prior appropriation of the water of the stream.

3. Instructions asked by defendant, justifying his acts complained of in a suit against him for destroying the dams of a lower proprietor of a mining claim on a nonnavigable stream, on the ground that they constituted a private nuisance to him, as an upper proprietor of a mining claim, are properly refused, where not predicated on the assumption that defendant sustained even nominal damages by the maintenance of the dams.

Appeal from circuit court, Malheur county; M. D. Clifford, Judge.

Action by John Turner against J. D. Locy and others. Judgment for plaintiff, and defendant Jed A. Blair appeals. Affirmed.

This is an action to recover damages for injuries to plaintiff's reservoirs. The facts are that plaintiff is the owner of a placer mining claim in Harney county, Or., through which Mormon Basin creek, a nonnavigable stream, flows in a well-defined channel. That he built two dams in said creek, and dug a ditch therefrom whereby he diverted water to his mines. The defendant is the owner of a prior right of appropriation of the waters of said stream, which he diverts and uses in operating placer mines above plaintiff's, returning the water with the tailings to the creek. He placed dams in the creek to catch the sediment from his mines, and by opening gates therein, the debris is carried down stream and emptied into Willow creek, into which Mormon Basin creek flows; and, claiming the right to continue flushing the latter creek, and deeming plaintiff's dams a private nuisance and an obstruction to such right, he removed them, thereby destroying the reservoirs, whereupon this action was instituted, resulting in a judgment for plaintiff in the sum of \$300, and the defendant appeals.

M. L. Olmsted, for appellant. J. L. Rand, for respondent.

MOORE, J. (after stating the facts). The defendant and his witnesses were not permitted to testify concerning the length of time which he and his predecessors had used the waters of Mormon Basin creek to carry off the tailings from his mine, or that flushing the creek in the manner adopted by him was the only means whereby such tailings could be removed; and, an exception having been taken by his counsel to the rejection of such testimony, it is insisted that the court erred in this respect. Assuming, without deciding, that an adverse user of the waters of a non-navigable stream could be acquired by depositing in the bed thereof soil, gravel, and stones, which could be carried off by suddenly precipitating into the channel of the stream a great quantity of water accumulated for that purpose, such right is not violated by a lower riparian proprietor who erects a dam in the stream whereby the debris is arrested, unless by retarding the flow of water he causes the disintegrated material to lodge upon the premises of the prior appropriator, or backs the water up, in consequence of which he sustains an injury. If the tailings put into Mormon Basin creek by defendant were not lodged upon his mining claim by the plaintiff's dams, it is immaterial how long he or his predecessors in interest had been using the waters of said stream for the purpose of carrying them off, or that such creek was the only means whereby he could get rid of them. There was no evidence introduced tending to show that defendant had been injured in any manner by the construction of plaintiff's dams. In order to justify him, as a prior appropriator, in destroying these dams, as a private nuisance, his premises must have been flooded by the backwater, or injured in some other way, in consequence of the obstruction to the flow of the stream. Cooley, Torts, 46; 1 Wood, Nuis. § 5; Ang. Water Courses, § 332; Gates v. Blincoe, 26 Am. Dec. 440; Stiles v. Laird, 5 Cal. 120. The defendant not appearing to have sustained any injury in this respect, no error was committed in rejecting the testimony so offered by him.

The court refused to give at defendant's request the following instructions: "The right to mine the placer ground of the United States or of private persons, by the use of water appropriated for that purpose from nonnavigable streams, carries with it the right to wash the tailings and mining debris into the natural channels of such streams whenever the channels of the streams become necessary for that purpose. Therefore, if you find from the evidence that it was necessary for the defendant Blair to use the channel of Mormon Basin creek for the carrying away of tailings at the time complained of in the complaint, then the plaintiff had no right to put dams or obstructions in the channel of the creek which would prevent the defendant

from washing away and carrying off mining tailings at such times as he required the use of the said channel for that purpose. The use of the waters appropriated from a stream for mining purposes is not only for washing out gold, but also for carrying away and removing the earth and gravel, the result of such washings. And the miner prior in right in the use of such water has a prior right to the use of the channels of a stream for the carrying away of the tailings by the use of such water in the channels of nonnavigable streams when necessary. Therefore, if you find from the evidence that defendant was using the waters of the stream through the channel of the said stream for carrying away tailings from his ground, or which were accumulated upon his grounds for mining purposes, then the plaintiff had no right to obstruct the channel of the stream in any manner whatever which would hinder the defendant Blair, or delay or prevent the free and unobstructed flow of the waters so used in the carrying away of such tailings." An exception having been taken to the refusal to give the instructions requested, it is maintained that the court erred in this respect. The rule is well settled that a party may abate a private nuisance upon his own motion, after notice, when necessary, provided he does so without disturbing the peace, does as little injury as possible, and removes so much of the thing only as causes the nuisance, whenever he can maintain an action for the injury caused thereby, though the damages resulting therefrom be nominal only. Ang. Water Courses, § 389; Brown v. Perkins, 12 Gray, 89; Manufacturing Co. v. Goodale, 46 N. H. 53. To make out a case of special injury to property from a nuisance, something materially affecting its capacity for ordinary use and enjoyment must be shown. Sparhawk v. Railroad Co., 54 Pa. St. 401. Thus, where a party erected a dam so as to flow backwater upon the land of another, it was held that injury would be presumed, and no special damage need be shown. Woodman v. Tufts, 9 N. H. 88. So, too, an infringement of a right which, if continued, would ripen into an easement, entitles the party injured thereby to nominal damages, for which he may maintain an action without proof of special damages. Tillotson v. Smith, 32 N. H. 90. An examination of the instructions refused will show that they are not predicated upon the assumption that the defendant sustained even nominal damages by the construction of the dam, or that the water flowed back upon his land so that if it were continued it would ripen into an easement. In the light of the rules to which attention has been called, if the defendant sustained no injury he could not maintain an action, and, if unable to maintain an action, he could not justify the demolition of the dams. Hence the instructions requested were immaterial, and no error was committed in refusing to give them.

The transcript shows that other exceptions were taken by the defendant at the trial, but, not being urged at the argument or in his brief, they are deemed abandoned, and will not be considered here. It follows that the judgment is affirmed.

LEW et al. v. LUCAS.

(Supreme Court of Oregon. June 11, 1900.)

APPEAL—TRANSCRIPT—CONTINUANCE—DENIAL—DISCRETION OF COURT—JUDGMENT—CONFORMITY TO VERDICT.

1. On appeal it will be conclusively presumed that the transcript is a correct copy of the record.

2. An application for a continuance to secure the attendance of an absent witness is addressed to the sound discretion of the trial court, and will not be reviewed except for a clear abuse thereof.

3. Under Hill's Ann. Laws, § 179, providing that a party moving for a continuance to secure the attendance of an absent witness shall state what he expects the absent witness to testify to, and if the opposite party admits that such witness will so testify, and stipulates that it may be considered that the evidence was actually given, the trial shall not be postponed, it is not error to deny the application for a continuance where defendant admits that plaintiff's witness would testify to matters set out in the application.

4. In an action on an account for goods sold and delivered, where the answer denied that defendant was indebted in the amount sued for, but admitted that he had received goods for an amount less than the amount sued for, and offered judgment therefor, it is not error to enter judgment for plaintiff for the amount of such offer, and for defendant for his costs, on a verdict finding in favor of defendant.

Appeal from circuit court, Grant county; M. D. Clifford, Judge.

Action by R. H. Lew and another, as co-partners, against N. A. Lucas, to recover on an account. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

This is a case brought in a justice's court to recover \$52.25 for goods, wares, and merchandise alleged to have been sold and delivered to the defendant by the plaintiffs between the 30th of August and 3d of September, 1898, no part of which has been paid. The answer denies the allegations of the complaint, except as thereafter admitted, and for a further and separate defense avers, in substance, that in August, 1898, the defendant ordered from the plaintiffs goods, wares, and merchandise of the value and amount of \$52.25, upon the express condition that they were to be delivered at the house of defendant, in Canyon City, on or before the 1st day of October; that plaintiffs have failed, neglected, and refused to deliver the goods according to the contract, and failed, neglected, and refused to deliver the same to defendant at any time or place; and that defendant has not received any part of such goods, except to the value of \$11.75, which amount he tendered to the plaintiffs prior to the commencement of the action, and deposits in court for the plaintiffs with his answer. The

reply puts in issue the material allegations of the answer, except the alleged tender and deposit in court. The plaintiffs had judgment in the justice's court for the amount demanded in their complaint, and defendant appealed to the circuit court; filing his transcript on the 20th day of November, the first day of the next succeeding term thereof. Thereafter such cause was postponed from day to day until the 25th of November, when it was called for trial, whereupon counsel for plaintiffs filed a motion for a continuance on account of the absence of his client and of a witness, supported by his affidavit, in which he stated the evidence which he expected to obtain. The defendant admits that the witnesses would so testify. The motion for continuance was overruled, and the cause proceeded for trial, resulting in a verdict, which, omitting the formal parts, is as follows: "We, the jury in the above-entitled cause, find our verdict for the defendant." On the same day, counsel for plaintiffs filed a motion to set aside the verdict, and for a new trial, on the ground of "insufficiency of the evidence to justify the verdict, and that it is against the law." Before this motion was disposed of, the defendant filed an offer to allow plaintiffs judgment for \$11.75, the amount admitted in his answer to be due, or, in lieu of such judgment, to permit them to take and withdraw such sum from the hands of the clerk. Thereafter, and on November 28th, the cause coming on to be heard, upon the motion of plaintiffs to set aside the verdict, and of defendant tendering plaintiffs a judgment for \$11.75, the amount admitted by the answer to be due them, the motion to set aside the verdict was overruled and denied, and a judgment entered in favor of the plaintiffs for \$11.75, and in favor of the defendant for costs and disbursements. From this judgment the plaintiffs appeal to this court, assigning as error (1) the ruling of the trial court in denying their motion for a continuance; (2) in receiving and filing the verdict returned by the jury, and in not setting it aside on its own motion; (3) in trying the cause without the jurors having been sworn before being examined as to their qualification to sit as jurors, and without being sworn to try the cause; and (4) in overruling the plaintiffs' motion to set aside the verdict, and entering judgment in favor of the plaintiffs for \$11.75, and in favor of the defendant for costs and disbursements.

W. F. Butcher, for appellants. A. D. Stillman, for respondents.

BEAN, J. (after stating the facts). It is claimed that at the time the appeal was taken the record of the court below did not show any disposition of the motion for a continuance, or that the jury impaneled to try the cause, and before which it was tried, was sworn as by law required. But the transcript, as filed, shows that the motion for a con-

tinuance was denied because the defendant admitted the testimony set out in the affidavit, and that the jury was properly sworn; and this is conclusive upon these questions. An application for a continuance is addressed to the sound discretion of the trial court, and its action thereon will not be reviewed, except for a clear abuse of discretion. *State v. Flester*, 32 Or. 254, 267, 50 Pac. 561. And, besides, the statute provides that "the court may require the moving party to state upon affidavit the evidence which he expects to obtain, and if the adverse party thereupon admit that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed." *Hill's Ann. Laws Or.* § 179. So that, for either of these reasons, there was no error in denying the application for a continuance.

In view of the record, the only remaining question is whether the verdict as returned by the jury is sufficient to support the judgment. The general rule is that a verdict must comprehend the whole issue submitted to the jury, or a judgment entered thereon will be reversed. *Wood v. McGuire*, 17 Ga. 361. But it is not necessary that it should be expressed in any particular language. It is sufficient, however informal it may be, when it covers the whole issue, and shows what the finding of the jury really is upon the issue presented to it. A verdict should be construed liberally, and not under the technical rules of construction which are applicable to pleadings; and, if the meaning of the jury can be ascertained and the point in issue can be concluded from its verdict, the court will, however informally it may be expressed, mold it into form, and make it serve. 28 Am. & Eng. Enc. Law, 370; 2 *Thomp. Trials*, § 2642; 2 *Elliot, Gen. Prac.* § 947; 20 *Cent. Law J.* (f) 147; 33 *Cent. Law J.* 358; *Middleton v. Quigley*, 12 N. J. Law, 352; *Cohn v. Scheuer*, 115 Pa. St. 178, 8 *Atl.* 421; *Humphreys v. Borough of Woodstown*, 48 N. J. Law, 588, 7 *Atl.* 301; *Phillips v. Kent*, 23 N. J. Law, 155. Applying these rules to the case at bar, we are of the opinion that the verdict is sufficient. It necessarily settles and determines the only contested issue between the parties, and there is no difficulty in ascertaining what the jury intended. The only point in dispute was whether the defendant was indebted to the plaintiffs for goods, wares, and merchandise sold, in excess of the \$11.75 admitted by the answer, and which had been tendered to the plaintiffs prior to the commencement of the action. To this issue the evidence was directed, and it is covered and concluded by the finding of the jury in favor of the defendant; and we think the court was fully justified in proceeding as if the verdict had been amended to conform to the manifest intention of the jury, and in entering judgment accordingly. In *Jacobs v. Oren*, 30 Or. 593, 48 Pac. 431, which is relied upon by the plaintiffs, and which in many of

its features is similar to the case now in hand, the question decided is that it was not error for the court upon its own motion to set aside a verdict of a jury and grant a new trial, when it had found contrary to the admissions in the answer. But in this case the court did not set aside the verdict, but treated it as amended to conform to the evident intention of the jury, and hence the case cited is not in point. It follows from these views that the judgment of the court below must be affirmed, and it is so ordered.

FLEISCHNER et al. v. FIRST NAT. BANK OF McMINNVILLE et al.

(Supreme Court of Oregon. June 11, 1900.)

FRAUDULENT CONVEYANCES—DISPOSITION OF PROCEEDS OF MORTGAGED PROPERTY.

Where certain creditors in a suit against mortgagees, instituted, not for the benefit of general creditors, but to set aside certain mortgages, executed by their debtor, which are valid as between the parties, establish the invalidity as to them of such mortgages, the surplus proceeds of the mortgaged property, after satisfying complainants, may be paid to the mortgagees.

On petition for rehearing. Decree modified, and petition overruled. For former opinion, see 60 Pac. 603.

BEAN, J. The record shows that, after the plaintiffs rested, defendants' counsel moved for a nonsuit, pending which counsel for plaintiffs asked leave to file a supplemental complaint, "to conform to the facts proven at this trial, setting up, in addition to the one filed in the other complaint, a judgment"; to which counsel for defendants objected, "for the reason this ought to have been filed before; plaintiffs knew about the judgment, and should have filed this supplementary complaint before"; to which counsel for plaintiffs replied, "I simply desire to add to the complaint by way of supplemental matter the fact of the judgment; I do not want anything except to allege the ripening of the claim into a judgment." The objection to the filing of the supplemental complaint was thereupon overruled, and the court stated: "It will be deemed as at issue now; that is, counsel may proceed and try the case on the theory that it is at issue; that is, I will receive in evidence what would be called for in case the allegation was permitted, just as much as if it were filed." Counsel for plaintiffs then offered, and the court admitted, in evidence, certain parts of the record in the action of *Fleischner, Mayer & Co.* against *Redmond*, after which counsel for defendants moved for a nonsuit, urging as grounds therefor: "First, that it does not appear from the testimony that there was any attachment ever levied so as to give the court jurisdiction, and that the court had and has no jurisdiction in this cause; second, there is no evidence before the court that any or

either of the said chattel mortgages or the said assignment is fraudulent or void or voidable." This motion was denied, and the defendants thereupon proceeded to introduce their evidence.

It thus appears that the only objection made to the filing of the supplemental complaint was that it came too late, and ought to have been filed at some previous stage of the trial. The defendants did not object because it was insufficient, or express any desire to move against it as a pleading. No objection was made to its being filed because it did not state facts sufficient to constitute a cause of suit, or that by it the plaintiffs sought to maintain their suit upon facts occurring since the filing of the original complaint. The defendants had ample opportunity to raise such questions, but they simply objected to the court granting the plaintiffs leave to file the supplemental complaint on the sole ground that it ought to have been filed before. We think, therefore, we were justified in proceeding on the theory that the objection now sought to be made to the complaint was waived because not made at the hearing. It is true the supplemental complaint in form was not filed at the time, but the trial proceeded without objection, so far as the record discloses, with the understanding that it should be, as stated by the court, deemed on file.

Counsel also rediscusses in the petition for rehearing the facts in the case. But, in view of the original opinion, it is sufficient to say that a re-examination of the record has confirmed us in the views already expressed.

It appears, however, that, after the satisfaction of all claims ordered paid by the decree herein, there will remain in the hands of the receiver, or of the court below, a considerable amount of money,—the proceeds of the sale of the property covered by defendants' mortgages,—which counsel for defendants move be paid over to them. The claim of the plaintiffs seems to be that such money should be distributed among Redmond's creditors, according to their respective rights, and that an opportunity ought to be given them to present their claims. But this is not a proceeding instituted for the benefit of his general creditors, but is a suit brought by plaintiffs to set aside and have declared void as to them the chattel mortgages referred to in the pleadings. These mortgages are valid between the parties, and the only creditors challenging their validity in this suit are the plaintiffs, and the intervening creditors, Kuh, Nathan & Fisher Co. and Sweet, Orr & Co. As to them the instruments are fraudulent and void, but, so far as this proceeding is concerned, they are valid for all other purposes. We are of the opinion, therefore, that the balance on hands ought to be paid over to the defendants. The decree entered here will be modified accordingly, and the petition for a rehearing overruled.

(36 Or. 234)

PORTLAND TRUST CO. v. HAVELY et ux.

(Supreme Court of Oregon. June 11, 1900.)

APPEAL—JOINT APPEAL BOND—DECEASED SURETY—AFFIRMANCE OF DECREE—ENTRY OF DECREE AGAINST ADMINISTRATOR.

Hill's Ann. Laws, §§ 537, 538, 541, 546, provide that on an appeal to the supreme court the appellant shall execute a bond for the costs, and, if the bond is also to stay foreclosure proceedings, for the payment of the personal decree remaining unsatisfied after sale, and authorize the court to enter the same decree against the sureties, "in like manner and with like effect, according to the nature and extent of their undertaking," as is given against the appellant. *Held* that, since the words "according to the nature and extent of their undertaking" have reference only to whether the bond is for appeal, or for stay also, a decree will be entered against the personal representatives of a deceased surety on affirmance of the foreclosure decree against the appellant, though the bond given is in terms joint, and the surety had no interest in the controversy.

Motion to prevent entry of decree against the personal representatives of appellants' deceased surety. Overruled.

For former opinion, see 59 Pac. 463.

Raleigh Stott and Ed Mendenhall, for appellants. Wirt Minor, for respondent.

PER CURIAM. This is a motion, the purpose of which is to prevent the entry of a decree against the personal representatives of H. W. Ross, who was a surety on the undertaking for appeal herein. The condition of the undertaking upon which the controversy hinges is as follows: "We, the said J. C. Havelly and Anna Havelly, the said defendants, as principals, and H. W. Ross, as surety, undertake that the appellants will pay all damages, costs, and disbursements which may be awarded against them on the appeal, and that the said appellants will pay any portion of such decree remaining unsatisfied after the sale of the property upon which the lien is foreclosed." Ross died intestate February 18, 1899, and on March 6th Lucinda Ross, his widow, and James C. Havelly, were appointed administratrix and administrator of the estate. This is shown by the affidavit of the appellant J. C. Havelly, and it is further shown that Ross had no interest in the suit, and received none of the consideration for any part or parcel of the relief awarded by the decree rendered by the circuit court in said cause. Based upon this showing, it is submitted that, because the undertaking is joint in form, the death of the surety discharges his estate, and therefore no decree can properly be entered against his personal representatives upon the obligation. The common-law rule that an action at law cannot be maintained against the personal representatives of a joint obligor is well settled. Equity will interpose, however, and give a right of suit, where the surviving obligor or obligors are insolvent, or the remedy at law has been exhausted without avail. Pom. Rem. §§ 302-304. So it is with a surety on a joint obliga-

tion. If he dies, there is no right of action left for the enforcement of the obligation against his estate. The cause of action dies with the person, and the only remedy upon the law side of the court is against the joint survivor or survivors. If, however, there is fraud or mistake, equity will interfere to correct it, and, in proper cases, will give a remedy against the estate of the deceased joint debtor or obligor. So, also, where the deceased joint obligor has participated in the consideration forming the basis of the joint obligation or demand, or where there is any previous equity imposing a moral obligation upon such obligor, equity will give relief against the estate of the deceased obligor, because of the reasonable presumption which obtains, that the parties intended the obligation to be joint and several, but that through some iniquity or oversight it was made joint only. But it is said, "This presumption is never indulged in in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and consequently there is nothing on which to found an equity for the interposition of a court of chancery." *Pickersgill v. Lahens*, 15 Wall. 140, 144, 21 L. Ed. 119. See, also, *Wood v. Fisk*, 63 N. Y. 245; *Getty v. Binsse*, 49 N. Y. 385; *U. S. v. Price*, 9 How. *84, 13 L. Ed. 56; 1 Brandt, Sur. (2d Ed.) § 130; *Story, Eq. Jur.* (13th Ed.) §§ 162-164. That this doctrine is well established, aside from any innovation the code practice of the several states may have impressed upon it, or any modifications thereof by statutory provisions, there can be no cavil. There is some strong authority against it, but it cannot be considered as overturning the doctrine, except in the special jurisdiction in which it has been announced. *Susong v. Valden*, 10 S. C. 247, 30 Am. Rep. 50. The rule grew up and has been established through the technicalities of common-law pleading, and upon the theory that a judgment could not be taken jointly against the estate of the deceased with the survivor upon the joint obligation. That this was purely technical, and without any inherent difficulty in the way of the entry of such a judgment, is now absolutely apparent, as exemplified under the equity and modern code practice. This is shown by the opinion of Mr. Justice McIver in the case last cited. But, notwithstanding these well-established rules of law, we are not impressed with their applicability to the present controversy. The statute provides that, "within ten days from the service of notice of the appeal, the appellant shall file with the clerk an undertaking, as hereinafter provided"; then, that "the undertaking of the appellant shall be given with one or more sureties, to the effect that appellant will pay all damages, costs, and disbursements which may be awarded against him on the

appeal; but such undertaking does not stay the proceedings, unless the undertaking further provides to the effect following: * * * When the decree appealed from is for the foreclosure of a lien, and also against the person for the amount of the debt secured thereby, the undertaking shall also be to the effect that the appellant will pay any portion of such decree remaining unsatisfied after the sale of the property upon which the lien is foreclosed." In sending up the transcript, the clerk is required to certify to the filing of the undertaking, whether by appellant or respondent, and set forth in his certificate the names of the sureties, the amount thereof, if specified, and, if given by the appellant, whether the undertaking is for an appeal only, or a stay of proceedings also; and, when judgment or decree is given against the appellant, the court is authorized and required to enter the same against his sureties also, "in like manner and with like effect, according to the nature and extent of their undertaking." *Hill's Ann. Laws Or.* § 537, subd. 2; *Id.* § 538, subd. 4; *Id.* § 541, subd. 1; *Id.* § 546, subd. 4. The undoubted purpose of the statute is to require the party appealing to amply secure the opposing litigant against costs or damages in case the appeal proves unsuccessful, and thus to prevent the instrumentalities of the law from being utilized for oppression, rather than for the purposes of justice. So, if the appellant would stay the enforcement of a judgment or decree against him, the purpose of the law is to give the judgment creditor security for the payment of such judgment or decree without further process, if and in so far as the same is affirmed. Further than this, the surety, by entering his name upon the appeal bond, expressly covenants, in view of the statute, that judgment shall be entered against him if the appellant, his principal, fails to sustain the appeal. *Beall v. New Mexico*, 16 Wall. 535, 21 L. Ed. 292. By so doing, he makes himself a party to the record, and no further notice is necessary to sustain or establish the jurisdiction of the court in the entry of judgment or decree against him according to the nature of his undertaking. He is as much bound by the judgment as is his principal. *Holbrook v. Investment Co.*, 32 Or. 104, 51 Pac. 451; *Brauer v. City of Portland (Or.)* 60 Pac. 378.

Now, coming to the very gist of the controversy, the court is authorized to enter judgment against the surety, also, according to the nature and extent of his undertaking (that is to say, when the judgment of the court below is sustained, then and in that event judgment should be entered against his surety as well); and it is not possible that the legislature contemplated that any particular form of the undertaking should be necessary to give the court jurisdiction to enter judgment or decree against the surety. The judgment or decree to be ren-

dered against the surety, within the contemplation of the act, is in its nature several,—as much so as that against the principal, as the law requires the same judgment or decree to be entered against the surety, in like manner and with like effect, as against the principal. The words "according to the nature and extent of their undertaking" must be construed with reference to the fact whether the undertaking is given for an appeal only, or, in addition thereto, for a stay of execution, and it has no reference to the form of the bond or undertaking. The clerk is required to certify that an undertaking has been filed, and whether for an appeal only, or for a stay of proceedings also, no copy or form thereof being required to be sent up. It is enough to know that the undertaking is sufficient in its structure to bind the surety, and the court will enforce its purposes. There is no suit or action upon the bond, and the sole question is whether the surety has authorized the entry of judgment or decree against him, and the fact that the undertaking is in form joint, and not joint and several, or several, is not, as we believe, by legislative intentment, controlling. We have not overlooked the cases of *Wood v. Fisk*, supra, and *Pickersgill v. Lahens*, supra, which declare, in effect, that the interpretation of the undertaking is not governed by the statute, but, rather, by the general rules applicable thereto. But we think that we have direct authority under the statute, regardless of the form of the undertaking in that respect, to enter the decree against the surety in like manner as it is entered against the principal. Such being the case, the form of the obligation being joint in tenor does not relieve the estate from the obligation. The motion will therefore be denied.

PIERCE v. ROCK CREEK GOLD-MIN. CO.
et al.

(Supreme Court of Oregon. June 11, 1900.)

**JUSTICES OF THE PEACE—MINING CLAIM—
PROCESS—DEFENDANT OUTSIDE
OF COUNTY.**

Hill's Ann. Laws, § 2175, confers upon justice courts jurisdiction of actions to recover possession of mining claims within the county where the court is holden. Section 910 provides that service in actions in justice courts can be had in any precinct in the county. Section 2061 provides that summons in such actions may be served by a sheriff of the county or by a constable of the precinct where the court is holden. *Held*, that as the jurisdiction of justice courts is purely statutory, and the statutes apply only to service in the county, a judgment in an action under section 2175, against a defendant served in another county, is void for want of jurisdiction.

Appeal from circuit court, Baker county;
Robert Eakin, Judge.

Writ of review by Charles M. Pierce against Rock Creek Gold-Mining Company and another to vacate a judgment of a jus-

tice of the peace. From a judgment in favor of plaintiff, defendants appeal. **Affirmed.**

F. M. Saxton, for appellants. C. A. Johns, F. L. Moore, and A. D. Stillman, for respondent.

WOLVERTON, C. J. This is a proceeding by writ of review prosecuted for the purpose of reviewing the judgment of the justice's court for district No. 1, Baker county, Or., in a cause instituted therein June 7, 1898, wherein the Rock Creek Gold-Mining Company was plaintiff, and said Pierce was defendant, to determine the right of possession to a certain quartz mine, for which the plaintiff herein was seeking to obtain a patent from the general government. The plaintiff had filed or made the necessary application to the proper officer of the land office at La Grande, Or., for a patent, and the defendant mining company, having filed an adverse claim, instituted the action for the purpose of determining the right of possession, as required by the Revised Statutes of the United States (sections 2325, 2326). The summons was served in Union county upon Pierce, who appeared specially, and moved the court to quash and set aside the service because it was made in a county other than that in which the court was held. The motion was overruled, and, after some other proceedings not material to the question involved here, judgment was given by default in favor of the mining company for possession of the claim, which judgment having been annulled by the circuit court upon the review, the defendants herein appeal.

The solution of the question first raised upon the record, as to whether a justice's court acquires jurisdiction in a possessory action for a mining claim by service of the summons in a county other than that in which the court is held, is decisive of the controversy. The matter is governed wholly by statute, wherein we find no authority for the service. By section 2175 of chapter 13 of the Civil and Criminal Procedure in Justices' Courts, such courts are accorded jurisdiction of actions to recover the possession of mining claims situate within the county where the court is holden, but the provisions governing the acquirement of jurisdiction are the same as obtain in respect to other civil causes instituted therein. These are found in sections 910 and 2061 of Hill's Annotated Laws of Oregon, the latter section being part of the Justices' Code. They provide that, "in an action to recover a penalty or forfeiture given by statute, the cause of action or some part thereof must have arisen within the county where the action is commenced, or upon a lake, river, or other water bordering upon such county and opposite thereto; but otherwise than this the jurisdiction of a justice's court does not depend upon where the cause arose, provided that the plaintiff or defendant shall reside in the precinct

where the action is commenced, or personal service can be had on the defendant in any precinct in the county; and if the defendant do not reside in the state, the action may be commenced in a precinct in the state"; and, further, that "the summons must be served at least five days before the time therein required for the defendant to appear, and may be served by the sheriff of the county or his deputy, or by any constable of the precinct, or marshal of the town or city in which the court is holden." In speaking of section 910, Mr. Justice Lord has this to say (in *Kirk v. Matlock*, 12 Or. 319, 321, 7 Pac. 322, 324): "The jurisdiction of a justice's court does not depend upon where the cause arose, provided that the plaintiff or defendant shall reside in the precinct where the action is commenced, or personal service can be had on the defendant in any precinct in the county; and, if the defendant do not reside in the state, the action may be commenced in any precinct in the state." In *Taylor v. Jenkins*, 11 Or. 274, 276, 3 Pac. 681, 682, the court says: "Jurisdiction exists where either party resides in the precinct where the action is commenced, or the defendant is a nonresident, or where personal service of the summons is obtained in any precinct in the county." In this latter case the action was commenced in a given precinct, and the return showed personal service within the county, and the court interpreted the statute to mean that it is sufficient to confer jurisdiction if service can be had in the county where the action is commenced, regardless of the place of residence of either party.

There is yet another phase of the statute which contemplates that the action may be commenced in the precinct where the plaintiff resides, but in such case we find no authority for the service of the summons outside of the county. Such authority must be found in the statute, as the manner of acquiring jurisdiction of the person by a court whose jurisdiction is limited and inferior is purely statutory. Section 910 provides for no other than service in the county, nor is the authority enlarged by section 2061. By the latter section, the summons may be served by the sheriff of the county (or his deputy) in which the court is holden. Now, it is well settled that a sheriff cannot serve civil process in his official capacity outside of his own county. *Crock. Sher.* (3d Ed.) § 348. So, it is quite natural to conclude that by legislative intentment it was not designed that service should be made outside of the county.

But it has been suggested that the word "may" is not mandatory, and is therefore not inhibitive of the sheriff of any other county making service. The answer to this, however, is that the statute has not authorized or empowered any other sheriff to make it. This idea is re-enforced by the fact that, by section 2061, the summons is required to be

served at least five days before the time therein required for the defendant to appear, and no other or different provision is made for his appearance in case the service is made outside of the county, as is the case where the action is commenced in the circuit court. The action in the justice's court is possessory in its nature, and was therefore properly brought in the county where the mining claim is situated, and in this respect is analogous to the case we have just been considering, where an ordinary action is commenced in the precinct where the plaintiff resides. The authority of the sheriff of the county to make the service is the same in both cases. Indeed, the nature of the action contemplates that there is some one in possession of the mine to be made defendant, who should necessarily be served in the county where the action is instituted. The sheriff of Union county being without authority to serve the summons upon the defendant in the cause pending in the justice's court in Baker county, the court did not acquire jurisdiction of the person of Pierce by such service, and therefore the judgment rendered against him was a nullity. The judgment of the circuit court annulling it will therefore be affirmed.

(37 Or. 503)

TALLMADGE v. HOOPER et al.¹

(Supreme Court of Oregon. June 11. 1900.)

APPEAL AND ERROR—TRANSCRIPT—FILING—EXTENSION OF TIME—CERTIFICATION OF TRANSCRIPT—EVIDENCE—AMBIGUITY OF CONTRACT—PAROL EVIDENCE.

1. Under Hill's Ann. Laws, § 541, as amended (Sess. Laws 1899, p. 229), providing that appellant shall, within 30 days after the appeal, file with the clerk of the appellate court a transcript, and, if not so filed, the appeal shall be deemed abandoned, but further providing that the trial court or a judge thereof is authorized to enlarge the time, provided the extension be made within the time allowed to file the transcript, and does not extend it beyond the term of the appellate court next following the appeal, the court has, in the exercise of its discretion, authority to grant a second extension of time within which appellant may file a transcript, though the second extension be made after the expiration of the first 30 days, provided it be before the expiration of the first extension, and does not extend the time for filing the transcript beyond the next following term of the appellate court.

2. Laws 1889, p. 142, provides that a stenographer's transcribed notes of evidence are prima facie correct statements of the evidence. Hill's Ann. Laws, § 397, as amended by Laws 1893, p. 26, provides for the filing of evidence taken before a court or referee; and section 315, as amended by Laws 1893, p. 27, provides that evidence taken before a referee in equitable actions shall be identified by the judge of the court entering the final decree within 10 days thereafter. *Held*, that a transcript of evidence in an equity case tried by the court, and not a referee, certified by the official stenographer, is sufficiently authenticated to be considered by the appellate court on appeal.

3. A written mining lease for a year provided that the lessee should have possession of the premises, and that he should clean out and repair a canal thereon, and used in the placer mining thereof, and have the water running

¹ For opinion on petition for rehearing, see 61 Pac. 1127.

therethrough, not later than a certain date. The lease also provided that the lessee should make the first payment of rent 30 days after he should commence using the waters of the canal in placer mining. *Held*, that the contract is not so ambiguous as to permit the introduction of parol evidence to show that the parties intended that the first payment should be due 30 days after the lessee commenced to use water from the canal after he had cleaned it out for its entire length, or, if it is ambiguous, the ambiguity is patent, and parol evidence is inadmissible to explain it.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Action by L. W. Tallmadge against A. B. Hooper and others. From a judgment in favor of defendants, plaintiff appeals. Reversed.

This is a suit to enjoin the prosecution of mining operations on, and to declare forfeited and canceled a lease of, mining ground. The facts are that on April 13, 1899, the plaintiff leased to defendants certain placer mining ground which she owned in Union county, a ditch or canal known as "Sparta Canal," the water rights and lateral ditches belonging thereto, and the use of the waters thereof, for the mining season of that year. The ditch is about 30 miles long, and has its source high up in Eagle Creek mountains, some 15 or 20 miles from the town of Sparta. During the winter season it becomes obstructed, so that it is necessary to clean out and repair it in the spring before it can be used to convey water for mining purposes; it being customary to begin at the lower end of the ditch, and proceed towards its source as rapidly as the season will permit, in the meantime using such surface water from melting snow and local feeders for mining purposes as can be diverted into the ditch. The lease is in writing, and the parts material on appeal are as follows: "First. That upon the execution of this agreement the parties of the second part (Hooper and J. W. Newton) shall be entitled to the possession of the above-mentioned properties, excepting the part hereinabove reserved, for the purpose of cleaning out the ditches and preparing the placer-mining ground for the mining season for the year 1899. Second. The parties of the second part shall commence cleaning out said Sparta Canal, and the lateral ditches thereto and therefrom, as soon as the season has so far advanced that it will permit the work to be done in an economic manner, and finish the work of cleaning out said ditch and repairing the flumes, and have the water running therethrough, onto the said mining premises, not later than the 15th day of June, 1899. * * * Fourth. The parties of the second part shall pay to the party of the first part (plaintiff), at the town of Sparta, \$500.00 legal money of the United States within thirty days after they shall commence using the glants or the waters of said canal in placer mining said mining grounds. Sixty days after said payment, the further sum of \$1,000.00 legal money of the

United States. And an additional sum of \$1,500.00 at the close of the mining season for the year 1899, when the final clean-up is made. * * * Time and the complete performance of all the covenants herein contained is of the essence of this agreement; and, in case default shall be made in any of the covenants or agreements as herein provided for, as soon as said default is made the party of the first part, or her duly-authorized agent, may re-enter said premises, or any part thereof, in the name of the whole, and repossess herself of her former estate therein, and all work done and all payments made shall be forfeited by the parties of the second part to the party of the first part as rent and liquidated damages, and these presents shall become null and void." Immediately upon the execution of the lease, the defendants entered into possession of the property, and proceeded to clean out and repair the ditch, so that on May 3d they commenced using the glants, with water therefrom, in mining on the leased premises, and had a full head of water thereafter, although the ditch was not opened its entire length until about July 6th. They made the first payment on the rent, but failed and neglected to make the second when it became due, according to the plaintiff's interpretation of the lease; and on August 25th, after repeated demands, she notified them that she elected to declare the lease forfeited, and to re-enter and take possession of the demised premises, which she attempted to do, but they refused to surrender possession, and continued thereafter to clean up the bedrock and pipe down the races on the mining premises. This suit was thereupon commenced, and the defendants were temporarily enjoined from further mining or trespassing upon the premises in question. The complaint sets out the lease in full, and alleges divers and sundry breaches thereof, but the only one necessary for us to consider is defendants' alleged failure to make the second payment of rent in accordance with the terms of their agreement. The answer admits the execution of the written contract as set out in the complaint, but alleges that it was the understanding and agreement that the first payment of \$500 rental should not become due or payable until 30 days after defendants began to use water flowing through the canal from the source thereof; and on the trial they were permitted to give evidence tending to show, and the court found, that, at the time the written contract was entered into, it was understood and agreed between the parties that the maturity of the first payment should not be counted or computed from the commencement of the use of surface water through the canal, but from the use of the water through its entire length, provided that on no account should the first payment be deferred later than the 15th of July, and that, by reason of such fact, the second payment of

\$1,000 did not become due or payable until the 13th of September, and hence there was no breach of the contract at the time of plaintiff's re-entry or the commencement of this suit. The court thereupon found that defendants were entitled to damages on account of the wrongful bringing of the suit, and proceeded to assess the same at \$1,208.75, by charging the plaintiff with the entire expense for labor incurred by the defendants in operating the mine from April 20th to the 30th of August, the \$500 paid as rental, the amount expended by them for supplies for boarding house and other incidentals, and the value of their services during the same time, and crediting them with the amount of gold taken out of the mine. From this decree the plaintiff appeals, claiming that the court erred in admitting oral testimony contradicting or varying the terms of the written contract, and in assuming to assess damages on account of the wrongful issuance of the injunction.

Wm. Smith and Frank L. Moore, for appellant. T. H. Crawford, for respondents.

BEAN, J. (after stating the facts). Before considering the merits, it is necessary to dispose of two questions of practice. The appeal was perfected on the 22d of January, 1900. On February 15th an order was made by the court below extending to the 1st of April the time in which to file the transcript. On March 31st, upon an application by plaintiff, and after notice to the defendants, the time was further extended until the 15th of April, within which time the transcript was filed. The defendants move to dismiss the appeal because (1) the application for the second extension of time was not sufficient to justify the court in making the order, and (2) such order is void for want of authority.

Section 541, Hill's Ann. Laws Or., as amended (Sess. Laws 1899, p. 229), provides that the appellant shall, within 30 days after the appeal is perfected, file with the clerk of the appellate court a transcript or such an abstract as the rules of the court may require, of so much of the record as may be necessary to intelligibly present the questions to be decided, together with copies of certain portions of the original record, and, if the transcript or abstract is not so filed, the appeal shall be deemed abandoned, and the effect thereof terminated; but the trial court or judge thereof, or the supreme court or a justice thereof, is authorized, upon such terms as may be just, to enlarge the time; but "such order shall be made within the time allowed to file the transcript, and shall not extend it beyond the term of the appellate court next following the appeal." So far as the first objection is concerned, it is sufficient to say that it was a matter within the sound discretion of the trial judge, with the exercise of which this court

will not interfere except in case of a manifest abuse thereof, which has not occurred in this instance.

In support of the second contention, it is argued that while the trial court or judge thereof, or the supreme court or a justice thereof, is authorized to enlarge the time for filing a transcript on appeal, such order can be made only within the 30 days allowed to file the transcript. But this does not impress us as the better view. The provision of the act of 1899 for the extension of time in which to file the transcript is simply a copy of the statute upon the subject as it had been in force for many years, under which, as we understand it, the practice has been, upon a proper showing, to make an order for such extension at any time before the appellant is in default; and this, in our opinion, is the proper construction of the statute. The "time allowed to file the transcript," within the meaning of the law, is the 30 days provided by statute, or such an extension thereof as may have been granted. Therefore the motion to dismiss must be overruled.

The defendants also move to strike from the files what purports to be the testimony taken in the court below, and upon which the trial was had. The suit was tried before the court without a referee, and the testimony taken by the official reporter, which he subsequently (presumably upon the plaintiff's request) transcribed, certified to, and filed with the county clerk, who certifies it to this court as the testimony and exhibits in the case as filed in his office. The defendants claim that the testimony should have been identified by the certificate of the trial judge, as provided in section 815 of the statute. By the act of 1899 (Sess. Laws 1899, p. 142), the circuit judge of each judicial district in the state is authorized, in his sound discretion, to appoint a skilled stenographer as official reporter in his district, whose duty it is, upon the trial of any cause, if requested by either party or ordered by the judge, to take accurate shorthand notes of the oral testimony and other proceedings, which shall be filed in the office of the clerk of the court where the trial is had. If the court, or either party to the suit or his attorney, requests a transcript of the notes into longhand, it is made the duty of the reporter to cause full and accurate typewritten transcripts thereof to be made, which, when certified to by him as provided in the statute, shall be filed with the clerk of the court where the cause was tried, for the use of the court or the parties, and shall be deemed prima facie a correct statement of the testimony and proceedings on the trial. Section 397 of the statute, as amended (Sess. Laws 1893, p. 26), provides that all issues of fact in suits shall be tried by the court, unless the same is referred to a referee pursuant to the provisions of section 815, and, if so tried, the

evidence shall be presented and reduced to writing, to be either in writing or in stenographic notes, which shall be extended into longhand, and filed with the clerk of the court in the cause at the request of any of the parties to such suit, or if required by the court, and, where not required to be extended, the notes shall be so filed. Section 815, as amended (Sess. Laws 1898, p. 27), provides that, whenever a suit in equity is at issue upon a question of fact, the court may refer the same to a referee, except as provided in section 397, to take the testimony, and report the same to the court, within such time as may be ordered, and, "when an equity cause has gone to a final decree, the judge of the court rendering the decree shall, within ten days after the entry of the decree, by a proper certificate, identify all the evidence in the cause, whether consisting of the testimony of the witnesses, documentary evidence or exhibits."

The contention for the defendants is that, under these several provisions, before any evidence in an equity case can be considered by the appellate court, it must be identified by the trial judge in the manner provided in section 815; while the plaintiff contends that the latter provision applies only to suits in which the testimony has been taken before a referee, and not to those which have been tried by the court, and the testimony taken by the official stenographer. There is undoubtedly some confusion in the statute, and the point is not entirely clear, but we are inclined to concur in the interpretation urged by the plaintiff. A stenographer is an officer of the court, charged with the duty of correctly reporting all the proceedings on the trial, and his certificate is entitled to the same faith and credit as that of any other officer. The transcription of his notes, when certified to by him and filed with the clerk of the court where the cause was tried, becomes a part of the record, and prima facie a correct statement of the testimony and proceedings on the trial, and is entitled to faith and credit as such in the appellate court. Nor do we think it makes any difference whether a request for the transcription is made at the time of the trial or afterwards. If no such request is made at that time, the stenographer's notes are required to be filed as a part of the record, and a subsequent transcription thereof, certified to by him, is merely the putting into more intelligible form what is already a part of the record. We are of the opinion, therefore, that the motion to strike the testimony from the files should also be denied.

We come, then, to the merits of the case. As already stated, the court below permitted the defendants to offer in evidence, over the plaintiff's objection, oral testimony tending to show that at the time the lease was executed it was understood and agreed between the parties that the first payment should become due and payable 30 days after the de-

fendants began to use water through the entire length of the Sparta canal or ditch, and for that reason the second payment was not due at the time of the commencement of the suit, and therefore defendants were not in default. It is difficult to perceive upon what ground it can be claimed that this testimony is admissible. Clearly, its object and effect was to vary the terms of the written contract between the parties, and no principle of evidence is better settled than that, when persons put their contracts in writing, it is, in the absence of fraud, accident, or mistake, "conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing." 1 Greenl. Ev. (15th Ed.) § 275. In *Looney v. Rankin*, 15 Or. 617, 16 Pac. 860, Mr. Justice Thayer, after alluding to the well-settled rule that parol evidence cannot be used for the purpose of contradicting, adding to, subtracting from, or varying the terms of a written contract, or to control its legal operation or effect, proceeds: "Another equally well-settled principle, kindred to the one above stated, is that all oral negotiations or stipulations between the parties, preceding or accompanying the execution of a written instrument, are regarded as merged in it. The reason of the rule, as explained by judges and text writers, is 'that the parties, by making a written memorial of their transaction, have implicitly agreed that, in event of any misunderstanding, that writing shall be referred to as the proof of their act and intention; that such application as arose from the paper, by just construction or legal intentment, should be valid and compulsory on them; but that they would not subject themselves to any stipulations beyond their contract, because, if they meant to be bound by any such, they might have added them to their contract, and thus have given them a clearness, a force, and a direction which they would not have by being trusted to the memory of a witness.' And, where a written contract appears on its face to be complete, no addition to, or contradiction of, its legal effect by parol stipulations, preceding or accompanying its execution, can be admitted, any more than its alteration through the same means in any other respect. The law controlling the operation of a written contract becomes a part of it. The rule here referred to, so far as it extends, is inflexible." 1 Hill's Ann. Laws Or. § 692; *Stoddard v. Nelson*, 17 Or. 417, 21 Pac. 456; *Bank v. Scott*, 20 Or. 421, 26 Pac. 276; *Hindman v. Edgar*, 24 Or. 581, 17 Pac. 862; *Abraham v. Railroad Co.* (Or.) 60 Pac. 899.

By the terms of the written contract, the first payment was to become due within 30 days after the defendants "shall commence using the giants or the waters of said canal in placer mining said mining grounds," and the second payment within 60 days thereafter. It is admitted, and the court below found, that the defendants began using the giants

and mining on the leased premises with water from the canal on the 3d day of May; so that, under the plain and unambiguous stipulation of the contract, the first payment became due 30 days, and the second within 90 days, from that date, or about the 1st of August, and prior to the declared forfeiture and re-entry by the plaintiff and the commencement of this suit.

It is claimed by the defendants, however, that the contract upon this point is ambiguous, and that parol evidence is admissible for the purpose of explaining such ambiguity, and this seems to have been the theory of the trial court. As we read the contract, there is no ambiguity in its language in this regard, but its provisions are clear and distinct. But, if there is any ambiguity, it is patent upon the face of the instrument, and cannot be removed by the application of extrinsic evidence. *Holcomb v. Mooney*, 13 Or. 503, 11 Pac. 274; *Bingham v. Honeyman*, 32 Or. 129, 51 Pac. 735, 52 Pac. 755; 1 Greenl. Ev. (15th Ed.) § 297 et seq. We are of the opinion, therefore, that the court below erred in admitting in evidence the oral testimony concerning the maturity of the payment under the lease, and in finding, as a matter of fact, that defendants were not in default in the payment of rent at the time of the re-entry, or attempted re-entry, by the plaintiff, and that, on the contrary, the second payment was long past due, and on account thereof plaintiff was entitled, under the provisions of the lease, to declare it forfeited, and to repossess herself of the leased premises. This conclusion renders unnecessary the consideration of the other question presented by the plaintiff. The decree of the court below will therefore be reversed, and a decree entered here as prayed for in the complaint.

REID, MURDOCH & CO. v. BIRD.

(Court of Appeals of Colorado. May 14, 1900.)

VENDOR AND PURCHASER—CREDITOR OF PURCHASER—CHATTEL MORTGAGEE—VALIDITY—BURDEN OF PROOF—NONSUIT—TITLE—EVIDENCE—SUFFICIENCY—INNOCENT PURCHASER.

1. Where a purchaser misrepresented his financial standing to commercial agencies, and on the strength of their report the plaintiff sold the goods, and immediately after their delivery the purchaser executed a chattel mortgage on them to the defendant to secure a pre-existing indebtedness, a judgment of nonsuit in an action by the seller against the mortgagee in possession, to recover the goods, was erroneous, since the question of the intent with which the purchaser bought the goods and made his report to the commercial agencies should have been submitted to the jury.

2. Where a chattel mortgage was executed to defendant on goods purchased from plaintiff, immediately after they were delivered to him, to secure a pre-existing indebtedness, on proof that the purchaser was insolvent at the time of the purchase, and had no intention to pay for the goods, or that he had misrepresented his financial standing in order to procure credit, the burden was cast on the defendant to establish the validity and good faith of his mortgage.

61 P.—23

3. Evidence, in an action by a seller for the value of goods which the buyer had delivered to defendant under a chattel mortgage, that the defendant had no interest in the mortgage, but was merely the representative of two bona fide creditors of the purchaser, and that the purchaser had represented to commercial agencies that the account of one of the creditors against him was \$20,000 less than it was, in order to secure credit from the plaintiff, was not sufficient to so establish title in the defendant under the chattel mortgage as to justify a nonsuit against the plaintiff.

4. Where the seller of goods had a right to rescind the sale for fraud, and acted promptly, a creditor of the purchaser, by taking a chattel mortgage on them to secure the pre-existing debt, did not become an innocent purchaser, and, as against the seller, acquired no title.

Appeal from district court, Laplata county.

Action by Reid, Murdoch & Co. against Willis E. Bird and another. From a judgment of nonsuit as to defendant Willis E. Bird, plaintiff appeals. Reversed.

Rogers, Cuthbert & Ellis, T. J. Jackson, and F. C. Perkins, for appellant. O. S. Galbreath (Pierpont Fuller, of counsel), for appellee.

BISSELL, P. J. A debt for goods of the value of about \$500 is the subject-matter of this action brought by Reid, Murdoch & Co. against the Schutt Mercantile Company and Willis E. Bird. The case went off on a nonsuit, and we state the facts as we find them. What we may say about them is not to be taken as an unquestionable narrative, nor may any of our suggestions be used to influence a jury hereafter. The case was begun in the county court, and afterwards tried in the district court. The Schutt Mercantile Company was a commercial corporation doing business in Durango. It had been transacting business for some years, and in October and November, 1896, bought the goods sued for. Part of them were sent on telegraphic order from a salesman, and part of them were delivered from a supply house in Durango. The goods were all delivered early in November, 1896. About the time of the sale the mercantile company became embarrassed, and, as we may be permitted to state, though the instrument is not before us, gave a chattel mortgage to the defendant Bird to secure debts owing to the Colorado State Bank of Durango and the Struby-Estabrook Company. Whether the mortgage secured any other creditors, we are not advised. Bird took possession, and proceeded to close out the stock. Reid, Murdoch & Co. immediately instituted inquiries about it, traced the goods, and found that they had been turned over to Bird. They served a written demand on him for them, with which he refused to comply. It did not very clearly appear whether at the time of the demand Bird had all the goods, nor whether all of them were turned over to him under the mortgage, though that he received some, and had some in his possession at that time, appears from his admissions. Thereupon the plaintiffs brought this suit against the mercantile company and Bird to recover the

goods or their value,—setting up facts which, if established, entitled them to rescind the sale on the ground of fraud,—and therein had judgment against the mercantile company, but were unsuited as to Bird. During the trial the plaintiff produced testimony tending to prove that the Schutt Mercantile Company, through its proper officers, had made statements to Bradstreet & Co. and Dun & Co. concerning their financial condition, and the representatives of those two mercantile agencies testified as to the statements which had been made. They also offered evidence tending to prove that prior to the sale the credit man of the house in Chicago examined the reports made the preceding November, carried on the agency books, and appearing in the reports of the July and October following. Smith attempted to give evidence to the point that he examined the reports before he ordered the goods boxed and shipped, and also before he ordered them delivered from the warehouse in Durango. The plaintiff also offered evidence to the point that the statements furnished by the company were untrue, and that at the time they were made the company owed the State Bank some \$20,000 more than they reported, and that there was a very large amount of bills payable excluded from them. If all these facts were true, and the jury should so find, it might well be contended that the creditors had the right to rescind, exercising it within a reasonable time after the discovery of the fraud.

The matter of reports to commercial agencies has been before this court, and while I expressed some doubt regarding the propriety of the rule which had been adopted by the various courts, believing that there ought to be proof, not only of a report, but a report made with the intent to deceive the vendor bringing suit, yet we conceded the law to be that where there is ample proof of a misrepresentation to the agencies, or either of them, and proof of a reliance on the report for the purposes of sale, the vendor may rescind, even though when the report was made there was no distinct and direct intention to defraud the vendor who sold the goods. This we stated and held in *Burchinell v. Hirsh*, 5 Colo. App. 500, 39 Pac. 352. This doctrine is necessarily subject to some other limitations, which need not be expressed. There was evidence tending in this direction, and the plaintiff was entitled to have the question go to the jury under proper instructions concerning its force and effect. It is always true that insolvency is a fact for the jury, and has some bearing on the question of intent. Alone, it would not be sufficient to warrant a finding, but in connection with other facts it is a proper subject-matter of proof, and possibly may tend to show the motive of the vendee when he made the purchase. *Brock v. Schradsky*, 6 Colo. App. 402, 41 Pac. 512. In the light of these authorities, it was undoubtedly the plaintiff's privilege to have the question of

the intent with which the mercantile company bought the goods submitted to the jury, and likewise that with which the report was made to the commercial agency on which the plaintiff's credit man relied when he made the sale,—at least, the statement on which he said he relied when he made it. We do not intend to say that his evidence directly established the fact that he relied on the report, rather than on the general reputation of the mercantile company which prevailed in commercial circles. His testimony is open to discussion, because the date of the sale and the date of the inspection of the record are not exactly concurrent, but these are wholly matters for the jury. It is quite generally true that where a mercantile concern is heavily embarrassed, and buys goods, and, almost concurrently with the purchase, mortgages all of its assets to secure certain preferred creditors, there arises in the mercantile mind a suspicion that it bought the goods with an intent not to pay for them, but to devote them to the liquidation of debts due certain creditors. These are matters for the consideration of the jury, and it is for them, under proper instructions, to determine the intent of the purchaser, and the force and effect of the evidence. The case was not so broadly or fully made that we feel at liberty to state abstractly the law with reference to what will establish a fraudulent intent, and the extent to which a plaintiff must go in maintaining it if he would recover. To lay down general principles on this subject would simply embarrass the trial court, and afford it no aid.

It is quite earnestly insisted by the attorney for the appellee that the plaintiffs do not sufficiently attack Bird's title, because they failed to prove value, or to overthrow the mortgage or attack its good faith. We think he is wrong with respect to both propositions. There is enough evidence of value to go to the jury, wherefrom they could ascertain the market price of the goods. It was not entirely clear, or wholly full and accurate, but there was enough whereon to submit the matter to them.

Respecting the other branch of the proposition,—and that is the burden to establish the validity and good faith of the mortgage,—we think that the rule is misstated. Should the jury find from the testimony that the mercantile company were insolvent when they bought the goods, and had no intention to pay for them, or that they misrepresented their financial status, whereby they procured credit, and whereby, under the law, the vendor would have a right to rescind the sale, then, in order to defend his title, it would be incumbent on Bird to produce proof of the character of his mortgage, the consideration on which it was based, and, in general, uphold the validity of his title. This seems to be the general current of authority on this question. *Starr v. Stevenson*, 91 Iowa, 684, 60 N. W. 217; *Easter v. Allen*, 8 Allen, 7;

Shotwell v. Harrison, 22 Mich. 410; Sillyman v. King, 36 Iowa, 207; Dry-Goods Co. v. Kahn, 53 Kan. 274, 36 Pac. 327; Wafer v. Bank, 46 Kan. 597, 26 Pac. 1032; Devoe v. Brandt, 53 N. Y. 462; McLeod v. Bank, 42 Miss. 99. Many others might be cited. The courts are in unison, and we have been referred to none which announce a contrary doctrine. It is quite true, the cashier of the State Bank was put on the stand by the plaintiff to show the untruthful and misleading character of the statement which the mercantile company had furnished the commercial agencies. From Mr. Kimball's evidence, it is quite evident the bank's account was represented to be some \$20,000 less than it was when the report was furnished, but he also testified that Mr. Bird was the mortgagee in possession of the property in the interest of the Colorado State Bank and the Struby-Estabrook Company. From his evidence it would likewise appear that Bird had no personal interest in the matter, but was simply the representative of those two creditors. It is sought by argument to give this evidence greater weight than it is entitled to for the purposes of this appeal. The appellee insists that it appeared from the plaintiff's own case that the mortgage was given in good faith to secure bona fide debts, but we do not regard the evidence as sufficient. We are not advised thereby of the terms and conditions of the mortgage, nor have we an opportunity to inspect it, to determine whether, on its face, it was valid; nor, in fact, do we believe that Mr. Kimball's testimony was enough to establish that the mortgage was given to creditors in good faith to secure debts then due and owing, which were protected by a legal instrument properly executed, and sufficient to transfer title to Bird, as the representative of these creditors. We are quite of the opinion the evidence did not go far enough to support the burden which the cases already cited put on him who buys from a fraudulent vendee, and seeks to protect his title on the theory that he is an innocent purchaser for value. The evidence was not broad enough or full enough. This suggestion is made in answer to the contention that even though the nonsuit may have been wrong on the hypothesis that the plaintiff made a case to go to the jury, yet it was right because the plaintiff produced evidence which established the defendant's title. When once this proposition is disposed of, the error committed in the ordering of a nonsuit is practically determined.

We are compelled, however, to advert to another proposition on which the appellee greatly relies. By the argument he seeks to apply a doctrine which has been expressed in several cases in the supreme court, and by a quotation from an early opinion, which is "that one who takes property in payment or security of a pre-existing debt is to be regarded as a purchaser for valuable consideration."

This doctrine was very early announced, and ever since that time the courts have universally held that a pre-existing debt is a good consideration for the transfer of property either in payment of, or as a security for, a debt. This, however, has only been held so far as the cases themselves show where there has been an actual transfer of the title, or a turning over of the property in payment or as a security. We have been referred to no case, nor have we found one, where it has been held that the execution of a chattel mortgage on personal property, on the consideration of a pre-existing debt, would be a valid transfer, unassailable by a vendor who had the right to rescind the sale on the ground of fraud. Since these cases are pressed so urgently on our attention, we will refer to what the supreme court has decided. The cases are Knox v. McFarraan, 4 Colo. 586; McFarraan v. Knox, 5 Colo. 217; McMurtrie v. Riddell, 9 Colo. 497, 13 Pac. 181; Bank v. McClelland, 9 Colo. 608, 13 Pac. 723. In the first case, Rose owned the property, and gave a title bond to Kettlewell for a named price. It was afterwards assigned by mesne transfers, whereby it vested in McGovney, who because the holder of the bond, and entitled to the conveyance on the payment of the consideration. In January, McGovney took up the bond, paid the consideration, and delivered the instrument to Rose, who destroyed it. But Rose did not then make the deed to Knox. That was done in January, 1876. Suit in ejectment was then begun to recover possession. McFarraan undertook to defend, contending that he was McGovney's creditor when the deed was executed, and attempted to make proof of the want of consideration as between McGovney, Rose, and Knox. In that suit he was defeated because in an action in ejectment under the old practice the legal title must prevail, and Knox had judgment. Subsequently, however, McFarraan filed a bill in equity in the proper county, and alleged that he had recovered judgment against McGovney prior to the time of the transfer, filed his record in the proper office, and thereby obtained a lien superior to the title which Knox subsequently got by the conveyance from Rose. McFarraan had judgment, and when the case came to the supreme court the judgment was affirmed on the ground that the bond was a proper instrument for record under the recording act, and, since it was not filed, McGovney's claim took precedence. It will be observed that the whole case turned on the recording act, and the failure to comply with it, and want of knowledge on McFarraan's part of the outstanding title. The next case was McMurtrie v. Riddell. Respecting this it is enough to say that the record title stood in Wightman, who deeded to McMurtrie, who held title by an unrecorded deed until the 10th of August, 1881, although the deed was dated in December, 1879. Riddell bought the property at an execution sale had on a judgment against

Wightman on the 13th of November, 1880, and he became entitled to his deed, which he got on the 16th day of August, 1881. It will be noticed that the record of McMurtrie's deed preceded the record of Riddell's by six days, although the purchase at the execution sale antedated the record of McMurtrie's title. Under these facts, the supreme court very properly held that a purchaser at an execution sale took title as against the unrecorded deed. The next case, and the only other in the supreme court to which our attention has been called, is that of *Bank v. McClelland*. It is sufficient to say that this only concerns the title to commercial paper, and can in no sense be regarded as a direct authority on the proposition that he who takes property in payment of or as security for a pre-existing debt is to be regarded as a purchaser for a valuable consideration. The rights of a holder of commercial paper wholly depend on other considerations. In all jurisdictions,—even those which do not concede that a pre-existing debt is a good consideration for the sale of property or its pledge,—it is universally held that one who takes title to commercial paper, either in payment of a debt or as a security for it, gets a good title, if he receives it without notice. The holder of commercial paper, who takes it in the usual course of business, is unaffected by the equities of antecedent parties. The rule is the same whether the instrument is received as a security for, or in payment of, the pre-existing debt. This is conformable to the recognizable usages of the commercial world, and had its origin in the necessity to protect commercial paper in the hands of the holder. This doctrine was very clearly announced by the supreme court of the United States in *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 805. This case has always been followed by that tribunal. We note, however, in the *Bank Case*, that the distinguished author of the opinion, Mr. Justice Helm, italicizes the word "property" when he makes the quotation from *Knox v. McFarran*, as though intending to intimate that the court would not extend the doctrine to the case of one who takes a chattel mortgage on personal property as security for an antecedent debt, whenever a case arises involving the rights of the holder of such security and of one who attacks the transaction. There would seem to be no other reason for the implied suggestion. This court followed the same general rule in *Haraszthy v. Shandel*, 1 Colo. App. 137, 27 Pac. 876. In that case we held (the court speaking through me) that Mrs. Shandel took a good title, although there was an attempt to rescind the sale. The reason for the application of the doctrine is very apparent from the facts. Therein Haraszthy had possession of the goods, and turned them over to Mrs. Shandel on a present consideration. There was not only a pre-existing indebtedness between Mrs. Shandel and Haraszthy, but there passed at the time of the

transfer a present consideration, which, under all the authorities, would make her a purchaser for value.

We now come to the consideration of what will prove a pivotal question in this case, and it may ultimately defeat Bird's title, though whether the facts will permit its application we are at present not advised. The question, however, is fairly raised by the record, urged by counsel, and we deem it our duty to decide it. The only modification, if it be deemed a modification, of the doctrine expressed in the supreme court cases, is first found in *Cassidy v. Harrelson*, 1 Colo. App. 458, 29 Pac. 525. Therein there were conflicting claims between prior and subsequent mortgagees. We hold (undertaking to distinguish it from them, and commenting, also, on *Brereton v. Bennett*, 15 Colo. 254, 25 Pac. 310) that subsequent lienors, who have taken their security with no other consideration passing between them than the pre-existing debt, hold the goods open to the equities and exceptions as to title which could be asserted if they were in the hands of the mortgagor. This principle was supported by the citation of a large number of eminent and persuasive authorities. The decision is justified by the proof that the subsequent lienors had notice and full knowledge of the antecedent security. In this respect it differs wholly from the present controversy. We are now brought face to face with the proposition whether a creditor can take a chattel mortgage on the property of his debtor, and thereby, as an innocent purchaser, acquire a good title against the vendor of the goods, who has the right to rescind the sale because of fraud in the purchase. This is widely different from any of the cases yet decided in any of the two tribunals. We have been very exact about it, because we believe the distinction is an important one, and the question is likely to arise many times in this jurisdiction, and we know of no way by which the present case can be taken to the supreme court for ultimate determination. We have neither doubt nor hesitation in declaring the doctrine, because neither the precise question nor any analogous one has been determined by the supreme court, and we find our position sustained by a very late case in the supreme court of the United States. *Bank v. Bates*, 120 U. S. 566, 7 Sup. Ct. 679, 30 L. Ed. 754. There are many other cases tending in the same direction, but personally I am always willing to end my examination of a question when I find a unanimous decision by this tribunal deciding it. In that particular case we find cited *Johnson v. Peck*, 1 Woodb. & M. 334, 336, Fed. Cas. No. 7,404, wherein it was held that a mortgagee in a mortgage given to secure a pre-existing debt due from a mortgagor who had purchased goods on representations which entitled his vendor to rescind acquired thereby no such rights as belong to a purchaser for a valuable consideration

without notice, but held the goods open to the same equities and exceptions as to title that they would be open to if found in the hands of the mortgagor. This was a direct and conclusive adjudication on the principal question involved in this litigation. It would therefore follow, if we accept it, that should Reid, Murdoch & Co. establish to the satisfaction of the jury fraud in the transaction between them and the mercantile company, and, under the law as the court should declare it, the jury should find that they had a right to rescind the sale, and that they acted promptly, whereby they preserved their rights. Bird, by the taking of the mortgage to secure the debts due the Colorado State Bank and the Struby-Estabrook Company, acquired no title. It might appear as though we were deciding a proposition which would determine the rights of the parties, and absolutely conclude the defendant from making any proof or successfully establishing any defense. This may be true. But the question is fairly presented on the record, it is rightly argued by counsel, and they justly call on us to determine it; and whatever may be its ultimate effect, and though it may be said to be in advance of a submission of the controversy to the jury, we believe it to be our duty to express our views respecting it, so that when the case comes to trial the court, being hereby advised, may correctly instruct the jury, and the verdict which they may render be conclusive.

This disposes of every question pressed on our attention which we feel at liberty to decide, and, for the error which it is apparent from this opinion the court committed in nonsuiting the plaintiff, this case must be reversed and sent back for a further trial in conformity with this opinion. Reversed.

(10 N.M. 177)

**ALBUQUERQUE LAND & IRRIGATION
CO. v. GUTIERREZ et al.**

(Supreme Court of New Mexico. May 3, 1900.)
**WATERS AND WATER COURSES—IRRIGATION—
EMINENT DOMAIN.**

1. A company was incorporated under Laws 1887, c. 12, for irrigation purposes. Section 17, subd. 4, enacts that the company shall have the right "to take and direct from any stream * * * the surplus water" for irrigation, etc., purposes. Section 17, subd. 6, gives the company the right "to enter upon and condemn and appropriate any lands * * * or other material that may be necessary for the uses and purposes of the company." *Held*, that the power of the company to make preliminary surveys and to exercise the right of eminent domain is subject to its ability to show that there is surplus water in the stream from which water is sought to be diverted, subject to appropriation.

2. An irrigation company organized under Laws 1887, c. 12, has the right, under section 17, to make surveys for reservoirs and pipe lines and ditches, and to enter upon and condemn and appropriate land, timber, etc., as may be necessary for the uses of the company, notwithstanding it is not the owner of the land to be irrigated by the water supplied by such reservoirs, pipe lines, and ditches, nor previously employed by the owners to divert the water for their use.

3. Companies for irrigation purposes have the right to organize under Laws 1887, c. 12, and exercise the powers conferred thereby to divert surplus and unappropriated water of a natural stream, notwithstanding the possibility of failure of water supply during a few months of exceptional years.

Appeal from district court, Santa Fé county; before Justice John R. McFie.

Action by the Albuquerque Land & Irrigation Company against Tomas C. Gutierrez and others to enjoin interference with a preliminary survey by plaintiff for the construction of irrigation canals and reservoirs. Judgment for plaintiff, and defendants appeal. Affirmed.

Neill B. Field, for appellants. Childers & Dobson, for appellee.

MILLS, C. J. The facts necessary to an understanding of this case are fully stated in the able opinion rendered by the court below, which is a part of the record in this case, and it is not necessary to restate them here. Two questions are to be determined in this case: First. Can a company lawfully incorporated under chapter 12 of the Acts of 1887 (sections 468-493, Comp. Laws 1897) go upon the lands of private persons for the purpose of making a preliminary survey, and acquire the right of way through such lands by the exercise of the right of eminent domain under the terms of said act, unless it is shown that there is a surplus of water in the stream from which it is proposed to divert water, unappropriated and subject to diversion and appropriation? Second. Can the company organized under such act exercise the powers granted thereby, unless it is itself the owner of the lands to be irrigated by the water to be so diverted, or have been previously employed by the owners of such land to divert water for their use? As to the first proposition, it is sufficient to say that the court below has found as a fact that there is a surplus of water in the Rio Grande subject to appropriation, and that from said river the appellees proposed to divert, carry, and distribute the same. There is ample evidence to sustain the findings of the court below, and it is a well-settled proposition that this court cannot disturb such findings. It is undoubtedly true that the diversion and distribution of water for irrigation and other domestic purposes in New Mexico, and other Western states where irrigation is necessary, is a public purpose. This has been held by the supreme court of the United States in the case of *Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 56, 41 L. Ed. 369. It seems to us to be equally well settled that it is not necessary that the company diverting, carrying, delivering, and distributing water for such purpose shall be itself a consumer, provided that the water, when so carried and distributed, shall, within a reasonable time, be applied to a beneficial use. The able opinion of the court below discusses these propositions so fully that we adopt its opinion and

make it the opinion of this court, as follows:

"This cause was brought into this court by change of venue from the county of Bernalillo, and has been submitted upon bill, answer, and replication, cross bill, answer, and replication, oral and documentary evidence, and arguments of counsel. To avoid unnecessary repetition, let it be understood that, wherever the word 'complainant' or 'plaintiff' is used, it means cross defendant, as well, and wherever 'defendant' is used it means cross plaintiff or complainant, as well, as the issues joined are embodied in both the original and cross suit, and they will be considered together.

"The proceedings had in these causes before his honor, Judge Crumpacker, presiding judge of the Second judicial district, have restricted somewhat the issues before this court, inasmuch as this court will not presume to review the action of the court of the Second judicial district, whose jurisdiction is co-extensive with that of this court. The following proceedings were had in the Second judicial district court before the venue was changed to this court: Temporary injunction was granted upon complainant's bill January 17, 1898, and the defendants were ordered to show cause why the injunction should not be continued on the 25th day of January, 1898. Defendants filed answer, cross complaint, and affidavits January 25, 1898, and the cause was heard by the court, and taken under advisement. On the 8th day of February, 1898, the court rendered his opinion in favor of the complainant in the bill, and entered an order continuing the injunction in force against the defendants until the further order of the court, and denying the injunction prayed for by the defendants in their cross bill. On the 19th day of February, 1898, the plaintiff in the original bill filed demurrer to the answer and cross complaint of the defendants, but, upon hearing, the court overruled the demurrer by an order entered March 12, 1898. The cross defendants filed answer to the cross complaint March 14, 1898, and, the necessary replications being filed, the issues were fully made up on the complaint and cross complaint. On the 18th of May, affidavit and motion for change of venue were filed, and upon the same day objections were filed to the granting of the motion, but the court sustained the motion, and ordered the venue changed to the First judicial district. It will thus be seen that before the cause came into this court his honor, Judge Crumpacker, had not only granted the injunction prayed for in the original bill, but ordered same continued in force until further order of the court; that the injunction prayed for by the defendants in their cross bill had been denied; and that the demurrer of the complainants to the new matter in the answer of the defendants and to their cross complaint had been overruled. Therefore all these matters have been eliminated, and will not be reviewed here. The entire case is before this court on its merits,

but the sole question to be determined is whether or not, upon the pleadings and proofs now before the court, either of the parties are entitled to a perpetual injunction, and, if so, which. To determine this, the court must decide whether or not the Albuquerque Land & Irrigation Company have a legal right to construct canals, ditches, or pipe lines authorized by their charter, and whether or not they have the right to enter upon, examine, and survey, and which practically involves the right to condemn and excavate, so much of the land of private owners along the line of their proposed canals or ditches as may be necessary for such purpose. If complainants have this right under the law, then it follows that the defendants had no legal right to interfere with or obstruct them in the pursuit of this lawful purpose. On the other hand, if the complainant had not such a legal right, the cross complainants had a right to prevent the company from attempting to exercise the right of eminent domain upon their lands along the proposed canal. Many questions are suggested by the pleadings that I do not deem it necessary or proper to consider in determining this case. Indeed, the proofs are not sufficiently specific to enable the court to do so. I apprehend that the sole reason why the court of the Second judicial district did not award the complainants a perpetual writ of injunction was because the court was of the opinion that the main question in the case, viz. whether or not there was surplus water in the river that the complainants would have a right to conduct through their proposed canal for the purpose of irrigation, or for some other beneficial use, should be determined upon proof, and not upon bill, answer, and affidavits. That counsel on both sides so understood the issue is plain from the nature of the oral and documentary evidence taken at the hearing. The evidence taken on behalf of the complainant tended to prove that there was surplus water in the Rio Grande at the point where the proposed canal was to be taken out; and the evidence taken on the part of the defendants, to show that all of the water of the river had been appropriated, and that there was no surplus water. Of course, there was some proof as to other matters, but this was the main controversy as shown by the evidence. Furthermore, in my opinion, the nature of the case, as well as the law applicable thereto, makes the matter of surplus water the controlling question.

"In 1887 the legislature of this territory passed an act providing for the formation of companies for the purpose of constructing irrigation and other canals, and the improvement and colonization of lands. Section 1, c. 12, Laws 1887, is as follows: 'Any five persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of irrigation, mining, manufacturing, domestic and

other public uses, including cities and towns, and for the purpose of colonization and improvement of lands in connection therewith; for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of the territory, or some other person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged such articles shall be filed with such secretary.' That the complainant company was incorporated under this act is admitted by the defendants in their answer. Section 2 provides, in paragraph 2, that 'the purpose or purposes for which said company is formed; and if the object be to construct reservoirs and canals or ditches and pipe lines for any of the purposes herein specified; the beginning point and terminus of the main line of such canals and ditches and pipe lines; and the general course, direction and length thereof shall be stated.' The articles of incorporation of the complainant company provide: 'The purpose for which said company is formed and created a body politic and corporate is to build, construct and maintain reservoirs and feeders therefor, canals, ditches, pipe lines, flumes and such branch lateral and side canals, pipe lines, ditches and flumes as may be necessary for the supplying of water for the purpose of irrigation and the improvement and colonization of lands in connection with such irrigation; and to acquire, purchase, lease and sell water, water rights, reservoirs, canals, ditches, pipe lines, flumes and lands in the furtherance of said purpose.' Section 3 of said article fixes the beginning point, course, direction, distance, and terminus of their proposed canal as required by law. From an examination of the law referred to, and the articles of incorporation just quoted, it seems clear that the complainant company has brought itself within the terms of the law, and is therefore entitled to the benefits and to exercise all the powers conferred by the act. The legislature which passed the act is charged with a knowledge of the community ditch system of the territory, and its benefits and defects. In enacting the law under consideration, it was manifestly the intention of the legislature, while preserving the present system and the rights of parties under it, to provide for a more modern and improved system of irrigation in the future, wherever it was desired, and did not interfere with prior rights. That improved methods of storing and conducting water by means of reservoirs, canals, ditches, and pipe lines may be constructed and operated, the right of eminent domain is fully given by the act in the following language (chapter 12, § 17): 'Corporations formed under this act for the purpose of furnishing and supplying water for any of the purposes mentioned in section one, shall have, in addition to the powers hereinbefore

mentioned, rights as follows: (1) To cause such examinations and surveys for their proposed reservoirs, canals, pipe lines and ditches to be made, as may be necessary to the selection of the most eligible locations and advantageous routes, and for such purpose, by their officers, agents and servants to enter upon the lands or water of any person, or of this territory. (2) To take and hold such voluntary grant of real estate and other property, as shall be made to them in furtherance of the purposes of such corporation. (3) To construct their canals, pipe lines or ditches upon or along any stream of water. (4) To take and divert from any stream, lake or spring the surplus water, for the purpose of supplying the same to persons, to be used for the objects mentioned in section one of this act, but such corporations shall have no right to interfere with the rights of, or appropriate the property of any person except upon the payment of the assessed value thereof, to be ascertained as in this act provided: And, provided, further: That no water shall be diverted, if it will interfere with the reasonable requirements of any person or persons using or requiring the same, when so diverted. (5) To furnish water for the purposes mentioned in section one, at such rates as the by-laws may prescribe; but equal rates shall be conceded to each class of consumers. (6) To enter upon and condemn and appropriate any lands, timber, stone, gravel, or other material that may be necessary for the uses and purposes of said companies.' It is difficult to see how the legislature could have conferred more complete powers upon such companies than it did by that act; and that the legislature has power to enact a law granting the right of eminent domain is settled, provided the property taken is for a public purpose. That lands condemned and used for the right of way of reservoirs, canals, ditches, and pipe lines, for the purposes specified in the act above referred to, are for a public purpose, is too plain to require extended discussion. Congress has liberally granted this right over the public domain for the purpose of the construction of railroads and for other public uses, and state and territorial legislatures have granted this right for purposes of irrigation, railroads, public roads, and for other purposes. In arid regions the construction of systems of reservoirs, canals, and ditches for the use of the public in irrigating lands is certainly as much for a public purpose as railroads or public roads, and authority to exercise the right of eminent domain is even more of a necessity than for such purposes. *Broder v. Mining Co.*, 101 U. S. 274, 25 L. Ed. 790; *Irrigation Dist. v. Bradley*, 164 U. S. 112, 17 Sup. Ct. 50, 41 L. Ed. 369; *Lumbering Co. v. Johnson (Or.)* 46 Pac. 799, 34 L. R. A. 378; *In re Madera Irr. Dist. (Cal.)* 28 Pac. 272, 675, 14 L. R. A. 762. *Oury v. Goodwin (Ariz.)* 26 Pac. 377.

"The legislature of this territory, however, placed a specific limitation upon the exercise of the right of eminent domain, by the use of the following language: 'To take and divert from any stream, lake or spring, the surplus water.' Section 17, subsec. 4. If, therefore, the complainant company proposed to divert water and obtain a supply for its canal from the Rio Grande alone, under the above section its power to exercise the right of eminent domain would be subject to its ability to show that there was surplus water in said stream, and for that purpose the burden of proof is upon the complainant, as the court has ruled. Now, what is surplus water? Surplus water, for the purposes of this case, is water which has not been diverted and applied to a beneficial use prior to the filing of complainant's bill. To state the proposition another way, surplus water is all water running in the Rio Grande not subject to a valid prior appropriation. Defendants' contention that there is no such thing as private ownership in the waters of the streams of this territory is undoubtedly correct. All the right obtainable in the water of public streams of the territory is the right to appropriate so much thereof as is actually used for some beneficial and legal purpose. This appropriation may become a vested right by continuous use, or it may be lost by non-use, and in this the right differs from private ownership. The doctrine of the common law no longer obtains in what is known as the 'Arid and Mountainous Region of the West,' and the doctrine of prior appropriation has been substituted for the common law, as a matter of necessity, on account of the peculiar conditions existing in most, if not all, the mountain states and territories. In the case of *U. S. v. Rio Grande Dam & Irr. Co.* (a case decided May 22, 1899) 19 Sup. Ct. 770, 43 L. Ed. 1136, the supreme court of the United States discusses the law of water rights, and refers to the laws of Congress on the subject, as follows: 'Notwithstanding the unquestioned rule of the common law in reference to the right of a lower riparian proprietor to insist upon the continuous flow of the stream as it was, and although there has been in all the Western states an adoption of recognition of the common law, it was early developed in their history that the mining industry in certain states, the reclamation of arid lands in others, compelled a departure from the common-law rule, and justified an appropriation of flowing waters both for mining purposes and for the reclamation of arid lands; and there has come to be recognized in those states, by custom and by state legislation, a different rule,—a rule which permits, under certain circumstances, the appropriation of the waters of a flowing stream for other than domestic purposes. So far as these rules have only a local significance, and affect only questions between citizens of the local federal courts, in 1863 congress passed the following act (14 Stat. 253; Rev. St. § 2339): 'Whenever, by priority of possession, rights to

the use of water for mining, agricultural, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.' * * * In 1887 an act was passed for the sale of desert lands, which contained in its first section this proviso (19 Stat. 377): 'Provided, however, that the right to the use of water by the persons so conducting the same on or to any tract of desert land of 640 acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.' On March 3, 1891, an act was passed repealing a prior act in respect to timber culture, the eighteenth section of which provided (26 Stat. 1101, § 18): 'That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any state or territory, which may have filed, or may hereafter file, with the secretary of the interior, a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and 50 feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth and stone necessary for the construction of such canal or ditch: provided, that no such right of way shall be so located as to interfere with the proper occupation by the government of any such reservation, and all maps of location shall be subject to the approval of the department of the government having jurisdiction of such reservation, and the privilege of water for irrigation and other purposes under the authority of the respective states and territories.'" This extended quotation from the most recent statement of the doctrine from that court will obviate the necessity of citing other cases.

"Water is declared free in the public streams of the state of Colorado, by express provision of the constitution of that state,

and the courts of that state apply the doctrine of prior appropriation in determining its water rights. The decisions of the courts of Colorado are therefore very instructive in similar litigation in this territory, inasmuch as the legislature of this territory in 1876 declared that 'all currents and sources of water flowing from the natural sources in the territory of New Mexico, shall be and they are by this act declared free.' Section 52, Comp. Laws 1897. The doctrine of prior appropriation is the law governing water rights in this territory, and, to constitute a valid prior appropriation of the water of the Rio Grande, two things must be established: (1) There must be a rightful diversion; (2) an application to some beneficial use. And neither of these is sufficient without the other. It is not essential that the water shall be used by the person or corporation diverting the water from the stream; for the law is well settled that water may be diverted from the streams by canals and ditches owned by individuals or corporations, and conducted long distances and beneficially used by others. This is fully established by the large canal and ditch systems existing in California, Colorado, Arizona, and many other states. In such cases the beneficial user is held to have constituted the ditch or canal company his agent to divert and conduct water for his use, and the Latin maxim, 'Qui facit per alium facit per se,' seems to apply in such cases. I see no reason, therefore, why such reservoir, canal, and ditch companies as are authorized by the laws of the territory should not be allowed to perform services in connection with the irrigation of lands in this territory similar to those performed by such corporations in other states and territories where the same law as to water rights prevails. I can see no legal reason for preventing them from exercising the power conferred upon such companies by the statute, provided there is surplus water subject to appropriation through the agency of such company. To determine whether or not there was any surplus water in the Rio Grande, subject to appropriation and use by complainant's proposed canal or ditch, it becomes necessary to ascertain from the evidence how much of the waters of that stream had been legally diverted and used for a beneficial purpose prior to the inception of plaintiff's rights.

"I find from the evidence: That the head gate of complainant's proposed canal is to be at a point on the Rio Grande three-eighths (3/8) of a mile below or south of the Indian village of San Felipe, about 28 miles above the city of Albuquerque. That the terminus or point of discharge into the river is at the railroad bridge near Isleta; the entire length of the canal to be about 35 miles. The present proposed terminus is at the city of Albuquerque. That the engineer of the company, Mr. Harroun, was proceeding with a survey of the line between Albuquerque and

the head gate when the interference of the defendants occurred, which led to the legal proceedings in which injunction issued as above referred to. The capacity of the canal I find to be 210 cubic feet of water per second. There is controversy as to the number of ditches on either side of the river between the proposed head gate of the proposed canal and Albuquerque, and also from Albuquerque to the terminus. All of the witnesses agree that there are at least ten acequias taking water from the river between the proposed head gate and Albuquerque on the east side, and at least three upon the west side. There are seven ditches heading below Albuquerque, down to Isleta, as shown by Mr. Follett's report, and all upon the west side of the river. The capacity of these ditches must be ascertained from the testimony of Mr. Harroun and Mr. Follett's report, as none of the other witnesses testify upon this point. Mr. Harroun and Mr. Follett's report practically agree that the ten ditches on the east side of the river above Albuquerque have a capacity of 180 cubic feet per second, and that the three ditches on the west side above the city have a capacity of 45 cubic feet per second. Mr. Follett's report alone gives the capacity of the ditches between the city and Isleta, and from this we find their capacity to be 273 cubic feet per second. Thus I find that the capacity of all the old ditches along the route of the proposed canal to have been 498 cubic feet per second, and this amount of the water of the Rio Grande was legally diverted by the old ditches prior to the existence of any rights of the complainant. The proof as to whether or not this entire amount was used for a beneficial purpose is not sufficiently specific to enable the court to find that it was not. Mr. Harroun is of the opinion that about one-half of the water diverted by the old ditches is wasted, and, while the court has no doubt that a large portion of the water thus diverted is wasted, still the proof is too general to warrant the court in holding that any specific part is wasted and not applied to a beneficial use. For the purposes of this case, therefore, I feel compelled to hold that there has been a prior appropriation of the water of the Rio Grande to the extent of the capacity of the ditches above referred to, but the court realizes that this is a very uncertain conclusion, as the testimony of Mr. Harroun is that there are about 1,800 acres of swamp and meadow lands made thus by the waste waters from the old ditches. However, as this is not a final determination of this question, except for the purposes of this inquiry, it is the duty of the court to overestimate, rather than underestimate, the quantity of water appropriated, that prior rights may be fully protected, in view of the uncertainty of the evidence on this point.

"Turning now to the flow of water in the river at the point where the head gate of

the proposed canal is to be located, I find the most reliable evidence to be that of Mr. Harroun, and the data submitted in connection with his testimony, inasmuch as his personal researches and investigations have been much greater than that of the other witnesses, and, being a competent civil engineer, his means of knowledge is much better than that of other witnesses. Indeed, he is the only witness on either side who attempts to testify as to the amount of water flowing in the Rio Grande, in any specific manner. The other witnesses testify that the river was dry at certain times, and give their opinion as to whether or not there was any surplus during the dry season, but none of them attempts to testify as to the amount of water flowing in the stream. Mr. Follett's report as to this matter is based largely upon data furnished by Mr. Harroun, as the report states, and, as to certain dates and places, agrees with the testimony and data of Mr. Harroun; but Mr. Harroun testifies much more fully, and submits data made upon more extensive and reliable investigation than that upon which the Follett report is based, and is therefore more satisfactory. These measurements are only approximately correct, it is true, but they are the best obtainable evidence, and are superior to the evidence not based upon measurements.

"In regard to the flow of water in the Rio Grande at Embudo, Rio Grande, and San Marcial for the years 1895, 1896, and 1897, Mr. Harroun testifies that: 'In 1895 the flow at Embudo aggregated 885,279 acre feet. That flow may be taken as the flow of San Marcial. The flow at Rio Grande during the same year was 1,392,507. There was an increase between these two points of 57 per cent. Q. Between Embudo and San Marcial? A. Yes, sir; 57 per cent. in 1895 between these two points. In 1896 the flow at Embudo was 467,960 acre feet. Q. What was it at San Marcial? A. There is no record made for 1896,—no record whatever. Although the gauge heights are kept continually, the channel is so shifting that with the few measurements that were made during that year no careful conclusions can be drawn from the gauge heights. But in 1896 the flow at Embudo was 467,960 acre feet, with an increase of 47 per cent. between that and Rio Grande, which was 698,072 acre feet. The flow at San Marcial during 1896 was 566,499, or a loss between these two points of only 19 per cent. In 1897 the Embudo flow was 1,112,382 acre feet, and Rio Grande 1,909,060 acre feet; showing an increase between these two points of 71 per cent. The flow at San Marcial was 2,331,586 acre feet,—an increase of 22 per cent. between these two points. Q. Explain what you mean by "acre feet." A. An acre foot is the amount covering one acre one foot,—43,560 cubic feet,—equal to about one acre foot in every 24 hours. Q. I will ask you to state if you have the data from which you can give the flow at these

points in the months beginning with February and ending with October in each year of these years. A. Yes, sir. At Embudo the mean flow in 1895, during the month of February, was 503 cubic feet a second; in March, 759; April, 2,541; May, 2,679; June, 3,021; July, 1,335; August, 1,080; September, 636; and October, 494. Q. In 1895? A. Yes, sir. At Rio Grande, the same year, the flow in February was 591 (this is the mean flow for the month); March, 1,371; April, 5,075; May, 4,411; June, 4,630; July, 1,768; August, 1,481; September, 722; October, 707. There is no record of San Marcial during 1895. In 1896, at Embudo, the mean February flow was 551; March, 957; April, 1,797; May, 1,598; June, 367; July, 299; August, 249; September, 222; October, 349. For 1896, at Rio Grande, there is no record from March 4th to March 31st; the first three days of March giving a mean flow of 1,355 second feet; for April, 3,483; May, 2,704; June, 535; July, 412; August, 243; September, 299; and October, 461. For 1896, at San Marcial, the mean flow for February was 680; March, 679; April, 3,142; May, 2,019; June, 466; August, 1,181; September, 130; October, 742. In 1897, at Embudo, the flow in cubic feet per second was for February, 407; March, 561; April, 1,691; May, 5,443; June, 4,596; July, 1,248; August, 388; September, 344; and October, 1,535. At Rio Grande, for the same year, the flow was for February, 541; March, 985; April, 5,056; May, 11,454; June, 6,153; July, 1,580; August, 458; September, 650; October, 2,227. For San Marcial, during the same months, the flow for February was 434; March, 660; April, 3,584; May, 12,173; June, 6,156; July, 1,117; August, 101; September, 1,907; October, 4,019. As I have said before, the record for 1898 is not concluded. That is the mean flow for the months mentioned. Q. Now explain what you mean by "mean flow." A. The mean flow, as there noted, is the sum of the acre feet per day divided by the number of days in the month; the sum of the acre feet and the number of feet per second divided by the number of days in the month. Q. I want to get the flow in each month, for a given day in each month, for the months of May, June, July, and August of each of the years from which points your observations were taken nearest to this ditch. A. The nearest station is at Rio Grande. The flow for April was 1,610 cubic feet per second (these are all figures in cubic feet per second); in May, 2,240; June, 1,120; July, 1,005; August, 705; September, 530. In 1896 the mean flow for April was 1,265; May, 255; June, 255; July, 210; August, 255; September, 350. For 1897 the mean flow for April was 10,200; May, 8,800; June, 2,486; July, 200; August, 240; and September, 360. Q. How far is this Rio Grande station from the proposed head gate of this plaintiff's canal? A. It is about 35 miles.'

"Mr. Follett's report shows the following flow at Rio Grande station for the years 1895 and 1896: Summer flow in second feet in 1895: April, 5,070; May, 4,615; June, 4,630; July, 1,170; August, 1,480; September, 720. In 1896: April, 3,480; May, 2,710; June, 580; July, 440; August, 195; September, 590. Winter flow for same years at same station: October, 705; November, 835; December, 710; January, 760; February, 790; March, 1,370. Rio Grande station is selected for illustration because it is the nearest station, where measurements were taken yearly, to the head gate of the proposed canal, thirty-five (35) miles; and Mr. Harroun further testifies that the flow at the head gate was substantially the same as at Rio Grande station, for the reason that there are tributaries between those points supplying a sufficient amount of water to equal the loss from seepage and evaporation.

"From this testimony I find as a fact that while during a few months, or parts of the summer months, of the years 1894, 1895, 1896, and 1897, there was no surplus water flowing in the river at the proposed head gate, during a large majority of the months of each of these years there was a large amount of surplus water flowing past that point. All of the witnesses testify that the years 1894, 1895, and 1896 were the driest years known, some say for 10 and others for 20 years, and the only years in which the river was dry at or above Albuquerque. I also find as a fact that in a majority of the last ten years there has been surplus water flowing in the river at the proposed head gate at all times, as witnesses, some of whom were mayordomos of those ditches, testify there was no scarcity during those years. I further find as a fact that the river became dry at Albuquerque about the last of June, and remained so, as most of the witnesses testify, for 22 days in 1894, and also in July, 1896. The number of days cannot be definitely stated from the evidence. Mr. Follett's report states that the river was dry at Albuquerque through July, 1895; but Mr. Follett doubts this, and it would seem clear that it was not, as Mr. Follett's report states that there was 'water all summer' in the river at Los Lunas. I find as a fact that the irrigation season begins in February and ends in October. I find as a fact that the months of June, July, August, and September are considered the dry season; and I further find that what is known as the 'rainy season' occurs during these months, also, that it is possible for the dry season to become the wet season; and the anomaly may be explained by stating that the term 'dry season' refers to the water in the river, rather than the rainfall. I find as a fact that very few farmers served by the present ditches sow wheat, oats, barley, or rye in the fall of the year, but do so in the spring, beginning during February or March; and I further find that very little, if any, of the water now appropriated is used for those crops after

July 1st. In fact, very little is used for those crops after June 15th; but water is used for chile, corn, alfalfa, and melons after that time, and for alfalfa as late as October. It appears, therefore, that less of the water diverted by the present ditches is used after the 1st of July than is used before that date, when the grain crops and all others are growing.

"The witnesses for the defense were asked the following question: 'From your knowledge of the existing system of community ditches and of the Rio Grande, is there, or is there not, any surplus of water in the Rio Grande in that vicinity during the dry season?' The answer was that there was no surplus. As has been stated, there was also testimony that the river was dry in 1894 and 1896 at different dates during the dry season. It will be observed that this testimony is confined especially to the dry season. This period includes June, July, August, and September; but as a matter of fact there is usually a large surplus in June, and frequently in September, also. The limitation to the dry season makes the testimony immaterial, because, if there was surplus water flowing in the river there at any time, it was subject to diversion and use, and, being surplus and unappropriated water, there can be no injury done to any prior appropriator. The law will protect him in the use of the water actually appropriated. Section 17 of chapter 12 grants the right of eminent domain to companies utilizing surplus waters for certain beneficial purposes, and the use of the word 'surplus' would indicate that the legislature had in mind streams whose waters had been in part appropriated. If there is surplus and unappropriated water in the stream, companies have a right to organize and exercise the powers conferred upon them by the statute, and this right is not dependent upon a contingency such as the possible failure of the water supply during a few months of exceptional years. The court takes judicial notice of the fact that from October until about the 1st of March in each year there is very little water used for any purpose by the farmers in the valley of the Rio Grande, and, as a matter of law, it is not an invasion of his rights for a subsequent appropriator to use water after a prior appropriator has ceased to do so.

"I am unable to ascertain the acreage in cultivation, except from the testimony of Mr. Harroun, as the other witnesses do not know and do not attempt to state it. Mr. Harroun says there are probably 12,000 acres there, subject to irrigation, but that only about 3,200 acres are served by the present ditches, and this is the extent of present cultivation; and he further says that at least 7,000 additional acres could be served by the proposed canal if a supply of water equal to the capacity of the canal can be obtained. The witnesses on behalf of the defendants testified that they did not know of any beneficial use to which com-

plainants could put the water in the event of the construction of the proposed canal. Such evidence is not of much value, in view of the testimony that there are 7,000 acres of irrigable land which the present ditches are unable to serve. If any part of this additional acreage could be brought under cultivation by means of the canal, it would be a beneficial purpose, within the meaning of the statute. It is evident that these witnesses so testified from a belief that there is no surplus water, or that the present method of irrigating and cultivating lands cannot be improved. I am of the opinion that the premises are wrong in either case, and their conclusions necessarily wrong. The court has found that there is surplus water in the Rio Grande during a majority of months of every year, and is equally satisfied that the present system of both irrigating and cultivating lands in this territory can be greatly improved by the adoption of more modern methods of storing and conducting water upon the lands, and a more economical use of it when so conducted. Mr. Follett's report shows that many of the present ditches were in use one hundred years ago, and it would seem strange that a system one hundred years old could not be improved upon. I do not underestimate the present ditch system, for in some respects it is very good, and so long as it is in existence its status and rights must be upheld by the courts; but that it is not an economical system, that it has no provision for storing water, and that there is an equal distribution of the water, is within the knowledge of this court, and is shown by the testimony. The suggestion that the water cannot be used for a beneficial purpose during the six months when it is not used by the ordinary farmer, I cannot accept. Mr. Blueher testifies that he uses water all the year in his market-gardening; and, in view of the provision of the statute and of complainant's charter, the court would not be warranted in holding that the water cannot be applied to some of the purposes declared to be a beneficial use by the statute.

"The right of eminent domain may be exercised by corporations organized under chapter 12, Laws 1887, in constructing reservoirs, canals, ditches, and pipe lines for the purpose of conveying surplus water for irrigation, manufacturing, or mining purposes; and the exercise of this right is not dependent upon the ownership of lands by the company, or contracts with customers for the use of water. These considerations may be important when the actual diversion of the water through the canal is attempted, but for the purpose of constructing the system the existence of surplus water is the controlling consideration. These companies are quasi public servants, and their existence is authorized by law. In *Wheeler v. Irrigation Co.*, 17 Pac. 487, the supreme court of Colorado says that such a canal is a

'quasi public servant. It exists largely for the benefit of others, being engaged in the business of transporting for hire water owned by the public to the people owning the right to its use. It is permitted to acquire certain rights as against those subsequently diverting water from the same stream. It may exercise the right of eminent domain.' In *Combs v. Ditch Co.*, 28 Pac. 906,—another Colorado case,—it was held that an owner of land along the line of the ditch could compel the company to supply him with water. In *Broder v. Mining Co.*, 101 U. S. 274, 25 L. Ed. 790, it was held that the rights of such companies 'are rights which the government had recognized and encouraged, and was bound to protect.' In *Ditch Co. v. Bennett* the court says: 'No sufficient reason has been suggested why the contemplated use may not be for and upon the possession of a person other than the appropriator. The authorities we have seem to support that it can be, and we believe it is correct upon principle. We take it, therefore, that the bona fide intention which is required of the appropriator to apply the water to some useful purpose may comprehend a use to be made through some other person, and upon lands and possession other than those of the appropriator. Thus, the appropriator is enabled to complete and finally establish his appropriation through the agency of the user.' It is also held that such canal companies 'must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional rights, as well as a private enterprise prosecuted for the benefit of its owners.' *Wyatt v. Irrigation Co.* (Colo. Sup.) 33 Pac. 147; *Reservoir Co. v. Southworth* (Colo. Sup.) 21 Pac. 1028; *Strickler v. City of Colorado Springs* (Colo.) 26 Pac. 313; *Oury v. Goodwin* (Ariz.) 26 Pac. 377.

"The law laid down in the cases cited above is applicable to similar litigation in this territory, as the law of prior appropriation governs in both jurisdictions. These corporations are deemed to be beneficial in the development of the country, and the right of eminent domain is accorded them to facilitate their operations. Subsection 6 of section 17, quoted above, provides that lands, stone, timber, gravel, or other material, or so much thereof as may be necessary, may be condemned and appropriated by such companies; but, in case of a failure to agree upon compensation for property thus taken, section 18 provides: 'Should any such corporation be unable to agree with the owners as to the compensation to be paid for any such land, water, timber, stone, gravel or other materials, the amount shall be ascertained and determined by the appraisal of three disinterested commissioners, who shall be appointed on application of either party, and upon five days' notice to the other party, by the judge of the district court in and for the district in which such land, wa-

ter, timber, stone, gravel or other material may be situated; and said commissioners, in their assessment of compensation, shall appraise such premises or property at what would have been the value thereof, if such reservoirs, canals, ditches or pipe lines for which such premises or property shall be required, had not, or was not in contemplation of being built or constructed; and upon a return into court of such appraisal, and upon the payment of the clerk thereof, or to the parties entitled to such compensation, the amount so assessed by such commissioners, the land, water, timber, stone, gravel or other materials so appropriated shall be deemed to be taken by such corporation, which shall thereby acquire full title to the same, for the uses and purposes aforesaid.' In view of these provisions of the statutes, it cannot be considered an invasion of private rights to condemn and appropriate so much of the lands of private owners as may be necessary, by such reservoir and canal companies. Compensation for such property is deemed sufficient for the owner, but the right to the use of so much water as has been lawfully appropriated is not subject to this rule, and the appropriator is given ample protection by the provision that only surplus water may be appropriated by such companies.

"Defendants contend that, under section 25 of the act above referred to, the complainant company is prohibited from appropriating any water from the Rio Grande between the 15th day of February and the 15th day of October in each year. While I do not deem it necessary to pass upon this question for the purpose of this case, I have given the matter consideration, and have arrived at the conclusion that the Rio Grande is not within the operation of that section. The act of 1887, § 25 (being section 492 of the Compiled Laws of 1897), provides, in substance, that no corporation organized for taking water for the purpose of irrigation or other purposes shall have any right to divert the use of the natural flow of water or any stream which by the law of 1854 had been declared a public acequia, for any use whatever, between the 15th day of February and the 15th day of October of each year, unless with unanimous consent of every person holding agricultural and cultivated lands under such stream or public acequia, etc. A reference to the session acts of 1854 will show that there was no statute passed at that session of the legislature on the subject referred to. In 1852 the act of January 7th was passed, which may be found in the Compiled Laws of 1863 (page 20), in full. All the material sections of this act were also compiled in 1884, beginning with section 6 of the Compiled Laws of 1884. In fact, section 6 is the only material section, so far as the present inquiry is concerned. This section is also carried into the compilation of 1897, as section 6. As there was no act

of 1854, as referred to in the act of 1897, it is clear that this was a mistake. The act of 1852 was evidently intended. In 1854 the Davenport compilation of the statutes was made, and the act of 1852 was carried into that compilation in full. See Rev. Code N. M. p. 86. This accounts for the mistake. Reference was evidently had to that Code instead of the session act. A consideration of the section (6) above referred to, together with the entire act, will show that it could have no application whatever to a stream like the Rio Grande. What is meant by this section is such ditches, acequias, or natural water courses used as acequias, as have become the subject of private or community ownership, and upon which labor is expended for the purpose of appropriating the water therefrom, and using the same to irrigate the lands of the persons so working thereon.

"The defendants seek to defend, not only on behalf of themselves, but also on behalf of their grantors, ancestors, and others, 'to the number of many thousands,' and allege that for centuries, in some instances, their grantors and ancestors had used the waters of the Rio Grande, and had secured rights under the laws of Spain and Mexico, guaranteed to them by the treaty of Guadalupe Hidalgo, to the full extent of the flow of said river during the planting and growing season, etc. As to the first of these allegations of the answer, I must decline to consider the rights of other than the defendants and those interested along the line of the proposed canal. The court cannot consider the rights of all appropriators of water from the Rio Grande below the terminus of the proposed canal—First, because they are not parties to the suit, and therefore not subject to the orders nor bound by the decision of this court; second, the testimony of Mr. Harroun as to the flow of water shows that fully as much water flows in the river at San Marcial, far below Albuquerque, as flows at Albuquerque and above during most of the year, and sometimes much more, all of which tends to show that there are tributaries contributing waters to the lower part of the river that must be taken into account when the rights of appropriators below the proposed canal are determined. If the rights of appropriators below are affected by the diversion of water through the proposed canal, the courts are open for the protection of their rights. This case involves the right of eminent domain over the defendants' land, or of landowners along the line of the canal, and as to that issue parties below the terminus of the ditch have no interest. The rights of parties to the use of water below the canal cannot be affected by this decision, and will not be considered. Upon the other allegation of defendants, as to treaty rights, I am of the opinion that the lands of citizens of New Mexico, since the cession, are subject to the operation of the law of eminent domain under the laws of the United

States and the states and territories thereof, and not exempt therefrom by virtue of the treaty of Guadalupe Hidalgo. The appropriation and distribution of water must be governed by similar laws, inasmuch as the United States has adopted its own system of water rights, and adjusted the system to the different sections of the country as necessity required, and the laws of the states and territories are in harmony therewith. These laws must govern wherein they differ from the treaty provisions, and, wherein they are harmonious, treaty provisions need not be considered. The laws of the United States and the states and territories are ample for the protection of the rights of appropriators of water in this territory, and remedies for impairment or destruction of such rights are adequate, also.

"It is insisted that the complainant company does not intend to construct a reservoir or reservoirs for the purpose of storing surplus water, nor has it the means to do so. The statute certainly authorizes such companies to do so. The charter of this company provides for such construction. Mr. Childers, one of the incorporators, testifies that it is the intention of the company to construct reservoirs if it becomes necessary to do so; and Mr. Harroun's testimony is to the same effect, and, further, that it is feasible to do so. In view of this evidence, and the fact that other evidence in the case shows that the complainants are aware that the river may not contain surplus water at all times, I cannot accept the view that complainants do not intend to construct reservoirs for the storage of water. That they have not the means to do so is not a material matter at this time. The fact that the head gate of the proposed canal is situated above the mouths of the other ditches is not material, as the rights of prior appropriators will be the same in any event. It is true that the proposed canal may cross the line of one or more of the old ditches, but the construction of the canal cannot be prohibited for this reason. It is within the knowledge of this court that the ditches now existing cross each other without affecting the flow of the water. Some of the ditches in the vicinity of Albuquerque cross each other, as shown by the plat filed as evidence. Of course, the complainant company will not be allowed to destroy the present ditches, or in any way diminish the flow of water lawfully diverted by or flowing through the old ditches. If, however, the canal can be constructed without injury to the present capacity of the old ditches, it may lawfully be done. The remedy that the law provides cannot be invoked until injury is attempted or threatened, but the construction of the canal alone is not necessarily an injury, as it may not affect the rights of prior appropriators in the slightest degree. The full scope of the defense in this case is to the effect that all of the water of the Rio Grande had been legally appropri-

ated before the inception of complainant's rights. The logical conclusion from this would be that there can be no further diversion of water from this stream, no further ditches or canals constructed, and no further lands brought under cultivation. I cannot so conclude from the evidence in this case, nor from the law of the case, as I understand it. I am of the opinion that the complainant company had a legal right to construct the proposed canal at the time it attempted to do so, and for that purpose they were authorized to enter upon, examine, and survey so much of the lands of the defendants as were necessary for the construction of said canal; that the defendants had no right to obstruct or interfere with the agents of the complainants in the prosecution of their work; that the injunction was properly granted and continued in force; and that the same ought to be made perpetual by the order of this court."

It is therefore ordered that the decree rendered by the court below be affirmed, and that a decree be entered accordingly, and that appellee have and recover its costs expended in this behalf, to be taxed.

PARKER and LELAND, JJ., concur. McFIE, J., before whom the case was tried below, did not sit in this case.

(8 Okl. 267)

MORROW v. SMITH.

(Supreme Court of Oklahoma. March 11, 1899.)

TAX DEED—TAX WARRANT—WHEN REQUIRED.

Section 5631, St. Okl. 1893, which provides that "an entry is required to be made upon the tax list, showing what it is and for what county and year it is, and the county clerk shall attach to the lists his warrant, under his hand and official seal, in general terms requiring the treasurer to collect the taxes therein levied according to law, and no informality in the foregoing requirements shall render any proceedings for the collection of taxes illegal," and that "the county clerk shall take the receipt of the county treasurer on delivering to him the tax list with the warrant of the county clerk attached, and such list shall be full and sufficient authority for the collection, by the treasurer, of all taxes therein contained," is mandatory; and without such warrant the county treasurer has no right or authority to sell real estate for the nonpayment of taxes, and any sale made by the county treasurer upon failure to pay taxes on such real estate, and any deed issued by him in pursuance of such sale, in the absence of a warrant as provided in section 5631, is absolutely void.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice John C. Tarsney.

Action by Robert Morrow against Mary B. Smith. Judgment for defendant, and plaintiff brings error. Affirmed.

R. B. Forrest, for plaintiff in error. Dille & Blake, for defendant in error.

BURWELL, J. Lots numbered 4 and 5 in block numbered 82 in the city of El Reno, Ca-

nadian county, territory of Oklahoma, were sold in 1894 for delinquent taxes, and bid in by the county treasurer, under section 5600, St. Okl. 1893. On the 21st day of November, 1895, E. K. Criley paid the county treasurer the amount of taxes, interests, penalties, costs, etc., accrued against said property, under section 5602, Id., and received an assignment of the certificate of purchase from the county treasurer, paid the taxes for the subsequent years of 1895 and 1896, and secured a tax deed therefor, and thereafter conveyed said lots to the plaintiff in error.

This case presents the question as to whether or not it is necessary for the county clerk to attach his warrant to the tax lists, directing the county treasurer to collect the taxes named therein. It is admitted that no warrants were issued by the county clerk, directing the county treasurer to collect the taxes designated in the tax list. Plaintiff and defendant entered into the following stipulation, which was duly filed in this court: "In the Supreme Court of the Territory of Oklahoma. Robert Morrow, Plaintiff in Error, v. Mary E. Smith, Defendant in Error. Stipulation. It is conceded that the question raised in the brief of the plaintiff in error in this case concerning the necessity of a warrant from the county clerk to the county treasurer is exactly the same question that is pending at this time before this court in the case of N. F. Frazier v. Edward Prince. So far as that question is concerned, plaintiff in error agrees that the brief of the defendant in error in said case may be considered in connection with the brief of this plaintiff in error. It is also agreed that any other question, if any there be, identical with the questions presented by the plaintiff in error in this case with similar questions in the Frazier Case, may be likewise considered. R. B. Forrest, Attorney for Plaintiff in Error. Dille & Blake, for Defendant in Error."

The only contention of plaintiff in error in reference to the necessity of a warrant from the clerk to the treasurer, which was not considered by the court in the case of Frazier v. Prince (Okla.) 58 Pac. 751, is that no irregularity in the warrant can defeat the deed, and that a warrant must always emanate from a judicial authority. The only certificate attached to the tax list was as follows: "Territory of Oklahoma, Canadian County—ss.: I, W. J. Clark, county clerk of said county and territory, do hereby certify that the attached tax rolls contain a true and correct copy of the tax rolls of Canadian county, Oklahoma territory, for the year 1894. In witness whereof, I have hereunto set my hand and affixed the seal of my office this 31st day of December, A. D. 1894. W. J. Clark, County Clerk." It is true, the statutes provide that "no informality in the foregoing requirements [referring to the section of the statutes which directs the issuance of a tax warrant] shall render any proceedings

for the collection of taxes illegal." Section 5631, St. Okl. 1893. But there is a great deal of difference between an informality in a tax warrant and the total absence of any warrant at all. The certificate attached to the tax lists was not a warrant. There was no direction to the treasurer to collect the taxes contained in the list, as required by the statutes. It is true that the act of the county clerk in issuing the warrant is a ministerial duty, and not a judicial one. So is the issuing of an execution or other writ by a clerk of a court a ministerial act. But the sheriff must be armed with the proper writ before he can sell property to satisfy a judgment. Likewise, before a county treasurer can legally sell real estate for taxes, he must be armed with the warrant of the county clerk; and, if he sells real estate without such warrant, the sale, and any deed issued by him in pursuance thereof, will be absolutely void, and the purchaser will acquire no interest in the land. He does not even have a lien on the land for the amount paid by him to the county treasurer at such sale. There are other questions raised by appellant, but as this question is decisive of his right to recovery, it is not necessary to consider them. The plaintiff in error having commenced his action in ejectment in the court below against the defendant on his tax deed, issues having been joined therein, a trial had, and judgment rendered for the defendant, canceling such deed and quieting the title in her, and taxing the costs to the plaintiff in error, for the reasons given in the case of Frazier v. Prince, 8 Okl. 253, 58 Pac. 751, and the reasons given herein, the judgment of the lower court is hereby affirmed at the costs of appellant.

BURFORD, C. J., not sitting. All of the other justices concurring.

BOARD OF COM'RS OF D COUNTY v. SAUER et al.

(Supreme Court of Oklahoma. Feb. 11, 1899.)

COUNTY WARRANT—VALIDITY—PRESUMPTION
—INDEBTEDNESS—LIMITATION—DEFENSES.

1. A county warrant, nothing appearing on its face to the contrary, is prima facie evidence of the validity of the claim for which it was issued. The presumption of law is that the warrant was issued for legitimate county purposes, and that it was not issued in contravention of the federal limitation.

2. Where an action is brought against a county by the holder of a county warrant, it is competent for the county to plead and prove, as a defense to the action, that its indebtedness was in excess of the federal limit at the time the debt was created, or that the warrant, in whole or part, was issued for an illegal corporate purpose.

3. Where a county pleads, as one of the defenses to an action upon a county warrant, that such warrant was issued in part for an illegal purpose, it is error for the court to sustain a demurrer to the answer pleading such facts.

(Syllabus by the Court.)

Error from district court, D county; before Justice John C. Tarsney.

Action by Nicholas Sauer and others against the board of commissioners of D county. Judgment for plaintiffs. Defendant brings error. Reversed.

John F. Stone and George S. Green, for plaintiff in error. E. M. Bamford, for defendants in error.

HAINER, J. This was an action brought in the district court of D county by the defendants in error against the board of county commissioners of D county, to recover \$238, with interest thereon, upon a county warrant issued by the county commissioners of said county to J. T. Lemons, on July 30, 1892; said warrant being subsequently purchased by the plaintiffs for value and in good faith. The answer of the defendant to the plaintiffs' petition contains the following averments: (1) Defendant admits all the material allegations of the plaintiffs' petition not hereinafter denied. (2) Defendant alleges that the territorial board of equalization completed its labors for the year 1893 on the 26th day of July, 1893; that the assessment then and thereby completed was the first assessment of said county ever made for the purposes of territorial and county taxation, and that the amount of such assessment was the sum of \$80,473.30; that the warrant declared upon in said petition was issued, and the services were rendered in settlement of which such warrant was issued, prior to the completion of said first assessment, wherefore defendant alleges, further, that the warrant sued upon in the petition filed in this action is void, as being issued and creating a debt in excess of 4 per cent. of the last assessment of said county for purposes of territorial and county taxation preceding the creation of such debt, and in violation of the provisions of the act of congress approved July 30, 1890, entitled "An act to prohibit the passage of local and special laws in the territories of the United States, to limit territorial indebtedness, and for other purposes." (3) Defendant alleges, further, that the warrant declared upon is null and void for the reason that the board of county commissioners, by whom such claims were allowed, and by whom the expenses were incurred in settlement of which the said warrant was issued, had no legal authority to incur such expenses, or to issue such warrant in settlement thereof, and that such expenses were not a legal charge against said county, and were not by law authorized to be incurred by said board of county commissioners against said county; that no part of such account was incurred for the building or repair of bridges, the said warrant being issued in settlement for locating and working a road between the village of Taloga, in said county, and the village of Woodward, in the Cherokee Strip; that all of the labor charged for and services render-

ed for which such warrant was issued, except the amount of \$50, was incurred in working the roads outside of the limits of said county. To this answer the plaintiffs demurred, upon the ground that said answer does not state facts sufficient to constitute a defense to plaintiffs' petition. The court sustained the demurrer to the answer, to which ruling of the court the defendant at the time duly excepted, and declined to plead further in said action. The plaintiffs then offered in evidence the warrant sued upon, and thereupon the court entered judgment in favor of the plaintiffs, and against the defendant, for the sum of \$300.90, and costs of the action. A motion for a new trial was duly filed by the defendant, which was considered and overruled by the court; to which ruling and judgment of the court the defendant duly excepted, and brings the case here on a case-made, to be reviewed by this court.

This appeal presents but one question; that is, did the court err in sustaining the plaintiffs' demurrer to the answer of the defendant? There are two separate and distinct defenses pleaded in the defendant's answer: (1) That when the debt was incurred and the warrant issued the county was indebted beyond the federal limit; and (2) that the entire debt for which the warrant was issued, except \$50, was incurred for services performed in working roads beyond the limits of the county, and hence the indebtedness, except said amount, was not a legal charge against the county. The warrant sued upon in this action was prima facie evidence of the validity of the claim for which it was issued. The presumption of law is that the warrant was issued for legitimate county purposes, and that it was not issued in contravention of the federal limitation. But it was competent for the county to plead and prove as a defense to the action that its indebtedness was in excess of the federal limit at the time the debt was created, or that the warrant was issued for an illegal corporate purpose. We think the answer clearly raises these questions; hence the court erred in sustaining the plaintiffs' demurrer thereto. The judgment of the district court is therefore reversed, and the case is remanded, with directions to overrule the demurrer.

TARSNEY, J., having presided in the court below, not sitting; all of the other justices concurring.

BAY CITY BUILDING & LOAN ASS'N v. BROAD et al. (S. F. 2206.)

(Supreme Court of California. June 7, 1900.)
APPEAL AND ERROR—UNDERTAKING—AMENDMENT.

Code Civ. Proc. § 954, provides that, where an undertaking on appeal is insufficient, a new undertaking may be given. The body of an appeal bond, which was in the proper form, contained the signature of but one surety, while below that signature was an affidavit signed

by the same surety and another person, stating that "they are the persons named in and who subscribed the foregoing undertaking as the sureties thereto." *Held* that, where a new undertaking was filed containing the signatures of the two sureties to the body of the bond, it was within the permission of the statute, and the appeal will not be dismissed on that ground.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by the Bay City Building & Loan Association against Charles E. Broad and others. Motion to dismiss defendants' appeal for failure to file a proper undertaking. Denied.

Sullivan & Sullivan, for appellants. Jas. A. Devoto and Devoto, Richardson & Long, for respondent.

McFARLAND, J. This case is before us on a motion to dismiss the appeal on the ground that "appellant has failed to file herein the undertaking on appeal according to law." The facts are these: An instrument in writing, the body of which is in the proper form of an undertaking on appeal in the case, was filed in due time. Upon this instrument there is a written statement and affidavit signed by Hu Jones and Louisa F. Hession, in which it is stated, among other things, that they are "the persons named in and who subscribed the foregoing undertaking as the sureties thereto"; but at the end of the main body of the intended undertaking, at the place where the signatures to such an instrument usually are, there is the signature of Hu Jones alone, Hession not having signed it at that place. On January 30, 1900, before the hearing on the motion to dismiss, appellant filed with the clerk of this court a new undertaking on appeal in due form, and properly signed by said Jones and Hession as sureties, and approved by the chief justice, and asked that it be accepted, under the provisions of section 954 of the Code of Civil Procedure. It is not necessary to inquire whether Hession would have been liable on the first undertaking, although her name was not signed at the usual place. "Insufficiency," within the meaning of section 954, is the most that can be said against it, and under that section the new undertaking should be received. There was evidently an honest attempt to file a good undertaking, and the neglect of Hession to sign it at the customary place was clearly a mere oversight. Section 954 necessarily implies that there may be an undertaking which is insufficient, and that this insufficiency may be remedied by a new undertaking; for, when the original undertaking is itself sufficient, there is no room for the application of the section. In the cases cited by respondent there had been an attempt to give one undertaking on several appeals from several different judgments and orders; and it was held that, as to a judgment or order not referred to in the undertaking, and as to appeals for each of

which a separate undertaking was necessary, the instrument relied on as an undertaking was "no undertaking at all." But that cannot be rightly said of the instrument in question here. The writing itself was in form and substance complete. As to one of the sureties it was an undertaking, and as to the other it is merely questionable whether she so signed it as to bind her in the way she evidently intended to be bound. The question here presented differs from any passed on in former decisions of this court; and, if the case at bar does not present an instance of an insufficient undertaking which may be remedied under section 954, then it is difficult to imagine such an instance. The motion to dismiss the appeal is denied, and the undertaking filed January 30, 1900, will stand as the undertaking on this appeal.

We concur: TEMPLE, J.; HENSHAW, J.

128 Cal. 665

CARPENTER et al. v. FURREY et al. (L. A. 714.)

(Supreme Court of California. June 6, 1900.)

MECHANIC'S LIEN — CONTRACTOR'S BOND — SURETIES—JUSTIFICATION—ACTION BY MATERIAL MEN — COMPLAINT — DEMAND — NOTICE—NECESSITY.

1. Under Code Civ. Proc. § 1203, providing that a contractor's bond shall inure to the benefit of persons performing labor or furnishing materials, etc., a demand or notice is not a prerequisite to a suit on the bond by a person furnishing material to the contractor.

2. Code Civ. Proc. § 1203, requiring a contractor's bond to be filed with every contract which the mechanic's lien law requires to be filed, and forming a part thereof, entitled "An act to add a new section to the Code of Civil Procedure, * * * to be numbered section 1203, relating to liens of mechanics and others," does not contravene Const. art. 4, § 24, requiring every act to embrace but one subject, which shall be plainly referred to in its title.

3. Sureties on a contractor's bond were not entitled to object, in an action by a material man thereon, that they had not justified by affidavit, as required by Code Civ. Proc. § 1067, since such requirement was solely for the protection of the obligees.

4. A complaint on a contractor's bond, required by Code Civ. Proc. § 1067, alleging that defendant had furnished materials, under a contract with the contractor, that were used in the building, was sufficient, as against a general demurrer, though it did not set out in detail the contract between the builder and the contractor, since it will be presumed that the materials were furnished and used under such contract.

5. Code Civ. Proc. § 1203, declares that one furnishing materials to a contractor shall have an action for the value thereof on the contractor's bond. *Held*, that where the contract price of the materials was alleged and found, and there was no demurrer for uncertainty in the complaint as to value, a finding in favor of the material man would not be reversed for failure to allege the value of the materials.

6. Code Civ. Proc. § 1203, requiring a contractor's bond with every contract which the mechanic's lien law requires to be filed, which bond shall be made to inure to the benefit of any and all persons who perform labor for or furnish materials to the contractor, is not unconstitutional, as class legislation.

Commissioners' decision, Department 1. Appeal from superior court, Los Angeles county.

Action by A. L. Carpenter and others against W. C. Furrey and others on a contractor's bond. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

A. W. Hutton and Jas. G. Scarborough, for appellants. Borden & Carhart, for respondents.

GRAY, C. Appeal from judgment on judgment roll without a bill of exceptions. The plaintiffs furnished material in the construction of a building, and, \$350.15 of the contract price thereof remaining unpaid, they brought this action on the contractor's bond given in pursuance of section 1203, Code Civ. Proc., and obtained judgment for that sum. Appellants are the sureties on said bond.

1. The obligation sued on was not a mere offer of guaranty depending for its binding force upon a notice of acceptance, but it was a contractor's bond conforming in all essential respects to the provisions of said section 1203. It is immaterial whether the liability of appellants was that of sureties or guarantors, suit could be maintained against them immediately on default of the principal and without demand or notice. Said section provides: "Said bond shall by its terms be made to inure to the benefit of any and all persons who perform labor for or furnish materials to the contractor, or any person acting for him or by his authority; and any such person shall have an action to recover on said bond against the principal or sureties, or either of them, for the value of such labor or materials or both." No notice is required by this statute. Nor, in the absence of a contract to that effect, is a notice ever required to fix the liability of either a surety or guarantor. *Treweek v. Howard*, 105 Cal. 441 39 Pac. 20; *Coburn v. Brooks*, 78 Cal. 443, 21 Pac. 2; Civ. Code, § 2807.

2. Said section 1203 is not unconstitutional. It does not contravene the provisions of section 24, art. 4, of the constitution, requiring that every act shall embrace but one subject, which subject shall be expressed in its title. The title to the section is "An act to add a new section to the Code of Civil Procedure of the State of California, to be numbered section one thousand two hundred and three, relating to liens of mechanics and others." Laws 1893, p. 202. The new section is the last of a chapter in the Code relating to mechanics' liens, and in terms it refers to mechanics' liens, and provides a security for claims in addition to such liens. Under the liberal construction of the said provision of the constitution heretofore adopted, the title of the act in question must be held to be sufficient. *Ex parte Liddell*, 93 Cal. 638, 20 Pac. 251; *Peo-*

ple v. Superior Court of City and County of San Francisco, 100 Cal. 120. 34 Pac. 492; *Hellman v. Shoulters*, 114 Cal. 150, 44 Pac. 915; *San Francisco & N. P. R. Co. v. State Board of Equalization*, 60 Cal. 30. Neither is said section 1203, Code Civ. Proc., in conflict with any of those provisions of the constitution directed against class legislation and special laws. This section, which was added to the Code in 1893, and the previous section of said Code bearing the same number and similar in its provisions, which was enacted in 1885 and repealed in 1887, have been under consideration by this court several times, and their constitutionality has not been questioned until now, so far as we are advised. *Mangrum v. Truesdale* (Cal.) 60 Pac. 775; *Klessig v. Allspaugh*, 91 Cal. 236, 27 Pac. 662, 13 L. R. A. 418; *Id.*, 99 Cal. 453, 34 Pac. 106. No case is cited in which this section or any similar provision has been held unconstitutional. And we think its validity may be upheld on the same reasoning that upholds other sections of the mechanic's lien law. A similar statute has been held constitutional and free from the objection that it was class legislation by the supreme court of Tennessee. *Manufacturing Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045.

3. The requirement of section 1057, Code Civ. Proc., that the sureties shall justify by affidavit accompanying the bond, is intended solely for the protection of obligees, and it does not lie in the mouth of the sureties to object to the sufficiency of the bond because of their failure to comply with this provision of the law. *People v. Shirley*, 18 Cal. 121; *Moffatt v. Greenwalt*, 90 Cal. 368, 27 Pac. 296.

4. The amended complaint is sufficient as against the demurrer interposed to it. It was not necessary to set out in detail the contract between the owner and the contractor. It was sufficient in that connection to set out facts showing, as the amended complaint does, that plaintiff had, pursuant to his contract, furnished materials that were used in the building in pursuance of the contract with the owner. From the fact that the materials were furnished to be used and were used by the contractor in the construction of the house, it will be presumed that they were so furnished and used in pursuance of the contract with the owner. Against a general demurrer the allegations of the complaint on this point are certainly sufficient, and there is no special demurrer for uncertainty in this respect.

5. Section 1203, Code Civ. Proc., provides that any one furnishing material may have an action for the value thereof, and the point is made that the value is not alleged in the complaint nor found by the court. The contract price of the materials is alleged and found, and there is no demurrer for uncertainty in the complaint as to value. The complaint and findings must therefore be held sufficient in this respect also. *Brigham v. Knox* (Cal.)

59 Pac. 198. The judgment should be affirmed.

We concur: SMITH, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(128 Cal. 627)

HOHENSHELL v. SOUTH RIVERSIDE LAND & WATER CO. (L. A. 586.)¹

(Supreme Court of California. May 23, 1900.)

EVIDENCE—PRESUMPTIONS—CONTINUANCE OF FACT ONCE SHOWN TO EXIST—TRIAL—FINDINGS—CONSTRUCTION—DEEDS—RESERVATION—EASEMENTS.

1. Under Code Civ. Proc. § 1963, subd. 32, providing that a thing once proven to exist will be presumed to continue to exist as long as usual with things of that nature, the title to land, having once been shown to have been vested in a grantor at a certain time prior to the execution of a deed by him, will be presumed to have continued to remain in him until the time of the execution of such deed, in the absence of any proof to the contrary.

2. In an action to abate a dam in the outlet of a lake which overflowed plaintiff's land, and which in part constituted a tract known as the "L. Ranch," the court found that plaintiff's predecessor in interest was on a certain date, and at the time of the excavation of the ditch which drained the lake and reclaimed the lands, the owner of the L. ranch, except a certain number of acres lying in one body in a certain part of the ranch. Plaintiff claimed the right to maintain his action on the ground that his predecessor in interest, being then the owner of so much of the ranch as included and surrounded the lake, had reclaimed the land covered by said lake. The trial court further found that plaintiff was entitled to the benefit of the reclamation effected by the ditch, and to have the same continued. *Held*, that it will be presumed that the tract excepted in the finding did not include any part of the land adjoining and including the lake, since the right to reclamation would only follow ownership.

3. The owners of a tract of land, which they had platted, and on which a lake is situate, conveyed a part thereof, with a reservation of the right to reclaim by drainage all or any portion of the land conveyed, or any other lands liable to overflow from the lake, and for that purpose to enter on the land conveyed, and construct a dam or ditch, and do anything necessary to reclaim any or all of such lands from overflow; the reclamation to inure to the benefit of the grantee. *Held* to reserve to the grantor and his grantees of adjoining tracts an easement over the land of the grantees for the purpose of constructing a ditch or other means of reclaiming the land, as well as the right to draw water from the grantee's land by a ditch constructed on their land, and to the grantee an easement on the lands of the grantor and his grantees for the continuance and maintenance of a drainage ditch existing at the time of the grant.

4. That a judgment is based on findings at variance with the theory of the complaint is not ground for a reversal, where the findings made are based on the allegations of the complaint, since the theory of a pleading is immaterial, providing the facts which entitle the party to relief are alleged.

Commissioners' decision. Department 1. Appeal from superior court, Riverside county.

Action by George W. Hohenshell against the South Riverside Land & Water Company

to abate the maintenance of a dam which overflowed plaintiff's lands. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

E. W. Freeman, for appellant. Collier & Evans, for respondent.

SMITH, C. Judgment was rendered in the lower court against the defendant, requiring it to abate, to a depth of 2.7 feet from the top, a dam placed by it in the outlet of Elsinore Lake, in Riverside county, whereby plaintiff's land was overflowed, and enjoining it from maintaining in said outlet that or any other obstruction. The appeal is on the judgment roll, and the points of error assigned are (1) that the theory of the complaint is at variance with the case as made by the findings; (2) that the findings are defective, in failing to show the extent of the plaintiff's right; and (3) in effect, that the findings negative the alleged right of the plaintiff.

The facts of the controversy, as they appear from the findings, are as follows: The lake referred to in the judgment is situated in a larger tract, known as the "Laguna Ranch," and varies in extent in different years, and at various seasons, according to the rainfall. It is drained to a certain level by a natural outlet, which in the year 1884, by means of a ditch constructed by the then owners of the lands adjoining and including the lake, was lowered or deepened to a plane 2.5 feet below the natural level, and again, in 1890, deepened and extended through the valley by owners of said lands. And again, in the year 1894, it was deepened by the defendant for the purpose of conveying water from the lake to South Riverside. Finally, just before the beginning of the suit, the defendant constructed in the outlet of the lake the bulkhead and dam complained of, by which the flow of water from the lake was obstructed, and the level of the lake raised "two and seven-tenths feet above the bottom and flow of the ditch as constructed and in use prior to the purchase" of lands in the lake tract by the defendant, which was in July, 1893. During all this period—that is to say, from the original construction of the ditch to the construction of the dam by the defendant—the ditch was in use, and water continued to flow through it and to relieve the lake. The ditch thus "operated to reclaim in part the lands of plaintiff * * * from overflow by said lake, and * * * the plaintiff was entitled to the benefit of such reclamation, and entitled to have the same continue." In the year 1883 the lands adjoining and including the lake, which constituted a distinct subdivision of the Laguna ranch, designated on the map of the rancho and known as "Elsinore," were owned by Graham, Collier, and Heald, and were subdivided by them into blocks and lots; and maps of the same were filed in the office of the recorder of San Diego county, in which the land was then situated.

¹ Rehearing denied June 18, 1900.

The plaintiff deraigns title from these owners under a deed executed by them to one Nicol February 11, 1884, in which there occurs, following the granting clause, a reservation or provision in the words and figures following: "Expressly reserving to the grantors herein, their heirs and assigns, the right to reclaim all or any portion of the land above described, or any or all other lands liable to overflow from the lake at Elsinore, and the right to enter upon the land above described and construct any dike, dam, ditch, or canal that may be necessary, and to do anything there or elsewhere necessary to reclaim any or all such lands from such overflow. The reclamation of the above-described land is to inure to the benefit of the grantee herein, his heirs and assigns." The defendant deraigns title from Heald, who was one of the owners of the ranch above mentioned, by whom the ranch was subdivided, and who was also at the time the ditch was deepened, in 1890, owner of the land afterwards acquired by the defendant, and as such participated in the making of the ditch. The facts above stated are, however, disputed by the defendant in two particulars: First, it is claimed that it is not found that the title of the Elsinore tract was vested in Graham, Collier, and Heald, September 24, 1883; and, secondly, that, if so, it is not found that it continued thus vested to the date of the deed to Nicol, February 11, 1884. The last objection is, however, obviously untenable. If the plaintiff's grantors were owners of the land in September, 1883, it is to be presumed, in the absence of anything appearing to the contrary, that they continued to be such to the date of the deed, February 11, 1884; and also to the time the ditch was constructed in the same year. Code Civ. Proc. § 1963, subd. 32; *Kidder v. Stevens*, 60 Cal. 419. We may confine our attention, therefore, to the first objection, the point of which is in the finding that the title of the Laguna rancho "was on the 24th day of September, 1883, vested in [said owner] except about five hundred acres of said tract, lying in one body, in the westerly corner of said Laguna rancho," from which it is claimed that it does not appear from the findings that the excepted tract did not include part of the lands adjoining and including the lake. But, were there no other finding on the point, the presumption would be otherwise; for there is a general finding that the plaintiff was entitled to the benefit of the reclamation effected by the ditch, and to have the same continued, and, in view of this finding, the ownership of the lands at the time of the reclamation must be presumed. And this presumption is confirmed, and in fact established, by other findings of the court,—for it is found that in the years 1883 to 1885 the Laguna ranch was subdivided by its owners, and it appears that one of the subdivisions of the ranch was Elsinore, or the Elsinore tract, consisting of the lands adjoining and including the lake, and that this tract ("being part of the grant of land

known as the 'Laguna Rancho'") was subdivided by Graham, Collier, and Heald, from which it is to be inferred that the Elsinore tract included no part of the 500 acres that did not belong to them. The points of error assigned will be considered inversely to the order in which they have been stated.

1. From what has been said, it must be assumed that the grantors in the deed to Nicol were at the date of the deed owners of the Elsinore tract, and that both parties deraign title from them. This being the case, the reservation clause in the deed must be construed as reserving and granting reciprocal easements, namely, to the plaintiff an easement over the land of the grantee, which would include, not only the right to construct a ditch or other means of reclamation on his land, but also the right to draw the water from his land by a ditch constructed on other lands, and to the grantee, his heirs and assigns, an easement on the lands of the grantors for the continuance and maintenance of the ditch; and of this grant the defendant, who deraigns title from one of the grantors, was by the record affected with notice. Civ. Code, § 1213.

2. The objection that "the findings fail to show * * * the extent of the alleged superior right asserted by plaintiff" is unfounded. The nature of the right is specifically determined by the facts above stated; and its precise extent, by the relief granted. It is simply to have the ditch restored to and maintained at its former level.

3. The supposed variance between the complaint and the findings with reference to the construction of the reservation clause in the deed is immaterial. The complaint alleges, in effect, "that, by the terms of the various deeds and agreements by and under which this plaintiff holds his title, it was agreed by and between this plaintiff and the owners of the said Laguna ranch, as owned and held in 1883," that by ditches, etc., "on plaintiff's land or elsewhere," said owners might reclaim the land, and that the reclamation should inure to the benefit of the plaintiff, his heirs and assigns, etc. The first part of these allegations necessarily includes, as one of the "various deeds and agreements," the deed from the owners to the first of plaintiff's predecessors, Nicol, and the effect of the reservation clause is otherwise correctly stated. The point of the objection is that the theory of the complaint is that this clause is a covenant or executory contract. But the allegation of the complaint is that "it was agreed" that the grantors should have the right to reclaim, and that the reclamation should inure to the benefit of the plaintiff, etc., and such an agreement constitutes a grant; for a grant is but "a transfer in writing" (Civ. Code, § 1052), or, more specifically, an agreement for the present transfer of a right; and such an agreement may be evidenced by any language showing this intent. It is, indeed, possible, as claimed by defendant, that the pleader re-

garded the clause as a covenant only, and that in the findings it is otherwise regarded, and that thus there is a variance between the "theory" of the complaint, and "the case as made by the findings." But the theory of a pleading is altogether immaterial, provided the material facts are alleged, and, in the progress of the case it may, and, indeed, ought to, be changed as often as a more correct theory may suggest itself. We therefore recommend that the judgment be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(128 Cal. 674)

HAND v. SOODELETTI et al. (S. F. 1,428.)
(Supreme Court of California. June 7, 1900.)

TROVER AND CONVERSION—WIFE'S SEPARATE PROPERTY—DEMAND—PROOF—IMPROPER CROSS-EXAMINATION—EVIDENCE—HARMLESS ERROR—INSTRUCTIONS—REQUEST.

1. In an action by a married woman for the conversion of goods, a demurrer to the petition because it did not state that the goods were plaintiff's separate property was properly overruled where the petition did not state that she was a married woman.

2. In an action for the conversion of goods, in which the answer of the defendant set up affirmative matter which showed that a demand for the goods would have been futile, it was not incumbent on the plaintiff to prove that a demand was made.

3. Where a witness had denied that he delivered goods to plaintiff's husband, the question, on cross-examination, "How long after you purchased the goods were they handed over to Mr. H?" was properly excluded, since it assumed a fact as true which the witness denied.

4. No objection can be urged on appeal for the rejection of evidence by the trial court, where the record does not show that the evidence was objected to or excluded, but only that, when a statement of such evidence in the presence of the jury was objected to, counsel dropped the matter.

5. Where a petition for the conversion of goods contained two counts,—the first in the usual form for conversion; the second alleging the wrongful taking of the goods, whereby plaintiff was deprived of the means of support for herself and family,—and praying for damages, and a recovery was had on the first count, permitting the plaintiff to answer the question as to when she first found out that she and her husband were penniless was harmless error.

6. No objection can be urged on appeal for the refusal of an instruction where the record does not show that such an instruction was requested.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Lilla Hand against E. Soodeletti and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Jas. A. Devoto and Reddy, Campbell & Metson, for appellants. Naphtaly, Freidenreich & Ackerman, for respondent.

AMPLE, J. This action is for the wrongful conversion of goods which plaintiff alleges composed the stock of plaintiff in a

merchant tailoring business. The complaint contains two counts or causes of action. The first is the usual complaint for conversion. In the second it is averred, in substance, that in May, 1896, plaintiff was carrying on the business of a merchant tailor in order that her family, consisting of her husband and six children, might be supported, and that while she was so conducting said business the defendants wrongfully entered into her store, took possession of her stock of goods, drove her agent from the store, and closed the same, "whereby, and by reason whereof, plaintiff has been deprived of conducting her said business and the means of earning a livelihood for the support of herself and family, to her damage in the special sum of five hundred dollars." A general demurrer was interposed to the complaint for want of facts, which was properly overruled, as there can be no doubt that the first count does state a cause of action. It was not necessary to aver in that count that the property was plaintiff's separate property, for in that count it does not appear that plaintiff was a married woman. The plaintiff was not required to prove that she made demand for the return of the goods before bringing her suit. The answer, although denying that demand was made, sets up affirmative matters which show that demand, if made, would have been unavailing.

Appellant contends that the court erred in refusing to allow him to ask, on cross-examination, plaintiff's witness Bine the following question: "How long after you purchased the goods were they handed over to Mr. Hand?" The objection was that the question assumes the fact not proven. The witness purchased the goods of which conversion was charged at sheriff's sale, and afterwards sold them to plaintiff. He had not testified that he had ever handed them over to Mr. Hand, but to the contrary. The question, therefore, assumes an important and disputed fact of which there was no evidence, and the existence of which the witness denied. The question, therefore, assuming that the witness admitted as a fact what he denied, was unfair and improper. Plaintiff's husband was also a witness for her, and on cross-examination was asked: "Did you pay three hundred dollars you owed the city and county of San Francisco by virtue of these orders?" On objection the question was excluded. Counsel for defendants then said: "I will make the offer more certain. I offer in evidence the orders of the superior court in the case of Scodeletti against Hand adjudging the defendant guilty of contempt, to show that the orders were made at or about the time that defendant closed up his tailoring establishment on Kearny street, and went to Europe." Mr. Naphtaly: "I object to such statement. He has denied that." The objection was sustained, and nothing further appears in the

* Rehearing denied July 7, 1900.

record in regard to the matter. We know nothing in regard to the orders, or why they should have any importance in this case. Besides, the record does not show that the question was objected to or excluded, but only that when a statement in the presence of the jury was objected to counsel dropped the matter. Complaint was made that counsel for plaintiff was permitted to ask her, when testifying: "When did you first find out that you and your husband were penniless?" The objection should have been sustained. The damage, under the first cause of action, if any, was the value of the property, with interest. To get the property back, plaintiff paid Bine \$575, and the court instructed the jury that the verdict could not exceed that sum, and the verdict was for that precise amount. The instruction took from the jury the claim for damages on the second cause of action. We need not decide whether a cause of action was stated in that count. The improper question could not affect the cause of action in the first count. Whether plaintiff was entitled to recover in the action depended altogether upon whether the property taken under the execution belonged to her as her separate property or was community property. The amount of damages, if plaintiff recovered, was the value of the goods up to \$575, for which plaintiff got them all back again.

Defendants further contend that the amount of \$575, to which the verdict was limited, included \$365 which plaintiff owed Bine before the repurchase, and that such sum should have been deducted, and the court erred in not so instructing the jury at the request of defendants. It does not appear that the previously existing debt was included in the alleged purchase price; nor does the record show that defendants requested any such instruction. The court did not instruct the jury to return a verdict for \$575, but, in effect, that, if they found a verdict for plaintiff, the damages would be the value of the goods, but not to exceed \$575, even though the property was worth more than that. The order is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

128 Cal. 623

WEIDENMUELLER v. STEARNS RANCHOS CO. et al. (L. A. 618.)

(Supreme Court of California. May 23, 1900.)

PLEADING—WAIVER OF OBJECTION—TRIAL—FINDING.

1. A complaint in an action to restrain defendant from lowering the grade of an irrigating canal alleged that plaintiff was the owner of a certain amount of water, and of the right to convey it through defendant's canal and take the same therefrom at the existing level, and that he had continuously received and taken water from the canal at the existing level since a certain year. The answer denied that

plaintiff had continuously used said water for as much as five years, or that defendant had recognized plaintiff's right to take water from the canal, or that plaintiff had any right to take any water from the canal, except by permission of defendant, under proper regulations, or that plaintiff had any right or easement in said canal, except under written deeds from a corporation, which, it is averred, has been in possession for 11 years. Held, that the answer denied plaintiff's ownership of the water, his right to carry the same through the canal and receive it therefrom, and that the water had been continuously taken and used by plaintiff for 10 years.

2. Where plaintiff introduces evidence in support of each material allegation of his complaint, and, without objection, permits defendant to introduce evidence in refutation thereof, he cannot for the first time on appeal urge the claim that the answer admits certain of the allegations of the complaint.

3. In an action to restrain defendant from changing the level of an irrigating canal, from which plaintiff claimed a prescriptive right to take water at the existing level, a finding that plaintiff had no prescriptive or other right to receive water from said canal at any other level than the bottom of the canal is a finding of fact, and not a conclusion of law.

Commissioners' decision. Department 1. Appeal from superior court, Riverside county.

Action by F. R. Weidenmueller against the Stearns Ranchos Company and others to restrain defendants from lowering the level of an irrigating canal. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

John G. North, for appellant. E. W. McGraw, for respondents.

COOPER, C. This appeal is from the judgment. It is claimed that the findings are contrary to the admissions of the pleadings, and that they do not support the judgment. The complaint alleges, in substance, that the defendant corporation is the owner of a canal known as the "North Riverside & Jurupa Canal," subject to the right of plaintiff to carry and receive waters from and through the same; that plaintiff is the owner of 4.33 inches of water, measured under a 4-inch pressure, and of the right to convey the same through the said canal, and take the same therefrom, and that plaintiff has continuously received and taken the said water from the canal for the purpose of irrigating his fruit trees upon the land described in the complaint upon the same level and in the same manner as in the year 1890, and has at all times claimed the right to do so; that plaintiff has the right to take his said water from said canal upon the same level as heretofore; and that defendants threaten to, and will unless restrained by the court, lower the grade of the canal so as to prevent plaintiff from taking out water on said level, or at all, except on so low a level as to prevent the irrigation of about one acre of plaintiff's land. Judgment is prayed for an injunction to prevent defendants from lowering the said canal, and thus preventing plaintiff from taking his water upon the same level

as heretofore. The pleadings were verified. It is claimed that the answers do not deny plaintiff's ownership of the water, his right to carry the same through the canal and receive it therefrom, that the water has been continuously taken and used by plaintiff since 1890 upon the level as then used, and that this level is no higher than necessary to enable plaintiff to irrigate his premises. Plaintiff evidently bases his claim to receive the water from the canal upon continuous adverse user for five years. The answers deny that the plaintiff has continuously used said water for as much as five years, or that any right of plaintiff to take the waters from said canal has been recognized by defendants, or that plaintiff has the right to take any water from said canal, except by permission of defendants, under proper regulations, or that plaintiff has any right or easement in said canal, except under written deeds from the Jurupa Land & Water Company, and aver that said right is subject to the proper and reasonable rules and regulations of defendant corporation. The answers further aver affirmatively that on the 23d day of May, 1888, the Jurupa Land & Water Company, a corporation, went into the exclusive possession and management of said canal, and that defendant corporation has not been in the possession or control thereof since 1890; that in March, 1894, the possession and control thereof were let to tenants, who have ever since been in the possession thereof, and managing the same. We think the answers were sufficient to raise issues upon all the material allegations of the complaint. They were evidently deemed sufficient at the trial, and the case was tried upon the theory that the allegations of the complaint were denied. This court does not look with approval upon the practice of trying a case in the lower court upon the theory that the pleadings are sufficient, and, without making any objection to them or to the evidence, raising the point here for the first time that some of the issues were in fact admitted. The plaintiff should not be allowed to lull the defendant into repose by introducing evidence upon each and every issue, and allowing the defendant to do the same, and then, if the verdict or decision is against him, to say for the first time in this court that some of the allegations of the complaint were not denied.

The findings support the judgment. The court found that the level at which plaintiff had been accustomed to receive his water was not established by defendant corporation as the level at which plaintiff had the right to receive the water; that plaintiff had no prescriptive or other right to receive water from said canal at any other level than the bottom of said canal. The objection is made that these findings are mere conclusions of law, and not findings of fact. We think they are findings of fact, according to the decisions of this court. It is said in *Levins v.*

Rovegno, 71 Cal. 275, 12 Pac. 162: "The line of demarkation between what are questions of fact and conclusions of law is not one easy to be drawn in all cases. * * * If, from the facts in evidence, the result can be reached by that process of natural reasoning adopted in the investigation of truth, it becomes an ultimate fact, to be found as such. If, on the other hand, resort must be had to the artificial processes of the law in order to reach final determination, the result is a conclusion of law." The following have been held to be findings of fact: "That plaintiff did not rescind said sales." *Hollenbach v. Schnabel*, 101 Cal. 317, 35 Pac. 878. "That plaintiff was not the owner." *Daly v. Sorocco*, 80 Cal. 308, 22 Pac. 212. "That Elizabeth Zink has no right, title, interest, claim, or lien of, in, or to or against any of the land or premises." *Dam v. Zink*, 112 Cal. 93, 44 Pac. 332. In the latter case it is said that it was not necessary for the court to state certain facts "as a reason for finding the issue as to the lien against the appellant." In this case it was not necessary for the court to give its reason for finding that plaintiff had no prescriptive or other right to receive water from any other level than the bottom of the canal. The evidence given at the trial furnished the reasons for the ultimate finding, and, if the reasons were not sufficient, the evidence could have been brought here, and the finding challenged. If the finding that "sales were not rescinded" is an ultimate finding, depending upon probative facts, and the finding that "no lien" existed is also such ultimate finding, we fail to see why a finding "that plaintiff has no prescriptive right" is not an ultimate finding of fact. It depends upon certain probative facts, which, in their turn, depend upon evidence. In the case of *Blum v. Weston* (Cal.) 36 Pac. 778, cited by plaintiff, the finding "that defendant had no right of way" was not the result from the other facts found. The court had found that the land was sold to defendant's grantors, with no means of egress or ingress to and from the land, and other facts, and this court said, "This finding contains facts showing, when taken in connection with the facts hereinbefore stated, all that is necessary to create a way of necessity." The court, instead of saying that the phrase "defendant had no right of way" was a conclusion of law, might more properly have said that it was, as an ultimate finding, inconsistent with, and not supported by, the probative facts previously found. Plaintiff in his brief, speaking of the allegation that he is "the owner of the right," says this is an "allegation that plaintiff is the owner of certain property, to wit, an easement," and then says, "The allegation of ownership is of an ultimate fact." If the allegation that plaintiff "is the owner of an easement" is the allegation of an ultimate fact for plaintiff, then the finding that plaintiff is not the owner of a prescriptive right is the finding of an ulti-

mate fact for defendant. The judgment should be affirmed.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

128 Cal. 650

LONDON & SAN FRANCISCO BANK, Limited, v. MOORE. (S. F. 1,400.)

(Supreme Court of California. May 25, 1900.)
BANKS AND BANKING—LETTER OF CREDIT—DRAFTS—AGENCY.

Where plaintiff purchased a draft drawn on a letter of credit providing that, when the drawer should ship goods for which the draft was drawn, the draft should be accompanied by a certificate from plaintiff bank that the bill of lading for merchandise had been sent to the grantor of the letter of credit for the goods shipped, and plaintiff's manager testified that it had put the grantor's name on its list of correspondents, and purchased the draft on its own account, and sent the draft, with the required certificate, to the grantor, such facts did not constitute plaintiff bank the agent of the grantor, except for the purpose of issuing the certificate, and hence it was entitled to recover against the drawer of the draft, after it is dishonored, though defendant testified that he surrendered the bill of lading and shipped the merchandise relying on the fact that plaintiff was the agent of the grantor.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by the London & San Francisco Bank, Limited, against John J. Moore, doing business as John J. Moore & Co. From a judgment in favor of the plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Gordon & Young, for appellant. Page & Eels, for respondent.

CHIPMAN, C. Action on bill of exchange. May 29, 1895, defendant, in the firm name of J. J. Moore & Co., drew a bill of exchange on the City of Melbourne Bank, Limited, at London, England, in favor of plaintiff at San Francisco, and delivered it to the latter bank, receiving therefor its value. The draft was accepted by the drawee in due course, but when presented for payment at maturity it was dishonored by the drawee, the latter having suspended. Upon notice of the dishonor to and demand upon the drawer, he refused payment, whereupon plaintiff brought this action, and had judgment. Defendant appeals from the judgment and from the order denying his motion for a new trial.

Defendant does not dispute the foregoing facts, but he seeks to exonerate himself from the liability ordinarily attaching to the drawer of a dishonored draft. The facts relied upon are as follows: J. G. Hay & Co., of Melbourne, Australia, procured from the City of Melbourne Bank, Limited, of Melbourne, a letter of credit for the sum of £500 sterling,

authorizing defendant, in payment of merchandise to be purchased by defendant for account of Hay & Co., and shipped to the latter, to draw bills upon the City of Melbourne Bank, Limited, of London, England. The letter of credit was as follows:

"Eastern Credit No. 6. £500 Stg. City of Melbourne Bank, Limited. Melbourne, 15th Mar., 1895. Messrs. J. J. Moore & Co. are hereby authorized to draw at usance upon the City of Melbourne Bank, Limited, in London, at any time prior to the 14th day of September next, for the cost of merchandise to be shipped to Melbourne on account of Messrs. J. G. Hay & Co. for any sum or sums not exceeding in the whole the sum of five hundred pounds stg.; and the City of Melbourne Bank, Limited, hereby engages with the drawers, indorsers, and bona fide holders of any bills so drawn that same shall be accepted on presentation, and paid at maturity: provided, they are accompanied by a certificate from the bank's agents at San Francisco that bills of lading and invoices of goods, purporting to be of sufficient amount, have been forwarded by the vessel bearing the merchandise to the manager of the City of Melbourne Bank, Limited, at Melbourne, specifying the same, and that the bills are drawn on account of Messrs. J. G. Hay & Co. under this credit. Purchasers are to note the amount of the bills separately on the back hereof, and see that they are described as 'drawn under Eastern credit No. 6, dated 15th Mar., 1895.' Wm. Robertson, Acting Genl. Manager. R. A. Ferguson, Accountant.

"N. B. The bank's agents at San Francisco are the London & San Francisco Bank, Ltd."

The letter of credit required that such bills should be accompanied by the certificate of the Australian bank's agents at San Francisco that bills of lading and invoices of goods representing the amount of the draft drawn for the purchase of the goods had been sent to the Australian bank by the vessel bearing the merchandise. Such certificate was issued in the present case, and went forward with the draft, and was as follows: "London & San Francisco Bank, Limited. San Francisco, 29 May, 1895. The undersigned, in our capacity of agents to the City of Melbourne Bank, Ltd., in transaction stipulated by their credit No. 6, Eastern, dated March 15th, 1895, hereby declare that Messrs. J. J. Moore & Co. have on this date valued under said credit on the London branch of the City of Melbourne Bank, Ltd., for £200 2-7 (say two hundred and nine pounds 2-7 stg.) against documents purporting to represent an equivalent amount of merchandise shipped per S. S. Mariposa to Melbourne, and that such documents have been lodged with us and will be duly forwarded to the manager at Melbourne. We also certify that the above-mentioned bill is drawn for account of Messrs. J. G. Hay & Co. For the London

and San Francisco Bank, Limited. [Signed] A. Scrivener, Manager, Agents for the City of Melbourne Bank, Ltd." Defendant alleges in his answer, with reference to the letter of credit, that plaintiff bank, "in all matters connected with the same [the letter], represented to this defendant that it was the agent of the said City of Melbourne Bank, Limited, and this defendant shipped the merchandise, as hereinafter set out, and parted with the bill of lading therefor, and drew the bill of exchange as hereinafter set out, relying solely upon the representations of the said plaintiff that it was the agent of the said City of Melbourne Bank, Limited, acting to and for said bank in cashing said bill of exchange as hereinafter alleged, and not for this defendant." Defendant avers that it was because of his reliance upon the representations of plaintiff that it was the agent of the Australian bank that he shipped the merchandise, and at the same time delivered to plaintiff the bill of lading and invoice of the same; and that it was as such agent that plaintiff issued its certificate required by the letter of credit; and that defendant drew his bill of exchange on the London bank "relying solely and wholly upon the representations made by said plaintiff that, as to the aforesaid credit, and all matters and transactions had thereunder, it was the agent of the said City of Melbourne Bank, Limited"; and that plaintiff permitted defendant to part with control of said merchandise, and also cashed his said bill of exchange, believing plaintiff to be agent of the Melbourne bank, and that defendant acted on such belief. The foregoing averments present the substance of the defense.

The court found that plaintiff was not the agent for the Melbourne bank "except for the purpose designated in the letter of credit, viz. to issue a certificate which should accompany drafts drawn under the credit to the acceptor in London that bills of lading and invoices of goods purporting to be of amount sufficient to cover the draft had been forwarded by the vessel bearing the merchandise (to cover cost of which the credit had been granted) to the manager of the bank granting the credit at Melbourne, specifying the bills, etc.; and that the bills were drawn on account of J. G. Hay & Company under the credit." The court further found: That plaintiff had no other business relation with the Melbourne bank, and did not represent to defendant that it was agent for any purpose other than the issuing of said certificate; nor did it represent to defendant that it was acting for said bank in cashing defendant's bill of exchange. That "plaintiff bank did not cash the said bill. It purchased the same in the ordinary course of business as a banking house." The court also found that the bill of exchange was not delivered to plaintiff as the agent of the Australian bank, "but was the result of an independent transaction between the plaintiff and defend-

ant, whereby the former purchased from the latter on its own account the draft of J. J. Moore & Company, upon the City of Melbourne Bank, which it thereafter held as its own property, and not as the agent of any one else." The court found that plaintiff did not represent itself to be the agent of the Melbourne bank, and that defendant did not act upon any such representations, and that "plaintiff did not receive the surrender and control of the said merchandise from defendant, except so far as the mere acceptance of the bill of lading and the forwarding of the same to the manager of the City of Melbourne Bank was such receipt; and its action in this regard was necessary, and done at defendant's request, to enable him to draw a draft under the said letter of credit after he had purchased and shipped the merchandise referred to." Briefly stated, the defense is that plaintiff represented itself to defendant as the agent of the Melbourne bank; that, as such agent, it took control of the merchandise purchased at San Francisco, and paid for it as such agent by cashing a draft upon its principal, the London bank. It appeared that the Melbourne bank was a branch of the bank of the same name doing business at the city of London, England. The allegations of the answer are found by the trial court to be untrue, and we think the evidence justifies the findings.

It appears from the testimony of the manager of plaintiff bank that the matter of the plaintiff serving in the capacity of agent for the bank at Melbourne was arranged between the London offices of the two banks respectively. What the agency was does not appear. The witness testified, "The bank here was simply notified to place the name [of the Melbourne bank] on the list of our correspondents." It appeared that the first draft drawn by defendant was purchased by the Bank of British Columbia, and plaintiff did no more than to furnish the certificate which the letter of credit required should be furnished by plaintiff, and for the doing of which the letter made plaintiff its agent at San Francisco. Plaintiff got nothing out of this transaction. The next draft drawn by defendant was first presented to the Bank of British Columbia, and a clerk of defendant applied to plaintiff for a certificate as formerly. Plaintiff suggested, as a matter of courtesy, that the request should come from the Bank of British Columbia, which was defendant's bank, stating to defendant's clerk, "You can see I am doing all of the work, and your bank is getting all the profit." It turned out that defendant's bank declined to make the request, and turned the business over to plaintiff. The witness testified: "I purchased the draft, and gave J. J. Moore & Company a check for the amount. I purchased the draft. I took that on our account." Plaintiff notified the bank at Melbourne that it had purchased the draft

against the letter of credit. The same kind of certificate went forward with the draft as when the Bank of British Columbia purchased the first draft. This witness also testified that the bank at Melbourne had no interest in the purchase of these drafts: "No entries were made in any of our books charging or crediting that bank with reference to these purchases affecting the City of Melbourne Bank. The only entry would be in what we call our 'bills purchased' account; so many pounds sterling bought at such and such a sum. * * * The City of Melbourne Bank, Limited, has never drawn on us directly, nor we on them. We have our agents there,—the Bank of New South Wales. This bank was simply put on our list of correspondents at their own request. We continued, and always have continued, to do all our agency business through the Bank of New South Wales. The gain or loss in the transaction would be the gain or loss of the plaintiff." When the bank at Melbourne forwarded the letter of credit it was inclosed in a letter of transmittal reading as follows: "We inclose for your guidance duplicate of our Eastern credit No. 6 in favor of J. J. Moore & Co., p. £500, which we have issued this day." Defendant relies much upon certain statements made by the witness on cross-examination. He had explained that, if he had refused to issue the certificate, the Melbourne bank "would no longer recognize it as its agent. When a party presents a draft, and requests us to give a certificate to the holder of the draft, and says, 'We want that certificate,' we would be bound to issue it. The bank has the power, under a special letter of credit of this kind, to purchase the draft. They could decline to purchase the draft, but so long as they are agents for another bank they would never think of declining. I cannot conceive any instance where we would decline to purchase a draft drawn under a letter of credit by a bank of which we were the agents. I cannot conceive of such an instance. We are the agents of a certain bank, and the drafts drawn under the letter of credit of that bank are presented to us as agents of that bank. It is presented to us to purchase for our own account, and, if we did not think that the bank was good, we would have their name stricken off our list. On the other hand, if any firm would come to us, and say, like Messrs. Moore & Company did, 'We want a certificate,' we would have to give them the certificate, whether we purchased the draft or not." Defendant seriously urges that this testimony clearly shows that plaintiff was the agent of the Melbourne bank, from which it results that plaintiff has no greater right than its principal, and that the principal had no right of action against defendant. We think it perfectly clear from the evidence that plaintiff became the agent of the Melbourne bank for the purpose only of issuing the certificate referred to in the letter of

credit, and that, when plaintiff purchased one of defendant's drafts, drawn on the London bank, against his letter of credit, plaintiff had the same rights as the Bank of British Columbia had, or any other bank would have had, as purchaser of one of his drafts. There is not the slightest evidence to support the averments of the answer that plaintiff represented itself to be the agent of the Melbourne bank for any purpose other than to issue certificates by which defendant would be enabled to cash his drafts. Defendant testified that he believed the plaintiff was the agent of the Melbourne bank, and that he relied upon that fact in surrendering the bills of lading and shipping documents and losing control of the business. But he did not testify what he meant by the term "agent," nor that plaintiff had made any representations to him as to its understanding of the extent of the agency. It was but common prudence, as well as the proper course to pursue, for plaintiff to require the surrender of the bills of lading and invoices of goods; and the certificate given at defendant's request read that plaintiff made the certificate "against documents purporting to represent an equivalent amount of merchandise shipped per S. S. [naming it] to Melbourne, and that such documents have been lodged with us, and will be duly forwarded to the manager at Melbourne." It was only by obtaining a certificate from plaintiff that defendant could have his drafts cashed, and certainly plaintiff would not issue the certificate and leave the documents and control of the merchandise in defendant's hands. The decision of the trial court seems so obviously correct that we must decline to follow the argument of appellant further. It is based principally upon the assumption that the evidence sustained the defense set out in the answer. This assumption not being well grounded, we do not feel called upon to notice the various authorities cited in support of defendant's contention. It is advised that the judgment and order should be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(128 Cal. 645)

SPRECKELS v. BUTLER et al. (S. F. 1,312.)¹
(Supreme Court of California. May 25, 1900.)

TRIAL—VARIANCE—NONSUIT—EVIDENCE—
MATERIALITY—OPINION—EVIDENCE—BILLS
AND NOTES—ASSIGNMENT.

1. A complaint in an action to enforce a stockholder's liability for a corporate debt alleged that on a certain date the corporation became indebted to F. for a certain sum for money loaned and advanced by him to it, and that it agreed to repay said sum, and that he had assigned said claim to plaintiff. The evidence showed that a stockholder solicited a loan for the corporation from plaintiff; that plaintiff drew a check for the amount of the loan;

¹ Rehearing denied June 12, 1900.

and left it with such stockholder. The corporation executed a note to F., its attorney, for the amount of the loan, and he indorsed it to plaintiff without recourse, whereupon the stockholder to whom plaintiff had previously given the amount of the note gave a check therefor to the corporation's manager, who thereupon indorsed it to F., and he indorsed it to the corporation. *Held*, that a motion for a nonsuit on the ground that the evidence did not sustain the material allegations of the complaint was properly denied, it not appearing that the defendants were in any way misled or prejudiced by the allegations of the complaint.

2. A complaint in an action to enforce a stockholder's liability for a corporate debt alleged that on a certain date the corporation became indebted to F. in a certain sum for money loaned by him to it, and that it agreed to repay him, and that he thereafter assigned the claim therefor to plaintiff. The evidence showed that a stockholder solicited a loan for the corporation from plaintiff; that plaintiff drew a check for the amount of the loan, and left it with such stockholder. The corporation executed a note to F., its attorney, for the amount of the loan, and he indorsed it to plaintiff without recourse, whereupon the stockholder to whom plaintiff had previously given the amount of the note gave a check therefor to the corporation's manager, who thereupon indorsed it to F., and he indorsed it to the corporation. Defendant called F., and asked him whether the corporation ever borrowed any money of him. *Held*, that the answer was properly excluded on the ground that the question was too general, and did not purport to relate to the transaction set forth in the complaint.

3. The question was further objectionable as seeking to have the witness determine whether or not the transaction constituted a loan.

4. A question of whether or not a witness assigned a note is incompetent where it is admitted that his indorsement thereon is genuine.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by C. A. Spreckels against C. C. Butler and others to enforce a stockholder's liability. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Rodgers & Paterson and Morrison & Foerster, for appellants. Wilson & Wilson and E. R. Taylor, for respondent.

HARRISON, J. The defendants are stockholders in the S. S. Construction Company, a corporation, and the plaintiff is the holder of a promissory note executed by the corporation to one Foerster for money received by it from him while the defendants were such stockholders, and seeks by this action to recover from them their proportion of the indebtedness for which the note was given. Judgment was rendered in favor of the plaintiff, from which the defendants have appealed.

The complaint sets forth the plaintiff's cause of action in three counts, the first alleging that on the 26th of January, 1892, the corporation became indebted to Foerster in the sum of \$50,000 for money loaned and advanced to it by him for use in its ordinary business, which it agreed to repay to him, with interest at the rate of 8 per cent. per annum; and that on the same day Foerster sold, assigned, and transferred to the plaintiff all his claim and demand against both

the corporation and the defendants as stockholders therein. The second count, after alleging the loan of the money by Foerster, alleges that on that day, and as evidence of said indebtedness, the corporation executed its promissory note to him for said amount, payable one year after date, with interest at the rate of 8 per cent. per annum, and that thereafter on the same day Foerster indorsed and delivered the note to the plaintiff. The third count alleges the loan of money by Foerster to the corporation, and that he thereupon assigned and transferred to the plaintiff all the indebtedness then due and owing, or thereafter to become due and owing, by reason of said indebtedness against the corporation and against the defendants as stockholders therein. Appropriate allegations are made in each of the counts of the amount of the capital stock held by each of the defendants, and that the note, as well as the indebtedness represented by it, were unpaid. At the trial the following facts were shown on behalf of the plaintiff: In the early part of January, 1892, the defendant Buck, who was a stockholder in the corporation, solicited and obtained from the plaintiff a promise to loan the corporation the sum of \$50,000. As the plaintiff was about to leave the city for several days, and might not return before the corporation would require the money, he drew his check on January 15th for that amount of money on the Bank of British Columbia in favor of Buck, who gave it to him for that purpose. Buck deposited the check to the credit of the firm of N. Ohlandt & Co., of which he was a member, in the Anglo-Californian Bank, on the 18th of January, and on the same day it was paid by the Bank of British Columbia through the clearing house. Foerster was a member of the law firm of Morrison & Foerster, who appear to have acted as the legal advisers of the corporation in this transaction, and on January 20th a resolution was passed by the board of directors of the corporation authorizing its president and secretary to execute and deliver to him its promissory note bearing date January 26, 1892, in the form which is set forth in the complaint. Before that date the plaintiff had returned to San Francisco, and was present at the completion of the transaction at the law office of Morrison & Foerster, where some of the defendants were also present. The note had been previously drawn up in accordance with a resolution of the board of directors, and on the 26th was at the office of Morrison & Foerster, but in whose custody does not appear. A check of N. Ohlandt & Co. for the amount of the note had been drawn upon that day to the order of Behrend Joost, who was the general manager of the corporation, and by him indorsed to the order of Foerster. The check was thereupon indorsed by Foerster to the order of the corporation, who received from it its note executed as above, which he immediately indorsed in blank, adding the words, "without recourse to me," and delivered to the

plaintiff. The corporation afterwards collected the check, and used its proceeds in its ordinary business. At the close of the plaintiff's evidence the defendants moved for a nonsuit upon the ground that the material allegations of the complaint were not sustained by the evidence; that the evidence failed to show that there had been any indebtedness or liability from the corporation to Foerster, or any loan of money by him to the corporation, or that he had ever assigned to the plaintiff the note, or any claim against the corporation; that there was a material variance between the allegations of the complaint and the proofs offered,—the allegation being that there was an indebtedness of the corporation to Foerster, while the evidence showed that the money was loaned to the corporation directly from the plaintiff, and that the indebtedness was from the corporation to him. The court denied the motion, and this ruling is the principal error argued upon this appeal.

The argument in support of the motion for a nonsuit is specious, rather than substantial. Upon an analysis of the ultimate relations between the plaintiff and the corporation, it might be said that the loan of money was from him to the corporation, but in the legal sequence of the acts by which the transaction was consummated the liability of the corporation was created in favor of Foerster, and the right of the plaintiff to enforce this liability was derived through the indorsement to him of the note which the corporation had executed to Foerster. The original liability of the corporation was incurred at the time the note was executed. The consideration for the note was the money received by it upon the check which it received from Foerster. The transactions by means of the check and its indorsements are to be considered with the same effect as if instead thereof Foerster had received the money from the drawer of the check, and delivered it to the corporation at the time he received its note. The receipt by the corporation from Foerster of the check was the creation of a corporate liability for which the stockholders at that time became liable by virtue of the statute as fully as if it had at that time received the \$50,000 from him in money. The liability of the corporation, as well as that of the stockholders, for this amount of money, whether received in this manner or upon the check, was not varied by the fact that it gave its note therefor. The note was evidence of its obligation, and furnished a simple mode of establishing its liability. But, if the note had not been given, the corporation could not have defended a suit by Foerster for the recovery of the money merely upon the ground that he had obtained the money from the plaintiff. If Foerster had retained the note, he would have had a right of action thereon against the corporation according to its terms, and also a right of action against the defendants upon their statutory liability for the indebtedness of the corporation created at the same time with the

execution of the note; and neither the defendants nor the corporation could have resisted a recovery by showing that the money represented by the note had been received by him for the purpose of making the loan. So long as Foerster held the note, he alone had a cause of action for the money, which was its consideration, against either the corporation or its stockholders. The corporation dealt wholly with him, and had no dealings with the plaintiff, and until the indorsement of the note to the plaintiff there was no contractual relation between the plaintiff and the corporation. Whether this indorsement was made on the day that the note was executed, or at any time thereafter, was immaterial. Until it was made, the plaintiff was legally a stranger to the transaction between the corporation and Foerster. By its indorsement to him the plaintiff acquired all the rights previously held by Foerster. His indorsement included an assignment of the indebtedness or obligation for which the note was given, and the right to enforce that obligation against either the corporation or the stockholders, as fully as he could have enforced it previous to the indorsement. It must be held, therefore, that the evidence offered at the trial was in support of the allegations of the complaint, and that the court did not err in refusing to grant a nonsuit. These allegations clearly show an existing liability on the part of the corporation, and that this liability was created at a time when the defendants were stockholders therein. For the purpose of establishing their liability as stockholders, it was proper for the plaintiff to set forth in the complaint, and to show at the trial, the facts constituting the transactions by which the corporate liability was originally created; but for the purpose of establishing the liability of the defendants it was immaterial whether Foerster furnished the consideration of the note from his own funds, or from moneys which originally came from the plaintiff for the purpose of being loaned to the corporation. Their liability for the indebtedness created by the transaction would be the same in either case. It is very clear that the defendants were in no respect misled, by the proofs at the trial, from what the allegations in the complaint may have authorized them to believe, or that they were in any respect prejudiced in maintaining a defense to the action, nor has there been any claim by them, either when making the motion before the trial court or in support of their appeal herein, that they were in any respect misled or prejudiced.

On the part of the defense Mr. Foerster was called as a witness, and asked whether he had at any time loaned any money to the corporation, or whether the corporation ever borrowed any money from him. Upon the objection of the plaintiff, the court excluded any answer to the question. The questions asked of the witness were general in their character, did not purport to relate to the transactions set forth in the complaint or testified to on

behalf of the plaintiff, and were properly excluded by the court. The questions were, moreover, objectionable as seeking to have the witness determine whether the transaction testified to constituted a "loan" by him of the money represented by the note. The further question whether he ever "assigned" the note to the plaintiff was immaterial, in view of the admission that his indorsement thereon was genuine. The judgment is affirmed.

We concur: VAN DYKE, J.; McFARLAND, J.

128 Cal. 672

HARDWICK et al. v. BLACK et al. (S. F. 1,810.)

(Supreme Court of California. June 7, 1900.)
HOMESTEAD—DEATH OF HUSBAND—SELECTION—DEATH OF WIDOW—DESCENT.

Under Code Civ. Proc. §§ 1465, 1468, which provided that where no statutory homestead had been selected the court must select a homestead for the surviving wife, and that in case there were no minor children the property so set apart was the property of the widow, where a testator died in 1878 leaving a widow and no minor children, and land was set aside out of the testator's separate property for her homestead, on her death such land goes to her administrator in preference to a devisee under testator's will; since the amendment to section 1468 of the above statute, providing that such property can be set aside only for a limited period designated in the order, and that the title rests in the heirs subject to such order, was not enacted until 1881, and is not retroactive.

Department 2. Appeal from superior court, San Benito county.

Action by N. G. Hardwick and others against W. W. Black, administrator, and another. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

A. M. Cuning, for appellants. Briggs & Hudner, for respondents.

McFARLAND, J. Action to quiet title to a certain piece of land. A general demurrer to the complaint was sustained, and judgment rendered for defendants. Plaintiffs appeal from the judgment.

Appellants claim title as devisees under the will of J. W. Hardwick, deceased, who died on December 16, 1878, seised of the land in question as his separate property. He left a widow, Amelia A. Hardwick, and no minor child. On April 14, 1879, the probate court made an order setting apart the land as a homestead, and, as there was no minor child, the homestead went to the widow. She afterwards died, and the defendant and respondent Black was duly appointed her administrator. Nichols was made a defendant as claiming some interest in the land. The contention of appellants is that, as the land was the separate property of the deceased, it could be set apart to the widow only for a limited period, not longer than during her life, and that after her death the title vested

in appellants under the will. Appellants undoubtedly claim in their complaint simply as "devisees," but we will not consider the question whether they could take advantage of the provision in section 1468, Code Civ. Proc., as it now stands, that in case of a limited probate homestead the title, subject to the homestead, vests in the "heirs"; for the case at bar must be decided in view of the statutory law as it was at the time the homestead order was made. At that time section 1465, Id., provided that where no statutory homestead had been selected the court must select a homestead for the surviving husband and wife and minor children "out of the real estate belonging to the deceased." It made no distinction between community and separate property. And section 1468 then provided that "when property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow and no minor child such property is the property of the widow." It did not contain the provision, afterwards put into the section, that "if the property set apart be a homestead selected from the separate property of the deceased, the court can only set it apart for a limited period, to be designated in the order, and the title vests in the heirs of the deceased, subject to such order," nor any similar provision. The section was not amended so as to include the provision last above quoted until 1881.

The very question here involved was decided adversely to appellants' contention in *Mawson v. Mawson*, 50 Cal. 539. The statutory provisions on the subject were the same then as they were at the time the homestead was set apart in the case at bar. The court there referred to the fact that "the legislature discriminates between a homestead selected and recorded in the lifetime of the parties and those to be set apart by the probate court out of the separate property of the deceased," and said that "these provisions are in no respect inconsistent with each other"; and it declares that "the language is incapable of any other interpretation than that if the homestead be set apart by the probate court out of the separate estate of the deceased husband it shall belong to the widow and minor child, if there be any." Counsel for appellants vigorously assails this decision, and asks us to overrule it, but we see no just reason for so doing. The case has not only stood unquestioned for 25 years, but it has been frequently alluded to in subsequent decisions of this court, sometimes with approval, and never otherwise. In *re Walkerly's Estate*, 108 Cal. 655, 41 Pac. 772; In *re Schmidt*, 94 Cal. 339, 29 Pac. 714; *Toby v. Railroad Co.*, 98 Cal. 496, 33 Pac. 550; *Sanders v. Russell*, 86 Cal. 120, 24 Pac. 862; In *re Ackerman*, 80 Cal. 210, 22 Pac. 141; *Collins v. Scott*, 100 Cal. 451, 34 Pac. 1085; In *re Burdick*, 76 Cal. 645, 18 Pac. 805; In *re Walkerly*, 81 Cal. 581, 22 Pac. 888; *Somers v. Somers*, 81 Cal. 615, 22 Pac. 967; *Comstock v. Yolo Co.*, 71

Cal. 602, 12 Pac. 728. Our conclusion is that the contention of appellants cannot be maintained, and that the judgment of the court below is right. Judgment appealed from is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

128 Cal. 678

MACKAY et al. v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 1,870.)

(Supreme Court of California. June 7, 1900.)

TAXATION—FOREIGN RAILROAD BONDS—TESTAMENTARY TRUSTEES—DISTRIBUTION OF ESTATE—RESIDENT TRUSTEE—STATUTES CONSTRUED—"BUSINESS SITUS."

1. Where bonds of a foreign railroad corporation, kept on deposit, and payable outside the state, belonging to the estate of a decedent, being administered in this state, were turned over to two trustees, in accordance with provisions of the will, on the final distribution of the estate and discharge of the executors, the situs of such bonds for taxation was changed from the locality of administration to the locality where such trustees resided.

2. Where assets of a testate consisting of bonds of a foreign railroad corporation, after final settlement and distribution of the estate and the discharge of the executors, have passed into the hands of two trustees under a provision in the will, the fact that such bonds are kept on deposit, and are payable in another state, and that one of the trustees is a nonresident, does not prevent the assessment and taxation of an undivided half of such bonds as the interest of the other trustee residing in this state.

3. Code Civ. Proc. § 1699, provides that after distribution the superior court shall retain jurisdiction of a decedent's estate for the purpose of settling the accounts of a trust created by the will. *Held*, that where assets of a testate, consisting of bonds of a foreign railroad corporation, after distribution of the estate and the discharge of the executors, have passed into the hands of two trustees under a provision of the will, such statute does not operate to render them subject to taxation as being property in the course of administration, and, if one of such trustees resides out of the state, an undivided half interest only, as belonging to the resident trustee, will be subject to taxation within this state.

4. A protest made by two trustees, one of them a resident of this state and the other a nonresident, holding bonds of a foreign railroad company, that taxes paid thereon were void, in that one of such trustees was a nonresident of the state, and that the situs for taxation thereof was not in this state, was a sufficient protest to uphold a judgment that only an undivided half interest in said bonds, as belonging to the resident trustee, was subject to taxation, and that the assessment of the other undivided half as belonging to the nonresident trustee was void, and could be recovered.

5. Bonds of a foreign railroad company, owned by two trustees, one of whom was a resident and the other a nonresident of the state, did not lose their situs in the state, as far as taxation of the interest therein of the resident trustee was concerned, by reason of the fact that the bonds were kept in the possession of the nonresident trustee in the city of New York, for sale and reinvestment, and had there acquired, as the trustees claimed, a "business situs."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by John W. Mackay and another, trustees under the will of Theresa Fair, deceased, against the city and county of San Francisco and others, to recover taxes paid under protest. From a judgment in favor of defendants, plaintiffs appeal. Reversed and modified.

Lloyd & Wood, for appellants. F. K. Lane, for respondents.

COOPER, C. This is an appeal from a judgment in favor of defendants and from an order denying the plaintiffs' motion for a new trial. The action was brought to recover \$28,445, taxes paid by plaintiff under protest, and claimed to have been illegally assessed. Theresa Fair died testate in September, 1891, being at said time a resident of the city and county of San Francisco, and leaving a will in which plaintiffs were named as executors and trustees. In October, 1891, the will was admitted to probate in the city and county of San Francisco, and plaintiffs appointed executors thereof. Among the assets of the estate were certain bonds of the Southern Pacific Railroad Company of Arizona, and certain other bonds of the West Shore Railroad Company of New York, of the aggregate value of \$1,282,000. In August, 1894, the administration of the estate was closed, and a decree of final distribution entered, whereby the said bonds, with certain other real and personal property, were distributed to plaintiffs as trustees, under and in pursuance of the terms of the will. At the time the decree of distribution was made, Mackay was and has continued to be a resident of the state of Nevada, but has lived and transacted business during the greater part of the time in New York City, while Dey was and is a resident of the city and county of San Francisco. The bonds were, at the time they were assessed and have since been, kept in New York City, in the American Exchange Bank, deposited in the joint names of plaintiffs as trustees. The trust estate consists of other real and personal property situate and kept in California. The beneficiaries under the trust reside in New York, and the interest upon the bonds as well as the principal is payable in that city. The assessor of the city and county of San Francisco assessed the bonds as being property owned by and in the possession of plaintiffs, as trustees, on the first Monday in March, 1895. The question to be here determined is the situs of the bonds for the purposes of taxation.

The bonds are evidences of indebtedness due or to become due from the Arizona corporation and the New York corporation to the plaintiffs as trustees, and as the legal owners thereof. The weight of authority is that a debt so due or to become due should be taxed at the place of residence of the creditor or owner, and that the situs of the debt is that of its owner, and that it is not property in the state of the debtor.

Burroughs, Tax'n, § 41; City and County of San Francisco v. Lux, 64 Cal. 481, 2 Pac. 254; State Tax on Foreign Held Bonds, 15 Wall. 320, 21 L. Ed. 187. The rule is well stated by Mr. Justice Field with his usual clearness in the latter case, and is thus given: "But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense. They are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To call debts property of the debtors is simply to misuse terms. All the property there can be, in the nature of things, in debts of corporations, belongs to the creditors to whom they are payable, and follows their domicile, wherever that may be. The debts have no locality separate from the parties to whom they are due." Judge Cooley, in his work on Taxation (2d Ed., p. 372), says: "The general rule that personalty is to be assessed to the owner where he has his domicile has been mentioned. This rule is applicable to bonds and other choses in action, though the debtor resides out of the state, and though they are secured by mortgage on lands out of the state." In Mackay v. City and County of San Francisco, 113 Cal. 397, 45 Pac. 698, these plaintiffs, as executors of the will of Theresa Fair, deceased, contended that the bonds upon which the taxes were levied in this case, or a portion of them, were not property within the state, and not taxable to the estate of Theresa Fair, deceased. But it was held that the bonds had their situs in San Francisco, and were there taxable. The court said: "The bonds in question were held here. Their situs was the city and county of San Francisco. They could not be taxed in Arizona, where the property mortgaged to secure them is situated." In that case the court followed the general rule sustained by the weight of authority. The rule is that the personal property of decedents is taxed at the domicile of the decedent. As said by law writers: "During the settlement of the estate it must have a situs somewhere, and none so appropriate as where the decedent lived." In fact, the appellants seem to agree with what has thus far been said, for in their brief they use this language: "When Theresa Fair died, these bonds had their situs within the state, because she had been a resident; and it is not now questioned that they continued to be liable to taxation in the state during the administration of the estate." The discussion is, therefore, narrowed to the proposition as to whether the same rule applies to plaintiffs, as trustees, after the estate had been closed, and the property distributed to them as such trustees. If the property had been distributed directly to the heirs, and possession given to them, they being nonresidents of the state, and the bonds being out of the state, there would be no

doubt but that the state of California could no longer tax it. But here we have the property which during the lifetime of Mrs. Fair had its situs in San Francisco. After her death its situs continued here during administration until August, 1894. Did its situs then change? It is conceded that plaintiffs were appointed trustees under the will of Mrs. Fair, and the decree distributed the property to them as such trustees. The plaintiffs, therefore, as trustees, were the owners of the legal title to the property at the time of the assessment.

The general rule is that personal property in the hands of a trustee is to be assessed to him at his place of domicile. Cooley, Tax'n (2d Ed.) p. 375; Burroughs, Tax'n, p. 224. The reason given is that the trustees are the representatives of the fund, and the fund contributes to the support of the state through the trustees. The property, under this rule, could not be assessed to the plaintiffs in San Francisco, because that is the place of domicile of only one of them. It could not be assessed to them in Nevada, because that is the place of domicile of only one of them. The property is not in California nor in Nevada, but, being intangible personal property, is said by defendants to follow the person of the owner. If it follows the person of the owner, it could not, as matter of law, be said to follow the person of the plaintiff, who resides in California, and to forsake and refuse to follow the person of the plaintiff, who resides in Nevada. It follows one as much as the other, and its situs is that of the place of domicile of its owners. Therefore, on the first Monday of March, 1895, the plaintiff Mackay was a resident of Nevada, and was the owner of an undivided one-half of the bonds, and, neither the property nor the owner being within the jurisdiction of the state, the assessment, as to Mackay's interest, was void. The language of the constitution is: "All property in the state * * * shall be taxed in proportion to its value." Const. art. 13, § 1. The interest of Mackay in this property was not "property in the state," within the meaning of the constitution. It was said by Chief Justice Marshall in McCulloch v. Maryland, 4 Wheat. 429, 4 L. Ed. 607: "All subjects over which the sovereign power of a state extends are objects of taxation, but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be presumed self-evident." It was held by the court of appeals of Maryland in Mayor, etc., v. Sterling, 29 Md. 48, that, where property was held by trustees who resided one in Baltimore city and one in Baltimore county, the property should be taxed in equal proportions as of the place of residence of each trustee. In the opinion the court said: "The tax laws of this state do not expressly provide for such a case, and our decision must be made to rest upon what we regard to be equity and right. The prop-

erty is certainly not liable to double tax. * * * We think it should be taxed one-half as of the place of residence of each trustee; that is, one half should be taxed to the trustee residing in Baltimore city, and the other half to the trustee residing in Baltimore county." This case was followed and approved in the late case of *Appeal Tax Court v. Gill*, 50 Md. 396, in which it was held that, where two of the trustees resided in Maryland and one in New York, two-thirds of the property should be assessed to the Maryland trustees and one-third to the New York trustee. It was held in *Hardy v. Inhabitants of Yarmouth*, 88 Mass. 277, that, where trustees of trust property reside in different towns, the property should be taxed in proportion, and the interest of each trustee taxed in the town in which he resides. The following authorities support the views expressed in the Maryland cases: *Cooley, Tax'n* (2d Ed.) note 3, p. 375; 1 *Desty, Tax'n*, p. 61; *Trustees of Academy v. City Council of Augusta*, 90 Ga. 634, 17 S. E. 61; *Davis v. Macy*, 124 Mass. 193; *Stinson v. City of Boston*, 125 Mass. 349. We are therefore of the opinion, both upon principle and authority, that the assessment as to plaintiff Mackay was void.

Defendants claim that the property is still within the jurisdiction of California, and in charge of the superior court of the city and county of San Francisco, by virtue of Code Civ. Proc. § 1699, which provides: "Where any trust has been created by or under any will, to continue after distribution, the superior court shall not lose jurisdiction of the estate by final distribution, but shall retain jurisdiction thereof for the purpose of the settlement of accounts under the trust." We do not think, under the section, that the court retained any jurisdiction except for the one purpose of settling the accounts of the trustees. It was, no doubt, intended by the legislature that the trustees, without any independent proceeding, or without being called upon by the beneficiaries, might file their accounts in the court in which the estate was administered, and have it settled, as a matter of convenience. It could not have been intended that the court should retain jurisdiction as to the property of the trust, or that its jurisdiction should be exclusive. The administration was closed, the accounts of the executors allowed, and the property distributed to them in a different capacity. By their discharge as executors they were as completely separated from the business of the estate as if they had been dead. *Willis v. Farley*, 24 Cal. 502. The rule that the executors were succeeded by trustees, whose duties were entirely different, is well stated in *Wheatley v. Badger*, 7 Pa. St. 462, where it is said: "It would be as absurd for a trustee to attempt the duties of an executor as for an executor to attempt the duties of a trustee, and it is, therefore, the business of the court to separate the two offices, in a

question like the present, '*reddendo singula singulis*.' As executor he was to pay the legacies; as trustee he was the devisee and depositary of the legal title for the accomplishment of confidential purposes, with which the office of an executor has no necessary connection. Had not the creation of the two offices in the same person been coupled also in the same clause, there would not have been a doubt of their severance in the contemplation of the testator. The will would have presented the union of distinct rights in the same person, which are always treated as if they existed in different persons." Suppose that in this case the plaintiff Dey, immediately after the decree of distribution, had removed to and continued to live in New York, how could the trustees have been held, by the courts of San Francisco, within their exclusive jurisdiction. If the beneficiaries and the trustees, after the decree of distribution, had all become residents of New York, the property also being there, how could section 1699 prevent the courts of New York from exercising jurisdiction, or give the San Francisco courts jurisdiction? Counsel for defendants rely upon *Lewis v. Chester Co.*, 60 Pa. St. 328, and a sentence used by Judge Cooley in his work on Taxation (page 370), in which he says: "If the fund is in charge of a court, it is taxable in the jurisdiction having control of it." The sentence from the text-book refers as authority to the single case of *Lewis v. Chester Co.* In the latter case the estate had not been distributed, and the same rule was followed as in *Mackay v. City and County of San Francisco*, supra. It is true the court had settled the accounts of the executrix as such, and the decree provided "that said executrix keep said balance invested, and that she retain the same on trust to apply the income thereof pursuant to the trusts and limitations of the said last will and testament until the further order of this court; and it is ordered that the said executrix be hereafter entitled to expend the sum of fifteen hundred dollars annually out of the income of said estate for the support and maintenance of each of said infants." And the court, in its opinion, said: "And distribution yet remains to be decreed upon the further order of the surrogate." Therefore the case is not authority in support of the proposition that the superior court of San Francisco has control of the bonds distributed to plaintiffs.

It is claimed by defendants that plaintiffs cannot recover any less than the whole tax, for the reason that the protest, instead of specifying that one-half the tax upon the bonds is void, is directed to the whole tax. We think the protest was sufficient. It specified that Mackay is not a resident of the state; that the bonds are in New York, and are bonds of foreign corporations. The protest, while it specified and pointed out that the whole assessment was void, did not, for

that reason, fail to point out and show that the assessment of all the property owned by Mackay was void. The greater includes the less, and, although the whole assessment was claimed to be void, the protest showed that the whole assessment as to Mackay was void. The notice was a substantial compliance with the statute. *Mackay v. City and County of San Francisco*, supra; *People v. Board of Assessors of Albany City*, 40 N. Y. 163.

It is claimed by plaintiffs that the bonds were in the exclusive control and possession of plaintiff Mackay, and were in New York for the purposes of sale and reinvestment, and had thus acquired what is termed in some of the cases a "business situs" in New York. The authorities generally agree that where the owner is not a resident of the state in which the credits are situated, and the credits are in the possession and control of a local agent, who holds them for the purpose of transacting a permanent business, and of investing and reinvesting the proceeds from the principal or interest in such manner that the property or credits comes in competition with the capital of the citizens of the state in which the agent resides, the credits have a situs for the purposes of taxation in the place of residence of the local agent. *New Orleans v. Stempel*, and cases cited, 175 U. S. 318, 20 Sup. Ct. 110, Adv. S. U. S. 110, 44 L. Ed. —. We do not think the facts of this case bring the bonds as to the interest of plaintiff Dey within the rule. As trustee he is the legal owner of an undivided one-half of them. They are the same identical bonds owned by Mrs. Fair at her death. They have not lost their identity simply by being on deposit in a bank in New York City. They have not been sold, and the proceeds reinvested, in New York or elsewhere. We advise that the judgment be reversed, and the court below directed to enter judgment on the findings in favor of plaintiffs for the sum of \$14,222.50 and interest thereon at the legal rate since the 19th day of November 1895.

We concur: CHIPMAN C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to enter judgment on the findings in favor of plaintiffs for the sum of \$14,222.50 and interest thereon at the legal rate since the 19th day of November, 1895.

(62 Kan. 1)

J. B. WATKINS LAND-MORTGAGE CO. v. MULLEN.

(Supreme Court of Kansas. June 9, 1900.)
PUBLIC LANDS—HOMESTEAD ENTRY—EXEMPTIONS—JUDGMENT.

The United States homestead law provides that "no land acquired under the provisions of this chapter shall in any event become liable
61 P.—25

to the satisfaction of any debt contracted prior to the issuing of the patent therefor." Rev. St. U. S. § 2296. Notwithstanding the exemption thus declared, a judgment of a probate court ordering a sale of land, the title to which was acquired under such law, for the payment of debts contracted prior to the issuance of the patent therefor, will be upheld, as against a collateral attack, unless the fact that such debts antedate the patent appears upon the record of the probate court's proceedings.

(Syllabus by the Court.)

Error from court of appeals, Southern department, Central division.

Action by Henry Dickinson against M. A. Mullen. The J. B. Watkins Land-Mortgage Company was substituted as plaintiff. Judgment for defendant was affirmed by the court of appeals (54 Pac. 921), and plaintiff brings error. Reversed.

Bishop & Mitchell and J. H. Mitchell, for plaintiff in error. H. E. Winterburn and J. W. McCormick, for defendant in error.

DOSTER, C. J. This is a proceeding in error from an order refusing to confirm a sheriff's sale of real estate, and from an order setting aside the sale. It was first taken to the court of appeals. That court affirmed the judgment of the court below. From the order of affirmance, error has been prosecuted to this court.

Bridget O'Connor acquired title to the land under the homestead laws of the United States. She died. An administrator of her estate was appointed, who petitioned the probate court for leave to sell the land for the payment of debts. Due notice of the application for leave to sell was given. The order to sell was allowed, the sale made to one S. J. Collins, and an administrator's deed executed to him. From him the land passed to one A. H. Teeter, who executed a mortgage upon it to secure a debt. This mortgage was foreclosed. At the foreclosure sale the plaintiff in error, the J. B. Watkins Land-Mortgage Company, became the purchaser. The defendant in error, Mary A. Mullen, is an heir of the deceased, Bridget O'Connor, and she interposed a proceeding to set aside the sale to the plaintiff in error on the ground that the debts for the payment of which the land was sold were contracted prior to the issuance of the patent to it, and that consequently such sale and the title founded thereon were void under the United States homestead laws. It will thus be seen that the attack made upon the administrator's sale and deed is a collateral one. Can it be maintained? In our judgment, it cannot, because the record in the probate court of the administration of the estate of Bridget O'Connor fails to show that the debts for which the land was sold were contracted prior to the issuance of the patent. The proof that was made as to the time the debts were contracted was made upon the hearing of the motion to confirm, and the proceeding to set aside the sale, and not upon the hearing of the claims

against the estate, nor upon the hearing of the application for leave to sell the land. The evidence offered in proof of the claims did not show when the debts were contracted; nor did the application of the administrator for leave to sell, or the evidence in support of such application, show when the debts were contracted. The language of the probate court granting the application for leave to sell negatives the idea that the debts, to pay which the sale was ordered, had been contracted before the issuance of the patent. That court, among other things, found that "the requirements of law and the orders of the court have been complied with." This, although general in terms and formal in language, is, nevertheless, to the extent to which it should be taken into account on either side, a finding in opposition to the claim that the debts were contracted before the patent issued. Section 2296 of the Revised Statutes of the United States reads as follows: "No land acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuance of the patent therefor." This section, as is seen, provides an exemption from forced sale for the satisfaction of debts antedating the acquisition of title by patent, and full effect has always been given to it by all the courts in cases where the claim of exemption was seasonably made. Wap. on Homest. p. 928. Our attention has not been called to any decision upon the effect of an inadvertent or erroneous judgment of a court of competent jurisdiction denying the claim of exemption, when such judgment was collaterally attacked, as was done in this case. Upon principle, however, we are fully persuaded that such judgment can only be reviewed upon appeal or other direct proceeding, and not in a collateral action. The general rule is that the judgments of courts of general jurisdiction, acting upon a subject-matter within that jurisdiction, are conclusive until reversed or otherwise vacated by a direct proceeding brought therefor. In this respect there is no difference between courts of general jurisdiction over all matters, and courts of general jurisdiction over a single subject-matter. Though the jurisdiction be limited to a particular subject-matter, yet, if authority exists to do anything to that subject-matter that can be done to it, the judgment of the court with respect to it is as conclusive as though pronounced by a court unlimited as to the list of things over which it may exercise jurisdiction. Now, probate courts are everywhere courts of general jurisdiction over the estates of deceased persons, and almost everywhere a conclusive presumption of verity attaches to the record of their proceedings. 1 Black, Judgm. § 284. This view of the character of probate courts, and the binding force of their adjudications, has always been taken in this state. In *Shoemaker v. Brown*, 10 Kan. 383, it was said: "The probate court has jurisdiction to make

final settlements with administrators. Its findings and decisions upon matters within its jurisdiction are in the nature of judicial determinations, and cannot be impeached collaterally except for fraud in obtaining the same." In *Colloway v. Cooley*, 50 Kan. 754, 32 Pac. 376, this court, speaking of the power of the probate court in respect to the proof of wills, said: "Being vested with jurisdiction, its findings and determination are final, unless corrected upon appeal or proceedings in error, and are not subject to collateral attack." In *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86, it was said: "The adjudication of the probate court of a matter within its jurisdiction is as conclusive upon the parties as a judgment of the district court, and it should be allowed to stand unless set aside upon appeal or some direct attack." In *Keith v. Guthrie*, 59 Kan. 200, 52 Pac. 435, it was said: "The probate court is a court of exclusive jurisdiction over the distribution of the estates of deceased persons, subject to appeal to the district court. Its orders made in the exercise of its jurisdiction cannot be collaterally attacked and their effect frustrated by proceedings in other courts. * * * While probate courts are in a sense courts of inferior jurisdiction, they are not inferior in the sense that superior courts will ignore their judgments and orders, or undertake their correction otherwise than upon appeal or by other modes provided by statute."

In the opinion of the court of appeals a quotation is made from one of the notes in 12 Am. & Eng. Enc. Law (1st Ed.) 247, as follows: "There is a tendency in the later decisions in the United States to hold that jurisdiction is not only the power to hear and determine, but also the power to enter the particular judgment in the particular case." If by this is meant that, when a court invested with general jurisdiction over a particular subject-matter wrongly applies the law to a proved or admitted state of facts, its judgment is outside of its jurisdiction and subject to collateral review, we unhesitatingly say that no such tendency is to be observed in the later decisions, because such a tendency, instead of modifying the general rule or introducing an exception to it, would go to its absolute subversion. It may be that some constitutional provisions are framed upon such high principles of natural right or public policy as to be beyond the power of the courts to misapply or wrongly interpret them, and, of course, a statute can be framed in such explicit and positive terms that a court disregarding its requirements would be held to have acted beyond its jurisdiction; but, generally speaking, when a court is invested with power, upon evidence, to determine a state of facts and declare the law applicable thereto, its decision, no matter how erroneous, is conclusive, unless the error of its judgment is apparent upon the face of its record. Herein, we think, lies the mistake of the court of

appeals in this case. The time when the debts of Bridget O'Connor were contracted was a matter of evidence. The date of the land patent was likewise a matter of evidence. Presumptively, the probate court received evidence as to these two matters, and, presumptively, made its order for a sale of the land in view of the proved fact that the debts were contracted after the patent was issued. It had jurisdiction to hear this evidence and to determine these matters, and its judgment, although erroneous in point of fact, is binding upon the interested parties. A stronger case than this one in favor of the theory of the conclusiveness of the judgment of the probate court is *Wolfley v. McPherson* (Kan. Sup.) 59 Pac. 1054. The question in that case was as to the erroneous classification of a demand against the estate of a deceased person. In the opinion it was said: "Counsel for defendant in error attempt to avoid the bar of the statute of limitations upon the theory that the original order of classification, being contrary to the statute, was void, and, therefore, as a void judgment, could be vacated at any time, under Code Civ. Proc. § 603. The judgment was not void. It was erroneous only. In *Gille v. Emmons*, 58 Kan. 118, 48 Pac. 569, we held that 'a judgment entirely outside the issues in the case, and upon a matter not submitted to the court for its determination, is a nullity, and may be vacated and set aside at any time upon motion by the defendant.' That case, however, was entirely unlike this one. In that case a judgment was rendered in favor of a party upon a claim he had never made. In this case a judgment was rendered against a party upon a claim which she did make. Stating to the probate court the character of her claim, she appropriated in her behalf the provisions of the law assigning it to the second class. The jurisdiction of the probate court was thus invoked, not only as to the existence of the claim, but as to the priorities of classification to which it was entitled. The statute regulating the matter of classification is not plain. It required construction to ascertain its meaning, and this court, subsequent to the original order of classification made by the probate court, was called upon to construe it. *Cawood v. Wolfley*, supra. The mistake which the probate court made in construing it was an error only. Every question of law as well as fact was within its jurisdiction to determine. Its determination, though erroneous, was not void." The writer of this opinion, who was also the writer of the one from which the above quotation is made, has some doubt, and at the time of that decision had some doubt, as to whether the doctrine in question was not pushed to an extreme in that case, but as to its entire application to the facts of this case neither he nor his associates have any doubt. Some courts have drawn a distinction between the

records of so-called inferior courts which affirmatively showed jurisdiction upon their face, and those which did not, but were silent as to recitals of jurisdictional facts; holding that the former were conclusive as against collateral attack, while the latter were not. This distinction, we think, cannot be drawn, in this state, as to the judgments of probate courts. The decisions heretofore made as to the character of those courts and the effect of their records preclude us from viewing their judgments as otherwise than conclusive, unless the errors committed by them affirmatively appear on the face of their records. This we believe to be the general rule. *Black, Judgm. § 283*. "A court of record, which has, by statute, all the power that any court could have over a certain subject of jurisdiction, especially if it be a subject of jurisdiction under the general rules of law or equity, is to be regarded (as to cases within that class) as a court of superior jurisdiction, within the rule which presumes the jurisdiction of such courts to render a particular judgment." *Stahl v. Mitchell*, 41 Minn. 325; 43 N. W. 385. This doctrine was distinctly declared as to the judgments of probate courts in *Howbert v. Heyle*, 47 Kan. 58-65, 27 Pac. 116, and *Bradford v. Larkin*, 57 Kan. 90-94, 45 Pac. 69. The judgments of the court of appeals and of the district court are reversed, with directions to the latter court to proceed in the case in accordance with this opinion. All the justices concurring.

(62 Kan. 31)

MUTUAL RESERVE FUND LIFE ASS'N v. BOYER.

(Supreme Court of Kansas. June 9, 1900.)

FOREIGN INSURANCE COMPANY—ACTION AGAINST.

The fact that a foreign life insurance company had at one time transacted business in this state under the license issued by the superintendent of insurance, and that it had filed in his office, as required by statute, its "written consent. Irrevocable," to the institution of suits against it in the courts of this state, and the issuance of summons against it, directed to the superintendent of insurance, does not subject it to suit in this state upon a policy of insurance wholly executed in another state, if previous to the issuance of such policy it had withdrawn or been expelled from this state, and had entirely ceased to do business here.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; *W. G. Holt, Judge*.

Action by *Harry E. Boyer* against the Mutual Reserve Fund Life Association. Judgment for plaintiff, and defendant brings error. Reversed.

Warner, Dean, McLeod & Holden, Miller, Buchan & Morris, and *Geo. Burnham, Jr.*, for plaintiff in error. *McGrew, Watson & Watson, J. O. Fife*, and *W. H. McCamish*, for defendant in error.

DOSTER, C. J. This was an action upon a policy of life insurance. The insurance was taken upon the life of Mrs. Clara A. Boyer in favor of her husband, Harry E. Boyer. Judgment was rendered in favor of the plaintiff, from which the defendant, the insurance company, has prosecuted error to this court. Before pleading to the merits, the insurance company made a motion to set aside the service upon it because of lack of jurisdiction in the court to compel it to respond to the summons issued against it. This motion was overruled. It then filed a plea in abatement to the jurisdiction of the court, based upon the same reasons as those set out in the motion. A demurrer to this plea was interposed by the plaintiff and sustained. The matters averred in the plea, and the evidence adduced in support of the motion, were the same, and the two will be considered together. The allegations of fact contained in the plea were, of course, admitted by the demurrer. These allegations and the evidence submitted under the motion were that the defendant was a foreign life insurance company, and had been at one time authorized to do business in this state, but about two years previous to the taking out of the policy in suit its license had been revoked by the superintendent of insurance, since which time it had not maintained any agency or transacted any business of any character whatever in the state; that application was made for the policy in Kansas City, Mo., through an agent whose office was in that city; that the medical examination of the applicant was made in Kansas City, Mo., by a resident physician there; that the policy was executed at the home office of the company, in New York, and delivered to the insured in Kansas City, Mo.; that the first premium was paid in that city; that the residence of the insured, as stated by her in her application, was in Kansas City, Kan. This last-mentioned fact, although proved under the motion, was not set out in the plea in abatement. All the others were. However, for the purpose of a consideration of the question of law involved, it will be treated as though set out in the plea. The summons to the defendant was served upon the state superintendent of insurance, in accordance with Gen. St. 1897, c. 74, § 104 (Gen. St. 1890, c. 50, § 3283). The material portion of this section reads as follows: "Every such company, on applying for admission and authority to transact business in this state, and as a condition precedent to obtaining any such authority, shall file in the insurance department its written consent, irrevocable, that actions may be commenced against such company in the proper court of any county in this state in which the cause of action shall arise or in which the plaintiff may reside, by the service of process on the superintendent of insurance of this state, and stipulating and agreeing that such service shall be taken and held in

all courts to be as valid and binding as if due service had been made upon the president or chief officer of such corporation. Such consent shall be executed by the president and secretary of the company; authenticated by the seal of the corporation, and shall be accompanied by a duly certified copy of the order or resolution of the board of directors, trustees or managers, authorizing the said president and secretary to execute the same. Actions against any such insurance company may be brought in any county where the cause of action arose, or in which the plaintiff may reside. The summons shall be directed to the superintendent of insurance, and shall require the defendant to answer by a certain day not less than forty days from its date."

We think the motion to set aside the service should have been sustained, and that the demurrer to the plea in abatement should have been overruled. By the rules of comity between states, corporations chartered in one of them may be admitted to do business in the others; but, unless so admitted, they are not subject in personam to the jurisdiction of the courts outside the domicile of their creation. The rules of obligation resting upon corporations, under the doctrine of interstate comity, to respond to the demands of suitors in the courts of the states where they may be doing business, or their exemption from the obligation, are quite well stated in *St. Clair v. Cox*, 106 U. S. 356, 1 Sup. Ct. 359, 27 L. Ed. 224: "While the theoretical and legal view, that the domicile of a corporation is only in the state where it is created, was admitted, it was perceived that when a foreign corporation sent its officers and agents into other states, and opened offices and carried on its business there, it was, in effect, as much represented by them there as in the state of its creation. As it was protected by the laws of those states, allowed to carry on its business within their borders, and to sue in their courts, it seemed only right that it should be held responsible in those courts to obligations and liabilities there incurred. * * * Without considering whether authorizing service of a copy of a writ of attachment as a summons on some of the persons named in the statute (a member, for instance, of the foreign corporation; that is, a mere stockholder) is not a departure from the principle of natural justice mentioned in *Insurance Co. v. French*, 18 How. 407, 15 L. Ed. 451, which forbids condemnation without citation, it is sufficient to observe that we are of opinion that, when service is made within the state upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere in the record—either in the application for the writ or accompanying its service, or in the pleadings or the finding of the court—that the corporation was engaged in business in

the state. The transaction of business by the corporation in the state, general or special, appearing, a certificate of service by the proper officer on a person who is its agent there would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered as evidence in another state, to show that the agent stood in no representative character to the company; that his duties were limited to those of a subordinate employé, or to a particular transaction, or that his agency had ceased when the matter in suit arose." In *Mor. Corp.* § 980, it is said: "If a corporation is not engaged in trade and makes no contracts in a foreign state, justice seems to demand that it should not be subjected to suits in that jurisdiction; and it has been held, therefore, that under these circumstances the agents of the company have no authority to represent it in receiving service of writs or entering a voluntary appearance. Service of process upon the president or other managing agent of a corporation while merely casually present in the jurisdiction of another state does not constitute personal service upon the corporation itself." The cases in which the question has oftenest arisen have been those where service of summons was made upon an officer or agent of a foreign company casually outside the jurisdiction of his own state. In such cases the courts have held almost uniformly that the service was bad. In *Camden Rolling-Mill Co. v. Swede Iron Co.*, 32 N. J. Law, 15, the court said: "Upon general principles, and in the absence of statutory innovations, it is to be regarded as settled, in this state, at least, that if a foreign corporation at the time of the commencement of suit does not do business, and has not any office or place of business, in this state, the contract sued on not having been entered into in this state, such corporation, except by its own consent, cannot be brought within the jurisdiction of this or any court of this state. Under such circumstances, the officers or agents of such foreign corporation, when they come into this jurisdiction, do not bring with them their official character or functions, and are not to be esteemed, out of the sovereignty by the laws of which the corporate body exists, the representatives, for the purpose of responding to suits of law, of such corporate body." In this and other like cases the ground upon which the claim of jurisdiction was rested was that the statute of the state in which the suit was filed provided that process against foreign corporations might be served upon their officers or agents,—as, for instance, an act of Pennsylvania (Act March 21, 1849) which provided: "Process may be served upon any officer, agent, or engineer of such corporation, either personally or by copy, or by leaving a certified copy thereof at the office, depot, or usual place of busi-

ness of said corporation; and such service shall be good and valid in law to all intents and purposes." *Phillips v. Library Co.*, 141 Pa. St. 402, 21 Atl. 640. However, as against such contentions, the view of the courts has been that the operative sphere of the statute was limited to cases in which the foreign corporation was subject, upon general principles of jurisdiction, to suits in the courts of other states than those of its creation. Thus, in *Camden Rolling-Mill Co. v. Swede Iron Co.*, supra, it was said: "We find thus a mode is prescribed of effecting service of process on foreign corporations, but the question still remains, in what cases can they be so served? Can they be so served when, upon general principles, the courts of this state have no jurisdiction? The statute does not say so. There is not a word in it indicative of an intention to amplify the capacity of the court with regard to that class of cases in which these creatures of foreign laws are parties defendant. The statute does not give any new right of suit, nor does it purport to take away any of the privileges of foreign corporations. It simply appoints a method of bringing corporations invested with a foreign character into the courts of this state, when such courts have jurisdiction over them. We think that the act in question has no scope beyond this. It may be further observed that the interpretation contended for in behalf of the plaintiff is one that could be judicially adopted only by force of the plainest manifestation of legislative intent. It would seem to be an improbable construction, for it is difficult to believe that it was the design to place within the jurisdiction of our courts all the corporations of the world, merely from the fact that a director, clerk, or other subordinate officer happened to come upon the territory of the state."

The precise question, leaving out of view the point next to be noticed, concerning the nature of the authority to the superintendent of insurance required by our statute from foreign life insurance companies, was determined in *People v. Commercial Alliance Life Ins. Co.* (Sup.) 40 N. Y. Supp. 269. In that case it appeared that a judgment had been rendered in the state of Maine against the insurance company. The judgment was sued upon in New York. The statute of Maine provided for service upon the agents of foreign life insurance companies, with a proviso that, if no such agent could be found, service might be made upon the insurance commissioner. The company had ceased to do business before the institution of suit against it. In the case cited the supreme court of New York ruled and remarked as follows: "The judgment must stand, if at all, on the service made on the state insurance commissioner, which was on the 3d day of July; and the referee found, in substance, that that service was ineffectual to bind the company in New York, because on that date

the company was not doing business in the state of Maine, and that the Maine court had no jurisdiction of the company to render a judgment enforceable outside of the state of Maine. When a foreign corporation undertakes to transact business in a state other than that in which it is incorporated, it undoubtedly submits itself to the authority of the courts of that other state, and will be bound by the statutory provisions respecting such courts obtaining jurisdiction over it. *Gibbs v. Insurance Co.*, 63 N. Y. 114. While this Commercial Alliance Company was transacting business in the state of Maine, it was subject to the provisions of the statute of Maine respecting the service of process in an action against it on the state commissioner of insurance, in the absence of any authorized agent of the company upon whom service might be made. But that subjection does not last forever. As the Commercial Alliance Insurance Company had ceased to do business on the 1st day of July, 1894, had withdrawn from the state, and had no authorized agent upon whom service might be made after that date, the substituted service on the state commissioner would not bind it, as equivalent of personal service. The effect of the statute of Maine was to constitute the insurance superintendent the agent of the company to receive process under certain circumstances, viz. while such company was doing business in the state. While so doing business, the superintendent was empowered to receive process, if there were no agent of the company upon whom it might be served. But after the 30th of June, 1894, it was not a foreign corporation doing business within the state of Maine, and the Maine courts had no jurisdiction over it to render a judgment in personam against it, on substituted service. Whether the judgment may stand as one enforceable against property of the company in Maine, it is not necessary to consider."

The claim of the defendant in error in this case in favor of the validity of the service of summons upon the superintendent of insurance, and the consequent jurisdiction of the court, is rested upon that portion of our statute hereinbefore quoted which requires foreign life insurance companies, as a condition precedent to the transaction of business in the state, to "file in the insurance department its written consent, irrevocable, that actions may be commenced against such company * * * by the service of process upon the superintendent of insurance of this state," etc. It must be admitted that this statute introduces an element of difficulty in the question. If it were not for the statute, no reasonable doubt could exist, we think, as to lack of jurisdiction of the courts of this state over the plaintiff in error. The instrument filed with the superintendent of insurance was in the nature of a power of attorney. What meaning must be given to the term "irrevocable," used in this power

of attorney? Does it mean, as the word implies, "never to be revoked; never to be abrogated, annulled or withdrawn"? We cannot think it bears such signification. It is a cardinal rule in the interpretation of statutes that the words used in them are not necessarily to be taken in their literal and absolute sense, but in that sense which will subserve the purpose the lawmakers had in using them. The spirit and policy of a statute must be looked at, rather than the literal definition of the words employed. If the word "irrevocable" was used in its literal and unqualified sense, the power conferred will last, therefore, as long as the life of the insurance company, though that be a thousand years, and that, too, though the company rigidly keeps out of the jurisdiction of this state throughout the whole of such period of time. Though all the business it transacted in this state during the time it acted here under the license of the insurance department be entirely closed out, though every policy issued by it while here be fully paid, yet if, a thousand years hence, a policy holder residing in another state should wish to sue in the courts of this state, the company, under the theory contended for by the defendant in error, must submit to the jurisdiction of our courts. It cannot be that the legislature of this state, in the enactment of the statute quoted, designedly made provision for cases so far in the time to come, and in which both the present and future citizens of this state could have no possible interest. The purpose of the statute was to provide our own citizens with a local forum for the trial of controversies with foreign life insurance companies during the time such companies were enjoying the privilege of being allowed to transact business within our jurisdiction under the favor and protection of our laws, with the like privilege to citizens of other states to resort to the same forum during the same period of time, and perhaps (though it is not necessary for the purposes of this case to so decide) to provide for our citizens a local forum in which, after the withdrawal or expulsion of foreign life insurance companies, to sue upon contracts made by them during the period they transacted business here. As before remarked, the instrument of consent filed with the superintendent of insurance is in the nature of a power of attorney. There is, we think, no difference in respect to revocability between a power of attorney executed between private individuals, as a matter of contract, and one authorized or required by statute between a private individual and a public officer. All powers of attorney are revocable by the donor of the power, except when coupled with an interest in the donee. Though they be by their terms irrevocable, they nevertheless may be revoked by the donor, except in cases where the donee has an interest in their continuance. It may be conceded that the superintendent of insurance has an in-

terest, as a public representative, in the continued exercise of the power conferred upon him to accept service for foreign life insurance companies, but that interest must surely terminate with the termination of the subject-matter in respect to which the authority was conferred. When, within the intent of the parties to the instrument, there no longer remains anything for the authority to act upon, the power to act must of necessity end. "Where the agency was created for the purpose of performing some specific act or acts, it will be terminated by the accomplishment of the purpose which called it into being. Having fulfilled its mission, it is henceforth functus officio." *Mechem, Ag. § 201.* With the withdrawal of the insurance company from this state, the subject-matter in respect to which the power was conferred, to wit, the business here transacted by the company, terminated; and, with the probable exception above mentioned, the company ceased to be amenable to our jurisdiction. In the case under consideration the motion to set aside the service, and also the plea in abatement, set forth in positive terms that the insurance company had ceased to do business in this state long before the policy in suit was issued, that long before that time it had ceased to maintain here any agencies for the transaction of business, and that the contract of insurance sued upon was executed wholly outside this state. Now, as to what should be regarded as doing business or maintaining agencies in this state, or as to when a contract should be regarded as having been made without this state or within it, we do not assume to determine or intimate. It may be that some of the several instruments of which, as the record showed, the contract in suit was composed, were executed in this state, and therefore that such contract should be, in law, regarded as made within this state. It may be that the insurance company was in fact doing business in this state, notwithstanding its claim of abandonment. It may be that the mere collection of premiums in this state from citizens here is such a doing of business as to subject the company to the jurisdiction of our courts. Issues of fact as to all these possible cases were tendered by the insurance company. In our judgment, they should have been tried, instead of ruling their legal sufficiency against the company.

Near the close of the trial that was had upon the merits, after the demurrer to the plea in abatement had been sustained, the agent who solicited Mrs. Boyer's application for insurance gave some testimony from which it might be inferred that the solicitation of the application was made by him in Kansas, and not in Missouri. However, this testimony was by no means direct, nor was it offered for the purpose of establishing such solicitation here as a fact in the case. It seemed to have been casually elicited, as prefatory or incidental to other matters. It was

not sufficient to justify a claim that so much of the insurance transaction was performed in this state. Besides, it was not given upon the issue tendered either by the motion or the plea in abatement, and, therefore, however explicit and positive it might have been, it could not be considered by us. Our judgment is that the case should be reversed for a trial upon the plea in abatement, and, of course, if the issue as to jurisdiction should be found against the company, then for a new trial upon the merits of the case. It is therefore reversed for proceedings in accordance with this opinion. All the justices concurring.

(62 Kan. 28)

BOARD OF COM'RS OF CLOUD COUNTY v. VICKERS.

(Supreme Court of Kansas. June 9, 1900.)

DEFECTIVE BRIDGE—NEGLIGENCE OF COUNTY —PLEADING—NOTICE OF DEFECTS—INDEPENDENT CONTRACTOR—IMPEACHMENT—INSTRUCTIONS.

1. A petition alleged that plaintiff was damaged by the negligent adoption by the board of county commissioners of defective plans for the construction of a bridge, in consequence of which the plaintiff's husband, while working under the same while it was building, was killed by the fall of the structure. The verdict of the coroner's jury, returned after an inquest over the body of the deceased, was attached to the petition, in which the cause of the death was found to be an "accidental falling of a stone-arch bridge." *Held*, that the finding of the coroner's jury, made a part of the petition, did not narrow the alleged cause of the death so as to confine it to an unforeseen and fortuitous circumstance.

2. The board of county commissioners was notified, before the plans and specifications for the bridge were adopted by it, that a bridge built in accordance therewith would not stand, and there was testimony of competent engineers that the plans were inadequate. *Held*, that such information was sufficient notice to the chairman of the board, within the requirements of the statute.

3. The contractor being required to build the bridge upon a defective plan adopted by the county, for which reason it fell, the latter cannot avail itself of the defense that the negligent acts of an independent contractor caused the damages complained of.

4. It was sought to impeach a witness for plaintiff by showing that he made statements before the coroner's jury contradicting his testimony given in this case. *Held*, that it was competent for plaintiff to prove that before the accident the witness made statements in harmony with his testimony upon the stand. *State v. Petty*, 21 Kan. 54, followed.

5. The practice of incorporating the entire opinion of this court into an instruction is disapproved; and the trial court ought not to embody the language used by this court in an instruction, prefaced with a statement that this court is the authority from which it is derived.

(Syllabus by the Court.)

Error from district court, Cloud county; *F. W. Sturges*, Judge.

Action by *E. J. Vickers* against the board of commissioners of Cloud county. Judgment for plaintiff, and defendant brings error. Affirmed.

L. J. Crans, for plaintiff in error. R. W. Turner and Pulsifer & Alexander, for defendant in error.

SMITH, J. A. L. Vickers was killed by the falling of a stone-arch bridge which at the time was being erected by J. M. Hass under a contract with Cloud county. The deceased was a common laborer. He assisted in the removal of certain wooden half-circles over which an arch of the bridge had been built, when the latter collapsed, causing stone and earth to fall upon him. This action was prosecuted by E. J. Vickers, his widow, to recover from the county her pecuniary loss by reason of his death. She alleged that the members of the board of county commissioners entered into a contract with Hass, and adopted plans and specifications for a bridge which were defective and dangerous; that they were informed that a bridge built in accordance with such plan would not stand; and, further, that the board of county commissioners retained to itself supervision of the work, and appointed one William McCall to superintend the same, and that the latter negligently omitted to notify Vickers of the dangers surrounding him. The contract between the county and J. M. Hass was attached as an exhibit to the petition; also, the verdict of a coroner's jury, returned after an inquest over the body of the deceased, in which it was found that his death was caused by an accidental falling of the bridge under which he was working at the time. The answer of defendant below alleged contributory negligence upon the part of Vickers, in that he carelessly and recklessly dislodged and removed stones composing a part of the bridge upon which he was then working under the direction of said Hass. There were a verdict and a judgment for the plaintiff.

The case has been in this court before. *Vickers v. Cloud Co.*, 59 Kan. 86, 52 Pac. 73. In the former decision it was held that the statute giving a right of action applies as well to those who are rightly under the bridge as to those who are traveling over it, and, further, that the statute, being remedial in its nature, should be liberally construed.

Counsel for plaintiff in error contends that the court below, in passing upon a demurrer filed by the county, considered as a part of the petition certain offers of proof made by the plaintiff below when the case was first tried, in 1895, as appears from the case-made of that trial, incorporated in the record before us. We do not understand, however, that this offer of proof was regarded as a part of the petition at the last trial. In the original suit the members of the board of county commissioners were joined as defendants with the county. The court sustained a demurrer interposed by defendants upon the ground that the causes of action were improperly joined, but permitted the plaintiff to allow her original petition in the case to stand against the board of county commis-

sioners. There is nothing in this record which definitely points out that the court, on the hearing of the demurrer, considered anything outside of the allegations of the petition upon which the last action was tried. It is contended that the demurrer should have been sustained, for the reason that, notwithstanding the specific allegations of negligence upon the part of defendant below, the verdict of the coroner's jury, attached to the petition as an exhibit, showed, as a result of the inquest, that the jury found the cause of the death was an "accidental falling of a stone-arch bridge." It would be a strained meaning to put upon the word "accidental" to say that its use in such a petition, coupled with the various averments of negligence charged against the county, narrowed down the alleged cause of the death by making it due to something unforeseen and fortuitous. The setting out of this coroner's verdict was wholly unnecessary and surplusage, yet, considering it as properly a part of the petition, we do not think the cause of the death stated therein controls the other allegations of the petition; nor can we say that the use of the word "accidental," so employed, is inconsistent with the accompanying averments that the deceased was killed through the negligent acts of the defendant below.

There was abundant proof that both the chairman and members of the board of county commissioners had express notice, at the time the plans and specifications for the bridge were adopted, that the same were defective and dangerous. This information was given them by Mr. Hass, who built the bridge. He told them, if constructed upon the plan adopted, it would not stand; and several competent civil engineers, in confirmation of Mr. Hass' prediction, testified, after examining such plan and specifications, that the same were wholly inadequate, and gave as their opinions that a bridge built in accordance therewith would fall. This knowledge, brought home to the members of the board before the defective plans were adopted, was sufficient notice to the chairman, within the requirements of the statute. The bridge was contracted to be built according to a plan and specifications at variance with the principles of applied mechanics. Requiring it to be so built was notice in advance that the contractor must necessarily erect an unsafe bridge. Nor can the defense avail that the work was committed to the charge of an independent contractor, over whom the county had no control. Inasmuch as the contractor in this case performed the work in conformity to defective plans, and had no option to deviate therefrom, his course was marked out for him by the county board. He did what he was employed to do. The adoption by the board of such defective plans brings the case within the exception to the general doctrine that the negligent acts of an independent contractor, by which a serv-

ant of the latter is injured, exonerate the person who has let the contract. *Water Co. v. Ware*, 16 Wall. 578, 21 L. Ed. 485; *City of Chicago v. Langlass*, 68 Ill. 361; *Jordan v. City of Hannibal*, 87 Mo. 673; *Prideaux v. City of Mineral Point*, 43 Wis. 513; *Gould v. City of Topeka*, 32 Kan. 485, 4 Pac. 822.

Hass, the contractor, testified on behalf of plaintiff below. By way of impeachment, testimony given by him before the coroner's jury was read, tending to contradict his statements made upon the witness stand. To corroborate him, plaintiff introduced testimony tending to show that before the accident Hass had made statements concerning the defective condition of the bridge in harmony with the testimony last given by him in this cause. This testimony was properly admitted. In *State v. Petty*, 21 Kan. 54, 59, 60, this court, speaking by Horton, C. J., said: "It is the general and almost universal rule that evidence of what the witness has said out of court cannot be received to fortify his testimony. Corroborative statements of this character are very easy of manufacture, and, if admitted, might oftentimes be made the means of great imposition. To this general rule, however, there are exceptions. Thus, when a witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, then it may be shown that he made similar declarations at a time when the imputed motive did not exist; and where there is evidence in contradiction, tending to show that the account of the transactions given by the witness is a fabrication of a late date, it may be shown that the same account was given by him before its ultimate effect and operation, arising from a change of circumstances, could have been foreseen. 1 *Whart. Ev.* § 570; *Robb v. Hackley*, 23 *Wend.* 49; *People v. Finnegan*, 1 *Parker, Cr. R.* 147; *Dailey v. State*, 28 *Ind.* 285; *Conrad v. Griffy*, 11 *How.* 480, 13 *L. Ed.* 779; 2 *Phil. Ev. (Cov. & H. notes)* 979. See, also, *State v. Dennin*, 32 *Vt.* 158; *Coffin v. Anderson*, 4 *Blackf.* 395; *Henderson v. Jones*, 10 *Serg. & R.* 322.

We have read the instructions given, and think that the law of the case was fully presented to the jury. The first instruction incorporated in full the opinion of this court. We do not commend this practice, and it ought to be discouraged. The jury are apt to be misled by it, especially when facts are stated or commented upon in the opinion. The jury should receive the law from the trial court. The expressions of this court are for the guidance of the former, and we consider it bad practice to embody our language in an instruction, when it is prefaced with a statement that this court is the authority from which it is derived. Here, however, no prejudice has resulted to plaintiff in error which counsel has pointed out.

The findings of the jury, taken together, are strongly against the defendant below, and they seem to be well supported by the evi-

dence. The verdict was moderate in amount. Several of the assignments of error set out in the brief of plaintiff in error do not refer to the pages of the record. These we cannot consider. The judgment of the court below will be affirmed. All the justices concurring.

WINANS v. MANNING et al.

(Supreme Court of Kansas. June 9, 1900.)

Where mortgagee urges mortgagor to secure insurance for the property, and negotiates with several companies, and finally one accepts the risk on application of mortgagor, and after the property is destroyed by fire it is found that the insurance company is worthless, the mortgagee is not to be treated as an insurer liable for the loss.

Error from district court, Neosho county; L. Stillwell, Judge.

Action by Joel Winans against William Manning and others. Judgment for defendants, and plaintiff brings error. Affirmed.

C. A. Cox, for plaintiff in error. J. L. Denison, for defendants in error.

PER CURIAM. Action for foreclosure of mortgage on mill property, the mill thereon having been destroyed by fire before the action was begun. One branch of the case involved the question whether the mortgagee, William Manning, and his agent, the Matthewson-Snyder Investment Company, should be held liable for the loss of the mill because the insurance had thereon proved to be valueless. Upon the testimony the trial court found that no liability existed. The mortgagor agreed to keep the premises insured, and, in case he failed to do so, that the mortgagee might do so, and might have a lien for the expense of the insurance. There appears to have been some delay and difficulty in obtaining the insurance. The mortgagee urged Winans, the mortgagor, to secure the insurance, and assisted him to some extent in finding it. The mortgagee negotiated with several companies, and finally one of them accepted the risk. Winans signed an application, and furnished the amount of the premium, and these were forwarded to the company by the agents of the mortgagee. After the mill was destroyed by fire, and an effort made to collect the insurance, it was discovered that the insurance company was worthless. In view of the finding of the court and the facts upon which it is based, we cannot say that the mortgagee is to be treated as an insurer who is liable for the loss.

The other branch of the case is a controversy between the mortgagor and the Johnsons and Kyles as to a number of real-estate transactions, including the conveyance by Winans to them of the land upon which the mill was situated, and a bond for a deed from Johnson and Kyle to Winans, conveying back the same property in case of certain payments being made and certain things being done by

Winans. On the issues formed between them the trial court found in favor of the Johnsons and Kyles. A reading of the record shows that the finding of the court is based upon conflicting testimony and the inferences to be drawn therefrom, and this concludes the inquiry here. The judgment will be affirmed.

HANSEN et al. v. DUNHAM.

(Supreme Court of Kansas. June 9, 1900.)

APPEAL—REVIEW.

Findings by the trial court will not be disturbed if there is sufficient evidence to sustain them.

Error from district court, Johnson county; J. T. Burris, Judge.

Action by Peter A. Hansen and others against Alberta Dunham. From the judgment, Hansen and others bring error. Affirmed.

A. Smith Devenney, for plaintiffs in error.
I. O. Pickering, for defendant in error.

PER CURIAM. After a careful reading of the evidence and briefs of counsel, we think this case comes clearly within the rule that findings made by the trial court will not be disturbed if there is sufficient evidence to justify them. The evidence heard in the court below was conflicting, and we cannot say that any of the findings are not supported by some testimony. See *Beaubien v. Hindman*, 37 Kan. 227, 15 Pac. 184; *Thompson v. Pfeiffer*, 60 Kan. 409, 56 Pac. 763. The judgment of the court below will be affirmed.

(62 Kan. 111)

STATE v. START.

(Supreme Court of Kansas. June 9, 1900.)

CRIMINAL LAW—FORMER JEOPARDY—DISCHARGE OF JURY—AMENDMENT OF RECORDS.

1. *State v. Allen*, 54 Pac. 1060, 59 Kan. 758, reaffirmed.

2. Neither the district court of a county to which a criminal action has been transferred by change of venue from another county of the same district, nor the judge of the district at chambers, has power to vacate or amend the journal entry of a judgment or order of the court of the county from which the removal was made, so as to show a legal discharge of the jury at a former trial had in such county, and thereby defeat the defendant's plea of former jeopardy, based upon the record as it stood when the change of venue was made.

(Syllabus by the Court.)

Appeal from district court, Hodgeman county; J. E. Andrews, Judge.

Al Start was convicted of manslaughter, and appeals. Reversed.

H. Fierce, G. Polk Clinic, S. I. Hale, Chas. Bucher, and J. W. McCormick, for appellant.
A. A. Godard, Atty. Gen., H. L. Andrews, Rush Co. Atty., and A. H. Wilson, Hodgeman Co. Atty., for the State.

OSTER, C. J. This is an appeal from a judgment of the district court of Hodgeman

county sentencing the appellant for the crime of manslaughter in the fourth degree. The homicide occurred in Rush county. A trial was had in that county at the October term for 1898, which resulted in a conviction. From the judgment then pronounced an appeal was taken to this court. The judgment was reversed, and a new trial ordered. *State v. Start*, 60 Kan. 256, 56 Pac. 15. A trial was again had in Rush county at the October term, 1899, but the jury failed to agree. The record of this second trial, after reciting the impanelment of the jury, the trial of the case, and the submission of it to the jury, concludes in the following language: "Thereafter, on the 14th day of October, 1899, the jury, not having agreed upon a verdict, was by the court discharged." The record contains no statement indicating the reasons for the discharge of the jury, other than the fact that they had not agreed upon a verdict. A change of venue to Hodgeman county was taken. Rush and Hodgeman counties are in the same judicial district, and are, of course, presided over by the same judge, and all the trials herein spoken of were had before him. The case was twice tried at the regular December term of Hodgeman county for 1899. At each of these trials the defendant interposed a plea of former jeopardy. Demurrers to these pleas were sustained, and the defendant ordered to trial. At both trials the jury disagreed, and the case was ordered to be again heard at an adjourned term in January, 1900. At this adjourned session the defendant again interposed a plea of former jeopardy; reciting his trial at the previous October term in Rush county, and the unauthorized discharge of the jury without a verdict. Upon the hearing of this plea the attorneys for the state moved the court to correct the journal entry of the proceedings of the district court of Rush county so as to show legal reasons for the discharge of the jury in that county, and to thereby conform to what was claimed to have been the actual facts. This motion was sustained, and an amended journal entry of the proceedings in Rush county prepared and signed by the judge. This journal entry recited reasons sufficient in law for the discharge of the jury in Rush county. The plea of former jeopardy was thereupon overruled, and a trial had, which resulted in the judgment of conviction before stated.

In *State v. Allen*, 59 Kan. 758, 54 Pac. 1060, it was held that: "Where a defendant has been placed upon trial on a criminal charge, and the jury is duly impaneled and sworn, the court cannot arbitrarily discharge the jury before a verdict is returned; and a discharge in such case, unless an absolute necessity, and for reasons which are sufficient in law, will operate as an acquittal. The essential facts upon which the discharge is based, and the finding of the court thereon, must be entered of record; and unless the record shows the existence of such facts,

and the decision of the court thereon, and that they constitute sufficient grounds for discharge, the defendant cannot again be put on trial for the same offense. A record entry that the jury, not having agreed, is discharged, does not show inability to agree, or any necessity for a discharge." The facts of that case and of this one are identical in effect, and the records of the two cases are very nearly identical in language. No question is raised by the state in this case as to the controlling authority of the one cited. The record of the proceedings of the district court of Rush county at the October term for 1899, as first made up, utterly failed to show any sufficient reason for the discharge of the jury. Under the decision in *State v. Allen*, supra, the defendant thereupon became entitled to a discharge from custody. The only question, therefore, is, of what effect were the proceedings in Hodgeman county, purporting to amend and correct the record of Rush county? Our decided judgment is that they were of no effect whatever. The constitution of the state declares that: "The district courts shall have such jurisdiction in their respective districts as may be provided by law." Article 3, § 6. "The several justices and judges of the courts of record in this state shall have such jurisdiction at chambers as may be provided by law." Article 3, § 16. The statutes provide that: "There shall be in each county organized for judicial purposes, a district court, which shall be a court of record, and shall have general original jurisdiction over all matters both civil and criminal not otherwise provided by law," etc. Gen. St. 1897, c. 85, § 1; Gen. St. 1899, c. 28, § 1. "The judges of the district courts, within their respective districts, shall have and exercise such power in vacation or at chambers as may be provided by law, and shall also have power in vacation to hear and determine motions to vacate and modify injunctions, discharge attachments, vacate orders of arrest, and to grant or vacate all necessary attachments, vacate orders of arrest, and to grant or vacate all necessary interlocutory orders," etc. Gen. St. 1897, c. 85, § 2; Gen. St. 1899, c. 28, § 2. The first of these statutes confers power upon the courts in term time. The second one confers power upon the judges at chambers. Elsewhere in the statute may be found provisions which, as to particular matters, confer power either upon the court or upon the judge; but none of them confer the power that in this case was exercised by the judge of the district court of Hodgeman county, either as a judge or as a court. It will be borne in mind that the order in question was made by the district court of Hodgeman county as to a case in the district court of Rush county, or, rather, as to a case which had been in the last-named county. Now, while these two counties are in the same judicial district, and the district courts of each of the counties are presided

over by the same judge, yet they are not the same courts. They are separate and independent of each other,—as much so as though they were not in the same district. For convenience in the administration of justice, the state is divided into districts, each district embracing the number of counties assigned to it; but the counties so assigned are, for all judicial purposes, in every sense of the word, independent of one another. The district court of Hodgeman county had, therefore, no jurisdiction whatever to make an order affecting a case in Rush county, or vacating or correcting the records of the district court of that county, merely because the judge of the two counties happened to be the same. To allow such power to be exercised would logically lead to the obliteration of all distinctions between the district courts of the different counties, and to lodge in the judge of the district the power to hold court for the entire district in such single county as he might choose.

Nor, viewing the judge making the order at his chambers, and the order as one made in the vacation of the district court of Rush county, can the authority exercised be upheld. However, the state does not claim that the order was made at chambers in vacation. If such claim were made, it would, of necessity, have to be brought within the terms of the final clause of section 2 of the statute above quoted, which reads, "and to grant or vacate all necessary interlocutory orders." But the order in question, if interlocutory in any sense, was not so in the sense which justified the judge at chambers to make it. It was an order vacating the entry of one judgment, and directing the entry of another, and such kind of order can only be made by the court. There are no statutory provisions conferring power upon the district courts to vacate or amend their orders and judgments which by their terms are made applicable in criminal cases, and, of course, no statutory power in the judges at chambers to make such vacation or amendment in such class of cases. If the power to vacate and amend orders in criminal cases exists, it is either inherent in the court or the judge, or is allowable under the terms of section 568 et seq. of the Code of Civil Procedure. It may be that in respect to such matters the Code of Criminal Procedure appropriates to itself the provisions of the Code of Civil Procedure for the vacation or amendment of judgments and orders; but, if so, the power to vacate or amend must be exercised by the court, and not by the judge, because the sections of the Code of Civil Procedure referred to confer power upon the court, not upon the judge. It is probably true that, independently of the statute, power exists to vacate or revise the entry of judgments or orders; but, if so, it is the court, not the judge, which possesses the power. Whenever such power is spoken of, it is spoken of

as belonging to the court, and is never spoken of as belonging to the judge. 1 Black. Judgm. § 297. Upon the other hand, the rule is that the powers of a judge at chambers are only such as have been conferred upon him by statute. "The powers of judges at chambers are usually regulated by statute or rules of court, and the general doctrine is that all judicial business must be transacted in court, whether there be an express direction to that effect or not; and that such business as may be transacted out of court is exceptional, and must find its express authority in statute." 4 Enc. Pl. & Prac. 337; *In re Barnhouse* (Kan. Sup.) 58 Pac. 480. "When a law authorizes or contemplates the doing of a judicial act, it is and must be understood to mean that the court, in term time, may or must do it, and not the judge in vacation, unless expressly conferred by the words of the law." *Reyburn v. Bassett, McCahon*, 86. That an order for the vacation or correction of a judgment is not an interlocutory order which may be made by the judge in vacation is sufficiently evidenced by the fact that the power to amend or vacate is limited to the courts, as such, by section 568 et seq. of the Civil Code, above cited. It would be startlingly strange, indeed, to hold that, although the exercise of the power of vacation or amendment of judgments and orders in civil cases is limited to the courts in term time, yet the same power may be exercised in criminal cases by the judge, out of court, in vacation. It will be observed that it is not merely the power to vacate or modify judgments and orders which in fact have been rendered that by the terms of section 568 of the Civil Code is limited to courts, but it is also the power to vacate or amend judgments which have been irregularly, undesignedly, or mistakenly entered which is likewise limited to courts, and thus by implication denied to judges. When an entry of judgment has been made, whether by mistake or otherwise, the court is bound to treat it as a judgment until it can be gotten rid of in the usual and formal way. There is no more power in the judge at chambers to vacate the entry of a judgment never rendered, than there is to vacate the entry of one which in fact was rendered. In the case under consideration a judgment was entered upon the records of the district court of Rush county. That judgment, so it was claimed, was incorrect, irregularly obtained, or that the entry of it was made by mistake of the clerk. Nevertheless, it had to be treated, for the time being, as a judgment. It was the only evidence of the action of the court. It imported absolute verity, and was entitled to stand as a judgment until by proper proceedings it could be vacated or corrected. Hence, for the purpose of the power to vacate, no distinction can be drawn between a judgment and an entry purporting to be a judgment. For

the purpose of the case we are considering, or any other like case, they are one and the same thing.

But we are not without authority upon the precise question. In the case of *Devine v. People*, 100 Ill. 290, an order of court improvidently settling an erroneous bill of exceptions in a criminal case was made. Upon the discovery of that fact, the judge who tried the case settled a supplemental bill of exceptions at his chambers, in another county, so as to correct the errors of the original bill. The supreme court refused to consider the supplemental bill, saying: "It is a well-recognized principle that judges can exercise no judicial functions in vacation, except such as they are specially authorized to do by statute. It is true, the mere settling and signing of a bill of exceptions may not be the exercise of judicial power; yet, when once it is signed, sealed, and filed in the proper office, it becomes as much a part of the record as an indictment or declaration when so filed, and, like other portions of the record, it imports a verity, and no plea or averment will be admitted which questions the truth of what it imports. If what purports to be a record has been so made up by the clerk or other official as to not speak the real facts, it must be amended so as to conform to them; and this can only be done by the court whose record is sought to be amended, and must, as a general rule, be done on due notice to all such as will be affected by the amendment. It would certainly be competent for the legislature to authorize judges to hear and determine questions of this character in vacation, but we are aware of no statute that authorizes them to do so." To the same effect are the cases of *Ingram v. Belk*, 2 Rich. Law, 111; *Garlington v. Copeland*, 32 S. C. 58, 10 S. E. 616. Some contrary holdings have been made in Louisiana, but they are not in harmony with any of the other authorities, and, unless consonant with the rules of the civil law, which prevail in that state, are erroneous in principle. See *State v. Folke*, 2 La. Ann. 744; *Picard v. Prival*, 35 La. Ann. 370.

But the order for the amendment of the record must be regarded as erroneous for another reason, which appears to us equally as conclusive as the one above given. Whether regarded as an order made by the district court of Hodgeman county, or by the judge of the district court of Rush county at his chambers in Hodgeman county, the order was made as to a case which had no existence or status in Rush county, the county in which it was designed to operate. There was no case in Rush county. The case which at one time had been upon the docket in that county had been transferred to another county. After the transfer the case was pending in Hodgeman county, and wholly pending there, and the district court of Hodgeman county had jurisdiction over the defendant only in that county; but the order was made to operate upon the defendant as though he were still in Rush

county. Neither the court nor the judge could make an order affecting the rights of the defendant, except in the jurisdiction in which his case was triable, or, rather, could make an order operative within a jurisdiction in which he was not being held for trial. When the venue of a case has been changed from one county to another, the court from which the order of removal is made loses jurisdiction over the case, and jurisdiction over it henceforth becomes lodged in the court to which the change has been made. There may be some exceptions to this as a general proposition, but in the main the rule as stated must be considered as sound, because two courts cannot have jurisdiction at the same time over the same parties and the same subject-matter. A case declarative of the principle is *Keen v. Schnedler*, 92 Mo. 516, 2 S. W. 312. In that case it was held that a court to which the venue of a case had been changed had no jurisdiction to allow a bill of exceptions as to matters occurring in the court from which the removal had been made.

But, after all, the general principle applicable to this case is one that has been frequently decided in this state, and that is that a court has no power in vacation to render a judgment in a cause. In the case of *In re Millington*, 24 Kan. 224, it was ruled that judicial proceedings not had at a regular and valid term of the court are void. In the case of *Earls v. Earls*, 27 Kan. 538, it was held that a judgment of divorce could not be rendered in vacation in a case which had been tried at the preceding term. In the case of *Cox v. State*, 30 Kan. 202, 2 Pac. 155, it was held that where, by operation of law, a term of court in a certain county expired, in order to the commencement of a term in another county of the same district, a case on trial before a judge pro tem. in the first-mentioned county could not be concluded in that county after the expiration of the term there, and while the regular judge of the district was holding the other term in the other county. In the case of *Packard v. Packard*, 34 Kan. 53, 7 Pac. 628, an action for divorce and alimony had been tried in one of the counties. A judgment granting the divorce was rendered before the close of the term, but the matter of alimony was taken under advisement, and was determined after the term, and in another county. It was held that that part of the judgment relating to alimony should be set aside and held for naught.

Our conclusion is that the order made in Hodgeman county correcting the journal entry of proceedings in Rush county was made without jurisdiction either in the court or the judge, and that it could not operate against the defendant's plea of former jeopardy; and, inasmuch as no similar order can ever be made without the defendant's consent, he is entitled to his discharge upon his plea. The judgment of the court below is therefore reversed, with directions for the appellant's discharge. All the justices concurring.

(62 Kan. 61)

CITY OF KANSAS CITY v. ORR et al.

(Supreme Court of Kansas. June 9, 1900.)

DEFECTIVE STREETS—LIABILITY OF CITY—VIOLATION OF SUNDAY LAW.

1. It is the duty of a city to keep its streets reasonably safe and convenient for all those who rightfully use them, or who have occasion to pass over them for purposes of business, convenience, or pleasure.

2. Where a railway is built upon a street by authority of a city, and a railway employé in the performance of his ordinary duties walks over the street, and is injured by reason of a defect in the street, of which the city has or should have knowledge, the city is liable for the injuries sustained.

3. The fact that it may have been the duty of the railway company, under its contract with the city, to construct and keep its tracks in a suitable and safe condition for those who have occasion to pass over the streets, does not discharge the city from its duty to the public to keep its streets in a reasonably safe condition, nor relieve it from liability for the consequences of its negligence in that respect.

4. The fact that one who sustains injury by reason of the negligence or wrongful act of another may have been at the time of the injury acting in disobedience of his collateral obligation to the state which required of him the observance of the Sunday law, will not prevent a recovery from one whose wrongful or negligent act or omission was the proximate cause of the injury.

5. The record examined, and held, that the case was fairly submitted to the jury, and that there was sufficient testimony to sustain the verdict and judgment.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; W. G. Holt, Judge.

Action by Annie Orr, administratrix of J. W. Orr, and others, against city of Kansas City. Judgment for plaintiffs, and defendant brings error. Affirmed.

T. A. Pollock and E. D. Hutchings, for plaintiff in error. Angervine & Cubbison, for defendants in error.

JOHNSTON, J. This was an action by Annie Orr, administratrix of the estate of J. W. Orr, deceased, to recover damages for the death of her husband, J. W. Orr, alleged to have resulted from the negligence of the city. J. W. Orr was a switchman in the employ of the Chicago Great Western Railway Company, who was killed on November 7, 1897, at the intersection of Central avenue and Wood street, in Kansas City. Central avenue, which runs east and west, is a paved and much-traveled street, and Wood street, which runs north and south, is occupied at this point by two tracks of the Kansas City & Northwestern Railroad Company, which are also used by the Chicago Great Western Railway Company, the employer of Orr. The intersection of the streets is planked between the tracks, and also between the rails of the tracks, with planks, which are about 4 inches thick. One of the planks on the inside of the rail was placed from 3½ to 4½ inches from the rail, leaving an opening about 4 inches deep. Space is required for the flanges of the car wheels, but the opening left is al-

leged to have been unnecessarily wide, and, further, that the street had been left in that dangerous condition for more than 30 days prior to the accident. In the early morning of the day mentioned, a train of cars was slowly backed along Wood street and over Central avenue. Orr was traveling alongside of the train, and at the intersection it became necessary for him to uncouple the cars; and it is alleged that for that purpose he went between the cars, stepped into the hole negligently left by the city, and his foot was wedged therein so that he was thrown down and crushed by the wheels of the cars and killed. The defense of the city was that it was not required to keep the streets in a reasonably safe condition for the use of switchmen and other railway employes passing along or over the streets, and, further, that it was not liable for injuries suffered by such persons while engaged in such occupations upon the streets. The answer also included an averment that the injury was the result of contributory negligence. Special findings of fact were made by the jury, which are to the effect that, while the train was backing over Central avenue at the rate of three miles per hour, Orr went between the cars to uncouple them, and stepped in the hole mentioned, which held his foot so that he could not withdraw it, and he was therefore thrown down and run over by the cars. There was a further finding that the space left for the flanges of the wheels at the point of the accident was wider than is usually left for that purpose, and that it had remained in the same condition for more than 30 days prior to the accident. The general verdict was against the city, and the damages were assessed at the sum of \$5,000.

The main contention of the city is that the only duty which it owes to the public with respect to streets is to keep them in a reasonably safe condition for the ordinary purposes of travel; that Orr was not making such use of the streets when he was injured; that he was not a traveler, in the legal sense, and therefore no liability could arise against it for injuries sustained by him on account of defective streets. Cases of our own and other courts are cited in which it is said, in substance, that it is the duty of the city to keep its streets in a reasonably safe and suitable condition for travel in the usual modes, or for the travel that usually passes over them. *Jansen v. City of Atchison*, 16 Kan. 358; *City of Wellington v. Gregson*, 31 Kan. 99, 1 Pac. 253; *City of Emporia v. Schmidling*, 33 Kan. 485, 6 Pac. 893. And it is argued from these that Orr was not using the street for ordinary travel. The cases referred to do not undertake to define the term "traveler," nor do they decide what are the usual modes of travel, or the legitimate uses to which the streets may be put. In most of the cases the purpose of the court was to show that the law does not require the streets to be so maintained as to secure absolute im-

munity from danger in using them, and that the limit of the duty of the city was to keep them in such a condition that persons entitled to the use of the streets could pass over or along them with reasonable safety and convenience. The fact that Orr was a railway employé, and engaged in the performance of his duties upon the street when he was injured, did not, we think, exclude him from the protection of the law, or relieve the city from liability for injuries to him resulting from its negligence. The corporate duty of the city is to keep the streets reasonably safe and convenient for all those who rightfully use them, and who have occasion to pass over them for purposes of business, convenience, or pleasure. The railway was placed in the street with the consent and by the authority of the city. It was one of the ordinary uses to which that street was put, and the employes of the company while engaged in the performance of their duties were required to pass along and over the street. While so engaged they were not travelers, in a technical sense, but they were making an appropriate and legitimate use of the street, and one which was within the contemplation of the city when the right to such use was granted. In determining the duty and liability of the city, the terms "travel" and "traveler" are not to be given a narrow and restricted meaning, but should be held to embrace such legitimate uses as may be made by persons having occasion to pass over them while engaged in any of the duties of life, and persons using the street as Orr was when the injury was sustained. Orr was rightfully in the street, his duties required him to pass along and over it, and he was as much entitled to a safe and convenient place to walk there as the conductor of a street car, the driver of a dray, or other person engaged in his ordinary business. A city is not required to prepare and maintain its streets for unusual and extraordinary uses, such as the moving of heavy buildings or the traveling over the streets with stilts, but the use made of the street by Orr was neither unusual nor extraordinary. It was just such use as was made of the street frequently every day, and which the city must have had in contemplation when the right to such use was conferred. The fact that it may have been the duty of the railway company, under its contract with the city, to construct and keep its tracks in a suitable and safe condition for those who have occasion to pass over the street, does not discharge the city from its duty to the public to keep the street in repair, nor relieve it from liability for the consequences of its negligence in that respect. *Railway Co. v. Stone*, 54 Kan. 83, 37 Pac. 1012. Our conclusion is that it was the duty of the city to keep the streets in a reasonably safe condition for the use of Orr, or any one else who had occasion to pass over the streets while engaged in any of the ordinary pursuits or duties of life. *Fletcher v. City of*

Ellsworth, 53 Kan. 731; 37 Pac. 115; City of Kansas City v. Hart, 60 Kan. 684, 57 Pac. 938; Duffy v. City of Dubuque, 63 Iowa, 171, 18 N. W. 900; McGarry v. Loomis, 63 N. Y. 104; Rehberg v. Mayor, etc., 91 N. Y. 137; McGuire v. Spence, Id. 303; Parker v. Mayor, etc., 39 Ga. 725; Grogan v. Foundry Co., 87 Mo. 321.

An objection is made to a recovery because of an alleged violation of the Sunday law. The accident occurred on Sunday morning. The statute forbids all labor on that day, except works of necessity and charity. Orr was at work as a switchman, and assisting in the operation of a railway train, when he was injured and killed; and the city, assuming the position of a champion of the Sunday law, insists that it is not liable for its own negligent acts, because Orr was a transgressor of the law. The operation of a railway train or other public conveyance may be a work of necessity, and there is nothing in the record to show that the operation of the train on this occasion was not a work of necessity. Aside from that consideration, the violation of the Sunday law, if in fact it was violated, was not the efficient or proximate cause of the injury to the plaintiff, nor an essential element of her cause of action. The general rule is that a plaintiff will not be permitted to recover when it is necessary for him to prove his own illegal act or contract, as a part of his cause of action; but the time when the injury occurred does not constitute the foundation of the action, and plaintiff could prove her cause of action without proving that her husband was violating the law when the injury occurred. The time when the injury was inflicted is only an incident to the efficient cause of the injury. The injury occurred by reason of the defect in the street, and was as liable to have occurred under similar circumstances on Saturday or Monday as it did on Sunday. There was not even a remote relation between the violation of the Sunday law and the injury which resulted from the negligence of the city in maintaining its streets in a proper condition. In *Railway Co. v. Frawley*, 110 Ind. 30, 9 N. E. 600, it is said that "the fact that one who sustains injury by the negligent or wrongful act of another may have been at the time of the injury acting in disobedience of his collateral obligation to the state, which required of him the observance of the Sunday laws, will not prevent a recovery from one whose wrongful or negligent act or omission was the proximate cause of said injury." See, also, *Sutton v. Town of Wauwatosa*, 29 Wis. 21; *Railway Co. v. Buck* (Ind. Sup.) 19 N. E. 453, 2 L. R. A. 520; *Philadelphia, W. & B. R. Co. v. Philadelphia & H. de G. Steam Towboat Co.*, 23 How. 209, 14 L. Ed. 433; *Mohney v. Cook*, 26 Pa. St. 342; *Baldwin v. Barney*, 12 R. I. 392; *Merritt v. Earle*, 20 N. Y. 115; *Carroll v. Railroad Co.*, 58 N. Y. 126; *Platz v. City of Co-*

hes, 89 N. Y. 219; *Schmid v. Humphrey*, 48 Iowa, 652; *Opsahl v. Judd*, 30 Minn. 126, 14 N. W. 575; *Railroad Co. v. Dick* (Ky.) 15 S. W. 905; *Black v. City of Lewistown* (Idaho) 13 Pac. 80; *Gross v. Miller*, 93 Iowa, 72, 61 N. W. 385, 26 L. R. A. 605; *Solarz v. Railway Co.* (Super. N. Y.) 29 N. Y. Supp. 1123; *Stewart v. Davis*, 31 Ark. 518; *Van Auken v. Railway Co.* (Mich.) 55 N. W. 971; *Patt. Ry. Acc. Law*, 64; *Cooley, Torts*, 178; *Whart. Neg.* § 331; *Beach, Contrib. Neg.* § 81. It is true that some of the New England courts hold to a contrary view, but such holding is against reason and the great weight of authority.

We think the case was fairly submitted to the jury by the charge of the court. There is complaint that the court assumed that the defect in the street was an act of negligence on the part of the city, because of some language that was used in one of the instructions; but it appears that like language was used by the city in its request for instructions, and hence the city is hardly in a position to complain. However, the whole charge indicates that the question of whether it was negligence to leave such a hole in the street as existed there was submitted to the jury, and must have been so understood by the jury itself. The charge also fairly presented to the jury the subject of proximate and efficient cause, as applied to the accident under consideration, and we find no substantial objections to any of the instructions. No error was committed in the refusal to submit certain special questions, and we think there was sufficient testimony tending to show that the injury and death were the result of the defect in the street. Upon this question the testimony is not as clear as might have been wished, but we regard it to be sufficient to take the case to the jury, and to sustain the finding that has been made. It follows that the judgment of the court below must be affirmed.

(62 Kan. 50)

STACY et al. v. COOK.

(Supreme Court of Kansas. June 9, 1900.)

RIGHT OF SET-OFF—WAIVER—CONSIDERATION—TRIAL—ARGUMENTS OF COUNSEL.

1. The right of set-off existing between parties owing each other may, upon valuable consideration, be waived. An agreement by one of such parties, having the larger claim, to pay to the other, having the smaller demand, the amount thereof in cash upon the latter securing by mortgage the amount of his indebtedness to the former, which mortgage was given, is founded upon a sufficient consideration and is valid.

2. In a case tried by jury, particular questions of fact were allowed and settled before argument. The court permitted a general discussion of the facts bearing upon the questions submitted, but refused to allow counsel, in his argument, to call the attention of the jury to each question, or to suggest or advise them what answers should be made thereto from the evidence heard. *Held* error.

(Syllabus by the Court.)

Error from district court, Reno county; M. P. Simpson, Judge.

Action by George W. Cook against Stacy, Adams & Co. Judgment for plaintiff, and defendants bring error. Reversed.

In August, 1894, George W. Cook and his son, Herbert Y. Cook, doing business under the name of Cook & Son, were indebted to Stacy, Adams & Co. in a sum exceeding \$12,000, and to W. H. Stacy for the sum of \$1,000 for money borrowed, evidenced by a note for that amount. Cook & Son were engaged in the retail boot and shoe business at Omaha, Neb., at that time, and their indebtedness to various creditors exceeded \$30,000. On the above date they executed a first mortgage to Stacy, Adams & Co. on their stock of goods for \$12,480.18, and to W. H. Stacy for \$1,000. They also gave chattel mortgages to other creditors. Stacy, Adams & Co., with the consent of Cook & Son, immediately took possession under their mortgages. Before this, George W. Cook had been in the employ of the plaintiffs in error for many years as a traveling salesman, and at the time the chattel mortgages were given they owed him a balance for salary up to that time of \$1,770, over which this controversy arose. It is claimed by Cook that in consideration of the execution by Cook & Son of the chattel mortgages to Stacy, Adams & Co., the latter agreed to pay him said salary, and to waive their right to offset the amount due him from the amount Cook & Son owed the plaintiffs in error. The following proceedings appear from the record: "During the oral argument by defendants' counsel, the attorney for defendants was proceeding to read to the jury the special questions submitted by the court at the request of the plaintiff, and to argue to the jury from the evidence how, in the opinion of the attorney, the jury should find as to each special question, by specific reference to the question, and what the answer, under the evidence, should be as to each special question asked and submitted. Thereupon the counsel for the plaintiff objected on the ground that it was improper to argue or state to the jury how they should find or how they should answer as to these special questions. The court, being advised in the premises, doth sustain the objection with the statement and qualification that counsel could argue generally all the evidence in the case bearing upon the facts covered by the special interrogatories, but could not specifically call the attention of the jury to each interrogatory, and suggest to the jury and advise the jury the answers which in his opinion the jury should give to each interrogatory, to which ruling the defendants and their counsel thereupon excepted. Defendants' counsel then asked and requested that he be permitted to argue before the jury, by special reference to each question, how they should find and answer each and every special question submitted, which application was denied, and the defendants except. The defendants then

objected to any special findings or questions upon the part of the plaintiff being submitted to the jury unless he should be permitted to argue them as above, which objection, with the above and foregoing qualifications, was by the court overruled, to which defendants excepted. * * * Before the arguments of counsel the defendants, Stacy, Adams & Co., request the right to argue the special findings submitted by both plaintiff and defendants to the jury, with the right to argue to the jury how each of those questions should be answered from the evidence in the case, by referring to the findings themselves, and the same right to argue these questions as the general verdict. By the Court: The court permits counsel on both sides to argue from the evidence in the case as to its bearing upon all questions of fact involved in the case in their general argument, but refuses the request of counsel on both sides, if such request is made, to take up the interrogatories and argue them specifically, and suggest to the jury what answer, in the opinion of the counsel, should be given to each interrogatory. By the Defendant: Except to the ruling of the court. By the Defendant: The defendant objects to any special interrogatories or questions being submitted to the jury on behalf of the plaintiff unless defendants are permitted to discuss them specifically before the jury. By the Court: Overruled, with the qualifications expressed in the last ruling above given. By the Defendant: Except to the ruling of the court." There were a verdict and a judgment in the court below against plaintiffs in error for the amount claimed and interest, from which judgment they prosecuted proceedings in error to this court.

Martin & Roberts, for plaintiffs in error.
H. Whiteside and O'Neill & Gilbert, for defendant in error.

SMITH, J. (after stating the facts). In answer to the petition, which stated a cause of action upon an account for services, the defendants below alleged, among other things, that George W. Cook was indebted to them in the sum of \$5,860.40 upon an account, a copy of which was attached to the answer, and was further indebted to them in the sum of \$1,000, evidenced by a note executed to William H. Stacy, which was indorsed by the latter to the firm of Stacy, Adams & Co., and prayed judgment against him for said amounts. In said account Cook is credited with, "Salary account for 1894, up to taking stock in August, 1894, \$1,770." In his reply the defendant in error denied generally the allegations of the cross petition and answer, except the admission that on August 31, 1894, defendants owed the plaintiff \$1,770 for salary. He further averred that Stacy, Adams & Co. agreed and promised that if he and his partner, constituting the firm of George W. Cook & Son, would give defendants below a

mortgage upon their stock of goods and fixtures, Stacy, Adams & Co. would pay in cash to said Cook all of the salary then due him, and would under no circumstances claim the right to apply said sum due for salary upon the amount owing by George W. Cook & Son to the defendants below; that, acting on said promise, and in consideration of the same, a mortgage was given. In opening the case, counsel for plaintiff below, George W. Cook, briefly stated to the jury his claim against Stacy, Adams & Co. Counsel for the latter then made a long and detailed presentation to the jury of the facts which the defense would show, in which he referred to the indebtedness of Cook & Son to Stacy, Adams & Co. as an offset against the claim for salary, and said: "Instead of being indebted to him [Cook], he is indebted to them [Stacy, Adams & Co.] in the sum of over \$6,000; and that at the time he says there was salary due him. There would be salary due him, but for the fact that he owed this large sum. That part is not in dispute." At the close of this statement the plaintiff below submitted the case to the jury on the pleadings and admissions of counsel, and rested. Defendants below then moved for judgment on the pleadings and the admissions of counsel, which motion was overruled. The court then decided that the burden of proof was upon the defendants below. There was no error in this ruling. The amount of salary due to Cook up to August 14, 1894, was clearly admitted in the statement of counsel; and the inquiry thereafter was rightly confined to the question whether by an agreement between the parties, upon sufficient consideration, Stacy, Adams & Co. had contracted to waive their right to use \$1,770 of the amount of their claim against Cook as an offset to the amount for which Cook was indebted to them. The testimony of George W. Cook and Herbert Y. Cook tended to establish an express agreement upon the part of Stacy, Adams & Co. that the amount of this salary would be paid at all events, in consideration of the latter executing a chattel mortgage on the goods in their store to the former. It is contended that a promise to pay this salary is without consideration, for that it is an agreement to pay to Cook what was already due him, and, being already bound to make payment of the amount, any additional agreement to do the same thing lacked consideration, within the rule of *Schuler v. Myton*, 48 Kan. 282, 29 Pac. 163. The facts, however, do not bring this case within the rule of that decision. Cook & Son were bound, in law and morals, to pay their indebtedness to plaintiffs in error, but were not bound to secure its payment by chattel mortgage or otherwise; and the giving of such security was sufficient consideration for an agreement upon the part of Stacy, Adams & Co. to waive their right of offset, and to pay Cook the amount of salary then due. *Jaffray v. Davis* (N. Y. App.) 11 L. R. A. 710, and note (a. c. 28 N. E. 351); *Gutchess*

v. Daniels, 49 N. Y. 605; *Tagg v. Bowman*, 108 Pa. St. 273; *Gross v. Weary*, 90 Ill. 256. For the same reason, special interrogatories 1 and 2, submitted by defendants below, were properly refused by the court; and the first and second instructions upon the subject of consideration, requested by them, were also rightly refused.

There is but one serious question in the case. It relates to the refusal of the court to permit counsel for plaintiffs in error to read to the jury the particular questions of fact, and to argue how, in his opinion, they should be answered. The court held that it was proper to argue generally all the evidence bearing upon the facts covered by the special interrogatories, but would not permit counsel to specifically call the attention of the jury to each question, and suggest to or advise them what answer they should make thereto from the evidence heard. The particular questions were settled before the argument, and were known to both parties. Under our practice, such answers control the general verdict. Section 297, c. 95, Gen. St. 1897. The jury are required to answer each of the questions propounded truthfully, in accordance with the preponderance of evidence bearing upon the interrogatory submitted; and we think counsel ought not to be restricted to a general discussion of the evidence, when particular questions of fact applicable to the case have been settled and allowed for submission to the jury. It is often of great assistance to the jury for counsel to array the facts, and point out their force as applied to a particular question which they are called upon to answer. The supreme court of Iowa has passed upon this question, saying: "That it is competent for an attorney to read special interrogatories to the jury, and discuss the evidence applicable thereto, must be conceded; and it seems to us that the court ought not, without good reasons, interfere with such right. It is difficult to see how an attorney can properly discuss the evidence bearing upon any question the jury is required to answer, without indicating quite plainly how, in his judgment, the question should be answered." *Timins v. Railway Co.*, 72 Iowa, 94—99, 33 N. W. 381. As bearing upon the general right of argument, see *Douglass v. Hill*, 29 Kan. 527; *Atchison, T. & S. F. R. Co. v. Consolidated Cattle Co.*, 59 Kan. 111, 52 Pac. 71. The court below erred in restricting the scope of argument in the manner stated.

There is no merit in the contention that plaintiff below was seeking to contradict the terms of the chattel mortgage by his proof of a contract upon the part of Stacy, Adams & Co. to pay the amount of his salary. There was no attempt to invalidate the mortgage, and the agreement went merely in explanation of the consideration. *McKinster v. Babcock*, 26 N. Y. 378; *Bainbridge v. Richmond*, 17 Hun, 391. The judgment of the court below will be reversed, and a new trial granted. All the justices concurring.

(62 Kan. 100)

APPLEGATE v. YOUNG.

(Supreme Court of Kansas. June 9, 1900.)

BAIL—PROSECUTION FOR MISDEMEANOR.

Upon the postponement of a trial for misdemeanor, the justice of the peace may release the defendant from custody upon the execution of a sufficient recognizance for his appearance for trial at the appointed time; but the justice has no authority to accept a deposit of money in lieu of bail, or as a substitute for a recognizance. Money so taken remains the property of the defendant, and may be recovered by him. (Syllabus by the Court.)

Error from court of appeals, Northern department, Western division.

Action by W. O. Applegate against R. M. Young. A judgment for plaintiff was reversed by the court of appeals (58 Pac. 1000), and he brings error. Reversed, and judgment of district court affirmed.

J. A. Gill and Garver & Larimer, for plaintiff in error. W. S. Willcoxon, for defendant in error.

JOHNSTON, J. This was an action to recover money deposited with a justice of the peace to obtain the release of the defendant, who was prosecuted for a misdemeanor. On a warrant charging a violation of the prohibitory liquor law, W. O. Applegate was arrested and taken before R. M. Young, a justice of the peace of Thomas county. Upon application of Applegate, the justice continued the case, and required him to enter into a recognizance in the sum of \$200 for his appearance. This was furnished, but the surety not being satisfactory, Applegate deposited \$200 with the justice, and the recognizance was then approved. Subsequently another continuance was granted, and a like recognizance was required of Applegate, and, the \$200 being still in the possession of the justice, the recognizance then tendered was also approved. At the appointed time for the trial, Applegate failed to appear, and the recognizance which he gave was forfeited, but nothing was said about the forfeiture of the money which was in the hands of the justice. Afterwards Applegate returned for the alleged purpose of appearing before the justice, and was again taken into custody. When he went before the justice he asked for the return of the \$200 deposit, but his motion was denied. After a change of venue, Applegate was tried for the offense charged against him and was acquitted. When the change of venue was taken from Young, he did not transmit the money deposited with him to the justice before whom the case was tried, nor was there any order or declaration that it had been forfeited. Applegate demanded from Young the return of the money, and, the demand being refused, the present proceeding was brought to recover it.

The question of the authority of the justice to take the deposit as a security for the appearance of the defendant, and to withhold the same upon demand, was raised upon

the pleadings; and the district court ruled that no such authority existed, and that the money remained the property of Applegate, and gave him the judgment for the amount of the deposit. How may a defendant charged with a misdemeanor, and whose trial is postponed, obtain a release from custody? In section 5 of the Code, of procedure before justices of the peace in misdemeanors, express provision is made that a recognizance with sufficient security shall be taken, conditioned that the defendant shall appear for trial at the time and place appointed. The security mentioned in this provision clearly refers to the person or persons signing the recognizance, and does not include security collateral to the recognizance. No mention is made in any of the provisions of the act that money or property may be deposited supplemental to a recognizance, or in lieu of bail. A release from custody by means of a recognizance having been expressly provided for in the procedure before justices in misdemeanors, that method must be followed, and the justice cannot, in the absence of statutory authority, accept money in lieu of bail, or as a substitute for a recognizance. As tending to sustain this view, see *State v. Lane*, 11 Kan. 458; *McCartney v. Wilson*, 17 Kan. 294; *Beckwith v. Railroad Co.*, 28 Kan. 484; *Reinhard v. City*, 49 Ohio St. 257, 31 N. E. 35; *Butler v. Foster*, 14 Ala. 323; *U. S. v. Faw*, 1 Cranch, C. C. 486, Fed. Cas. No. 15,078; *Eagan v. Stevens*, 39 Hun, 311. Section 145 of the Criminal Code does provide that the defendant may deposit money in lieu of bail with the clerk of the court, and thus obtain a release from custody; and the contention is that this provision is made applicable to misdemeanors before a justice by section 20 of the Justices' Code. It provides that "all proceedings including the mode of procuring and the grounds for a change of venue upon the trial of misdemeanors before a justice of the peace shall be governed by the provisions of the Code of Criminal Procedure, so far as the same are in their nature applicable and in respect to which no provision is made by statute." If no provision had been made in the procedure before justices in misdemeanors for a release of the defendant from custody when the case was continued, section 145 of the Criminal Code would certainly have been applicable, and a discharge from custody might have been obtained by means of a money deposit. The Justices' Code, however, having specifically provided for a release from custody in cases of misdemeanor, there is neither necessity nor right to invoke or apply the provisions of the other Code. It is true, as the defendant below contends, that the Justices' Code does not provide for a deposit of money in lieu of a recognizance or bail, but it does provide a particular method for obtaining a release from custody in such cases, and the court is not warranted in adding other methods than those definitely prescribed by the legislature.

We cannot look to the Code of Criminal Procedure, except in proceedings "in respect to which no provision is made by statute." *State v. Brayman*, 35 Kan. 714, 12 Pac. 111. In *Toles v. Adey*, 84 N. Y. 222, it was said "that public policy requires that officers armed with bailable process for the arrest of defendants should, in taking bonds or other security for their enlargement, be held to a strict compliance with statutory requirements; neither accepting less nor demanding more than the law prescribes." Having taken and retained the money without authority, it must be treated as the property of Applegate, and therefore he was entitled to recover the same. The judgment of the court of appeals will be reversed, and the judgment of the district court will be affirmed. All the justices concurring.

DICKINSON v. BALES et al.

(Supreme Court of Kansas. June 9, 1900.)

ADVERSE POSSESSION.

Where limit of land purchased was measured, and monuments of stone erected, and hay cut and stacked on the premises, and furrows for fire guards were ploughed around the stacks, and taxes paid, and an open claim of ownership made, and the country was new, it constituted sufficient adverse possession.

Error from district court, Greenwood county; C. W. Shinn, Judge.

Action by O. P. Dickinson against Joseph S. Bales and others. Judgment for defendants, and plaintiff brings error. Affirmed.

R. P. Kelley, for plaintiff in error. J. B. Clogston and L. E. Clogston, for defendants in error.

PER CURIAM. Action by O. P. Dickinson to recover from Joseph S. Bales a tract of land in Greenwood county. At the first trial Bales prevailed upon the ground of continuous adverse possession by him and his grantors for 15 years. That judgment was reversed for the reason that the testimony was insufficient to establish a title by adverse possession: *Dickinson v. Bales*, 59 Kan. 224, 52 Pac. 447. Another trial was had, which resulted in another judgment in favor of Bales, and the case is here a second time for review. Considerable testimony tending to show adverse possession, and one which would divest title, was offered in the last trial which was not produced at the first trial. When Pierce purchased the land, in 1879, he found persons in possession of the same, who had a corral constructed from posts and rails, and who recognized him as the owner of the land, and promised to pay the taxes for its use. It was used as a pasture for three seasons thereafter, and during that time the yards or corral remained upon the land. In addition to that, there was a spring upon the land, in which a barrel was sunk, and otherwise improved. The

exterior limits of the land were measured, and monuments of stone erected on the corners thereof. Within a few years after it was obtained by Pierce, hay was cut and stacked upon the premises, and furrows or fire guards were plowed around the stacks. All these evidences of possession, taken in connection with the purchase, payment of taxes, and the open claim of ownership, considering the newness of the country, and the use to which such land was adapted and put, are deemed to be sufficient to take the case to the jury. The jury have found that there was actual, continual, visible, and notorious occupation and possession of the land for the requisite period; and this was done upon instructions which fairly presented the case to them. Objections were made to some of the instructions as well as rulings upon the testimony, but we find nothing substantial in them, nor any just cause for complaint. The judgment will be affirmed.

(62 Kan. 121)

BOARD OF COM'RS OF HARPER COUNTY v. COLE, Auditor, et al.

(Supreme Court of Kansas. June 9, 1900.)

DELINQUENT TAX SALE—PURCHASE BY COUNTY—LIABILITY TO STATE.

1. By the terms of Gen. St. 1897, c. 158, § 182, in connection with chapter 199, Laws 1885, counties are liable to the state for uncollected state taxes levied upon lands which, in default of payment, are sold at delinquent tax sale and bid in by the county; and, by the last-mentioned act, provision is made for the collection of such taxes by a special additional levy in the year succeeding the delinquency.

2. *Railway Co. v. Clark*, 58 Pac. 561, 60 Kan. 831, reaffirmed and followed.

(Syllabus by the Court.)

Mandamus by the board of county commissioners of the county of Harper against George E. Cole, auditor, and Frank E. Grimes, treasurer, of the state of Kansas. Writ denied.

T. A. Nofztager, for plaintiff. A. A. Godard, Atty. Gen., for defendants.

DOSTER, C. J. This is an original action of mandamus brought by the board of commissioners of Harper county to compel the auditor and the treasurer of the state to credit the county with certain amounts of state tax charged against it in the years preceding 1898, and uncollected by it on its delinquent land tax sales. The contention of the plaintiff is that counties which have been compelled to bid in lands at tax sales, and which have not been able to secure a redemption of the lands for the full amount of taxes charged, or have not been able to sell or assign their tax-sale certificates for the full amount of taxes charged, are relieved from liability to the state as to the unrealized portion of state taxes. The contention of the state is that chapter 199 of the Laws of 1885, in connection with Gen. St. 1897, c. 158, § 182, declares the liability of the county

for such unpaid taxes, and provides for a special levy to make up the delinquency. In *Railway Co. v. Clark*, 60 Kan. 831, 58 Pac. 561, we held with the state upon the same question, but the correctness of our conclusion in that case is now challenged. We did not, in the opinion in that case, make special mention of all the statutory provisions bearing upon the question, and will, therefore, in this one, review them.

Chapter 196, Laws 1872, provided that in case lands were bid in by a county at tax sales, and remained unredeemed for five years, the county treasurer should sell them for such sum as could be realized, and, after paying the costs of the proceeding, should distribute the proceeds to the various funds entitled thereto, in proportion to the amounts due such funds. This act was repealed by section 158, c. 34, Laws 1876. Chapter 39, Laws 1877, also provided for a sale of lands bid in by counties at tax sales for such sum as could be realized. The procedure under this statute was by foreclosure of the tax lien, and, like the statute of 1872, it directed the distribution of the proceeds to the various funds entitled to it. Chapter 43, Laws 1879, provided that, if lands bid in by counties at tax sales should remain unredeemed for three years, the county commissioners might permit the owners to redeem for a less sum than the taxes, or the county clerk might assign the county's tax-sale certificate for a less sum than the amount due thereon. It also provided in its third section for a distribution of the proceeds of redemption or assignment to the different funds. While all the above-mentioned acts provided that the net proceeds realized from the above-mentioned sales, redemptions, or assignments of certificates should be distributed among and credited to the different funds in proper proportion, none of them provided what should be done as to the unrealized portion of taxes. While it would seem that a proper account of such unrealized taxes should be kept, none of the acts, in terms, so provided. Chapter 199, Laws 1885, provided in its first section that, as to lands sold under the acts of 1872 and 1877, the county clerk should "divide and charge the amount of such unrealized tax to the several funds in proper proportion," etc., while in its second section it amended the third section of chapter 43, Laws 1879, by adding a provision that taxes uncollected upon a redemption or assignment of the certificate of sale of lands sold and bid in by the county should be "divided among and charged to the several funds in proper proportion," etc. Thus, the provisions of the law as to the debiting and crediting of realized and unrealized taxes on lands sold under the acts of 1872 and 1877, or redeemed, etc., under the act of 1879, were made uniform and plain. None of these acts, nor any acts to which our attention has been called, provided a method of securing to the state the unrealized portion of taxes which

the counties had been unable to collect upon land sales, redemptions, or assignments of certificates. However, during all this time there was a provision declaring that each county should be responsible to the state for the full amount of taxes levied for state purposes, together with a provision which seemingly, though not, as we think in proper construction, would seem to neutralize or modify the one first mentioned, to the effect that the county treasurer should not be required to pay to the state treasurer more state taxes than were actually collected by him. Gen. St. 1868, c. 107, §§ 132-134; Laws 1876, c. 34, §§ 102-104. These provisions are still upon the statute book. Gen. St. 1897, c. 158, §§ 181, 182. The meaning of these two sections is that, while counties are liable to the state for the full amount of the levy for state purposes, the county treasurer shall not be required to take moneys belonging to other funds with which to pay the amount due the state. The act of 1885, c. 199, undertook to provide for the collection of all delinquent state taxes due from counties during all the previous years, and also to provide a method for making up the deficiency occurring in succeeding years. It provided in its third section what had never before been provided for,—a certification to the auditor of state of the amount of uncollected state taxes for which the county was entitled to credit,—and it directed the auditor and treasurer to accordingly credit the counties with the amount. This crediting, as is evident from the provisions of the act, was intended to be provisional,—was intended to provide for an accounting between the counties and the state as to uncollected state taxes, and was not intended to declare the nonliability of the counties. This is manifest, because while in its fourth section it gave counties until July 15, 1885, within which to claim credits upon levies made previous to 1884, it nevertheless, by section 5, provided that the auditor of state should on the fourth Monday in July, 1885, report to each county the balance due from it upon delinquent taxes, and that the county clerk should then determine the rate per cent. necessary to raise the amount, and should place it upon the tax roll in addition to the state tax for that year; and it followed this with a proviso that the additional levy should not exceed one-half mill in any year, but that it should be continued until the delinquent taxes due from each county had been paid. These provisions were by their terms limited to the taxes of 1883 and the preceding years. In 1891 the time in which counties were allowed under the provisions of section 4, c. 199, Laws 1885, to claim credit for uncollected state taxes under the levies of 1883 and preceding years, was extended to July 15, 1891. Laws 1891, c. 205. In 1895 a similar extension of time was allowed. Laws 1895, c. 262. It is evident from these various enactments that the legislature had in contemplation an

accounting between the state and the several counties as to the delinquent state taxes of 1883 and preceding years, and that it was providing for the correction of such delinquencies by the collection and payment of the amounts due. As to delinquencies in the payment of state taxes for the year 1884 and subsequent years, provision was made by the act of 1885, c. 190, § 6. That section, in terms, declares: "If after the settlement by the county treasurer of any county in November of each year as provided in section ninety-nine, chapter thirty-four, of the Session Laws of Eighteen Hundred and Seventy-Six, there shall remain due from such county any portion of the state tax levied for the preceding year, the auditor of state on the second Monday of July in each year succeeding the said November settlement shall report to the county clerk of such county the amounts of such unpaid tax, and the county clerk shall determine the rate per cent. necessary to raise the said amount, and shall place the same on the tax roll in addition to the regular levy for state purposes, and the same shall be collected by the county treasurer, and paid into the state treasury as are other state taxes." This section, therefore, supplements section 102, c. 34, of the Laws of 1876 (Gen. St. 1897, c. 158, § 182). Together they declare the continuing liability of the counties to the state for the full amount of state taxes, and provide a method by which the deficiency shall be collected and paid into the state treasury. These provisions are plain. They leave no room for construction. As before stated, the demand made by the county upon the auditor and treasurer is for a credit for the amount of the uncollected state taxes. The alternative writ issued in the case does not state the years in which the delinquencies occurred. If they occurred in 1884 or preceding years, the claim of credit, even as a mere matter of formal accounting between the county and the state, could not be allowed, because by the provisions of the acts of 1891 and 1895, before referred to, the time within which the claim of credit must be made has long since expired; and, as before stated, the credit, when allowed under the provisions of section 4, c. 190, of the Laws of 1885, as amended by the subsequent acts of 1891 and 1895, would be provisional in its nature, and would be followed by a certification from the auditor of the delinquency thus temporarily credited, upon receipt of which a special levy to correct it would have to be made. As to the state taxes levied in 1885 and since that time, no credit, even as a matter of mere bookkeeping, is allowed, because the statute above quoted specifically declares that the county clerk, upon the receipt of a report from the auditor of state, on the second Monday of July in each year of the amount of the delinquency, shall determine the rate per cent. necessary to raise such amount, and shall place it on the tax

roll in addition to the regular levy for state purposes. The county is not entitled to a peremptory writ. The motion to quash the alternative writ is therefore sustained, and the peremptory writ denied. All the justices concurring.

(62 Kan. 85)

DANGERFIELD v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas. June 9, 1900.)

CARRIERS—LIMITED TICKETS—REGULATIONS FOR USE—EJECTION OF PASSENGER—ESTOPPEL.

1. Conditions in a round-trip excursion railroad ticket stipulating that it shall be used only by the original purchaser, and requiring him to identify himself as such at the point of destination before beginning the return passage, are not unreasonable or invalid.

2. D. purchased the return portion of such a ticket from a broker at the point of destination, upon which the conditions named were plainly printed. It had not been signed by the original purchaser, and the broker signed D.'s name on the ticket as though he were the original purchaser, had the signature witnessed, and then delivered it to D., who started on his journey. The first conductor to whom it was presented accepted the ticket for passage, but the second conductor discovered that D. was not entitled to ride upon the ticket, took it up, and D., having refused to pay his fare, was required to leave the train. Held, that D., not being the original purchaser, nor having complied with the conditions plainly printed upon the ticket, was not entitled to ride upon the same; that the conditions of the contract were not waived, and the railway company was not estopped to refuse the ticket because the agents of the company to whom it was first presented did not discover the imposition, and when the discovery was made the company had the right to refuse to carry D. further, and, upon his failure to pay his fare, to require him to leave the train.

3. The general rule is that the conduct of one which had been induced by the misrepresentation or fraud of another cannot be relied upon by the latter as an estoppel.

(Syllabus by the Court.)

Error from district court, Osage county; William Thomson, Judge.

Action by Thomas Dangerfield against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Waters & Waters, for plaintiff in error. A. A. Hurd, O. J. Wood, W. Littlefield, and Robert C. Heizer, for defendant in error.

JOHNSTON, J. Thomas Dangerfield, contemplating a trip to Europe, and desirous of purchasing transportation from his home at Scranton, Kan., to the city of New York, applied to an agent at Scranton, who wrote to a ticket broker in Topeka, and from him procured the unused portion of an excursion ticket over the Atchison, Topeka & Santa Fé Railway. With this ticket he started on his journey, and the first conductor of the railway company to whom he presented the ticket accepted it for passage from Topeka to Kansas City. There another conductor came upon the train, and when the ticket was presented

to him he took it up, refused to allow Dangerfield to ride upon it, and, as the passenger did not pay his fare, he was required to leave the train. For the loss sustained by being compelled to discontinue his journey, and for the disgrace and humiliation of being put off the train, he seeks a recovery from the railway company.

The ticket purchased by Dangerfield from the ticket broker at Topeka had been sold in Chicago at a reduced rate by the Chicago, Rock Island & Pacific Railway Company, and provided for a round-trip ride from Chicago to Topeka over the road of the company issuing it, and a return to Chicago from Topeka over the Atchison, Topeka & Santa Fé Railway. It was sold subject to certain conditions that were plainly written on the face of the ticket, and one among them was that it should be used within limited times, for continuous passage, and only by the original purchaser, who, at the point of destination, and before return passage, was required to identify himself as the original purchaser in a particular way. There was a clause that, unless the provisions of the ticket were fully complied with, it should be void. It appears that the original purchaser did not sign the ticket when it was purchased, as the contract seemed to require, and that the ticket broker signed Dangerfield's name to the ticket when the purchase was made, as though he were the original purchaser, and had it witnessed by agents of the railway company in North Topeka. Upon the facts the district court held the ticket to be invalid in the hands of Dangerfield, and that he was not entitled to recover from the railway company.

Limited round-trip tickets, like the one presented by Dangerfield, are in common use throughout the country, and the conditions written upon the face of such tickets, and which constitute the contract between the parties, are not unreasonable or invalid. The ticket itself was notice to Dangerfield that it could only be used by the original purchaser, and that it was invalid in the hands of any one else. He knew that he was not the original purchaser, that his name had been signed to it by some one else as though he were the original purchaser, and he knew also that he had never been identified to the agents of the railway company as the original purchaser. The conductor to whom the ticket was first presented did not detect the deception, and raised no question as to the validity of the ticket, but the suspicions of the second conductor were in some way aroused, and upon inquiry he learned from Dangerfield that he was not entitled to ride upon the ticket, and in default of the payment of fare he required him to leave the train. The validity of the contract between the purchaser and the railway company issuing the ticket is conceded, and the plaintiff also conceded that the railway company might have refused the ticket when it was presented to its agents and to the first conductor; but it is contended

that, the conductor having accepted it for passage at the outset, and having allowed Dangerfield to start on his journey, the railway company is thereafter estopped to question the validity of the ticket, or to deny his right to be carried upon it. The doctrine of estoppel is not applicable in such cases; and the plaintiff, who was pretending to be the original purchaser, and was, therefore, practicing a deceit upon the other party, is not entitled to invoke the equitable rule in his favor. The general rule is that the conduct of one, which has been induced by the misrepresentation or fraud of another, cannot be relied upon by the latter as an estoppel. Nor can there be any waiver or estoppel without knowledge by the agents of the company of the facts and circumstances under which Dangerfield had procured the ticket. The fact that those to whom the invalid ticket was first presented did not detect the imposition does not preclude a refusal of such ticket by other agents or conductors who subsequently discovered its invalidity. *Bowers v. Railroad Co.*, 158 Pa. St. 302, 27 Atl. 893; *Boylan v. Railroad Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290.

Attention is called to the fact that the original purchaser did not sign the ticket when it was issued, but it is clear that his failure to sign did not eliminate the conditions of the contract. If these were binding upon the company, they were equally binding upon the purchaser, whether signed by him or not. Neither does the fact that the first company omitted or dispensed with the signing of the ticket affect the right of the second company to insist on the conditions, and it did not make the ticket transferable. *Comer v. Foley* (Ga.) 25 S. E. 671. The ticket was, in fact, not transferable, and Dangerfield, not being the original purchaser, had no right to ride upon it. As soon as the agents of the company discovered that the conditions of the contract written on the face of the ticket had been violated, they had the right to refuse to carry the passenger, and, upon his failure to pay fare, to require him to leave the train. *Abram v. Railway Co.*, 83 Tex. 61, 18 S. W. 321; *Moses v. Railroad Co.*, 73 Ga. 356; *Rahilly v. Railway Co.*, 66 Minn. 143, 68 N. W. 853; 1 Fetter, Carr. Pass. 382. The judgment of the district court will be affirmed. All the justices concurring.

(62 Kan. 69)

CASE v. CHEROKEE LANYON SPELTER CO. et al.

(Supreme Court of Kansas. June 9, 1900.)

EXECUTION SALE.

By the provisions of section 23 of the act of 1893, providing for the sale of real estate upon execution or other like process (Laws 1893, c. 109; Gen. St. 1897, c. 95, art. 22; Gen. St. 1899, § 4742 et seq.), land once sold upon such process cannot again be sold in satisfaction of any inferior judgment or lien under which the holder of such lien was allowed a right of redemption, contingent upon the non-

exercise of the same right by the preferred classes of persons therein mentioned, but whose contingent right did not accrue to him, on account of the exercise of the superior right by one of the preferred classes.

(Syllabus by the Court.)

Error from district court, Crawford county; W. L. Simons, Judge:

Action by George A. Case against the Cherokee Mining & Smelting Company and others. Judgment for plaintiff. On sale of certain land belonging to defendant, the Cherokee Lanyon Spelter Company made a motion to set it aside. Motion granted, and Case brings error. Affirmed.

S. E. Cheeseman, J. R. Sapp, and B. S. Gaitskill, for plaintiff in error. Morris Cligitt, for defendants in error.

DOSTER, C. J. This is a proceeding in error from an order refusing to confirm a sale of real estate, and from an order sustaining a motion to set aside the sale, and it involves a consideration of some of the provisions of the act of 1893 providing for the redemption of real estate from execution or judicial sale. Gen. St. 1897, c. 95, art. 22; Gen. St. 1899, § 4742 et seq. In 1895 the Long-Bell Lumber Company recovered a judgment against the Cherokee Mining & Smelting Company. Subsequently it caused the issuance of sale process, and the sale of certain real estate belonging to the judgment debtor. At this sale one Edward E. Wells became the purchaser. Soon thereafter the sale was confirmed, and the sheriff directed to issue a certificate of purchase in accordance with the act of 1893. Soon after this sale and confirmation the plaintiff in error, George A. Case, recovered a judgment against the Cherokee Mining & Smelting Company, and soon after that time the company named assigned its right of redemption of the land sold under the Long-Bell Lumber Company's judgment to one Rollin Steward, and also executed to him a warranty deed therefor. Shortly before the expiration of one year from the time of the before-mentioned sale to Wells in the suit of the Long-Bell Lumber Company against the Cherokee Mining & Smelting Company, Rollin Steward, as owner of the right of redemption, redeemed the land from the sale, and soon thereafter he executed a conveyance of such land to the defendant in error herein, the Cherokee Lanyon Spelter Company. Subsequently the plaintiff in error herein, George A. Case, caused an execution to issue upon his judgment against the Cherokee Mining & Smelting Company, and caused another sale of the land which had been sold under the previous judgment of the Long-Bell Lumber Company, and from which first sale Steward, as stated, had made redemption. At the sale thus procured by Case, he became the purchaser of the land. The Cherokee Lanyon Spelter Company, the owner of the conveyance from Steward, moved to set aside the sale to Case, while he, in turn,

moved to confirm it. The motion to set aside was sustained; the motion to confirm, denied. From these orders Case has prosecuted error to this court.

The plaintiff in error was a subsequent judgment creditor of the Cherokee Mining & Smelting Company. Under the provisions of the redemption act, a judgment debtor, or his assignee of the right of redemption, is given a preferred right, within the first 12 months after the sale, to redeem. For the next three months creditors, in the order of priority of their liens, are allowed the right of redemption. The main proposition of counsel for plaintiff in error is that a purchaser at an execution or judicial sale has, during the period allowed for redemption, only a lien upon the land for the repayment of the purchase money, and that in this case the redemption of the land by Steward, the assignee of the judgment debtor, from the sale under the prior judgment of the Long-Bell Lumber Company, made, as it was, previous to the time when the right of his client to redeem accrued, and which thereby prevented his client's right of redemption, was a simple discharge of the prior purchase-money lien, and left the land subject to the subsequent judgment lien,—in other words, that it was a discharge of a lien, and not a redemption of land. This is not his language, but it is the point his argument would establish. The assertion of the claim thus made is preceded by some subsidiary propositions, such as that the redemption act is to be strictly construed, and the rights claimed under it are to be strictly pursued; that the object of the redemption law is to apply the debtor's lands, as far as possible, to the payment of his debts; that statutory redemption rights are not conferred for the benefit of the prior-sale creditor, but for the benefit of the debtor and junior incumbrancers; that the right of Rollin Steward, as assignee of the Cherokee Mining & Smelting Company's right of redemption, became merged in the conveyance of the legal title made to him by such company, etc.

A right to redeem from a sale of real estate is purely statutory. It does not exist at common law. Courts of equity, in justifiable cases, may grant in their decrees of sale something akin to the right, but the power thus exercised is apart from the one conferred by the statute under consideration. In the case before us, the statute, after authorizing sales of real estate upon legal process, confers upon certain interested classes of persons a right of redemption from the sale; and it also points out the mode and time of the exercise of the right, and, in addition thereto, declares the effect to follow the sale and the allowance of the right. In this last particular it is unlike the statutes of other states upon which the decisions cited by counsel for plaintiff in error are based. It is altogether likely that in the case of a statute which merely au-

thorizes the sale of real estate, and merely gives a right of redemption from the sale, without prescribing the effect of the sale and the allowance of the right, the consequence of the exercise of the right would only be to free the land from the prior judgment or other lien upon which it was sold, and thus give place to subsequent liens; but, if the statute which authorizes the sale and gives the redemption right likewise declares the effect of the sale and allowance of the right, that effect, and it alone, may be allowed. Our statute (section 23 of the originally published act) reads as follows: "Real estate once sold upon order of sale, special execution or general execution, shall not again be liable for sale for any balance due upon the judgment or decree under which the same is sold, or any judgment or lien inferior thereto, under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for." It thus appears that real estate once sold shall not again be sold for the satisfaction of inferior liens. This statute is not only positive, but it is plain, down to the concluding clause. The land shall not again be sold for the satisfaction of inferior liens "under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for." It will be remembered that, within the 12 months allowed by the statute to execution debtors and their assignees of the right of redemption, Steward, the assignee of the Cherokee Mining & Smelting Company, redeemed the land from the sale. This exercise of the right of redemption by Steward prevented Case, the plaintiff in error, from exercising his like right as a subsequent lienholder. Before the time for the exercise of his right had accrued, redemption had been effected by the one to whom the preferred right had been given. From this counsel for plaintiff in error argues that his client did not have a right to redeem, and, therefore, by the concluding clause of section 23, was not excluded from the right to procure a resale of the land for the satisfaction of his judgment. In this, counsel is mistaken. What is meant by the "right to redeem" is the right in the contingency and under the conditions allowed by the act. The phrase "right to redeem" is not synonymous with "opportunity to redeem." The plaintiff in error had the right to redeem, contingent upon the failure of a preferred class of persons to redeem. The exercise of that preferred right defeated the right of plaintiff in error, but it did not destroy his contingent right as allowed by law. In the language of section 23 of the redemption act, "judgment or lien inferior thereto, and under which the holder of such lien had a right to redeem within the fifteen months hereinbefore provided for," was doubtless used to distinguish between liens of such grade and those still more inferior, which might become inchoate upon the land

within the final three months allowed to the judgment debtor for redemption by him. Suppose a judgment against the debtor should be rendered within the final three months mentioned, or suppose the debtor within that time should give a mortgage upon the land, and, before the expiration of the final limit, should himself redeem from the sale; neither this judgment creditor nor this mortgagee would have a right of redemption, but they would have a lien which should be discharged. Their right to a sale of the land in satisfaction of their liens should be preserved, and it is preserved by the section of the act quoted. This act excludes a resale by creditors who had a right of redemption within the prescribed time, though they may not acquire the opportunity to exercise it, but it does not restrict the right of resale by creditors who had no right of redemption at all. As before stated, the cases cited by counsel for plaintiff in error are cases in which the effect of a sale and the allowance of a redemption right were not prescribed by statute. Where such effect is not thus prescribed, it may be that upon common-law principles a redemption, so called, from sale, either by the judgment debtor or his assignee, should be given no other effect than the payment of a lien. It was so ruled in *Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 400. In that case it was held, "The failure of a subsequent judgment creditor to redeem the land of the debtor from sale under a former judgment does not render his judgment lien inoperative against the debtor or his grantee, in the event neither should redeem within the time allowed by law." The sale was had in that case under the provisions of the Iowa statute providing for the sale and redemption of real estate. Code Iowa 1851, c. 110, § 1924 et seq. That statute, however, did not contain any provision similar to section 23 of our redemption act, nor did it contain any provision declaring the effect of a redemption upon the rights of subsequent lienholders. Our conclusion is that the orders of the court below refusing to confirm the sale, and ruling that the sale should be set aside, were correct, and should be affirmed. They are affirmed. All the justices concurring.

DOBBS et al. v. STATE

(Supreme Court of Kansas. June 9, 1900.)

CRIMINAL LAW—ERROR—CORAM NOBIS.

A writ of error coram nobis may be obtained in a criminal proceeding by a motion for the writ, and notice thereof served upon the county attorney. For such purpose the state is deemed to be still in court, and upon the facts in this case it is held that the motion to obtain the writ is a proceeding in the principal case to which the state was a party, and not a new and distinct suit brought by the defendants against the state.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. W. Shinn, Judge.

George H. Dobbs and Emelia New were convicted of murder, and move for writ of error coram nobis. Motion dismissed, and petitioners bring error. Reversed.

Stowell & Nold, for plaintiffs in error. L. H. Johnson, for the State.

JOHNSTON, J. This was a motion for a writ of error coram nobis in a prosecution in Greenwood county of George H. Dobbs and Emelia New, who were convicted of murder on January 24, 1898. The motion, which was accompanied by an affidavit setting forth the reasons for the issuance of the writ, which is designated as an assignment of error, was filed in the district court on February 25, 1899. At the same time notice of the motion was served on the county attorney of Greenwood county, who subsequently appeared, and moved the court to dismiss the motion and proceeding on jurisdictional grounds, namely: (1) That the state is a sovereign power, which cannot be sued without its consent, and that no consent has been given; (2) that no service of a sufficient summons has been made upon the state; and (3) that no bond or security for costs has been given, or any sufficient excuse stated for the failure to give the same. The court sustained that motion and dismissed the proceeding, and the defendants in the prosecution prosecuted proceedings in the court of appeals, and that court certified the case to the supreme court.

It is not denied that the writ of error coram nobis is available in cases like the present one, nor is there any attack made upon the sufficiency of the averments upon which the application for the writ is based. In fact, the sufficiency of the averments or the merits of the controversy appear not to have been considered or decided by the trial court, but the decision rests alone upon the view that this is an independent proceeding, which cannot be brought against the state without its consent. Treating the writ as an available remedy, as we must, the only question open for review at this time is whether the state was in court, and required to answer the motion, notice of which was served upon the county attorney. If the proceeding is to be regarded as a new suit brought against the state to obtain a new trial upon one of the statutory grounds, as was done in *Asbell v. State*, 60 Kan. 51, 55 Pac. 338, the ruling of the trial court was right, and should be affirmed. On the other hand, if it is not a new action against the state, but a proceeding instituted by the defendants in the criminal prosecution, as was done in *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38, 18 L. R. A. 838, the state must be regarded as still in court, and subject to challenge by the common-law writ of error coram nobis. Manifestly, the defendants undertook to follow

the procedure employed in the *Calhoun Case*, for, instead of causing a summons to be issued and served, the attention of the state and the court was again called to the case by a mere motion, and the notice of the same. In entitling the motion the defendants were first named; that is, there was a transposition of the names of the parties to the prosecution. It seems to us that the correct practice in moving for a writ of error coram nobis is to retain the title of the principal case, but this practice is not universally followed, as some courts hold that the paper ought not to be entitled in any suit. 5 Enc. Pl. & Prac. 32. The important consideration is that the nature of the relief sought by the proceeding shall be clearly stated, and that it shall be instituted in the very same case in which the error is alleged to have been committed. Whatever may be the correct practice, the fact that the names of the parties were transposed in the title employed on the motion and other papers hardly justifies the court in treating the application for the writ as a new proceeding wholly apart and distinct from the prosecution in which the moving parties were convicted. The record of the prosecutions was still open. The state was still in court in that case, and was subject to challenge by the defendants' motion for the purpose of obtaining any relief that may be obtained by the writ of error coram nobis. The steps taken were substantially those which were employed in *State v. Calhoun*, supra, and we think that error was committed in holding that the state was not in court, and in dismissing the proceeding. The judgment of the court will be reversed. All the justices concurring.

(62 Kan. 48)

ROBERTS et al. v. YAW et al.

(Supreme Court of Kansas. June 9, 1900.)

VENDOR AND PURCHASER—DEFAULT IN PAYMENTS—CONTRACT—CONSTRUCTION.

1. Plaintiffs executed and delivered to defendants a bond for a deed to real estate, which was duly recorded by the latter. Two hundred and ninety dollars was paid by the obligee at the date of the instrument, March 12, 1894. This was the only payment made. Deferred payments were due as follows: \$410 on or before August 1, 1894, and \$300 on or before January 1, 1895. In August, 1895, plaintiffs tendered a deed to the obligee in the bond, and demanded payment of the amounts due, which demand was refused. An action was brought, in which all the facts were pleaded in the petition, and judgment prayed for in the alternative, either for a foreclosure of the bond and a sale of the land to satisfy the amount of the deferred payments, with interest, or a cancellation of the contract, and for a decree quieting the plaintiffs' title. The court granted the relief last prayed for. *Held* no error; that defendants, by reason of their default, were not entitled to a return of the amount of their first payment as a condition to granting the relief given the plaintiffs.

2. Where, by the terms of a written instrument, time is not made of the essence of the contract, it can nevertheless be made so by a

performance or tender of performance by one party and a demand upon the other.
(Syllabus by the Court.)

Error from court of appeals, Northern department, Eastern division.

Action by Marsellus Yaw and others against Frank Roberts and others. Judgment for defendants was reversed in the court of appeals (58 Pac. 490), and they bring error. Judgment of court of appeals reversed, and of district court affirmed.

This action was based upon the breach of a written contract for the sale and conveyance of real estate. On March 12, 1894, Frank Roberts and wife executed and delivered to Marsellus Yaw their bond for a deed to certain land in Shawnee county. The bond recited that \$290 had been paid by the obligee at the delivery of the instrument; that \$410 were to be paid on or before August 1, 1894, and the balance—\$300—on or before January 1, 1895; deferred payments to draw 7 per cent. interest per annum from date. The bond recites: "Now, if said parties of the first part shall, on or before the first day of January, A. D. 1895, and upon full payment of said sum and sums of money, execute and deliver to said party of the second part a good and sufficient warranty deed, conveying an absolute and indefeasible estate in fee simple, with the usual covenant in and to said tract and parcel of land, then this obligation shall be void; otherwise, to remain in full force and effect." The petition filed by the plaintiffs below, the obligors in the bond, alleged the execution of the bond, its acceptance by the obligee, and the receipt of the \$290. It averred that before the commencement of the suit, and on August 6, 1895, plaintiffs duly executed their deed to and in favor of Marsellus Yaw for the real estate, with covenants of warranty strictly in accordance with the terms of the contract, and tendered same to him, demanding payment of the balance of the purchase money agreed upon, which demand was refused; that plaintiffs brought said deed into court for the use and benefit of the obligee in the bond; that the latter neglected and refused to perform the conditions of the bond on his part, or to pay the balance of the purchase money; that Yaw filed the bond for record in the office of the register of deeds, and same was recorded, March 12, 1894; that, notwithstanding their refusal to perform or be bound by the terms of the writing, the defendants, Yaw and wife, claim some estate, right, title, or interest to the real estate adverse to plaintiffs by virtue of said bond, which they refuse to surrender to the plaintiffs for cancellation, and which casts a cloud upon the title of their real estate. The relief prayed for was: First, specific performance of said contract; a judgment against Yaw for \$710, with interest, to be declared a first lien on the real estate; a foreclosure of all the estate and interest of defendants, and an order of sale

to satisfy the decree; or, if the court should find that the contract ought not to be enforced specifically, that defendants surrender said writing and bond for cancellation, and that the cloud cast upon the title to the land be removed, and that plaintiffs' title be quieted, etc. The defendants below answered, first denying generally the allegations of the petition, and further alleging that they paid the sum of \$290 at the time of the delivery of the bond, and averring that ever since said time plaintiffs below have been in possession of the land, and enjoying the rents and profits thereof, and that since then defendants have paid taxes on the land to the amount of \$13.33; that on or about January 1, 1895, defendants tendered and offered to pay plaintiffs the further sum of \$200, and proposed that, if plaintiffs would execute a deed, and hold it, so it could be delivered upon effecting a loan on the land, defendants would execute a note, and secure the same by a mortgage on the land for sufficient to pay plaintiffs fully the amount due, and that plaintiffs refused to do this. The prayer of the answer is as follows: "Wherefore these defendants say that the plaintiffs ought not to have a decree of this court canceling said contract without first paying to defendants said sum of \$290, with interest thereon from March 12, 1894, and also said sum of \$13.33, with interest from the date of its payment; and so these defendants pray that, in the event the court should decree the cancellation of said contract, that defendants have judgment against plaintiffs for said sum of \$290, with 6 per cent. interest from March 12, 1894, and also for said sum of \$13.33, with interest thereon, and that said sums be declared a first lien upon the land described in plaintiffs' petition; and that the court do enter an order that, if plaintiffs do not pay the same at an early day, to be fixed by the court, that said land be ordered to be sold accordingly to pay the same, and for such other and further relief as to this court shall seem right in the premises." On the trial the following admissions were made by the parties: "It is admitted that the oral testimony at the trial of this case tended to prove all the allegations of the plaintiffs' amended petition, and showed, among other things, that plaintiff Roberts had been in the possession of said premises ever since the execution and delivery of said bond for deed; that prior to the commencing of his action he tendered defendant Yaw a deed to said premises, and demanded payment of the balance due, and that Yaw failed to comply with this demand. The defendant Yaw and his wife testified that about January 1, 1895, at Yaw's house, he (Yaw) offered to pay Roberts \$200, and asked Roberts to accept this amount and execute a deed to him for said land, and hold it until he (Yaw) could effect a loan on said premises sufficient to pay the balance that was due, and that Roberts refused to do

this; but Roberts testified that no such offer had been made. And it is further admitted that since the execution of said bond for a deed, and before the commencement of the action, Yaw paid taxes on said land to the amount of \$13.33." The district court rendered a judgment declaring that the bond for a deed was null and void, and ordering that the same be canceled, and for naught held; that the cloud cast upon the title of the real estate in consequence of the execution and recording of said instrument be removed, and plaintiffs' title to the land quieted, perpetually enjoining the defendants from interfering with the plaintiffs' possession or title. This judgment of the district court was reversed in the court of appeals, Northern department. *Yaw v. Roberts*, 58 Pac. 490.

Jetmore & Jetmore and D. F. Jetmore, for plaintiffs in error. J. T. Ward, for defendants in error.

SMITH, J. (after stating the facts). Defendants in error contend that plaintiffs in the trial court were at most entitled to conditional relief, only, under their petition, dependent upon the repayment to the obligee in the bond for a deed of the \$290 paid by Yaw to Roberts at the date of the instrument, together with \$13.33 taxes, paid by the former. This bond for a deed is a contract unilateral in character. The obligators alone were bound by its provisions. *Guthrie v. Anderson*, 47 Kan. 383, 28 Pac. 164. When the action was commenced, Yaw, defendant below, had been in default for about 14 months. At no time had he offered to comply with the terms of the instrument requiring payment as a condition to obtaining a deed to the land. He could not at any time have recovered back the first payment of \$290, made by him when the contract was executed. *Ketchum v. Evertson*, 13 Johns. 359. Plaintiffs tendered a deed to the land before suit was brought, demanding payment of the amount due, and again in their petition made a like tender. Defendants below have at no time claimed any rights under the contract. On the other hand, persistently repudiating it, they demand back what they have paid. It is well settled that where, by the terms of a written instrument, time is not made of the essence of the contract, it can nevertheless be made so by a performance, or the tender of performance, by one party, and a demand of the other. *Foster v. Ley* (Neb.) 15 L. R. A. 737, and note (s. c. 49 N. W. 450); *Frink v. Thomas* (Or.) 12 L. R. A. 239, and note (s. c. 25 Pac. 717); *Barnard v. Lee*, 97 Mass. 92; *Hatch v. Cobb*, 4 Johns. Ch. 559; *Sea v. Morehouse*, 79 Ill. 216; *King v. Ruckman*, 20 N. J. Eq. 316. In the case of *Kirby v. Harrison*, 2 Ohio St. 320-332, there is an able discussion by Thurman, J., of this question, applied to a contract quite like the one under consideration.

Kirby made a written contract for the sale of certain real estate to Harrison at the price of \$1,000. One hundred dollars was paid down, and the residue agreed to be paid in nine annual installments of \$100 each, and, when so paid, Kirby covenanted to execute to the obligee a warranty deed to the premises. The second installment coming due, Kirby notified Harrison, some seven months thereafter, of the fact, and requested payment, but received no response. Six months later he filed his bill for rescission. The learned justice said: "Although there is no stipulation of the parties that time shall be of the essence of the contract, nor anything in the nature or circumstances of the agreement to make it so, yet it may be made essential by the proper action of a party who is not in default, and is ready to perform, if the other party is in default without justification. Thus, if the vendee, without sufficient excuse, fail to pay at the stipulated time, and the vendor is in no default, and is able and ready to perform all that the contract then requires of him, he may notify the vendee to pay within a reasonable time, or he [the vendor] will consider and treat the contract as rescinded. In such case, if payment be not made within a reasonable time, the vendor has a right to treat the contract as abandoned by the vendee. In like manner, and with like consequences, the vendee may notify the vendor, if the latter is in default and the former is not. *Rummington v. Kelley*, 7 Ohio, 97, pt. 2; *Higby v. Whittaker*, 8 Ohio, 201." In that case there was a decree entered that the contract be delivered up and canceled. In the case at bar there was a prayer for relief in the alternative, first, for a judgment against Yaw for \$710, with interest, to be declared a first lien on the real estate, and an order of sale thereof; or, if the court should find that specific performance of said writing ought not to be enforced, then that the court decree that defendants surrender said writing for cancellation, and the cloud upon the title of the real estate be removed, and that plaintiffs' title be quieted. The relief last prayed for was granted by the court, and, we think, rightly so, in view of the persistent neglect of the obligees in the bond to comply with its terms, particularly after demand and tender of a deed by plaintiffs. In *Benedict v. Lynch*, 1 Johns. Ch. 370-376, Chancellor Kent said: "The notion that seems too much to prevail that a party may be utterly regardless of his stipulated payments, and that a court of chancery will, almost at any time, relieve him from the penalty of his gross negligence, is very injurious to good morals, to a lively sense of obligation, to the sanctity of contracts, and to the character of this court. It would be against all my impressions of the principles of equity to help those who show no equitable title to relief." The conduct of the defendants below was such as not to entitle them to any equitable relief,

and the decree entered against them in the district court was justified under the facts shown. The judgment of the court of appeals will be reversed, and the judgment of the district court affirmed. All the justices concurring.

(62 Kan. 79)

BAKER v. AGRICULTURAL LAND CO.
et al.

(Supreme Court of Kansas. June 9, 1900.)

STATUTES — AMENDMENT — PROCESS — SERVICE BY PUBLICATION — APPEARANCE.

1. Section 1, c. 107, Laws 1889, recites that it amends section 72, Gen. St. 1868. The title reads that the same is amendatory of section 72, c. 80, Gen. St. 1868, and section 9 of the act provides that section 72 of said chapter 80 is repealed. *Held*, that it was clearly the legislative intent by the latter act to amend chapter 80, Gen. St. 1868.

2. The same holding is made respecting section 2, c. 107, Laws 1889, which is decided to be amendatory of section 73, c. 80, Gen. St. 1868.

3. An affidavit for service by publication was entitled in the cause, but the venue was stated thus: "State of Kansas, ——— County." *Held* sufficient.

4. After decree entered against a defendant, based upon service by publication, he appeared, and filed a motion to redeem the land in controversy from a lien fixed upon it in the judgment. *Held*, that this act was, in effect, an appearance in the suit, and that the validity of the judgment could not thereafter be questioned in an action of ejectment by the party filing said motion.

(Syllabus by the Court.)

Error from district court, Lyon county; Charles B. Graves, Judge.

Action by C. J. Baker against the Agricultural Land Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

On October 10, 1887, Julia A. Smith and her husband, F. E. Smith, executed and delivered to the Farm Land Mortgage & Debenture Company a note for \$2,000, and secured the same by a mortgage on land in Lyon county. Having made default in the payment of interest, a foreclosure suit was begun by the mortgagee on March 3, 1891, wherein F. E. Smith, Julia A. Smith, C. W. Smith, and 28 others were made parties defendant. The mortgaged land was deeded by Julia A. Smith and husband to C. W. Smith, which deed was filed for record on August 13, 1890. Service was obtained upon C. W. Smith by publication, and a decree entered in February, 1892, foreclosing the mortgage. Sale was made thereunder, and the land bid in by Charles Humble on October 10, 1892, and a sheriff's deed issued to him. Afterwards, on September 23, 1893, he conveyed the land by quitclaim deed to the Farm Land Mortgage & Debenture Company. On September 26, 1892, there was recorded in the office of the register of deeds of Lyon county a deed from C. W. Smith to C. J. Baker, purporting to convey the land in controversy subject to the mortgage of \$2,000 and interest, which deed bore

date May 13, 1890. On September 13, 1893, the Farm Land Mortgage & Debenture Company brought another suit in the district court of Lyon county on the same note and mortgage, making as defendants therein C. J. Baker and Charles Humble, and recited and set out therein the entire proceedings had in the former action against Julia A. Smith et al., and alleged in their petition that, after the execution and delivery of said sheriff's deed to Humble, plaintiff for the first time discovered that on September 26, 1892, there had been placed of record in the register of deeds office of said county a warranty deed executed by C. W. Smith to C. J. Baker, dated May 13, 1890, and acknowledged the same day before J. A. Smith, a notary public, and that plaintiff had no notice of the existence of said deed until after the sheriff's sale and the execution of the sheriff's deed; that said F. E. Smith, one of the makers of said note and mortgage, and his son C. W. Smith, to whom said land was conveyed, and by whom said land is purported to be conveyed to C. J. Baker, have frequently refused, upon request of plaintiff, to give any information as to the whereabouts of C. J. Baker, but have offered to secure a quitclaim deed from Baker to this plaintiff if plaintiff would give them said Smith's \$100. The petition also alleged that the conveyance to Baker was fraudulent, and not made when it purported to be, and that Humble, the purchaser at the sheriff's sale, took actual possession of the property, and has ever since held the same, and requiring C. J. Baker to set up any claim to the premises he may have, and that said mortgage be foreclosed as to him, and the amount due thereon be declared a first lien. Service by publication was duly had upon C. J. Baker, Humble filing an answer in the cause. On February 27, 1894, judgment was duly rendered in accordance with the prayer of said petition, excluding C. J. Baker from all interest in the land. In the first foreclosure action, commenced March 3, 1891, against Julia A. Smith et al., the affidavit for service by publication was duly entitled in the cause, the venue, however, being stated thus: "State of Kansas, ——— County—ss." On November 4, 1895, the Farm Land Mortgage & Debenture Company conveyed the land in controversy to defendant in error the Agricultural Land Company. This action in ejectment was brought by Baker in December, 1896, to recover possession of the property, and for rents and profits. The court made conclusions of fact and law, and rendered judgment in favor of defendants below.

J. A. Smith, for plaintiff in error. Buck & Spencer, for defendants in error.

SMITH, J. (after stating the facts). It is contended by counsel for plaintiff in error that since the enactment of chapter 107 of the Laws of 1889 there has been no statute in force in this state authorizing service by

publication. This claim is based upon the fact that sections 1 and 2 of that act do not refer to the chapter of the General Statutes of 1868 which they purport to amend. Section 1 commences as follows: "Section 1. That section 72 of the General Statutes of 1868 be and the same is hereby amended so that the same shall read as follows." Then follow provisions prescribing in what cases service by publication may be had, etc. Section 2 begins: "Sec. 2. That section 73 of the General Statutes of 1868 be and the same is hereby amended so that the same shall read as follows." Then follows the requirement concerning the affidavit for publication, and what it shall contain. Chapter 80 of the General Statutes of 1868 relates to civil procedure. That it was the purpose of the legislature by the act of 1880 to amend said chapter 80 of the General Statutes of 1868 appears to us clear. The title of said chapter 107 of the Session Laws of 1880 reads as follows: "An act relating to the Code of Civil Procedure, and amendatory of sections seventy-two and seventy-three, and six hundred forty-three, six hundred forty-four, and six hundred forty-six and six hundred forty-seven of chapter eighty of the General Statutes of 1868." Again section 9 of the same act reads: "Sec. 9. Original sections 72 and 73 * * * of chapter 80 of the General Statutes of 1868, * * * are hereby repealed." Thus the title to the act and section 9 thereof expressly mentioned chapter 80 of the General Statutes of 1868 as being amended and repealed. The language of the title of an act cannot be ignored as an aid to determine legislative intent. *Mitchell v. State*, 61 Kan. —, 60 Pac. 1055. The omission of the words "chapter eighty" in sections 1 and 2 of chapter 107 of the Laws of 1880 constitute the sole ground of attack upon the law. The objection is technical in a high degree, and hardly worthy of the extended comment we have made upon it. In *Landrum v. Flannigan*, 60 Kan. 436, 56 Pac. 753, it is said: "The cases in which the courts have been called upon to supply evident legislative omissions by the interpolation of words to complete the sense of the act, and thus harmonize it with the obvious legislative intent, are frequent." The affidavit for service by publication was not void for lack of venue. The strict rule laid down in early decisions has been greatly modified and relaxed. In *Proff. Not. § 66* (2d Ed.), it is said: "It is presumed, when no venue is stated, that the affidavit was taken within the jurisdiction of the officer taking the affidavit. So it is held that the absence of a venue is not fatal to an affidavit, for the important thing is that it shall appear that the oath was administered by a person authorized to administer the same; and the omission to state the venue may be aided, when the affidavit is offered to be used in legal proceedings, by the presumption that the officer acted within his jurisdiction, and, on

a prosecution for perjury, by proof extrinsic to the paper." See, also, *Reavis v. Cowell*, 56 Cal. 588; *Young v. Young*, 18 Minn. 90 (Gil. 72).

An attack is made upon the judgment in the second suit brought on September 13, 1893, by the Farm Land Mortgage & Debenture Company against C. J. Baker, wherein all his rights under the deed from C. W. Smith were cut off by the decree. The plaintiff in error is not in a position to attack the validity or question the regularity of that judgment. After it was rendered, and in 1896, Baker, without objecting to the jurisdiction of the court, filed a motion in the cause, and claimed the right to redeem. In this motion no jurisdictional question was raised. On that hearing Baker's deposition was read to sustain his claim of interest in the property. By this motion Baker entered his appearance in the cause. *Investment Co. v. Cornell*, 60 Kan. 283, 56 Pac. 475. After this, if he complained of the judgment, he should have commenced proceedings in error to have it reversed.

Again, the court found: "Fifth. The deed from C. W. Smith to C. J. Baker was not recorded until seven months and eighteen days after the judgment in said suit No. 7,715 was rendered, and was recorded pending the publication of the sheriff's notice of sale, and only fourteen days before said sale." Neither C. W. Smith nor plaintiff in error was ever in possession of the land. Baker, therefore, was a purchaser pendente lite, and could obtain no greater rights than his grantor, whose interest in the property had been terminated and cut off by the decree in the foreclosure action. *Smith v. Worster*, 59 Kan. 640, 54 Pac. 676. There was no error in the proceedings, and the judgment of the court below will be affirmed. All the justices concurring.

DOUGLAS v. MUSE et al.

(Supreme Court of Kansas. June 9, 1900.)

EJECTMENT—DIRECTION OF VERDICT—ERROR—TRANSFER OF INTEREST—ORIGINAL PARTY—SECOND TRIAL—RECORD—SUFFICIENCY.

1. Where plaintiff claimed land under a tax deed and adverse possession for more than 15 years, and defendant attacked the validity of the tax deed, and averred that the plaintiff obtained possession through fraud, and offered testimony on both propositions, it was error to instruct the jury to find for the defendants, since the legality of plaintiff's possession, and when it began and ended, were questions for the determination of the jury.

2. Under Civ. Code, § 40, providing that in cases of transfer of interest the action may be prosecuted in the name of the original party, an averment in the answer that plaintiff had conveyed his interest in the land since the commencement of the action, which was not denied under oath, was not sufficient to bar a recovery by the plaintiff.

Error from district court, Wyandotte county; H. L. Alden, Judge.

Action by John C. Douglas against Lena De Witt Muse and others. From a judgment

in favor of defendants, plaintiff brings error. Reversed and remanded.

True & True and Hutchings & Keplinger, for plaintiff in error. Waters & Waters, for defendants in error.

PER CURIAM. Ejectment to recover 70 acres of land in Jefferson county, with the rents and profits thereof. John C. Douglas, the plaintiff, claimed the land under a tax deed issued in November, 1873, and also because of adverse possession for more than 15 years; while the defendants claimed it under a conveyance from D. L. Lakin, the original owner, and also through a sale of the land for the taxes of 1886. The deed to the land was taken in the name of C. I. Richards for himself and his alleged partner, John C. Douglas; and Douglas acquired the entire interest by a conveyance made in October, 1887. The plaintiff claims to have taken open and adverse possession of the land in July, 1875, and to have continuously held possession until the latter part of 1890. The defendants attacked the legality of the tax proceedings and the validity of the tax title, and they also claimed and attempted to show that the possession taken by Douglas was illegal; that the tenant of the original owner was induced by artifice and trick to attorn to Douglas, and that this he did without the knowledge of the original owner; and some of the circumstances strongly point in that direction. The plaintiff contended that the possession of the defendants was obtained in 1891 in the same manner. Testimony is offered as to the regularity of the tax proceedings, and at the conclusion of the trial the court took the case from the jury by peremptorily instructing for the defendants. In this, we think, there was error. Assuming that the tax proceedings are irregular, there is testimony tending to show adverse possession by the defendant for the period of 15 years and more. Whether the possession was illegally obtained, and when adverse possession actually began and ended, cannot be declared from the testimony as a matter of law. It was fairly a question for the determination of the jury, and the action of the court in determining this disputed question requires a reversal of the judgment.

The claim that the plaintiff could not recover because of the averment in the defendants' answer that he had conveyed his interest in the land since the commencement of the action cannot be sustained. It is true that the reply denying this averment was not verified, and therefore it is to be taken as admitted by the pleadings. However, the case appears to have been tried as though the fact averred was in issue between the parties, and, besides, under section 40 of the Civil Code, in cases of transfer of interest, the action may be prosecuted in the name of the original party.

Another claim is made that the judgment should be affirmed because it does not appear

affirmatively that a second trial was asked, nor that it had been waived, and that the plaintiff must exhaust these remedies before prosecuting proceedings in error. We know as a matter of fact that the case has been twice tried. After the first trial it was brought to this court for review, and on jurisdictional grounds was certified to the court of appeals, where the judgment was reversed, and the case remanded for another trial. That trial has been had, and the case is here again for review, and hence there is no necessity for putting the parties to the trouble and expense of showing from the records of the trial court what is apparent enough from the records of our own court. For the reasons stated, the judgment of the district court will be reversed, and the cause remanded for another trial.

(62 Kan. 57)

CHICAGO, R. I. & P. RY. CO. v. SCHEINKOENIG.

(Supreme Court of Kansas. June 9, 1900.)

PERSONAL INJURIES—MEASURE OF DAMAGES.

1. Profits derived from a business speculative and uncertain in character are not provable, as a measure of damages, in an action to recover for injuries negligently inflicted upon the owner of the business, whereby he was prevented from giving it his personal attention, and earning from it such probable amount as its nature permitted; but they are provable to show the character and extent of the business in which the injured person was engaged, the probable value to him of the time he lost on account of his injuries, and the probable loss he sustained by not being able to give to his business his accustomed oversight and attention; and this rule is not affected by the fact that the business in question was that of a partnership conducted by the injured man and another.

2. *Railway Co. v. Posten*, 53 Pac. 465, 59 Kan. 449, reaffirmed.

(Syllabus by the Court.)

Error to district court, Clay county; W. S. Glass, Judge.

Action by R. Scheinkoenig against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

M. A. Low, W. F. Evans, and J. D. McFarland, for plaintiff in error. Coleman & Williams, for defendant in error.

DOSTER, C. J. The defendant in error herein sued the plaintiff in error to recover damages for injuries negligently inflicted upon him as a passenger on one of the trains of the latter. A verdict and judgment were rendered for the plaintiff in the court below, from which the defendant in that court has prosecuted error. The errors complained of are the admission of incompetent and irrelevant testimony in proof of the damages sustained, and the giving of an erroneous instruction as to damages. The evidence to which objection was made was that of the plaintiff, and was as follows: "Q. I will

ask you to state, as nearly as you can, what the average annual profits of your business was during a period of, say, four or five years preceding the time of your injury. I refer to the firm business. A. Our average net profits for the last five years run from about five thousand dollars net profits a year for the last five years. Q. I will ask you to state to the jury what amount of business your firm transacted. State, in a general way, what amount of business your firm transacted annually. A. Well, our business—our amount of business—would run from buying from six thousand to nine thousand head of cattle a year, buying and selling that many." The instruction complained of was as follows: "Evidence of the loss sustained by the plaintiff in his business in consequence of the injuries sustained by him may be considered by the jury, not as furnishing the measure of damages, but to aid the jury in estimating them, and for this purpose the nature of plaintiff's business, its extent, and the importance of his personal oversight and superintendence in conducting it has been allowed to be shown; but you are instructed that speculative profits on invested capital are not recoverable as damages in this case." It was in evidence that the plaintiff in the court below was in partnership with another person; that they were engaged in the business of buying and selling cattle, and were equal sharers of the profits of such business. Excepting in the fact that the plaintiff in this case was a member of a partnership, and that the loss sustained by him on account of his injuries was a loss to him as a member of a partnership, the case is identical in point of fact and in legal questions arising thereon with *Railway Co. v. Posten*, 59 Kan. 449, 53 Pac. 465. Counsel for plaintiff in error vigorously assail the decision made in that case, because, as they say, it allows a jury to award as damages the loss of contingent and possible profits upon invested capital under the superintendence of personal effort. We have given reconsideration to the rulings of law there announced, and are entirely satisfied as to their soundness. Neither in that case nor in the above-quoted instruction of the court below in this one was it ruled that evidence of the speculative and uncertain profits of a business could be considered as a measure of damages. In that case the plaintiff had testified to the amount of profits of his business in the years immediately preceding his injury. Replying to the contention of counsel that evidence of such character was inadmissible, Mr. Justice Allen said: "It is said that this income, being derived from invested capital as well as the personal attention of the plaintiff, did not furnish a proper measure of damages; that profits of the kind realized were speculative; and that, while profits might be made in one year, losses might be sustained in another. The contention is sound so far as it relates to the rule by

which the plaintiff's damages are to be measured, but it is not sound as to the proposition that testimony with reference to the plaintiff's employment, and the nature and character of his business, and whether it is profitable or otherwise, may not be admitted in evidence. Certainly evidence as to earnings in cases of this kind is not necessarily confined to wages. It is not alone wage earners whose time is valuable, and who may recover damages for injuries resulting in the loss of it. In order that the jury may intelligently estimate the loss the plaintiff has sustained, it is necessary that they should be informed with reference to his business affairs; and while they may not, as compensation for the loss of his time, include speculative profits, or profits on invested capital, it is for them to say what loss has resulted to his business because of his being incapacitated from attending to it, and to award him as damages the value of his time and labor to himself in the transaction of his own business." Evidence of speculative and uncertain profits derivable from invested capital and the personal oversight of it is not receivable, of course, as a measure of damages, but it is receivable to show the character and extent of a man's business, and the probable loss sustained by him on account of not being able to give to it his usual and ordinary attention. It may be that the evidence objected to in this case would have been erroneous without an instruction by the court to the jury explaining the purpose for which it was admitted, and limiting the use to be made of it by them in their deliberations; but, instructed as they were, it became entirely admissible and proper.

Counsel for plaintiff in error criticize the use in the above-quoted instruction of the words "any loss sustained by the plaintiff in his business in consequence of the injuries sustained by him." They argue that there was no evidence of "loss sustained" by the plaintiff in his business. The evidence of loss sustained was: First, in the fact that the plaintiff had a business; and, second, in the fact that the injuries he sustained prevented him from giving attention to it. The loss was not stated by him in dollars, nor, perhaps, should it have been so stated. When the facts were proved, the inference of loss arose, or, rather, the fact of loss became apparent; and it was for the jury to say, considering all the circumstances, the character and extent of the plaintiff's business, the profits he had been realizing from it, and the extent to which he had been prevented from attending to it, what his losses were.

Counsel for plaintiff in error also say that the defendant in error being a member of a partnership, the business of which could go on without his personal attention to it, prevented the application of the rule laid down in *Railway Co. v. Posten*, *supra*. It is inconceivable to us that such should be the case.

If it had been proved as a fact that the plaintiff's business went on as well without him as with him, that fact would have been material, and relevant to consider. The fact that it might possibly go on as well without him as with him was a fact to be taken into account by the jury. They, doubtless, did take it into account. Upon this question the case of *Walker v. Railway Co.*, 63 Barb. 265, is in point.

The above are the only errors complained of in the case. They are unavailing, and the judgment of the court below is affirmed. All the justices concurring.

(63 Kan. 75)

SMITH v. SUPREME LODGE OF ORDER OF SELECT FRIENDS.

(Supreme Court of Kansas. June 9, 1900.)

BENEFICIAL ASSOCIATIONS—DISABILITY—RIGHT TO RELIEF.

A contract of insurance with a fraternal insurance company provided for the payment of a certain benefit whenever a member thereof, by reason of disease, accident, or otherwise, became totally and permanently disabled from following his usual or regular business, occupation, or profession. A member, who was a pharmacist and engaged in running a drug store, was accidentally shot in the left arm, and it was amputated at the shoulder joint, and no other injury was alleged to have been sustained. In an action upon the contract of insurance it is held that the loss of the left arm alone does not constitute a total disability within the terms and meaning of the contract.

(Syllabus by the Court.)

Error to district court, Labette county; A. H. Skidmore, Judge.

Action by Irvin Smith against the Supreme Lodge of the Order of Select Friends. Judgment for defendant, and plaintiff brings error. Affirmed.

W. D. Atkinson, for plaintiff in error.
Boyle & Dillard, for defendant in error.

JOHNSTON, J. Irvin Smith brought an action against the Supreme Lodge of the Order of Select Friends, a fraternal insurance organization, to recover \$3,000 upon an insurance contract. The order had issued to him a certificate which entitled him to a benefit from the relief fund, not exceeding \$3,000, in case of disability or death in such a manner as the constitution and general laws of the order governing the relief fund provided. The constitution and general laws provide for the payment of a benefit for disability whenever a member by reason of disease, accident, or otherwise, while engaged in the performance of any reputable or legitimate business or recreation, becomes totally and permanently disabled from following his usual or regular business, occupation, or profession. One section of the general law provides that: "The following, among other things, are hereby declared to be total and permanent disabilities within the meaning of the laws of this order: The loss of both eyes; the loss of one hand

and permanent crippling of the other; the loss of one foot and permanent crippling of the other leg or foot." The plaintiff was a pharmacist, engaged in running a drug store in the city of Parsons, and on December 4, 1897, he suffered an accidental gunshot wound in the left arm, and it became necessary to amputate the arm at the shoulder joint. The right hand was not injured, nor was any other injury sustained, but the plaintiff alleged and claimed that the loss of the left hand constituted a permanent and total disability within the terms of the contract, and claimed a recovery for \$3,000. Upon a demurrer to the petition the court held that the loss of the left arm alone did not constitute a permanent and total disability within the terms and meaning of the contract between the order and the member, and of this ruling complaint is made.

The ruling and judgment of the court must be sustained. The petition set forth the nature and extent of the plaintiff's injury in detail, and then averred that it constituted a total and permanent disability; but the last averment is no more than a conclusion. The sufficiency of the petition is to be determined from the facts stated therein and those of which the court must take notice. The occupation of the plaintiff, namely, pharmacist, or druggist, is well understood, and of the requirements of the business the court must take notice. While the loss of an arm and hand is a serious one, it cannot be held to be a total disability. It is a matter of common knowledge that much, if not all, of the work and business of a druggist can be fairly well done by one who has lost a hand. He will not be able to compound medicines so conveniently and expeditiously as a person who has both hands, but a large proportion of the medicines sold in a drug store to-day are compounded and ready for sale before they reach the hands of the retail dealer. It is equally well known that a large proportion of the business of the ordinary drug store consists in the sale of medical stores and instruments, toilet articles, holiday goods, cigars, soda and mineral waters, etc.; and hence all know that this, if not all, the work of the druggist may be done, and the business conducted, with reasonable efficiency, by a person who has lost a hand. To sustain his claim, the plaintiff must show more than a partial disability. He cannot recover under the contract of insurance which fixed the right of one party and the liability of the other unless he has sustained a total disability; that is, a complete disability to carry on the business of a druggist. This view is strengthened by that provision of the law of the order declaring what shall constitute a total and permanent disability. It specifically refers to such a loss as was sustained in this case, and provides that the loss of one hand and the permanent crippling of the other shall be deemed a total and permanent disability within the meaning of the law. This definition and declaration as to what

shall constitute a total disability is a part of the contract, and binding upon both of the parties. Whether an injury constitutes a total disability is ordinarily a question for the jury, but from the facts alleged here, and the well-known requirements of the plaintiff's occupation, it is clear that the plaintiff is not totally and permanently disabled from carrying it on. To so hold would be to alter the contract which has been made between the parties, and to enlarge the liability of one of them beyond that which had been agreed upon. *Lyon v. Assurance Co.*, 46 Iowa, 631; *Rhodes v. Insurance Co.*, 5 Lana. 71; *Albert v. Order of Chosen Friends (C. C.)* 34 Fed. 721; *Hutchinson v. Tent Co.*, 68 Hun, 355, 22 N. Y. Supp. 801; *Saveland v. Casualty Co.*, 67 Wis. 174, 30 N. W. 237. The judgment of the district court will be affirmed. All the justices concurring.

HERRON v. EAGLE MIN. CO.

(Supreme Court of Oregon. June 18, 1900.)

UNPATENTED MINING CLAIM—CONTRACT FOR SALE—SPECIFIC PERFORMANCE—NECESSARY ALLEGATIONS—LIMITATIONS.

1. The interest acquired by a locator in possession of a mining claim prior to his compliance with provisions of United States statutes entitling him to a patent is merely personalty, and not an interest in real property, within Hill's Ann. Laws, § 382, providing that a suit for the determination of an interest in real property shall be deemed within the limitations of actions for the recovery of real property, and hence such statute has no application to an action for specific performance of a contract to convey such mining claims.

2. Where the owner of lands was to convey an interest therein for services to be rendered by plaintiff, and the contract provided that the owner might sell the claim before the expiration of the work, no recovery could be had in an action for specific performance against the owner's assignee, where there was no allegation that the lands were not so sold.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Action by Isaac Herron against Eagle Mining Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is a suit for the specific performance of a contract. The facts are that in September, 1886, one Henry Cable, who was in possession as locator of a quartz mining claim in Baker county known as the "Grey Eagle," entered into a written contract with D. C. Probasco and A. H. Huntington, by the terms of which he agreed to sell and convey them an undivided two-thirds interest therein in consideration of their doing the annual assessment work for the four consecutive years beginning with 1886; it being stipulated, however, that in case the whole or any part of the claim should be sold or disposed of by Cable before the expiration of the four years, Probasco and Huntington should share in the proceeds, the same as though they were the legal and

rightful owners of the two-thirds interest in the mine. Probasco and Huntington performed the assessment work for the years 1886 and 1887, when Probasco transferred to plaintiff all his rights under the contract, and the plaintiff and Huntington thereafter complied with its terms, so as to become entitled, on the 1st day of January, 1890, to a conveyance, as stipulated in the contract. About that time Cable conveyed to Huntington an undivided one-third interest in the mine, but refused to make a conveyance to the plaintiff. The defendant corporation has been the owner of the mine since December 7, 1891, but purchased it with knowledge of the plaintiff's rights. This suit was commenced on December 20, 1899, whereupon the defendant interposed a demurrer to the complaint on the grounds that it appears upon the face thereof that the suit is barred by the statute of limitations, and that it does not state facts sufficient to constitute a cause of suit; which being sustained, and the suit dismissed, plaintiff appeals.

M. L. Olmsted, for appellant. N. B. Knight, for respondent.

BEAN, J. (after stating the facts). The contention for the plaintiff is that this is a suit for the determination of a claim to or interest in real property within the meaning of section 382, Hill's Ann. Laws, and is, therefore, within the 10-years statute of limitations. The nature of the title or rights acquired or held by a locator in possession of a mining claim prior to his compliance with the provisions of the statutes of the United States entitling him to a patent is difficult to determine from the authorities. Prior to such compliance it is agreed he has an absolute right of possession. In many states this possessory right is by statute declared to be an interest in real estate, and subject to seizure and sale as such. *Barringer & A. Mines & Mining*, 317; 1 Lindl. Mines, § 535. And the decisions of the courts holding it to be real estate are in most, if not all, instances based upon some such statutory provision. Prior to the law of 1898 (Sess. Laws 1898, p. 16) we had no statute to that effect except section 3830, Hill's Ann. Laws, which is not involved here. It was consequently held in *Duffy v. Mix*, 24 Or. 265, 33 Pac. 807, and *Allen v. Dunlap*, 24 Or. 229, 33 Pac. 675, that the locator of a quartz mine prior to the time he becomes entitled to a patent has a mere right of possession or possessory title, which is valuable, and will be protected by law, but is not real estate or an interest in land. This view finds support in the decisions in California that prior to the act of 1860, providing for the conveyance of mining claims they would pass by a verbal sale, if accompanied by an actual transfer of the possession of the ground, because the right to such claim rested on possession only, and did not

amount to an interest in the land, and therefore not within the statute of frauds. *Patterson v. Mining Co.*, 30 Cal. 360; *Tunnel Co. v. Stranahan*, 20 Cal. 198. In accordance with the doctrine adopted by this court, the demurrer must be sustained on the ground that the suit was barred by the statute of limitations.

There is, however, another ground for supporting the decree of the court below. The contract between Cable and the plaintiff's assignor manifestly contemplated that Cable should have the right to sell and dispose of the mine at any time before the completion of the assessment work, and there is no allegation in the complaint negating such sale or disposition. The decree of the court below will therefore be affirmed, and it is so ordered.

MCBEAN v. MCBEAN et al.

(Supreme Court of Oregon. June 18, 1900.)

EVIDENCE—MARRIAGE—PRESUMPTION—ALLOTMENT OF LANDS—DESCENT.

1. Plaintiff claims title to 160 acres of land as the granddaughter and heir of the original allottee of Indian lands. Her case hinges on the question of whether or not her grandfather was lawfully married to an Indian woman. Four witnesses, including the allottee's mother and sister, testify that no marriage was ever solemnized between them, and two witnesses testify contra. It also appeared that the same Catholic priest who was alleged to have performed the wedding ceremony had later performed a ceremony marrying the grandfather to another woman, which he could not have done lawfully, under the rites of the Catholic Church, if a wife by a former marriage was still alive. *Held*, that the evidence is not sufficient to prove a lawful marriage, and hence, plaintiff's father being an illegitimate child, and having no inheritable blood which would entitle him to inherit from his father, plaintiff has no claim to the estate in question.

2. The presumption of a lawful marriage from the fact that the parties have lived together and cohabited as husband and wife does not arise where the proof indicates that their relations were entirely meretricious from their inception.

3. Supp. Rev. St. U. S. p. 898, § 5, providing that, for the purpose of determining the descent of land to the heirs of Indians, the offspring of Indians who have cohabited together as man and wife shall be deemed to be legitimate, is general in its purpose, and does not repeal or in any way affect the special act of 1885, relating to the allotment of lands to the Umatilla Indians, and enacting that the law of alienation and descent in force in the state of Oregon shall apply thereto.

Appeal from circuit court, Umatilla county; S. A. Lowell, Judge.

Action by Cora McBean against Jane McBean and others to determine who are the heirs of John McBean, deceased. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

H. J. Bean and J. H. Lawrey, for appellant. T. G. Halley, for respondents.

WOLVERTON, C. J. John McBean, an allottee of 160 acres of the Umatilla reserva-

tion, in Umatilla county, Or., designated in the allotment as "Cayuse Mixed Blood No. 388," died intestate, leaving surviving him his mother, brothers and sisters, and nieces and nephews, who are the defendants herein. The plaintiff claims to be his granddaughter, and the only living descendant of heritable blood, and the purpose of this suit is to determine her right to the title and to the rents and profits of the land so allotted to him. Plaintiff is the daughter of William McBean, the son of John and an Indian woman whose maiden name was Jane Timoochin, the daughter of the Nez Perces chief. The question upon which the case hinges is whether William was born in lawful wedlock, as to which there is much conflict in the testimony. John McBean was of mixed blood, but had no tribal relations with the Indians until 1887, when he was adopted by the Umatillas, chiefly for the purpose of sharing in the allotment. When about 14 years old, he was employed by the general government as interpreter between the Indians and the agents and representatives of the government. John W. Gay, a witness of much intelligence, testifies that he met John in 1854 at Gov. Stevens' council with the Indians, when he was 12 or 13 years of age, and again at The Dalles, in 1856; that he first saw Timoochin's daughter during the winter of 1857 and 1858, who at that time was living with John McBean in a tent back of the garrison at Ft. Walla Walla; that he was not married to the woman, but was simply living and cohabiting with her as some of the unmarried officers and private soldiers did with other Indian women who stayed about the garrison, and that these relations continued for a year or a year and a half. Joseph McEvoy relates that he became acquainted with John McBean in 1856; that witness was then a soldier, and that McBean was an interpreter for the government, and served in the same company with him; that witness was afterwards connected with the quartermaster's service, and that they continued under military discipline until 1861, and that McBean could not leave during the time without a pass or furlough from the proper officer; that he began living with this woman in a tent on Garrison creek in the fall of 1857, possibly not until 1858, and that they lived together about a year and a half in a tent procured from the quartermaster. John Silcott testifies that he first knew John McBean in Walla Walla in 1858; that he and Timoochin's daughter were living together as man and wife, and that a boy was born as the issue of such relations, who was named William McBean; that as near as he could tell the parties lived together about a year; that the woman afterwards lived with several different men as their wife; and that she was not reputed to be a lewd or immoral woman. Thomas B. Beall testifies that he became acquainted with John McBean in the fall of 1857; that he was then acting as Indian in-

terpreter in the service of the United States government, and was married, but his wife was living at Alpowai with her father, the Indian chief Timoochin, and her mother, Tema; that in the spring of 1858, having obtained a leave of absence from Col. Steptoe, he went after her, and brought her home; that they lived in a house back of the commanding officer's quarters, and continued so to live until some time in July; that he saw them and their child, William McBean, frequently, and that the child was born some time in the fall of 1857; that the parties lived together something over a year, and were generally reputed to be husband and wife; that the woman subsequently lived with several other men as their wife; that she lived with John Silcott in 1866, and was not considered an immoral woman. Catherine Jordal testifies that John McBean was married to Jane Timoochin four or five years after the Cayuse war, by Father Mesplie, a Catholic priest, at the house of John's father and mother; that she was present at the wedding, and witnessed the ceremony; that John's mother and two of his sisters were also present; and that she was 17 years of age at the time. She relates that Father Mesplie remonstrated with John at the time for living with the woman without being married as required by the rites of the Catholic Church. Joe La Rocque testifies that John went down to The Dalles; that Timoochin's crowd went down there also, and that he and Timoochin's daughter were married at the church while there by Father Mesplie; that he was not present at the church, but he saw the old folks when they went down to see him married; and that they were not married at Walla Walla. This was before the end of the Cayuse war, which occurred in the years 1855 and 1856. Jane McBean, John's mother, testifies that John was never married to the Timoochin woman, but that some time subsequent to the Cayuse war he was married to Tintinnitz's daughter (about this there is some confusion whether the marriage was to her or to Lalouskin's sister) at her home, and by the Catholic priest Father Mesplie; that Jane Timoochin and her mother brought the child Willie McBean to their place shortly after the war, when he was just learning to walk, and left him there; and that he remained with them and was supported by them until he became big enough to travel, when he went away. Mrs. Mary La Favre testifies that she is a sister of John McBean; that she was at home when John and Father Mesplie were there; that Father Mesplie remonstrated with John for living with Jane Timoochin without being married to her by a priest, and that John said he did not want to marry her, because she would not stay with him, and finally told the priest that he would not marry her; that Father Mesplie never at any time, to her knowledge, performed the ceremony for the marriage of John McBean, her brother, and

Timoochin's daughter. She further testifies that John was married to Tintinnitz's daughter about two years after the war, at the house of her father and mother, and that Father Mesplie officiated in the ceremony; that the first woman he took was Timoochin's daughter; that he stayed with her a little over a year; that she was called John's wife, but he was never married to her, so far as she knew. Susan Gagon testifies that John got a woman at The Dalles named Jane Timoochin, and brought her to Walla Walla; that he was not married to her,—just lived with her; that John was later married to Tintinnitz's daughter at Mrs. McBean's house, and that Father Mesplie came from The Dalles to marry them; that John and Timoochin's daughter were married Indian fashion; that they separated, and she went back to her folks at Lapwai or Alpowai.

Without particularizing further, it is sufficient to state that John was subsequently married to Lalouskin's sister, and then to Spellila's sister, in each instance by a Catholic priest, and subsequent to the decease of his former wife; that it was a tenet of the Catholic Church, of which John was a member, that the priest should not officiate when one of the contracting parties had a spouse living, whether divorced or not. There is much conflict in the testimony touching the Indian custom of marriage and divorce, one notion or idea being that the Indians purchased their wives; that is to say, that the parents of the young people who were desirous of entering into the marital union would agree among themselves upon the amount of the stipend to be paid to the girl's parents by those of the young man, and when this was arranged, and the stipend paid, the contracting parties assumed the marital relation. Either party was at liberty to abandon the other, and such was the manner of their divorcement. The other is that they simply assumed the marital relation and cohabited as man and wife without previous contract or ceremony; that such relations continued at the pleasure of either party to the union; and that a voluntary separation constituted a divorcement entitling either to enter into new relations with another. Aside from this, there is much loose testimony to the effect that these parties lived together as man and wife for a space of time ranging from one to six or seven years; that Jane Timoochin was reputed to be and generally known as John's wife; that he recognized and treated her as such, and admitted to sundry persons that she was his wife.

Because of the great divergency in the testimony, it is utterly impossible to determine the exact history of the affair which forms the basis of this controversy. It is probable, and more so than any other theory that we are able to adopt, that John McBean, while in the employ of the government as interpreter, met Timoochin's daughter at The Dalles, and there began living with her, and con-

tinued the relation at Ft. Walla Walla for a year or two. That he was never regularly married to the woman according to the rites of the Catholic Church is quite well established. It is related by one of the witnesses, Mrs. Jordal, that he was married at the house of his parents to this woman by Father Mesple, a Catholic priest who was then located at The Dalles, while another witness testifies that he was married at The Dalles, the same party officiating. The mother and sister of John both testify that no marriage ceremony ever took place at the house of John's parents between these people, but that Father Mesple did officiate in a ceremony at their house uniting John and Tintinnitz's daughter in the bonds of matrimony. These witnesses fix the date of the event at about the same time that Mrs. Jordal swears that he was married to Timoochin's daughter. Mrs. Jordal was then 17 years of age, and is more likely to be mistaken than John's mother and sister. Another circumstance which goes to bear out this idea is that by the rites of the Catholic Church it was not permissible for a Catholic to remarry while he had a wife living, and, as Father Mesple performed the ceremony of marriage between John and Tintinnitz's daughter, he would most assuredly have had in mind the fact of any prior marriage at which he officiated between John and another woman then living. The testimony touching the alleged marriage at The Dalles is so indefinite that no reliance can be placed upon it. The party so testifying says that he was not at the church in which they were married, but that he saw the old people going there, and the rumor was that John was to be married to this girl. So that, upon the whole, we have concluded that John was never married to Timoochin's daughter according to the rites of the Catholic Church.

Such being the case, the next inquiry is whether these parties were married according to the recognized and established Indian custom then in vogue with the tribe to which the parties, or one of them, belonged. As a general proposition, it is well settled that a marriage valid according to the law or custom of the place where it is contracted is valid everywhere. Story, *Conf. Laws*, § 113. And it is the adjudged policy of the law to treat the Indian tribes who adhere to their peculiar customs, as separate communities or distinct nationalities, with full and free authority to manage their own domestic affairs, and to pursue their own peculiar habits and customs, especially as it concerns the marriage relation. And this is so although their territory is located within the state lines, and the federal government manages their affairs through agencies designated for the purpose. Nor are they regarded as subject to the state laws. *Boyer v. Dively*, 58 Mo. 510, 529, citing *Morgan v. McGhee*, 5 Humph. 13, and *Wall v. Williams*, 11 Ala. 826. As broadly stated in *Kobogum v. Iron Co.*, 76 Mich. 498, 43 N. W. 67: "The United States supreme

court and the state courts have recognized as law that no state laws have any force over Indians in their tribal relations;" citing many authorities. So, it is said in *Earl v. Godley*, 42 Minn. 361, 362, 44 N. W. 255: "The general rule is that marriages valid by the laws of the country where they are entered into are binding here, though not solemnized in accordance with the provisions of our laws; and the same rule must be adopted in relation to these Indian marriages, where the tribal relations still exist." The rule was applied in *Johnson v. Johnson*, 30 Mo. 72, where the marriage relation was assumed in Indian territory, outside of the limits of a state, by a white man and an Indian woman according to the tribal customs of the tribe to which she belonged; and again in *Morgan v. McGhee*, supra, where the marriage was between a white man and a half-blood Cherokee upon Indian territory situate within the limits of a state. From these authorities it would seem that where the marriage is between members of the tribe wholly, or between white persons and members of the tribe, conforming to tribal customs, the union will be recognized as constituting a valid marriage in the state and federal courts. If valid everywhere, it follows as a logical sequence that the offspring of the contracting parties will take from them by the rules of inheritance in vogue in the state or country of their adoption.

At the time of the alleged marriage the territory of Washington had been set apart by congress and provided with a form of government, but some of the Indian tribes, yet maintaining their distinct tribal customs, among whom may be designated the Cayuses, Walla Wallas, Umatillas, and Nez Perces, still occupied, without relinquishment of the Indian title, a large portion of the territory, which included Ft. Walla Walla within its boundaries. Whatever testimony has been introduced touching the marriage custom then prevailing is not confined to any one of the tribes named, and we assume that whatever the custom was it prevailed alike among all these tribes. Timoochin's daughter was a Nez Perces, but John McBean, although having Indian blood, had no tribal affiliations until he was adopted by the Umatillas, as above stated.

The evidence has impressed us that the prevalent marriage custom was the one which has for its basis the purchase of the wife by the relatives of the intended husband, especially where it concerns the marriage of young persons. We will briefly state our reasons for this conclusion, without attempting to dilate largely upon the evidence. Mrs. Woodard testifies, when asked touching her knowledge of the custom, that the Indians who were under the influence of the priest generally married according to the rites of the Catholic Church, and the "others bought their women"; and J. W. Gay, who was conversant with the Indian habits and customs,

says: "My understanding of the Indian rules of marriage is this: If I had a son, and another Indian had a daughter, and my son wanted that daughter, the fathers of the two parties would meet, and set a price on her, and if I could raise the means to buy that daughter from the other Indian my son would get her, and if not he could not get her. If he stole her, she would be taken back." This is a crude, but it is the most intelligent, explanation made in the record of the custom, and it is otherwise distinctly corroborated. Other witnesses, however, testify in a general way that the marital relations were consummated by the mere cohabitation of the sexes, which continued at the pleasure of either spouse; but it cannot be said that this latter alleged custom has been substantiated by the evidence.

There is no direct proof that John McBean and Timoochin's daughter were ever married in accordance with the custom prevailing; but it is contended that the fact, which was undoubtedly proven, that these parties lived together and cohabited as man and wife is presumptive evidence of a lawful marriage. This would be true if not for the further fact that the proofs indicate that the relations between these people were meretricious from their inception. Several witnesses testify that a number of Indian women stayed about the garrison, and that white men in the employ of the government lived with them temporarily, but with no intention of marrying them. The testimony shows no more than this touching the relations that existed between John McBean and this Indian woman. Where parties have been living together and cohabiting as man and wife, and were reputed to be such in the community where they lived, and the husband has represented the woman to be his wife, there is a presumption that they were in fact lawfully married; but this presumption does not obtain where there is casual commerce between the sexes without intent upon the part of either to consummate a marital union. Promiscuous temporary intercourse has never been recognized as constituting marriage. It is said in *Lawson's Rights and Remedies* (volume 2, § 711) that a marriage "will not be presumed even where, for convenience, the parties hold themselves out as man and wife before third persons, provided their cohabitation has the elements of a purely meretricious relation."

As we have seen, John McBean fell in company with Jane Timoochin at The Dalles while he was interpreter for the government. He was very young at the time, and the girl was not older than he. They were next heard of at Ft. Walla Walla, when they are found to be living together in a tent which he had procured from the quartermaster for temporary use. This relation did not continue for more than a year or two, at most, and while the parties may have been reputed to be man and wife, and John McBean may have made admissions to the effect that this woman was

his wife, yet we cannot find from the testimony that he intended to form any such relations with her. Whatever relations he had with her were temporary, and it is very probable were not intended by either as the consummation of a marriage between them in any form, either in pursuance of the Indian custom or of the rites of a more modern civilization. The child was not born at the place of their residence, but at Alpowa. There is some testimony that McBean went to Alpowa to bring the mother and child home to his habitation, but the better view is that Timoochin's daughter and her mother brought the child to the home of John McBean's father and mother without his concurrence, and left it there to be reared by them. It is not seriously denied that the child is the offspring of the temporary intercourse between these parties, but it is very apparent that such relations do not constitute a marital union, even according to the custom of the Indians shown to be then prevailing, and therefore the child has no inheritable blood by which he would be entitled to the real estate of the father.

It is contended that, it having been shown that William McBean is the child of John McBean, the plaintiff would inherit from the grandfather by virtue of the act of congress of February 28, 1891 (Supp. Rev. St. U. S. p. 898, § 5), which provides as follows: "That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such cohabitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child." Section 5 of the original act, which was "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the territories over the Indians, and for other purposes," adopted February 8, 1887 (24 Stat. 388), provided as follows: "That the law of descent and partition in force in the state or territory where such lands are situate shall apply there-to after patents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the state of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian territory which may be allotted in severalty under the provisions of this act." The act of 1891 is an amendment of this original act. As will be seen by the title, the original act is a general one applying to the Indians upon the various reservations. It was enacted and became a law subsequent to the act providing for the alloc-

ment of lands upon the Umatilla Indian reservation. That act was adopted March 3, 1885, and it was enacted thereby, among other things, "that the law of alienation and descent in force in the state of Oregon shall apply thereto after patents have been executed, except as herein otherwise provided." The act of 1885 was special in its nature, affecting none but the Umatilla reservation and the confederated tribes inhabiting the same. While the act of 1887 was general in its purpose, it seems there was no intention of extending its provisions to the Umatilla reservation and the Indians concerned. The allotments are made upon an entirely different basis, and the acts are otherwise incongruous, so that the general act could not well supersede the special without repealing it, and no such intention is made apparent from the terms of the general act. The clause in the latter act touching inheritance and partition, therefore, did not supersede the provisions touching the same subject in the special act, and it logically follows that the amendment of 1891 to the general act did not affect the special act. The laws of descent within this state are therefore applicable to the present controversy, and not those denoted by the acts of congress of 1887 and 1891. The plaintiff cannot, therefore, inherit through her father the property of her grandfather John McBean. These considerations affirm the decree of the court below; and it is so ordered.

PACIFIC LIVE-STOCK CO. v. GENTRY.
(Supreme Court of Oregon. June 18, 1900.)

PUBLIC LANDS—PRE-EMPTION—CORPORATION—EMPLOYEE—CONSPIRACY—BREACH OF TRUST—EQUITY—STATE LANDS—DONATION ACT—SUBSEQUENT TITLE—CONSPIRATOR—DECLARATIONS.

1. A cattle company employed a person, at a monthly salary, to settle on a portion of its ranch, the title to which was in the government, and hold it under the homestead law, and agreed to pay him \$200, as extra wages, when title thereto was secured. The employé at various times informed his neighbors that he was holding the land for the company. *Held*, that from the evidence it was manifest that the employé was holding the land in the right of the company, and that the finding of a referee that he was holding same in his own right was error.

2. A private corporation in possession of a large ranch, the title of a portion of which was still in the government, to perfect title thereto employed a person to go on such government land in the guise of a settler under the homestead law, and, when title thereto had been secured to such employé, he should immediately convey it to the company, and in the meantime he should harvest the alfalfa thereon and feed it to the company's cattle, receiving a salary for his services. *Held*, that where such employé repudiated the trust, used the alfalfa for his own benefit, and asserted that the pre-emption was in his own behalf, a court of equity will grant no relief to such company, restraining such trespass or granting damages therefor, as such contract was contrary to public policy and the pre-emption law.

3. Though it is the policy of the general government, after a survey of the public lands, to

extend to persons who theretofore settled thereon a prior right to file on the same, and courts of equity, on behalf of such settler or his assignee, will restrain a trespass thereon before a survey is made, yet such assignee must be a person entitled to pre-empt under the homestead law; and where a corporation has purchased the interest in land of a settler before survey, the title being still in the government, a court of equity will not lend its aid to such corporation to restrain trespass thereon, and to award damages therefor.

4. Hill's Ann. Laws, § 3597, provides that the governor may appoint an agent to select all lands donated to the state by the United States. Section 3600 provides that a person may purchase such selected lands of the state on making an affidavit that he is over the age of 18 years, is a citizen of the United States, or has declared his intention to be such, and that the purchase is not made for the purpose of speculation, but for a home. *Held*, that a court of equity would not entertain a suit to award damages, and restrain a trespass on unselected government land, of which he had taken possession, on a showing that he intended to obtain title thereto under such statutes.

5. A private corporation, to obtain title to government land upon which it had placed valuable improvements, put a salaried employé thereon, who was to pre-empt the same under the guise of a homesteader, and convey the same to the company. *Held*, that, such employé having disregarded his agreement and asserted a right on his own behalf, the fact that the corporation thereafter secured the interest of a person who had surrendered lands in a forest reserve, and was given in lieu thereof title to the land in question, did not place it in such a position that a court of equity would award damages against and restrain the trespass of the employé, as the arrangement upon which he took possession was against public policy and in contravention of the pre-emption law, and the subsequently acquired title placed the corporation in no better aspect in equity.

6. In an action by a cattle company to restrain a trespass on a portion of its ranch, it appeared that title was in the government, and that plaintiff had for a long time attempted to secure title thereto; that the defendant was old and infirm; that plaintiff had given him \$25 per month to stay on the land, and he was not expected to do any work; that the company's employés were told to defer to him, as it pleased him, but that his authority did not amount to anything; that a company agent told him that he would give him \$200 over his wages "when the whole business is wound up, for faithfully staying on that place." *Held*, that it was fairly inferable from the circumstances that a conspiracy existed between the plaintiff and defendant to acquire title to such land under the homestead law for the benefit of the plaintiff corporations; and therefore declarations made by a deceased agent of the company, pending such efforts to obtain title, with reference to the relations between plaintiff and defendant, were admissible though not made in the discharge of his duty.

Appeal from circuit court, Malheur county; M. D. Clifford, Judge.

Action by the Pacific Live-Stock Company against James Gentry to restrain trespass, and for damages therefor. From a judgment dismissing the action, plaintiff appeals. *Affirmed*.

This is a suit to enjoin an alleged trespass, and to recover damages therefor. The facts are that one James Sullivan, having settled on unsurveyed public lands of the United States known as the "Rinehart Springs

Ranch," in Malheur county, Or., cleared about 40 acres thereof, which he sowed to alfalfa, irrigating it with water from springs thereon, and about 1888 sold said improvements to plaintiff, a corporation engaged in raising cattle in Harney and Malheur counties. This ranch is situated on the Owyhee river, which at that place has almost precipitous banks from 1,000 to 1,500 feet high, so that it is impossible for cattle to descend to the river for water. The table-lands in the vicinity afford good pasturage for cattle, which, for a radius of about 10 miles, find water only at said springs. After purchasing these improvements, plaintiff built a flume on the ranch, cleaned out the old ditch, increased the area of cultivated land, and built corrals and fences; expending about \$5,000 in the original purchase and subsequent improvements. The ranch annually yields from 100 to 150 tons of alfalfa hay, which is cut and stacked on the place, and fed to the cattle on the range during the winter. The plaintiff has kept an employé on the ranch to irrigate the alfalfa, to feed and care for the stock, and to look after its interests; furnishing him food, cooking utensils, a team, wagon, harness, machinery, and farming tools. In October, 1894, plaintiff's superintendent, having learned that the employé in charge of the ranch intended to claim it in his own right, removed him, and engaged the defendant in his stead; agreeing to pay him \$25 per month for his services. At that time the defendant was 62 years old, his shoulder had been broken, and, the dislocation never having been reduced, his left arm was nearly useless; and he had also suffered several strokes of paralysis,—notwithstanding which he was able to irrigate the alfalfa and look after the ranch, to which he immediately moved; and, having no family, he lived alone in the house thereon, remote from neighbors. In 1898 the townships in which the Rinehart springs are situated were surveyed by a deputy United States surveyor, and it was ascertained that plaintiff's improvements were upon the following described premises: The N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 24 in township 27 S., of range 41 E., of the Willamette meridian, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 18, the N. W. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 19 in township 27 S., range 42 E., of said meridian. But the plat of said survey has never been approved by the interior department. After the location of said ranch was thus established, defendant, claiming to be entitled to file a homestead entry upon a part thereof, to wit, the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of said section 19, built a small cabin thereon, into which he moved, and in which he lived a part of the time; and in 1898 he cut the alfalfa hay growing on the land so claimed by him, 60 tons of which he sold, realizing therefrom the sum of \$300. Under an act of congress approved

June 4, 1897 (30 Stat. 36), one F. A. Hyde, having selected the land included in the Rinehart Springs ranch, and such selection having been approved, executed deeds to plaintiff, relinquishing all his interest in said premises. The plaintiff, having secured said deeds, instituted this suit, alleging that it is the owner in fee of the real property known as the "Rinehart Springs Ranch," particularly describing the same; that the defendant was employed by it to take charge of said premises; that while so employed he converted to his own use about 150 tons of hay cut from and stacked on said land by its employés; that he willfully ejected its servants from the said ranch, and refused to permit them or the plaintiff's agents to go upon or take possession of the land, and wrongfully claims to be the owner thereof, to plaintiff's damage in the sum of \$2,000. The defendant, after denying the material allegations of the complaint, avers that on October 21, 1894, he was a citizen of the United States over the age of 21 years, and qualified to make a homestead entry on its public lands; that on said day the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 19, in township 27 S., of range 42 E. of the Willamette meridian being unsurveyed public lands of the United States, he settled thereon, claiming the same under the homestead laws of the United States, and intending to make an entry thereof as soon as he could file thereon; that ever since he established such residence he has been in the quiet and peaceable possession of said land, complying with all the requirements of the laws of the United States respecting such residence and the cultivation of said premises; and that he is entitled to the exclusive possession thereof. The reply having put in issue the allegations of new matter contained in the answer, the cause was referred to W. L. Coleman, and from the testimony taken by him the court found, in effect, that defendant was qualified to make a homestead entry on the public lands of the United States; that on the said 21st day of October, 1894, with plaintiff's advice and consent, he settled upon the land so claimed by him, intending to enter the same under the laws of the United States as soon as the plat of the survey thereof was approved, and the lands susceptible of entry; that he went upon said land under an agreement to put up the hay annually raised thereon, to feed the same to plaintiff's cattle, and to maintain a camp at said ranch to accommodate plaintiff's employés, in consideration of which plaintiff promised to pay him \$25 per month, and to supply him with the necessary provisions, stock, and machinery; that he did not settle upon said land in pursuance of any agreement with or employment by the plaintiff, nor did he at any time hold the premises for its benefit; and that the plaintiff was not at any time since October 21, 1894, the owner or in the possession of the land so claimed

by him, or any part thereof. And, having rendered a decree dismissing the suit, the plaintiff appeals.

J. L. Rand, for appellant. Turner & Biggs, for respondent.

MOORE, J. (after stating the facts). A careful examination of the testimony leads us to conclude that the court erred in finding that the defendant did not enter into possession of the Rinehart Springs ranch in pursuance of any agreement or employment with plaintiff, and that he did not hold the premises for its benefit. The defendant's theory is that plaintiff surrendered to him all its interest in the land, and paid him \$25 per month for three years, in consideration of the hay grown on the place and the use of the pasture thereon. He testified, in substance, that Charles Jones, now deceased, then the plaintiff's assistant superintendent, put him in possession of the premises, and told him to stay there and work for the plaintiff until the land was surveyed, and then to file on the same as a homestead, and that in October, 1894, he settled thereon, with the intention of claiming it as a homestead, and from that time it had been his intention to file upon the land as soon as he could do so; that he was to stay on the place and help raise all the hay he could for plaintiff, in consideration of which it paid him \$25 per month for the hay and the use of the pasture. On cross-examination he was asked if he was not hired to take the Rinehart Springs ranch and occupy it for the Pacific Live-Stock Company. Instead of giving a direct answer, he replied: "I never promised to deed it to anybody." On further cross-examination he was asked: "You knew all the while when you went on that place that the company expected you to hold it for them, or they would not have put you there?"—to which he replied: "They might have, but I didn't. Q. You understood they did, did you? A. I suppose— I expect they thought they would take chances on it, that is all." P. Madison, an employé of plaintiff, testified that he was present when Jones engaged the defendant, who, under the agreement, was to go to the Rinehart Springs ranch, stay there, work for and represent the Pacific Live-Stock Company, and hold the ranch for it until it could get a title, and that the defendant had always told him he was holding possession of the land and improvements for the company, to which they belonged. K. Kilbourn, another of plaintiff's employés, testified that the defendant had always told him he was holding the ranch for the Pacific Live-Stock Company, which was to pay him \$25 a month for staying on the land until it could secure a title thereto. John Glchrist, plaintiff's superintendent, in referring to a conversation which he had with the defendant, said: "In August, 1898, I talked with Gentry as to what his contract was with the company. I says,

'Jimmy, what was the agreement made when you came with Jones,—when you came out here?'—and he says: 'It was to stay on this place, and hold the place for the company. I was to get \$30 per month, and,' he says, 'afterwards it was changed to \$25.' 'I afterwards told you,' says I, 'that I would give you \$200 extra, didn't I, when we secured the title?' and he says: 'Yes, sir; you did.'" This testimony, we think, substantiates the conclusion we have reached regarding the relation existing between the parties, and shows that plaintiff employed him to take possession of its ranch, and to hold it for its benefit. That plaintiff, a corporation, should voluntarily give to the defendant all its interest in this valuable ranch, the improvements upon which cost it about \$5,000, thereby depriving itself of property that was very valuable by reason of the water thereon affording, as it did, the only means of carrying on the business of cattle raising in that vicinity, and also paying him, notwithstanding his age and infirmities, the sum of \$25 per month for several years, expecting no other return than the hay and pasturage which the land furnished, is beyond belief, and, if true, would evidence a degree of magnanimity unparalleled in the history of private corporations.

The testimony having been taken before a referee, the trial court possessed no greater advantages in determining its weight than are enjoyed by this court, and hence we have no hesitancy in changing the findings to which attention has been called.

A court of equity will not permit an agent to take advantage of his fiduciary relation, and, when necessary, will enjoin him from defrauding his principal. 2 High, Inj. (3d Ed.) § 1559. The defendant, having been employed by plaintiff to protect its interests and to guard its property rights in the Rinehart Springs ranch, ought not to be permitted to violate his trust and derive a benefit from a betrayal thereof, if the plaintiff's conduct in employing him does not violate the maxim that he who comes into a court of equity must come with clean hands. It may be admitted, we think, that plaintiff's agents were very anxious that their principal should secure the legal title to the land from which the Rinehart springs emanated. These springs furnishing the only water accessible to stock for many miles, the owner thereof would necessarily control the pasturage on the table-lands in the vicinity. In about 1888 plaintiff's agents, having discovered the advantages which these springs afforded, purchased the improvements of the person who settled on the ranch, and thereafter made every reasonable effort to secure the title to the lands; but, the township in which the springs are situated not having been surveyed, plaintiff's right to the improvements so purchased depended upon its possession, and, this being so, the necessity of always keeping some employé at the

ranch to represent its interests and to defend its rights is apparent. The Rhinehart springs being remote from any settlement, plaintiff found it difficult to secure a servant who would remain at the place for any length of time. Gilchrist, the superintendent, illustrates this difficulty by stating that an employé, upon his return from a short stay at the ranch, said to him: "I would not stay on that place another day if you would give me the place and all the cattle the company has got. That is the most lonesome place I ever saw in my life. I would jump off the rimrock and go crazy." The defendant, however, was taciturn, disliked society, and had indomitable courage,—qualities which fitted him for the discharge of the duties devolving upon him; and this explains the payment of the wages he received, notwithstanding his age and debility.

The usual policy of the general government for many years, except in cases of extensive grants to aid corporations in developing the country, has been to reserve the public domain for its citizens, who have been permitted to secure title to tracts of certain area upon condition of bona fide settlement and cultivation. They have been permitted, by a tacit license of the United States, to settle upon and cultivate the public land prior to its survey; and such settlement has been recognized by the officers of the interior department of the government, as conferring upon the settler a prior right to file upon the same in the local land office, when surveyed. Courts of equity, acting upon the recognition of such settlement as conferring an inchoate right to the land, and invoking the maxim that equity will not suffer a wrong without a remedy, have enjoined the disturbance of such right by parties who would trespass upon the land so settled upon. *Kitcherside v. Myers*, 10 Or. 21; *Jackson v. Jackson*, 17 Or. 110, 19 Pac. 847. "The right of such a settler being property," says Mr. Justice Bean in *Hindman v. Rizer*, 21 Or. 112, 27 Pac. 13, "he may sell and transfer it so as to pass his right thereto, and, except as against the government, vest the rightful possession in the purchaser." The legal principle thus announced will, of course, be understood to relate to the transfer of such possessory right to one who is or may, under the provisions of law, become entitled to secure directly from the government a legal title to the land so claimed. The purchaser not being able to tack his settlement to that of his predecessor, the effect of the transfer is the initiation of a new right by which the prior settler surrenders his interest in the premises to the United States, which tacitly licenses the purchaser to take and hold the possession with the intention of securing the title. To become such licensee, the purchaser must be a qualified settler; that is, he must be a citizen of the United States, or capable of becoming such in the manner prescribed by the acts of congress, and must make a bona

fide settlement upon the land in person, with intent to obtain the title to the same by complying with the provisions of the land laws of the United States. *Peterson v. Railroad Co.*, 27 Minn. 218, 6 N. W. 615. Plaintiff did not make, and was not capable of making, a settlement in person upon the land; and it was not, nor could it become, a citizen of the United States, in the sense required by the acts of congress, and hence it was not a qualified settler upon the public domain. To permit a corporation to hold public lands, the improvements upon which had been transferred to it by a settler, would thwart the public policy of the government, and often enable the purchaser of such improvements to control, as in the present instance, vast areas of grazing lands, in consequence of securing the use of the waters, which alone render such lands valuable. Our attention has been called to the case of *Tidwell v. Cattle Co. (Ariz.)* 53 Pac. 192, which seems to tolerate such conditions, but that case was an action at law under a statute of Arizona which permitted ejectment to be maintained upon proof of settlement upon and cultivation of public lands. Whatever the rule may be in an action at law, we cannot think that the claim of a private corporation to hold possession of public lands, thereby preventing actual settlers from securing the advantage of the laws enacted for their benefit, appeals very strongly to a court of conscience. Plaintiff, being a private corporation, could not, under such general policy, secure in its own right the title to any of the public lands of the United States; but, the Rhinehart Springs ranch being very valuable to the plaintiff, it adopted a method to circumvent the policy of the general government, and to secure the title to this property, so necessary to the prosecution of its business. Gilchrist testified that prior to 1897 the Pacific Live-Stock Company expected to secure the title to the Rhinehart Springs ranch by state selection. As we understand the witness, the mode thus intended to be pursued undoubtedly contemplated a selection of the tracts which plaintiff desired by an agent of the state of Oregon, as indemnity lands, under the provisions of section 3597, Hill's Ann. Laws Or., after the townships in which the springs were situated had been surveyed, and the plats thereof approved. Assuming that the state had thus acquired the desired tracts, plaintiff, being a private corporation, could not secure title to them, except through applicants therefor whom it might induce to make the affidavit required by section 3600, Hill's Ann. Laws Or., that no contract or agreement, express or implied, had been made for the sale or other disposition of such lands in case they were permitted to purchase the same, and, after deeds therefor had been executed by the state to such applicants, persuading them to transfer to it the title thus secured. It will thus be seen that the method contemplated by which

It was expected that the title to the Rinehart Springs ranch could be secured by plaintiff would seem to imply subornation of perjury. Congress passed an act, approved June 4, 1897, by which a settler upon public lands, or a person who held a title thereto, within the boundaries of any forest reserve, might surrender to the United States his possessory right, or transfer such title and take other public lands in lieu thereof. 30 Stat. 36. One F. A. Hyde, having taken advantage of such act, selected the said Rinehart Springs ranch, and, his selection having been approved, he executed deeds to plaintiff, relinquishing his right in the premises; but the act, having been passed after defendant was engaged to look after plaintiff's interest in and to defend the premises, does not change, in equity, the consequences which follow the original intent by which it was expected the title could be secured.

An examination of the testimony induces the belief that each party attempted to hide the real terms of the agreement entered into between the defendant and Charles Jones as agent and on behalf of the plaintiff. Jones having died prior to the trial herein, his alleged declarations respecting the nature of such agreement, made after defendant moved to the Rinehart Springs ranch, were admitted in evidence over plaintiff's objection and exception on the ground that they formed no part of the *res gestæ*. Our statute regulating the general principles of evidence provides that the rights of a party cannot be prejudiced by the declaration, act, or omission of another, except by virtue of a particular relation between them. Hill's Ann. Laws Or. § 684. The rule is well settled that the declarations of an agent are admissible in evidence against his principal only when they are made in the discharge of his duty, and form a part of the *res gestæ*. 1 Am. & Eng. Enc. Law (2d Ed.) 1143, and notes; 1 Greenl. Ev. (14th Ed.) § 113; Story, Ag. (9th Ed.) § 134 et seq.; *Mateer v. Brown*, 1 Cal. 221; *Ward v. Preston*, 23 Cal. 468; *Van Dusen v. Mining Co.*, 36 Cal. 571; *Green v. Mining Co.*, 45 Cal. 522; *Bee v. Railroad Co.*, 46 Cal. 248; *Wickorwitz v. Insurance Co.*, 31 Or. 569, 51 Pac. 75. Jones' alleged declarations, being in the nature of admissions by a conspirator, are not admissible in evidence against his co-conspirators until after proof of the conspiracy has been given. Hill's Ann. Laws Or. § 706. In construing this section in *State v. Moore*, 32 Or. 65, 48 Pac. 468, it was held that the declarations of an alleged conspirator were admissible in evidence after testimony had been given which *prima facie* tended to prove the existence of a conspiracy, or from which it might reasonably be inferred. See, also, 6 Am. & Eng. Enc. Law (2d Ed.) 868. Can it be reasonably inferred from the evidence that a conspiracy had been entered into whereby the defendant agreed to secure the title to the Rinehart Springs ranch for the plaintiff? The testimony shows that the su-

perintendent of the Pacific Live-Stock Company, having discovered that the person employed to look after its interests in the ranch intended to claim the premises in his own right, discharged him and employed the defendant, in whom trust was reposed. The latter's evasive answer to the question as to whether he was not hired to take charge of and to occupy the ranch for the Pacific Live-Stock Company, above quoted, creates an inference that he agreed with Jones to take the place, as he testified, in his own right. This inference is strengthened by the testimony of Gilchrist, who, in speaking of the character of the defendant's possession, says: "Jimmy was always looked upon as being in charge of the place, and we—and I—had all the men to defer to him in that particular, because it pleased the old man, and he felt that he was in charge,—in authority; and I told them always to rather recognize his authority. It didn't cut any ice, anyway,—didn't hurt them; and it made Jim more pleasant, and he was never too pleasant." In the summer of 1897 the defendant, having been informed by some one that he was to be dismissed from plaintiff's service, became dissatisfied, whereupon Gilchrist told him that his discharge was never contemplated, and testified that he said to him: "I will tell you further, Jimmie, right now, I will give you \$200 over and above your wages when the whole business is wound up, for faithfully staying on that place." When it is remembered how aged and infirm the defendant was, we think it is fairly inferable from the promise to pay him \$200 in addition to his wages of \$25 per month that he agreed to take the land in his own right for plaintiff's benefit. Gilchrist also testified, in substance, that he secured the appointment of a person as deputy United States surveyor, and paid him \$700 to survey the township in which the Rinehart springs are situated, but, the survey made by him not having been approved, he told the defendant to file on the land, the boundaries of which were determined by such survey, as a desert claim, but upon examining the affidavit which an applicant for lands of that character was required to make, to the effect that no portion thereof was in cultivation, he found it impossible to secure the title in this manner.

The testimony to which attention has been called on this branch of the case leads us to conclude that it is fairly inferable therefrom that an agreement had been entered into whereby the defendant was to perfect a title to the premises, and convey the same to plaintiff. The next question to be considered is whether the alleged declarations of Jones were admissible in evidence, having been made after the defendant had moved to the Rinehart Springs ranch. It has been repeatedly held by this court that statements made by a conspirator after the common enterprise has ended, and not in the presence of the co-conspirators, are inadmissi-

ble in evidence against the latter. Sheppard v. Yocum, 10 Or. 402; Osmun v. Winters, 30 Or. 177, 46 Pac. 780; State v. Tice, 30 Or. 457, 48 Pac. 367; State v. Magone, 32 Or. 206, 51 Pac. 452; State v. Hinkle, 33 Or. 93, 54 Pac. 155. "To this rule, however, an exception has been recognized where the declarations were made with reference to a subsisting interest in property fraudulently acquired pursuant to a conspiracy." 6 Am. & Eng. Enc. Law (2d Ed.) 870; State v. Thaden, 43 Minn. 253, 45 Pac. 447; Com. v. Smith, 151 Mass. 491, 24 N. E. 677; Baker v. State, 80 Wis. 416, 50 N. W. 518. The unlawful enterprise, if it existed, was initiated when the defendant, in pursuance of an agreement to secure the title for plaintiff, took possession of the Rinehart Springs ranch, and would have continued until he performed his part of the contract by executing a deed to plaintiff of the premises. The declarations imputed to Jones are alleged to have been made while the unlawful combination existed, and before the fruits thereof were conveyed to plaintiff, and are substantiated by the testimony of Maurice Fitzgerald, a former employé of plaintiff, who had known the defendant 27 years, and who, being called as his witness, details a conversation with Charles Jones illustrative of the method so adopted by plaintiff. He says: "Some time in the fall of 1894 Mr. Jones came to me, to the Island ranch,—I was at that time on the Island ranch, in the employ of the company,—and he asked me if I would take a wagon over to the Rinehart Springs ranch for him; that he had nobody else there at the time that he could send; and I told him that I would. And then he told me that he had just got Jimmy Gentry, and had sent him over to the Rinehart Springs ranch, and he also went on to speak about the Rinehart Springs ranch at considerable length, stating that the company had had a good deal of trouble with that place, and that different parties had been talking of trying to get away with it from the company, jumping it, and one thing and another; and he said that he had met old Jimmy, and told him to go out there and take possession of those premises, and to hold possession of the place as a squatter, and to allow nobody else to come upon the place, but to claim it as his. And also he told me the terms that he and Mr. Gentry had agreed to as to the holding of the place. He told me that he had agreed to pay Gentry \$25 per month, and that Gentry was to do all the work that he possibly could, keep the ditch in repair, irrigate the alfalfa, and everything on the ranch, and that, whenever there was any assistance needed, that he would send men from the Harper ranch to help him; and that the company was to have all the products of the place, and, of course, he said that he had told Gentry that whenever the land was sur-

veyed he could go ahead and file on it, and after he had proved up on it he could do what he pleased with it; that, if he felt like selling it to the company, all right; and they would expect, anyhow, that he would give them the first chance on it. And he asked my opinion about the matter,—what I thought as to getting Gentry there. He thought, he said, that Gentry was a man of his word, and that he would do the fair thing with the company. And I told him that, under that condition, I believed he could not have made a better selection for the place; that I had known Gentry for a long time, and believed that he was a man of his word, and would do everything he agreed to do; and told him that there was one thing I was sure of,—that nobody could bluff him off; no sheep man nor anybody could come and run him off; that he would hold possession if he had to hold it with a rifle." The testimony shows that Jones was plaintiff's agent when such declaration was made, and that the questions propounded by him to Fitzgerald concerning defendant's qualifications related to the discharge of his duty. Assuming that, if Fitzgerald's answers had revealed Gentry's untrustworthiness, Jones would have immediately discharged him, and engaged another person in his stead who could be trusted, such declarations, having been made while the agreement with Gentry remained unexecuted, were admissible in evidence against the plaintiff, as Jones' principal, and also against the defendant, a co-conspirator, as a part of the *res gestæ* in each instance.

We think the testimony shows that a conspiracy existed whereby the defendant was engaged to secure the title for plaintiff, and as such agreement tended to violate public policy, by securing for a private corporation land intended by the United States for its bona fide settlers, the remaining question is whether a court of equity, upon the discovery of such fact, will dismiss the suit of its own motion. In *Ah Doon v. Smith*, 25 Or. 89, 34 Pac. 1093, it is held that if the illegality of a contract sued on appear from the testimony of plaintiff's witnesses, although not pleaded in the answer, the court, of its own motion, ought to dismiss the action. To the same effect, see *Buchtel v. Evans*, 21 Or. 309, 28 Pac. 67; *Brattfeldt v. Cooke*, 27 Or. 194, 40 Pac. 1; *Miller v. Hirschberg*, 27 Or. 522, 40 Pac. 506. No defense was interposed on account of the illegality of the contract, but it is inferred from the testimony of plaintiff's witnesses that the agreement entered into between plaintiff and defendant violated public policy, and, this being so, it did not come into a court of equity with clean hands; and under the rule announced in this state the trial court was authorized to dismiss the suit, and, having done so, the decree is affirmed.

MULDRICK et al. v. BROWN et al.

(Supreme Court of Oregon. June 18, 1900.)
**EQUITY—JURISDICTION—TRESPASS TO MINING
 CLAIM—QUARTZ CLAIM—QUANTITY OF
 ORE NECESSARY—ESTOPPEL.**

1. A court of equity will restrain a person preparing to extract ores from another's mine, though a trespass, since such extraction would destroy the substance and value of plaintiff's estate.

2. Under Rev. St. U. S. § 2320, requiring the discovery of a vein or lode within a quartz claim before any right can be acquired thereto, it is enough to entitle the discoverer to protect his mining rights if ore or metalliferous rock be found in place sufficient to warrant a prudent man in spending time and money on it, though it may not contain ore in paying quantities.

3. Where defendant testified that plaintiff, the owner of a quartz mine, gave him permission to locate a placer mine on the same ground, and that he spent \$1,100 on a debt and water right necessary to work it, but on cross-examination stated that he was not told by plaintiff to work any particular mine, and plaintiff denied having any such conversation with him, but stated he notified him to keep off the ground, plaintiff was not estopped from asserting his claim to such quartz mine.

Appeal from circuit court, Grant county; M. D. Clifford, Judge.

Suit by John Muldrick and others against Walter Brown and others. From a judgment in favor of plaintiffs, defendants appeal. Modified.

This is a suit to enjoin a trespass upon a mining claim. The complaint alleges, in substance, that on February 4, 1886, J. A. Whitman located a gold-bearing quartz claim in Grant county, known in the record as the Zero, and four days thereafter caused due and legal notice of such location to be filed and recorded in the clerk's office; that on January 9, 1896, plaintiff Muldrick and Whitman jointly located another gold-bearing quartz claim, known in the record as the Piedmont, which, according to the notice of location and their contention, lies immediately west of and adjoining the Zero, and notice thereof was filed and recorded on the next day; that subsequent to the location of the Zero claim, and prior to the commencement of this suit and the trespass complained of, Whitman, for a valuable consideration, sold and transferred to the plaintiff Muldrick an undivided half interest therein, and thereafter sold and transferred all his right, title, and interest in and to both claims to the plaintiff Mason, who subsequently transferred an undivided interest to the plaintiff Finlayson; that ever since their location the plaintiffs, their grantors and predecessors in interest, have been in the actual possession of both claims, and have during each and every year expended more than \$100 on each claim, and have in all things complied with the laws of the United States and of this state, and with the local customs, rules, and regulations of miners, and were so in possession on the 22d day of April, 1897; that on the day last named the defendants wrongfully, unlawfully,

and against the plaintiffs' will, entered upon such claims with picks, shovels, and other like instruments, and began the construction of a mining ditch across and within the boundaries thereof, and threaten and are about to begin to extract the gold therefrom, to the irreparable loss and damage of the plaintiffs, and will do so unless restrained by the court; that the defendants, and each of them, are insolvent, and unable to respond in damages for such unlawful acts and trespass. The answer, after denying specifically certain allegations of the complaint, admits that notices of the Zero and Piedmont claims appear of record, as alleged, but avers that they do not refer to nor describe the premises in controversy, except as to a portion thereof more particularly set forth; admits that the defendant Brown was about to begin work within the boundaries and upon the mining ground claimed by plaintiffs, and to extract the gold therefrom, and would continue to do so unless restrained by the court, but denies that such ground belongs to the plaintiffs or any of them. For a further and separate defense, it is averred that at the time of the alleged trespass the land mentioned and described in the complaint was unappropriated placer-mining ground of the United States, open to purchase and location under the mining laws, rules, and regulations of the interior department; that on November 5, 1896, the defendant Brown and J. C. Cobb, as they might well and lawfully do, entered upon the ground referred to, and made a placer location thereon, according to the rules and regulations aforesaid; that no vein or ledge of quartz rock in place, bearing gold, existed throughout said ground, but the whole thereof was valuable only for the gold contained in the earth, gravel, and sand and rock float thereof, and could only be worked, enjoyed, located, and purchased as placer-mining ground of the United States; that no portion of the ground so located in any way covers or interferes with any portion of the Piedmont mining claim; that a small portion of the Zero claim is covered by the defendants' placer location, but exactly what portion the defendants have not been able to ascertain on account of the injunction. For a further and separate defense by way of estoppel, it is alleged, in substance, that plaintiffs ought not to be heard to claim the mining ground described in their complaint as against the defendants, because prior to the location by them the plaintiff Muldrick assured the defendant Brown that there was no quartz ledge or quartz in place ever discovered therein, and it was open to placer location, and invited him to take up the same as a placer claim; that, relying upon such assurances, Brown made the location, and has expended large sums of money in the purchase of water rights and ditches adjacent to such ground, in order to work the same; that prior to this suit, and before the purchase by the plaintiffs Mason and Finlayson

of Whitman's interest in the Piedmont and Zero mining claims, Whitman represented to and assured the defendant that no quartz lodes or quartz in place had ever been discovered in the Zero or Piedmont claims, that he had abandoned all rights under the location thereof; and that plaintiffs Mason and Finlayson purchased with knowledge of such facts. The affirmative allegations of the answer being put in issue by the reply, a trial was had upon the testimony reported by the referee, resulting in a decree in favor of the plaintiffs, and the defendants appeal.

V. Z. Cozad and T. Williams, for appellants. J. L. Rand, for respondents.

BEAN, J. (after stating the facts). The evidence is quite voluminous, but a large portion of it is irrelevant and immaterial. The questions presented are substantially questions of fact. It is claimed at the outset that the plaintiffs have not made out a case requiring the interposition of a court of equity. Under the practice in this state, the jurisdiction of courts of equity is freely exercised to prevent trespass upon mines, for the reason that the extraction of ores therefrom reaches to the substance and value of the estate, and goes to the destruction of the very essence thereof. *Bishop v. Balsley*, 28 Or. 119, 41 Pac. 936. It is not only alleged in the complaint, but admitted in the answer, that the defendants were engaged in preparing to extract the ores from the ground in dispute, and would have done so had they not been restrained by the preliminary injunction, and therefore the record is sufficient, under the authorities, to give a court of equity jurisdiction. Some claim was made at the argument that the allegations of the complaint are insufficient, but whatever defect there may be in this regard is cured by the answer, and it is now too late to insist upon the objection.

We proceed, then, to a consideration of the case upon the merits. As we understand the record, the questions presented are: (1) Was there a valid location made of the Zero and Piedmont claims by the plaintiffs and their predecessors in interest? (2) Does any part of the placer claim as located by the defendants interfere with or cover the ground claimed by the plaintiffs? (3) Are the plaintiffs estopped by their conduct from asserting their right as against the defendants?

It is contended that no gold-bearing vein or lode was discovered within the limits of either the Zero or Piedmont claims prior to their location, and for this reason the plaintiffs are not entitled to the ground as a quartz mining claim. Under the provisions of section 2320, Rev. St. U. S., no right can be acquired to a quartz claim before the discovery of a vein or lode within its limits; but the finding of ore or metalliferous rock in place in a defined vein is sufficient to satisfy the statute, although it does not contain ore in

paying quantities. If the rock in place is sufficiently encouraging to warrant an ordinarily prudent man in spending his time or money upon it, it is sufficient, as against a subsequent locator for mining purposes. *Barringer & A., Mines & M. 214*; *Railway Co. v. Migeon (C. C.) 68 Fed. 811*; *Harrington v. Chambers*, 3 Utah, 94, 1 Pac. 362; *Burke v. McDonald*, 2 Idaho, 1022, 29 Pac. 98.

Mr. Whitman, who located the Zero claim in 1886, testifies that before locating it he discovered a well-defined quartz lode or rock in place 16 or 18 inches thick; that he then measured off the claim on the ground as accurately as he could, building monuments of stone around each stake from 2 to 2½ feet in height; that he posted not less than six stakes, one at each end of the ledge, and one at each corner of the location, and marked those at the corners; that afterwards he made an open cut until he had obtained a trace of maybe 9 feet or more, and then extended a tunnel about 150 feet, for the purpose of tapping the ledge; that since the location he had expended each year more than \$100 in work and improvement on the claim; that he also located the Piedmont claim in 1894, but the notice was not recorded until 1896; that before locating the claim he discovered within its limits a quartz ledge which he traced for quite a long distance, but did not make any measurements; that after discovering such ledge he drove end stakes and posted corner stakes, after a careful measurement by a compass and measuring rod; that he posted a stake at each corner, and also one at the center of each end, and built monuments around them; that he took a copy of the notice he posted on the claim, and gave it to the plaintiff Muldrick to be recorded, but for some reason it was not recorded until two years thereafter; that after the location of the Piedmont claim he placed on the ground an outfit,—tools, picks, shovels, wheelbarrows, and everything necessary for the work,—and that a part of these implements or tools were there all the time; that he lived a short distance down the hill from the east line of the Zero, and that when not working these quartz claims he was engaged in hydraulic mining, and passed them every day; that from the time of the location of the two claims he and his co-owner, Mr. Muldrick, had been in possession thereof, claiming to own them; that he maintained the stakes marking the boundaries of the claims, and examined them carefully every fall and spring, always replacing any that had been moved. The witnesses Gifford, Guker, Silsby, Bartram, and Johnson testify that they examined each of the claims referred to, and found well-defined veins or lodes of gold-bearing rock in place on each claim. There is other evidence to the same effect, and from an examination of the entire testimony we are satisfied that the plaintiffs' contention in this regard is sustained by a large preponderance of the evidence. The great bulk of

the evidence on this point seems to be directed to the question as to whether the quartz found upon the claims is sufficiently rich to justify working them as quartz claims. But, as we have already seen, that is a matter wholly immaterial in this controversy. The law does not require any particular degree of richness in order to support a quartz-claim location. It only requires that there shall be sufficient indication to justify a reasonably prudent person in expending his time and money in its development, and there is abundant testimony in this case to satisfy such requirement. Indeed, the fact that Muldrick and Whitman were willing to and did expend considerable sums of money in the development and maintenance of the Zero and Piedmont claims is quite strong evidence of that fact. So that we shall pass without further notice this branch of the case.

It is next claimed that the Zero and Piedmont are not adjoining claims, but that the southeast corner of the Piedmont is some 600 feet or more in a northwesterly direction from the southwest corner of the Zero, thus leaving a triangular shaped piece of ground between the two claims. Mr. Whitman, who located both claims, testifies positively and unequivocally that the northwest corner of the Zero and the northeast corner of the Piedmont and the southwest corner of the Zero and the southeast corner of the Piedmont are common points, and that the west line of the Zero and the east line of the Piedmont is a common line; and he is corroborated by the entire circumstances of the case, and especially by the location notice prepared and recorded months before this controversy arose, which states that the east line of the Piedmont claim is the west line of the Zero. The contention of the defendants in this regard is based largely, if not entirely, upon alleged declarations of Whitman to Brown and others that the northwest corner of the Piedmont was marked by a certain fir tree near a tap in the Whitman ditch. But these alleged statements are denied by Mr. Whitman, and the testimony relating thereto is not sufficient to overcome the other evidence in the case bearing upon the location of the Piedmont claim. In our opinion it is quite clear from all the testimony that the two claims lie adjoining, and that there is no unappropriated ground between them.

The remaining question, and the one principally relied upon, is the alleged estoppel. The claim upon this point is that, prior to the placer location by defendants, Brown had a conversation with the plaintiff Muldrick, in which he (Muldrick) said that he and Whitman had been unable to find a quartz ledge or vein on either the Zero or Piedmont claim, and if Brown would locate a placer claim covering the ground it would be all right, if he would agree to deed to them any quartz ledges which might thereafter be found within the boundaries of his

placer claim; that acting upon this statement and proposition, and relying upon Muldrick's representations, the defendants located the placer claim, and a few days later Brown purchased for \$1,100 a ditch and water right necessary to work it. This branch of the case, so far as it concerns the defendants, depends principally upon the testimony of Brown. In his direct examination he testifies that, in a conversation with Muldrick prior to the location of the placer mine, Muldrick told him to go out and make such location if he wanted to. He also testifies that he had some conversation with Whitman about the matter after the location had been made, and that Whitman made no objection to his occupying the ground or mining thereon. On cross-examination, however, he testifies as follows in answer to interrogatories: "Q. Now, then, Mr. Brown, the date of some of these conversations you had with Muldrick and Whitman. When was it that Muldrick told you to locate the placer in the vicinity of Quartz Gulch? A. I don't think he ever told me to locate the placer. Q. Did he ever tell you to locate any of the ground at or near Quartz Gulch? A. No, sir; he never told me to locate it. Q. He didn't? A. No, sir; I lived in Muldrick's house, and we talked together so often that it would be hard for me to designate the times. Q. Did he tell you to locate any part of the Zero or Piedmont as placer? A. No, sir; he never told me anything of that kind. Q. Did Mr. Whitman tell you to do any such thing? A. No, sir. Q. How did you come to locate the placer you made over the Piedmont? A. I just put up a location. Q. Just of your own accord? A. Yes, sir. Q. Muldrick didn't tell you to do so? A. He didn't tell me to do it; no, sir. Q. Didn't advise you to do it? A. No, sir; but he didn't object. Q. Nor Mr. Whitman didn't tell you to do it? A. No, sir. Q. Nor advise you to do it? A. No, sir. Q. You simply went out there and found what you thought was placer, and located it? A. Yes, sir. Q. That is a fact, is it? A. Yes, sir. Q. At that time you didn't know there was any such claim as the Zero or Piedmont? A. No, sir. Q. You did not? A. No, sir; not by that name. Q. You never asked the permission of Muldrick to go on that ground and work it for placer,—the surface? A. No, sir; I did not." Thereafter, on redirect examination, in reference to the same matter, he says that his previous statement that Muldrick never told him to locate the ground was a mistake, and that he did not mean to make it. He then proceeds to testify, in very great detail, to a conversation he claims to have had with Muldrick in October or November, 1896, in which Muldrick said that Thompson and Grott were claiming an interest in the mining claim by reason of some work done thereon, and in order to bar them it was agreed that he (Brown) should locate the ground as a placer claim, and deed back to

Muldrick whatever portion thereof he might want. It thus appears that Brown's testimony is of itself not consistent, and, so far as the alleged conversation with Muldrick and Whitman is concerned, he is flatly and positively contradicted by both of them. They testify that they never had any such conversations with him, and never agreed that he might file the placer location on their ground, or encouraged him in any way to do so, but, on the contrary, that they both objected to his location as soon as they were advised of it, and notified him to keep off the ground. We are of the opinion that the preponderance of the testimony is in their favor on this point.

Soon after or about the time the placer location was made by the defendants, Brown purchased of Hupprich for \$1,100 a placer mine and certain water rights appurtenant thereto, for the purchase price of which he asked plaintiff Muldrick to go his security; stating, as he claims, that he desired the ditch and water rights, for the purpose of mining on the placer claim, located a few days before. Muldrick agreed to go his security for the amount of the purchase price, but Hupprich was unwilling to sell except for cash in hand, which Brown obtained a few days later. The claim is made by the defendants that this was sufficient to estop Muldrick from questioning the validity of Brown's placer location, but Muldrick denies that Brown told him he desired the ditch and water rights for use in mining on the placer ground. He testifies that he understood and supposed at the time that Brown was simply purchasing Hupprich's interest in the claim for the purpose of working it. We think, therefore, the evidence on this point is not sufficient to constitute an equitable estoppel.

There are many other incidental questions covered by the testimony, but it is unnecessary to notice them in detail. It is sufficient to say that, after a careful examination of the record and the exhaustive briefs of counsel, we are satisfied the decree of the court below should be affirmed, except in so far as it may enjoin the defendants from using that portion of the Hupprich ditch which passes over or across the Zero claim, for the purpose of conveying water therein; and to that extent it will be modified.

HUTCHINSON et al. v. GORHAM et al.

(Supreme Court of Oregon. June 18, 1900.)
JUDGMENT—LIEN—TRANSCRIPT TO ANOTHER COUNTY.

Hill's Ann. Laws, § 572, requires the judgment docket to show when judgments were docketed. Section 269 enacts that the plaintiff may file a certified transcript of the original docket in the county clerk's office of any county of the state, and that the clerk of the latter county shall docket it in the judgment docket of his office, and it shall be a lien on the real property of the defendant in the

county. The docket entry of the county where a judgment was rendered failed to show when the entry was made. An abstract of the docket entry of the judgment certified to the clerk of another county did not state, nor was it reasonably inferable therefrom, that the judgment was docketed in the county where the judgment was rendered, nor did the clerk's certificate state that the abstract was a transcript of the original docket, as required by section 269. The judgment came within the provision of sections 263 and 264, requiring its entry in the journal within the day rendered, unless otherwise ordered by the court, and section 269, requiring the clerk immediately thereafter to docket it in the judgment docket. *Held*, that the docketing of such transcript in the latter county did not create a lien on the judgment defendant's real estate in that county, since subsequent purchasers of such real estate were not charged with constructive notice of more than could be discovered by an inspection of the transcript; the facts therein recited not being sufficient to create a lien in the latter county.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Action by James H. Hutchinson and another against O. H. Gorham and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

This is a suit to enjoin the sale of certain real property on execution. The facts are: That on June 13, 1888, one W. W. Ellis was the owner in fee of 160 acres of land in Union county, Or., on which day judgment by default was rendered against him for the sum of \$2,079.12 in the circuit court of the state of Oregon for Baker county, in an action wherein the defendants H. O. Gorham and Herman Rothchild, as partners under the firm name of Gorham & Rothchild, were plaintiffs. That on September 7, 1888, said defendants, as plaintiffs therein, caused to be filed in the office of the county clerk of Union county a memorandum, purporting to be a transcript of said judgment, whereupon said clerk made an entry in the judgment docket of said county at page 2 of volume B, under the index letter E, as follows:

Judgment Docket, Circuit Court, Union Co., Oregon.

Judgment Debtor.	Judgment Creditor.	Court.	Date of Judgment.	Date of Docket.		Damages.
W. W. Ellis.	Gorham & Rothchild.	Transcript Cir. Ct. Baker Co.	1888, June 13.	1888, Sept. 7.	10%	\$2,079 12

—That in December, 1888, the plaintiffs herein loaned to Ellis the sum of \$1,100, to secure the payment of which he executed a mortgage on said real property, and on February 6, 1896, deeded the same to them in payment of the mortgage debt, which then amounted to \$1,825. That on April 20, 1899, an execution was issued on said judgment, directed to the sheriff of Union county, who in pursuance thereof levied on said real property and advertised it for sale, to prevent which this suit

was instituted; plaintiffs alleging that they were the owners in fee of said land, which they purchased without knowledge or notice of said judgment, and that a sale of the premises on said execution would create a cloud on their title. The answer having put in issue the allegations of the complaint, a trial was had, resulting in a decree as prayed for, and the defendants appeal.

J. B. Messick and W. H. Packwood, for appellants. T. H. Crawford, for respondents.

MOORE, J. (after stating the facts). The question presented by this appeal is whether the entry in the judgment docket of Union county afforded plaintiffs constructive notice of the judgment rendered against their grantor in Baker county, Or. The following statutory provisions are deemed essential to a clear understanding of the question involved: "The records of the circuit courts are, a register, journal, judgment docket, execution docket, fee-book, jury-book, and final record." Hill's Ann. Laws Or. § 569. "The journal is a book wherein the clerk shall enter the proceedings of the court during term time, and such proceedings in vacation as this Code specially directs." Id. § 571. "The judgment docket is the book wherein judgments and decrees are docketed, as elsewhere provided in this Code. Each page thereof shall be divided into eight columns, and headed as follows: Judgment Debtors; Judgment Creditors; Amount of Judgment; Date of Entry in Journal; When Docketed; Appeal, When Taken; Decision on Appeal; Satisfaction, When Entered." Id. § 572. "All judgments shall be entered by the clerk in the journal, and shall specify clearly the amount to be recovered, the relief granted, or other determination of the action. * * * In the entry of all judgments, except judgments by default for want of an answer, the clerk shall be subject to the direction of the court." Id. § 260. "When judgment is given for want of an answer, the entry shall state substantially that the defendant has been duly served with the summons, and has failed to answer the complaint." Id. § 263. "When a decision has been made sustaining or overruling a demurrer, unless the party against whom the decision is made be allowed to amend or plead over, judgment shall be given for the plaintiff or defendant, as the case may be, for such amount or relief, or to such effect, as it appears from the pleadings he is entitled to; but if the cause is otherwise at issue upon a question of fact, the court may order the entry of judgment to be delayed until such issue be tried or otherwise disposed of." Id. § 264. "When judgment is given in any of the cases mentioned in sections 263 and 264, unless otherwise ordered by the court, it shall be entered by the clerk within the day it is given." Id. § 265. "Immediately after the entry of judgment in any action, the clerk shall docket the same in the judgment docket.

At any time thereafter, while an execution might issue upon such judgment, and the same remains unsatisfied in whole or in part, the plaintiff, or in case of his death his representative, may file a certified transcript of the original docket in the office of the county clerk of any county in this state. Upon the filing of such transcript, the clerk shall docket the same in the judgment docket of his office. From the date of docketing a judgment as in this title provided, or the transcript thereof, such judgment shall be a lien upon all the real property of the defendant within the county or counties where the same is docketed, or which he may afterwards acquire therein, during the time an execution may issue thereon." Id. § 269. "Whenever, after the entry of judgment, a period of ten years shall elapse without an execution being issued on such judgment, the lien thereof shall expire." Id. § 270.

The entry in the judgment docket of Baker county is as follows, to wit:

No.	Judgment Deb. Ors.	Judgment Cr. Citors.	Judgment.	Time of Entry.			Entered In Judgment Book.	
				Amt. of Judgment.	Inter-est.	Month day year.	No.	Page.
L118	W. W. Ellis	Gorham & Rothchild	3,679 12 10%	June	18	'88	I	44

Under the title "Remarks," in the last column at the right, appears the following: "This judgment satisfied in the amount of \$1,000.00. See execution docket 'C,' page 124." This docket contains other columns, but, no entries having been made therein respecting the judgment under consideration, they are omitted.

An inspection of this abstract of the judgment will disclose that no entry of "When Docketed" was made, as required by the provisions of section 572, supra. The lien of a judgment attaches to the real property of the judgment debtor, situate in the county in which the judgment is given, from the date of docketing the judgment, and to his real property in other counties of the state upon filing a certified transcript of the original docket in the offices of the county clerks of the latter counties. Id. § 269; Creighton v. Leeds, 9 Or. 215; De Lashmutt v. Sellwood, 10 Or. 319; Lovelady v. Burgess, 32 Or. 418, 52 Pac. 25. As a condition precedent to securing a lien on the real property of W. W. Ellis in Union county, Or., the judgment rendered against him must have been docketed in the county in which it was given, but when this was done is not discoverable from an examination of the judgment docket of Baker county; nor can it be ascertained from an inspection of the certificate of the county clerk of said county, upon the faith of which the county clerk of Union county entered a memorandum of said judgment in the judg-

ment docket of the latter county. The abstract certified to and filed in the office of the county clerk of Union county is as follows:

Judgment Debtor.	Judgment Creditor.	Judgment.	Interest.	Date.	Book & Page.
W. W. Ellis.	Gorham & Rothchild.	\$2,079 12	10 %	1888, June 13th.	Journal I. p. 44.

State of Oregon, County of Baker—ss.: W. H. Mix, county clerk of the above-named county and state, do hereby certify that the foregoing judgment has been by me compared with the original, and that the same is a correct transcript therefrom, and of the whole of such original judgment, as same appears at page 45 volume I, record of circuit court proceedings for Baker county, Oregon, in my office, and in my care and custody. In testimony whereof, I have hereunto set my hand and affixed my official seal this 5th day of Sept., A. D. 1888. W. H. Mix, County Clerk, by Wm. J. Eastabrook, Deputy. [Circuit Court Seal.]

This memorandum having been entered in the judgment docket of Union county prior to the execution of the mortgage given by Ellis to plaintiffs, they are chargeable with such notice as the judgment docket of Union county and the transcript from Baker county afforded. In *Metz v. Bank*, 7 Neb. 165, Mr. Justice Maxwell, in speaking of the nature of a judgment docket, observes, "It is said that the docket is an index to the judgment, invented by the courts for their own ease, and the security of purchasers, to avoid the trouble and inconvenience of turning over the rolls at large." Further in the opinion, in commenting upon the duty of a purchaser of real property to examine such docket, he says: "A subsequent purchaser, however, is affected with such notice as the index entries afford; and, if they are of such a character as would induce a cautious and prudent man to make an examination, he must make such investigation, or the failure to do so will be at his peril." The rule is general that constructive notice without search is equivalent to actual notice upon search. *Hesse v. Mann*, 40 Wis. 560. The statute creating the lien of a judgment, being remedial in its character, causes the lien to attach to the judgment debtor's real property, as against subsequent purchasers and incumbrancers thereof without notice, when the provisions of the act conferring the right have been substantially complied with. 2 Freem. Judgm. § 343; 12 Am. & Eng. Enc. Law, 105. "The object of the law," says Mr. Justice Field in *Re Boyd*, 4 Sawy. 262, Fed. Cas. No. 1,746, in construing section 269, Hill's Ann. Laws Or., "is to make the judgment a lien upon the property of the debtor in any county where it is situated; and, as such county may be at great distance from the one in which the judgment is rendered, the law contemplates that the docket entry shall impart knowledge of all the facts which a purchaser of the property

need ascertain." Under the rule thus announced, the entry of an abstract of the judgment in the judgment docket of Union county did not impose upon plaintiffs the duty to examine the judgment docket of Baker county to ascertain the existence or validity of such judgment, but they were chargeable with constructive notice of all the facts expressly recited in the judgment docket of Union county; and it was incumbent upon them, as prudent and cautious men, to make an examination of the transcript from Baker county, to see if it recited that the judgment was docketed in that county, or stated facts from which it could be reasonably inferred that it would operate as a lien upon real property that Ellis might acquire therein. *Johnson v. Hess*, 128 Ind. 298, 25 N. E. 445, 9 L. R. A. 471. The judgment docket of Union county does not state that the judgment rendered against Ellis was docketed in Baker county, nor is such fact reasonably inferable therefrom. An examination of the transcript from Baker county does not disclose that the judgment was ever docketed in that county, and the certificate appended thereto does not state that the abstract of the judgment, of which it forms a part, is a transcript of the original docket, as required by section 269, Hill's Ann. Laws Or.

It is contended by defendants' counsel, however, that, the judgment having been rendered for want of an answer, the clerk was not subject to the direction of the court, but was required to enter the judgment in the journal within the day it was given, and immediately thereafter to docket the same in the judgment docket; that the complaint alleges, and it was stipulated at the trial, that the judgment was docketed in Baker county; and that, invoking the presumption that official duty has been regularly performed (Hill's Ann. Laws Or. § 776, subd. 15), it evidences the fact that the judgment was so docketed on the day in which it was given, and, this being so, the court erred in restraining the sale of the real property to prevent a cloud on plaintiffs' title. Whether the failure to state in the judgment docket of Baker county the date when the judgment was docketed renders it insufficient to create a lien on any real property Ellis might have in that county, is a question the determination of which is not necessary to a decision herein. Nor is it necessary to discuss the presumptions which might be invoked in that county in aid of the record. We do not think the presumption relied upon sufficient to charge the plaintiffs with constructive notice of more than could be discovered by an inspection of the transcript filed in Union county, and, no facts having been recited therein from which it could be inferred that the judgment was sufficient to create such lien in Baker county, it follows that the decree is affirmed.

DETEMPLE v. MITCHELL.¹

(Court of Appeals of Colorado. May 14, 1900)

PARTNERSHIP—CONFLICTING EVIDENCE—UNSIGNED CONTRACT.

In an action to enforce claims for labor against an alleged partner, where the evidence of partnership was conflicting, and there was testimony that an unsigned partnership contract in evidence had been drawn by him, and its execution requested and refused, it was error to charge the jury that such paper might be considered a circumstance tending to prove the partnership.

Appeal from district court, Boulder county.

Action by Bolus Mitchell against Charles Halt and others to recover on claims for labor. From a judgment in favor of the plaintiff, defendant Nicholas Detemple appeals. Reversed.

George F. Dunklee and O. E. Jackson (O. F. A. Greene, of counsel), for appellant. Sylvester S. Downer (Jas. M. North, of counsel), for appellee.

WILSON, J. Charles Halt secured a lease upon certain mining property in Boulder county, to run for six months from December 1, 1896. It was in writing, and was in the name of Halt alone as lessee. Operations under it were begun in December, and continued until about February 24th following, when they were suspended, leaving, it is claimed, an unpaid indebtedness due to employes upon the lease of about \$800. The various holders of these claims for work assigned the same to plaintiff, Bolus Mitchell, who commenced suit therefor, and sought a recovery from the said Halt, John Staudinger, and Nick Detemple, the appellant herein. The two latter were joined as defendants upon the ground that they were parties with Halt in the lease, and jointly liable with him for all indebtedness incurred. The case was tried upon this theory, and this was the sole issue. Staudinger made default, but Detemple filed answer, denying the partnership and all liability for the debts. Trial was to a jury, and the verdict and judgment were in favor of plaintiff for the sum of about \$300, including interest.

There are numerous assignments of error, but it is unnecessary for us to consider but one, as it is decisive of the case, and will necessitate a reversal. Halt, who was the principal witness for the plaintiff, testified that Detemple came to Boulder about January 8th, and requested him to sign a written contract of partnership and agreement as to the working of the mine; that he refused, and that the contract was never signed or executed. This unsigned contract was then offered in evidence by plaintiff, and was received, over the objection of the defendant. It is unnecessary to insert the entire contract. We will give only that portion of it which

bears upon the issue, and which discloses the purpose for which it was offered in evidence. Its first recital is: "Whereas, Charles Halt has obtained a lease and bond on what is known as the 'North Star Lode Mining Claim,' situated in Sugar Loaf mining district, near Gordon Gulch, Boulder county, Colorado, for the use of himself, J. W. Orvis, Nicholas Detemple, Max Mallich, and Maria Ayen, equally, for the term of six months, at a purchase price of two thousand five hundred dollars; and whereas, it is now desired to work this claim, and, if thought advisable by the parties interested before the termination of the above-mentioned lease and bond, to buy the same; now therefore," etc. Upon the conclusion of the evidence the defendants requested the court to instruct the jury as follows: "The court instructs the jury as a matter of law that no amount of visiting mines or talk about forming a partnership or drawing of papers would alone constitute a partnership. And in this case, should the jury believe from the evidence that said Detemple visited the mines testified to, and talked about forming a partnership, and had papers drawn to that effect, but not signed, such acts alone would not of themselves constitute a partnership." The court modified the instruction by adding the words: "But are facts which may be taken into consideration by you as circumstances tending to prove the partnership." To this modification, the defendant excepted. The instruction given was clearly erroneous. Under no circumstances could it be said that the unsigned contract tended to prove a partnership. At most, it could only be claimed that it showed an effort to effect a partnership. As introduced in evidence, unsigned, especially in connection with the testimony of Halt that he refused to sign it, it was, in fact, evidence tending to show that there was no partnership. The testimony with reference to the existence of the partnership, either expressed or implied, was exceedingly conflicting. If it were at all conclusive, or there was a large and pronounced preponderance in favor of the existence of the partnership, this court might say that, while the instruction was erroneous, it was without prejudice to the defendant. Such is not the case, however, and it is not for us to say how much or how little effect this erroneous instruction had upon the jury. If the contract had been signed, it would have been an unequivocal admission by all parties of the existence of a partnership; and when the court told the jury that it tended to prove a partnership it is by no means clear that the jury could have understood it otherwise than that, in the opinion of the court, it was, to some extent, an admission. As we have said, the evidence was greatly conflicting, but there was sufficient to have sustained the verdict of the jury; and, but for the error in this instruction, we would certainly not interfere with it. There having been two trials of this cause,

¹ Rehearing denied June 20, 1900.

we regret the necessity now of reversal, but we are constrained to it by the materiality of the error. For the reasons given, the judgment will be reversed, and the cause remanded for a new trial. Reversed.

BINGEL et al. v. BROWN et al.

(Court of Appeals of Colorado. June 20, 1900.)

PARTNERS—ASSIGNMENT OF INTEREST IN FIRM CONTRACT—ACTION—DEFECT OF PARTIES—NONSUIT.

1. An assignee of the interest of a partner in a contract made with the firm is not a necessary party to an action by the firm on such contract.

2. Where, after the granting of a nonsuit, plaintiffs, on their request, are given leave to amend, but, within the time allowed, elect to stand by their complaint, and request the court to vacate orders made subsequent to the order of nonsuit, this is not inviting or consenting to the nonsuit in such a way as to preclude them from having the action of the trial court reviewed in a higher court.

Error to district court, Weld county.

Action by Dietrich E. Bingel and Albert Hill, co-partners as Bingel & Hill, against William G. Brown and another, on a contract. From a judgment of nonsuit, plaintiffs bring error. Reversed.

James E. Garrigues, for plaintiffs in error. Harvey Riddell, R. D. Thompson, and Chas. D. Todd, for defendant in error W. G. Brown.

WILSON, J. Plaintiffs were co-partners as ditch contractors, doing business under the firm name and style of Bingel & Hill. As such, under a verbal contract, they constructed a ditch for the Western Drainage & Supply Company, a corporation, and claim that there is a balance due them on account of said work of about \$1,400. To recover this sum, suit is brought against the defendants, directors in said corporation, to enforce a personal liability alleged to have been incurred by reason of a failure to make the annual report required by the statute. During the trial, plaintiffs offered in evidence a statement of mechanic's lien filed by them upon the property of the corporation to secure this indebtedness, and also a copy of the complaint in a suit instituted to foreclose this mechanic's lien. The latter was sworn to by plaintiff Bingel, and in it was an allegation that plaintiff Hill had sold and assigned his interest in said claim and lien to one David Snyder. Upon the presentation of this, defendants moved the court for a nonsuit, on the ground that, it appearing from plaintiffs' own evidence that Snyder was the owner of Hill's interest, he was a necessary party to the suit, and that it was not being prosecuted in the name of the real parties in interest. This motion was sustained, and judgment of nonsuit entered. Thereupon, on the request of plaintiffs, the judgment of nonsuit was set aside, and

plaintiffs were given leave to amend within a certain time, by making Snyder a party. Within the time limited, the plaintiffs appeared, declined to amend, and asked the court to vacate the orders made subsequent to the judgment of nonsuit, so as to restore them to their situation at that time; they electing to stand upon the action of the court in granting a nonsuit. This was done, and from this judgment plaintiffs appeal.

The only question presented is, was Snyder a necessary party to this suit? We are not concerned with what the rule may be as to suits for the recovery of partnership assets, where one partner has sold his entire interest in the co-partnership, with the consent of his partner, and the assignee has been accepted or admitted into the partnership. This is not such a case. In this instance the partner seems to have sold, or attempted to sell and assign, his interest in only one obligation claimed to be due to the partnership. In such case the rule seems, upon principle and authority, to be quite well settled adversely to the contention of defendants. The assignee is not a necessary party. The effects and property of a co-partnership belong to the firm, and not to the individuals; and one partner cannot assign his interest in a single asset or obligation due to the firm, so as to divest the firm of its title to the whole. The assignment in such case simply, in effect, makes the assignee a creditor of the firm, to the extent realized from the undivided interest attempted to be assigned, after the settlement or winding up of the affairs of the co-partnership, and the payment of the firm debts. Mr. Bliss, in his work on Code Pleading (section 65c), thus aptly states the doctrine: "While a partner may assign his interest in a firm, or it may be transferred in invitum, I cannot see how he can transfer his interest in any particular obligation held by the firm. He has a joint interest, and for himself, and as agent for his co-partners, may assign in the firm name any one contract held by it, but he holds no personal interest except as partner. He holds it, or its proceeds if sold, subject to the claims of the partnership creditors and of his co-partners. His personal interest is only in the partnership fund, not in any particular chose in action; and his assignee takes nothing by the assignment,—at least, unless the thing, the interest in which has been assigned, can, on final settlement, be so severed from the common stock as to be held by a tenancy in common." Upon the principle here enunciated is founded the rule, well supported by authority, that all suits for breach of contract made with a co-partnership should be prosecuted in the name, and in that alone, of the partners at the time when the contract sued on was made. Maxw. Code Pl. pp. 23, 34; Dicey, Parties, p. 151. This rule holds good even in case of a retired partner. Id. p. 153. In *Davis v. Megroz*, 55 N. J. Law, 431,

26 Atl. 1010, it is said: "Suits for the recovery of partnership property and for the collection of its choses in action must be prosecuted in the firm name, and suits by its creditors for the collection of debts due by the firm must be brought against the partners in their individual names, as partners. It is a general rule that actions by and against the firm continue to be what they would have been before the dissolution. The names of all the partners must be used in an action brought for a debt due to the firm, and, if a debt owed by the firm is sued for, all the partners may be and must be made defendants, unless by the articles of dissolution the omitted partners are expressly discharged from the firm debts." In *Parsons on Partnership* (section 235) the author says: "It must be the general rule that all those who were partners at the time a debt was contracted are those to whom it is due, and they should join in an action to recover the debt. * * * Thus, by no assignment of a debt due to a partnership by one of the partners can he acquire the right to sue it in his own name. * * * Persons who leave the firm and cease to be partners may transfer the debt so as to retain no interest in it, but still their names should be used." Upon principle, this doctrine would seem to have been settled by adjudications of the supreme court of our own state. *Metzler v. James*, 12 Colo. 336, 19 Pac. 885; *Smith v. Atkinson*, 18 Colo. 255, 32 Pac. 425. In the latter case it was held that, where there has been an assignment of part of an entire claim, the assignee had no right of action thereon in his own name, and that a suit could only be maintained in the name of the original parties. The correct test of when a party is a necessary one, and when a defendant could raise the objection of a defect of parties, is where it appears that some other person than the plaintiff has such a legal interest in the obligation sued upon that a recovery by the plaintiff would not preclude its being enforced by such other party, and the defendant be thereby subjected to the risk of another suit upon the same subject-matter. Tried by this rule, *Snyder* was not a necessary party. Under all of the authorities, it was necessary that a suit for the collection of this partnership debt should be prosecuted in the name of the co-partnership, whatever the contingent interest of *Snyder* might be in the sum finally realized, and hence a judgment in favor of plaintiffs could have been successfully pleaded in bar of any suit which *Snyder* might institute on the same cause of action. For additional authority in support of these views, see *Leese v. Sherwood*, 21 Cal. 164; *De Manderfield v. Field*, 7 N. M. 22, 32 Pac. 146; *Reyburn v. Mitchell*, 106 Mo. 374, 16 S. W. 592; *Pom. Rem. & Rem. Rights*, § 137. We are of opinion, therefore, that the court erred in entering a judgment of nonsuit.

It is insisted, however, in behalf of the

defendants, that the plaintiffs suffered a voluntary nonsuit, and that they are precluded, therefore, from obtaining any relief in the appellate court. We do not think that the facts sustain such contention. Plaintiffs strenuously resisted a nonsuit. It is true that the judgment was set aside at their request, with the expectation and view of amending their complaint so as to conform to the rulings of the court, and that afterwards, concluding not to amend, they requested the court to rescind all orders made subsequent to the entry of the judgment of nonsuit, thus permitting the judgment to stand. This was clearly done, however, simply for the purpose of restoring the status quo, and permitting them to test in an appellate court the validity of a judgment which was final. We cannot see how by this action they can be said either to have invited or consented to a nonsuit. They merely elected to stand upon the case as presented when the nonsuit was granted, and this was their privilege, without prejudice to their right to have the case reviewed in a higher court. For these reasons, the judgment will be reversed, and the cause remanded for a new trial in accordance with the views here expressed. Reversed.

MARK et al. v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 2,281.)

(Supreme Court of California. June 12, 1900.)

INJUNCTION—APPEAL—CONTEMPT—WRIT OF PROHIBITION.

An appeal from a decree in a proceeding for an injunction by a publisher to enjoin the use of books published by a rival concern, and to compel the use of his books, wherein the trial court decreed that the school board desist from using the intervening respondent's books, and that it use petitioner's books, stays not only so much of the decree as commands the use of petitioner's books, but also that portion which prohibits the use of respondent's books. Hence the board are not in contempt in refusing, pending the appeal, to desist from using the books of the intervening respondent, and a writ of prohibition will issue to prevent their punishment.

In bank. Application by Cecil W. Mark and others for a writ of prohibition against the superior court of the city and county of San Francisco and Hon. J. C. B. Hebbard, as judge thereof, to restrain certain contempt proceedings against relators. Application granted.

Franklin K. Lane, for petitioners. H. E. Monroe, for respondents.

VAN DYKE, J. This is an application for a writ of prohibition to prevent the respondent court and the judge thereof from enforcing obedience to a decree and writ of injunction issued pursuant thereto. From the petition and papers it appears that on July 18, 1899, one J. C. Green, as plaintiff, commenced an action in said superior court

against the said board of education and the members thereof to obtain an injunction commanding and requiring said board of education and the members thereof to cause to be used in the public schools of the city and county of San Francisco the text-books of the "California system of vertical penmanship," and to refrain from using and causing to be used text-books of the "Shaylor system of vertical round-hand penmanship"; that on the 18th of July, 1899, an order was issued by said court, directed to the defendants in said action, to show cause why an injunction should not issue restraining them from using or causing to be used in the public schools of said city and county the text-books of the Shaylor system of vertical round-hand penmanship. Upon the return to the said order to show cause the court, after hearing the evidence adduced, on July 31, 1899, denied the plaintiffs' motion for a writ of injunction pendente lite, and dismissed said order to show cause. At the opening of the school year in the month of August, 1899, the text-books of the Shaylor system of round-hand penmanship were introduced into the public schools of the city and county of San Francisco, and ever since have been used as a uniform system of text-books upon penmanship therein, and no text-books of the "California system of vertical penmanship" have been used in the public schools of said city and county subsequent to the opening of the said public schools in the month of August, 1899. On the 28th day of July, 1899, Edwin Ginn and others, partners doing business under the firm name of Ginn & Co., of Boston, Mass., having first been, by order of said superior court, permitted to intervene in the said action, filed a complaint in intervention setting forth that the defendant board of education had, by resolution duly given, made, and entered, adopted the text-books of the said Shaylor system of vertical round-hand penmanship for use in the public schools of the city and county of San Francisco, and that a contract had been made by and between them and the said board of education whereby they had bound themselves to furnish the text-books of the said Shaylor system for use in the said public schools, and praying that the defendant board of education be required specifically to perform the said contract, and that the relief prayed by the plaintiff in said action be denied. On or about the 11th day of September, 1899, the H. S. Crocker Company, a corporation, having been, by order of said superior court, permitted to intervene, filed therein its complaint in intervention. Thereafter, issue having been joined upon the plaintiffs' second amended complaint in said action, by the answer of said board of education, and Ginn & Co.'s complaint in intervention, and the H. S. Crocker Company's complaint in intervention, trial was had, and thereupon, on the 19th of February, 1900, a judgment and decree were entered in said superior court, and

thereupon an injunction was issued directed to the petitioners herein restraining them from using, or causing to be used, in the public schools of the city and county of San Francisco, the text-books of the Shaylor system of vertical round-hand penmanship, and commanding them to cause to be used in said public schools the text-books of the California system of vertical penmanship as the text-books on penmanship therein. Thereafter, on or about the 19th of March, 1900, the said superior court, upon the application of the plaintiff in said action, J. C. Green, issued an order requiring the petitioners and R. H. Webster, superintendent of schools, to appear before said court on the 23d of March to show cause why they should not be punished for contempt of court for disobeying said injunction order; that, on the 22d of March, 1900, the board of education and the interveners Ginn & Co. took and perfected an appeal from the said judgment entered in said superior court; that on the coming on of the hearing before said court of the order to show cause the petitioners, appearing by the city attorney, objected to said court and judge proceeding to hear the same, on the ground that it had no jurisdiction to proceed pending the appeals. Nevertheless the respondent entertained jurisdiction of said proceedings, and proceeded with the hearing upon said order to show cause. Wherefore the petitioners pray for a writ of prohibition commanding the respondent court and the judge thereof to desist from hearing further the said order to show cause, and from all further proceedings in the said action pending said appeal. It appears in the petition, when the attention of the respondent court and judge was called to the fact of appeals having been taken, that said judge stated in open court that he considered the said appeals would stay only that portion of the decree which commanded the defendant board of education to cause to be used in the public schools in the city and county of San Francisco the text-books of the California system of vertical penmanship, but that the said appeals did not and could not stay that portion of the said decree which commanded and directed the defendant board of education to refrain from using or causing to be used in the public schools the Shaylor system of vertical round-hand penmanship; that the said judge further stated in open court that if the defendant board were prevented by injunction from using or causing to be used text-books of the Shaylor system it would be the moral duty of said board to cause the text-books of the California system to be used in said public schools. It appears further that the real parties in interest in said action are the plaintiff J. C. Green and the interveners the H. S. Crocker Company and Ginn & Co. of Boston.

The question presented seems to be whether the prohibitory portion of the injunction can be separated from the mandatory por-

tion, or whether the two are so inseparably connected as to render it improper during the appeal to enforce one while the other is suspended. It is very apparent that the purpose of the action is not only to prevent the use of the Shaylor system, but also to compel the use of the California system. It would seem, therefore, that the portion of the injunction which is in form prohibitory, and forbids the use of the text-books of the Shaylor system, is subordinate and ancillary to the portion of the injunction which commands the board of education to cause to be used in the public schools the text-books of the California system. The plaintiff's complaint in said action, as well as his affidavit on the application to have the injunction enforced, is based on the ground that the California system had been in use prior to the contract between the board of education and Ginn & Co., and should be restored and used in the public schools; and, without this being done, it would seem that the injunction would afford no relief to the plaintiff, and that the main purpose of the injunction is its mandatory feature. This appears from the statement of respondent judge, as set forth in the petition, that, if the board of education should be compelled to discontinue the use of the text-books of the Shaylor system, it would be their moral duty to reinstate the California system in the public schools. This would seem to be obviously the case. To compel the board of education to discontinue the text-books of the system now in use without at the same time requiring the board to use the text-books of the other system, would inflict very serious injury upon the pupils of the public schools without affording any relief or being of any benefit whatever to the plaintiff or the interveners in behalf of the California system. The findings and judgment of the respondent court were to the effect that the contract between said board and the H. S. Crocker Company, the interveners in said action, was valid, and in force, and that the contract made with the intervening firm of Ginn & Co. was invalid. The injunction ordered by the decree was but the means employed to give effect to said judgment. This decision and judgment having been suspended by the appeal, it would seem but proper that the injunction, being merely the means of giving effect to such decision and judgment, would also be suspended pending the appeal. An injunction, though restrictive in form, if it have the effect to compel the performance of a substantive act, is mandatory, and necessarily contemplates a change in the relative positions or rights of the parties from those existing at the time the injunction is granted or the decree is entered. As stated in *Dewey v. Superior Court*, 81 Cal. 64, 22 Pac. 333: "During the pendency of the appeal the court below could do no act which did not look to the holding of the subject of the litigation just as it existed when the decree was rendered." In *Dulln v. Coal Co.*,

98 Cal. 304, 33 Pac. 123, the effect of the appeal from the judgment was to leave the parties in the same situation, with reference to the rights involved in the action, as they were prior to the rendition of the judgment. And in *Schwarz v. Superior Court*, 111 Cal. 106, 43 Pac. 580, it was held that the mandatory injunction pendente lite commanding the removal of trade signs is stayed and suspended in its effect by an appeal from the order granting the same; and pending such appeal the petitioners could not be punished for contempt for failure to remove or discontinue such trade signs. *Foster v. Superior Court*, 115 Cal. 279, 47 Pac. 58, is a case where there was a contest as to which of two parties had been elected a director in the S. F. & N. P. R. Co. The court below, on trial of the contest, decided that Smith, and not Lillenthal, had been elected a director with the others, and that he was entitled to exercise the office, and that Lillenthal should be excluded therefrom. Judgment was entered in accordance with this decision, and also enjoining the defendants from interfering with Smith in the exercise of his office as director. On the same day the judgment was rendered an appeal was taken therefrom, and thereafter at a meeting of the directors Smith sought to enter the room in which the meeting was held, but was excluded therefrom by Foster, as chairman of the board, and the meeting of the directors was held without permitting him to be present. Upon an application the superior court cited Foster before it to show cause why he should not be punished for contempt, and upon the hearing adjudged him guilty of contempt in thus preventing Smith from being present at a meeting of the directors. Upon certiorari this court annulled that order. In the opinion it is said: "The injunction in the judgment against the interference with Smith's right to act as director was but ancillary to the judgment determining that he had such right, and was merely incidental thereto. Although preventive in form, it was, in effect, mandatory, as it required Foster and the other directors to recognize Smith as one of their number, and to refuse to recognize Lillenthal. As that portion of the judgment declaring that Smith was elected was suspended by the appeal, the injunctive portion of the judgment, being merely incidental thereto, was also suspended, and the power of the court to enforce any portion of its judgment by inflicting punishment for its violation was stayed. An enforcement of this portion of the judgment would operate to carry the decree into effect, and would change the relative positions of the parties from those existing at the time the decree was entered, and might render a reversal of the judgment entirely ineffectual." See, also, *Stewart v. Superior Court*, 100 Cal. 543, 35 Pac. 156, 563.

The real controversy before the respondent court, as already shown, was as to which one of the systems of penmanship—whether

the so-called "Shaylor system" or the "California system"—had been legally adopted and should be used in the public schools of said city and county. The court found in favor of the California system, and against the Shaylor system, and decreed that the former system should be used, and the latter should not be used. It would require, however, like affirmative action on the part of the board of education to cause to be excluded from the public schools, and cease to be used therein, the Shaylor system as it would to cause to be used the California system in said schools. But it is conceded that the board of education cannot be required, pending the appeal, to cause to be used in said public schools the California system. And it seems equally clear that such board should not be compelled to carry out the other portion of the decree requiring them to cease using the said Shaylor system. The board should only be required to remain passive, and take no action in favor of or against either of the real parties to the contest in said action pending the appeal. In seeking to compel the petitioners, the board of education, to carry out the portion of the decree in question, under the circumstances, pending an appeal from the whole of such decree, the respondent court exceeded its jurisdiction. Let the writ issue as prayed.

We concur: BEATTY, C. J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.

(62 Kan. 89)

ST. LOUIS & S. F. R. CO. v. BURROWS.

(Supreme Court of Kansas. June 9, 1900.)

CARRIERS—INJURY TO PASSENGER—NEGLIGENCE—BURDEN OF PROOF—CONTRIBUTORY NEGLIGENCE—EVIDENCE—INSTRUCTIONS.

1. In an action by a passenger against a common carrier to recover for personal injuries received while traveling in a conveyance of the latter, proof of the accident and plaintiff's injury casts the burden upon the carrier to free itself from the presumption of negligence. The gist of the action being the negligence of the defendant, the above rule is not applicable in such a suit against a railway company where the evidence introduced by the plaintiff shows that the accident resulted from an act of God, unavoidable casualty, or from causes not connected with the construction, operation, or maintenance of the railway.

2. Whether it is an act amounting to contributory negligence for a passenger, traveling in the caboose of a freight train in motion, to stand up and lean forward to spit in a stove in the car, should be left to the jury.

3. It is error for the court to instruct the jury that their answers to particular questions of fact submitted should be consistent each with the other. *Brick Co. v. Zimmerman*, 60 Pac. 1064, 61 Kan. —, followed.

4. The case of *Railroad Co. v. Johns*, 36 Kan. 769, 14 Pac. 237, as to the admissibility of complaints of an injured person concerning the presence of existing pain, adhered to.

5. An instruction criticised, in which the jury were told that, before the defendant could avail itself of a plea of contributory negligence, it must establish the facts pleaded in defense.

(Syllabus by the Court.)

Error from district court, Cherokee county; A. H. Skidmore, Judge.

Action by G. R. Burrows against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

In his petition in the court below, plaintiff alleged the following facts in substance: That on the 28th day of February, 1898, he purchased a ticket for first-class passage over defendant's railroad from Halliwell, Kan., to Columbus, Kan., and that while riding upon a freight train upon its regular run, and upon which it was the custom and habit to carry passengers, he was injured by reason of the negligence of defendant, its agents and employes, in the following manner: The train upon which he was going, while traveling at the rate of from 10 to 15 miles per hour, came to a short, sudden, and abrupt stop, and caused him to be violently thrown down and forward, thereby seriously breaking his left arm just above the wrist, by which fall his back was wrenched and twisted, and his left side bruised, thereby inflicting upon him permanent injury, etc. The answer of the railroad company contained, first, a general denial, and an allegation of contributory negligence upon the part of plaintiff below. The testimony of plaintiff below, in which he gave an account of the accident and how it occurred, we have extracted from the record, and it is as follows: "Q. Now, where were you when they started? A. I was sitting down when they started. Q. Now, go right on and tell, Mr. Burrows, what took place, how far they had run when it took place, if anything did, and all about it. A. Well, they had run about a quarter, I guess— Q. Go right on. A. About a quarter of a mile, or somewhere near that, and they were going fast, or down grade, and they just lit right out. Then all to once they just stopped, as sudden as if they had run against a mountain. Q. Now, state to the jury just the position you were in at the time they stopped, as you have stated, or just about. I wish you would just show the jury the position you occupied all the time. (Counsel brings seat, and places before the jury, and witness uses same for illustration.) A. Well, I was sitting right down close—midding close—to the stove; and, as the train started off, I might have been sitting there a second or two, or a half a minute, or something like that. I couldn't tell just how long I was sitting there. And I raised up, to look around, to see whether I could see any place to spit. I chew tobacco. I didn't want to spit on the floor. And I raised up to spit in the stove. Q. Go right on, Mr. Burrows, and state. A. I went to spit, and I looked around to see if there was any spitoon, and there wasn't none there, and I just merely raised up and braced myself in that way (indicating) to spit; and there was a sudden check or stop came, and I went over and broke my arm." As to the

position plaintiff was in when he fell, he testified as follows: "Q. You looked around on the dirty floor to find some place to spit, and couldn't find any? A. I did. Q. Then you rose up, and about this position, for to brace yourself with your left foot, and put yourself in the position to spit in the stove? (Counsel indicates position on seat before the jury.) A. Yes, sir. Q. And you were about in the position then that I am now? A. Somewheres near that. Q. Well, very nearly that, is it not? A. Well, I don't know; yes. Q. Was that the position you were in when on your direct examination? A. Yes, sir. Q. Your face was about 2½ feet from the floor? A. Well, I couldn't tell how far it was. Q. And your left arm was about 1½ feet from the floor? A. I don't know how far it was. Q. That is the position that I am in now? A. I don't know whether it was or not, exactly. Q. That is as near as you can remember? A. No; if you put your hand back there I can remember. Q. Back here? (Counsel puts left hand back on seat.) A. That is where it was. Q. Your left hand back on the seat? A. Yes, sir. Q. Then your face was about 2½ feet from the floor, and the left hand was against the seat, your left foot extended to brace you, and was in that position when you fell? A. Yes; somewheres near that position. Q. That is as near as you can now state it? A. Yes, sir. Q. Now, about how far were you from the stove? A. Well, I was probably two feet; maybe not quite so far. Q. West of it? A. I was west of it. Q. And about how far north of it were you? A. Well, I wasn't very far north. It was pretty close. Q. Now, you say when the train suddenly stopped you fell between the stove and the seat? A. Between the stove and the seat. Q. Now, after you had fallen to the floor, how soon thereafter did you see the drummer? A. Well, I seen him just as soon as I fell down on the floor; and there he came to me, and I was trying to get up. He came and helped me up. I could not get up myself,—I was hurt so,—with one hand, and the train was running. Q. Now, Mr. Burrows, after the sudden stop and fall which you say you met with, and the injury you received, what did the train then do? A. It ran right on. Q. Just kept up and went on east? A. Just went right on east. According to my judgment, the train was running at a speed of from ten to fifteen miles an hour when the accident happened. Q. You say the drummer assisted you to your feet after you fell there? How did he do it? A. Why, he got up and got around me. I could not tell you just how, but he caught hold of me around me, and, says he, 'Are you hurt?' I says, 'Yes; my back.' I think I said my back and arm was hurt. Q. Now, you say that when you fell in the car you fell with your head to the east,—to the eastward? A. Right to the east,—eastward; yes. Q. Fell between the seat and the stove? A.

Yes, sir. Q. The car was neat and clean and tidy? A. Not very. Q. It wasn't clean? It was dirty inside? A. Yes, sir; on the floor." There was no evidence introduced on behalf of the defendant railway company. The jury, in answer to particular questions of fact, found that plaintiff was 50 years old, and of sound mind and judgment; that the train was not moving when he got on, and the caboose had arrived at the depot at that time; that plaintiff had been on the train 5 or 10 minutes before the accident occurred, and was moving at the time of the injury at least 10 miles an hour; that plaintiff fell towards the engine; that there were seats in the caboose that plaintiff might have occupied; that the accident would have occurred if plaintiff had been sitting down; that the train was a quarter of a mile from the depot when the accident happened; that plaintiff had traveled on freight trains, and knew that there was more or less jar and jolt in the handling of the same; that he did not tell the conductor there was no use of making any report of the accident; that he was on the north side of the car, west of the stove, when the injury occurred; that he was not standing up in the car, and was not injured by an unavoidable accident; that the train was running between Halliwell and Sherwin when the accident occurred, and that the conductor knew plaintiff was on the train; that some member of the train crew was negligent, but the evidence did not show which one, and that the negligence consisted of improper handling of the train; that plaintiff was not injured by the reason of running in or out of slack of the train; that the train was not handled in the usual and ordinary manner, in that it was suddenly and violently stopped; that the crew might have been competent, but they were not careful at the time of plaintiff's injury; that they could not tell which member of the crew was not careful and competent; that the sudden stopping of the train was the direct and proximate cause of the injury. There was a general verdict for the plaintiff below, and answers returned to particular questions of fact, upon which judgment was rendered by the court. A motion for a new trial was overruled.

J. W. Gleed, J. S. Hunt, Gleed, Ware & Gleed, and D. E. Palmer, for plaintiff in error. Chas. Stevens, C. A. McNeill, and Chas. Smith, for defendant in error.

SMITH, J. (after stating the facts). Counsel for plaintiff in error earnestly contended that the trial court erred in overruling their demurrer to the evidence, for the reason that the testimony introduced by plaintiff below raised no presumption of negligence upon the part of the railroad company or its servants in the operation of the train. They cite authority to the effect that, if the accident occurred under circumstances which might be

attributable to causes unavoidable upon the part of the railroad company, mere proof of plaintiff's injury is insufficient to make out a prima facie case of negligence against the carrier. We have carefully examined the cases referred to by plaintiff in error, together with others involving this question, and conclude that the rule of evidence in cases of injury to a passenger is in accord with the decision of this court in *Railroad Co. v. Elder*, 57 Kan. 312-316, 46 Pac. 311. An accident resulted in death. The deceased left a widow and next of kin surviving him. The court, by Martin, C. J., said: "Under the pleadings and the allegations of negligence contained in the petition, it devolved upon the plaintiff below, in the first instance, only to prove the derailment, the injury of the passenger thereby, that death occurred from the injury, and that the deceased left a widow or kindred surviving him; and it then became incumbent upon the company, in order to escape liability, to show that the derailment resulted from inevitable accident, or something against which no human prudence or foresight on the part of the company could provide. *Railway Co. v. Walsh*, 45 Kan. 653, 659, 26 Pac. 45, and cases cited; *Railway Co. v. Johnson*, 55 Kan. 344, 345, 40 Pac. 641." If the testimony introduced on behalf of the plaintiff in such cases should develop that the injury resulted from an act of God, unavoidable casualty, or from causes not connected with the construction, operation, or maintenance of the railroad, then the burden of proof would not shift to the defendant to account for the accident, for the explanation itself (made by the plaintiff) would exonerate the carrier from the charge of negligence. The gist of the action is want of care on the part of defendant. A presumption of negligence in such cases arises, not from the fact of the injury alone, but from its cause or the circumstances attending it; and if such circumstances as detailed in the testimony introduced by the plaintiff should show, for instance, that he was shot through a window by a person distant from the track, or that the train was struck by lightning, or that he fell down while the train was standing still, or that the accident happened in some other manner wholly beyond the control of the carrier or its servants, there would be no presumption of negligence for the defendant to rebut, for the reason that the plaintiff had, in his account of the accident, disproved the charge of negligence made by him. The railroad company being held to the highest degree of care which human prudence or foresight can provide, it is sufficient in this class of cases to show prima facie that the injury was occasioned by the failure of some portion of the machinery, appliances, or means provided for the transportation of passengers, or any other thing which the carrier can and ought to control, as a part of its duty to carry passengers safely. *Meier v.*

Railroad Co., 64 Pa. St. 225. A presumption of negligence arises from the occurrence of an accident, alone, when it proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible. *Transportation Co. v. Downer*, 11 Wall. 129, 20 L. Ed. 160. In *Gleeson v. Railroad Co.*, 140 U. S. 435-444, 11 Sup. Ct. 862, 35 L. Ed. 463, this question was considered by the supreme court of the United States. The accident in that case occurred by reason of a landslide in a railway cut caused by an ordinary fall of rain. It was held that an injury to a passenger, caused by the train coming in contact with the earth which had fallen down upon the track, raised a presumption of negligence on the part of the railway company, and threw the burden of proof of showing that the slide was in fact the result of causes beyond the control of the railway company upon the latter. In passing upon the question the court said: "The law is that the plaintiff must show negligence in the defendant. This is done prima facie by showing, if the plaintiff be a passenger, that the accident occurred. If that accident was in fact the result of causes beyond the defendant's responsibility or of the act of God, it is still none the less true that the plaintiff has made out his prima facie case. When he proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by one party or the other. They are its matter of defense. And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances." See *Lawson*, Pres. Ev. p. 128. We think the plaintiff below, by the testimony offered in his behalf, brought the case within the established rule, and that when he rested a prima facie charge of negligence had been made out, which the railway company was called upon to meet, in order to overcome the presumption against it. Nor can we hold, as a matter of law, that the plaintiff below was guilty of contributory negligence. This question was one for the jury. *Railroad Co. v. Hughes*, 55 Kan. 491, 40 Pac. 919. We cannot say, from the fact that plaintiff below leaned over towards the stove to spit, that he was guilty of an act of negligence. This is not an uncommon thing to do. Railroads recognize the general use of tobacco, both for smoking and chewing, by running smoking cars on all passenger trains, and by furnishing their coaches with cuspidors. Plaintiff was riding in a caboose attached to a freight train, and it is not quite clear from the testimony what his posi-

tion was immediately before he was hurt; but it would seem that he had assumed a crouching position, with one hand upon the seat, to brace himself. In *Beaver v. Railroad Co.*, 56 Kan. 514, 43 Pac. 1136, it is said: "In an action to recover for personal injuries, where the defense is contributory negligence on the part of the plaintiff, the court cannot take the case from the jury, and determine, as a matter of law, that the plaintiff was negligent, where the standard of care required of him was a subject upon which different opinions might be entertained, and where the facts shown and inferences to be drawn from them were such that reasonable minds might differ with respect to whether he had acted as a reasonably prudent man should have done under the circumstances."

Objection is made to the reception of testimony of professional and lay witnesses relating to complaints of plaintiff with regard to the existence of his pain and suffering, communicated to them after the accident. Counsel for plaintiff below, in propounding questions upon this point, brought themselves strictly within the rule stated in *Railroad Co. v. Johns*, 38 Kan. 769, 14 Pac. 237, and inquired concerning the presence of existing pain, and the answers given were responsive to such questions. There was no error in the admission of such testimony.

Particular questions of fact were submitted to the jury on behalf of the defendant, to be answered, and one of the instructions relative thereto is as follows: "Your answers to these questions, if any, should be consistent each with the other, and should be answered in the event that your verdict is for the plaintiff, in the light of the testimony, after due consideration thereof, and under the rules of law given you in this case." There was error in this direction to the jury. It was not their duty to reconcile the answer of any particular question of fact with another, but to answer each question in accordance with the preponderance of evidence bearing upon the fact involved in the interrogatory. *Brick Co. v. Zimmerman*, 61 Kan. —, 60 Pac. 1064, and cases cited. This erroneous instruction compels a reversal of the cause, and, in view of another trial, we think that the following instruction is subject to criticism: "The plea of carelessness and want of due care and caution on the part of the plaintiff is an affirmative plea tendered by the defendant, and, before it can avail itself of the relief in such plea sought, it must establish by the fair weight of the evidence the facts stated in such allegation and defense." By this direction the jury might have been misled into the belief that if the plaintiff, by testimony offered in his behalf, had shown contributory negligence upon his part, the same could not avail the defendant, because the fact of such contributory negligence was not established by the company. A similar instruction was passed

upon and criticised in case of *Railway Co. v. Merrill*, 61 Kan. —, 60 Pac. 819-822. Again, the court instructed the jury that if they found that the plaintiff, by reason of his carelessness and negligence, as alleged by the defendant in its answer, occasioned the injury, then there could be no recovery. In the answer it was alleged that the injury was occasioned wholly by the plaintiff's own carelessness and negligence. It would thus follow from the instruction that the plaintiff might nevertheless recover, although his injury was occasioned partly through his own negligence. The instruction was misleading. The judgment of the court below will be reversed, and a new trial ordered. All the justices concurring.

MEADOR v. MISSOURI PAC. RY. CO.

(Supreme Court of Kansas. June 9, 1900.)

BURDEN OF PROOF—LIABILITY OF CARRIER FOR INJURY TO PASSENGER—DIRECTING VERDICT.

1. Plaintiff's husband was a passenger on one of defendant's trains, and was killed by reason of a derailment of the train. *Held* that, after plaintiff has shown these facts, the burden of proof is on defendant to show that such derailment resulted from inevitable accident, or some other cause against which no human foresight could provide.

2. Where it was contended in the court below that a wire cattle guard of defendant company was not sufficient for the purpose intended, and the guard was introduced in evidence, it was error not to permit the jury to pass upon the question.

Error from district court, Leavenworth county; Lewis A. Myers, Judge.

Action by Sarah E. Meador, administratrix, against the Missouri Pacific Railway Company, for negligently causing the death of her husband. The court directed a verdict for defendant, and plaintiff brings error. Reversed.

Kelso & Van Tuyl, for plaintiff in error. Waggener, Horton & Orr, for defendant in error.

PER CURIAM. It was error for the trial court to direct a verdict for the defendant below, in view of the high degree of care required of carriers to prevent injuries to passengers. "It [the railway company] must use the most exact diligence, and is answerable for any negligence, however slight. It is bound to exercise the highest degree of practicable care,—not the utmost possible precaution that might be imagined, but the highest care and best precaution known to practical use, and which are consistent with the mode of transportation adopted." *Railway Co. v. Walsh*, 45 Kan. 653-656, 26 Pac. 45. After the plaintiff below had introduced her evidence, the burden of proof was then placed upon the railway company to show that the derailment of the train resulted from inevitable accident, or something against which no human prudence or foresight on the part of

the company could provide. *Railroad Co. v. Elder*, 57 Kan. 312, 46 Pac. 310. See *Railroad Co. v. Burrows*, 61 Kan. —, 61 Pac. 439. Applying such rule to the case at bar, we cannot say that human prudence and foresight might not have averted the accident. It appears that sectionmen went over and inspected track every day, but omitted doing so on Sunday, the day plaintiff's husband was killed. Had they done so, they might have seen the horses on the right of way and driven them off.

Again, we think that the question of the sufficiency of the wire cattle guard for the purposes intended should have been submitted to the jury. There was some testimony showing its inefficiency to turn stock. The jury also saw the guard, which was introduced in evidence, and should have been allowed to pass upon its sufficiency, and determine whether it was the best for practical use. *Timins v. Railway Co.*, 72 Iowa, 94, 33 N. W. 379. The failure to make the cattle guard a part of the case-made is no ground for a dismissal of the petition in error. It was a bulky iron structure. The descriptions given of it by the witnesses, and the picture of it in the record, are sufficient for our purposes. The cause should have been submitted to the jury. The judgment of the district court will be reversed, and a new trial ordered.

(62 Kan. 9)

STATE BANK OF CHATHAM, N. Y., v.
HUTCHINSON et al.

(Supreme Court of Kansas. June 9, 1900.)

MORTGAGE—DURESS—EVIDENCE—DEED
—VALIDITY—ESTOPPEL.

1. It is not necessary, in order to sustain a plea of duress of fears excited by threats of arrest and prosecution for crime, and under the influence of which fears an instrument of writing was involuntarily executed, that the threats be directly made by the threatener to the one from whom the writing was extorted, or that they be communicated to him by an agent of the threatener authorized for that purpose. It is sufficient to sustain the plea if the threats be communicated by others, and that the natural and reasonable consequence of making them be to so excite the fears of the one who does the act as to overcome his judgment and will.

2. When a wife testifies upon direct examination, without objection, that she heard of the making of threats to arrest and imprison her husband, without stating from whom she heard them, and that in consequence she became so alarmed concerning him that she executed a mortgage upon her homestead, against her judgment and will, in order to insure his safety, her evidence, as to the bare fact of what she heard, is not rendered incompetent by a disclosure upon cross-examination that she heard it as a communication from her husband.

3. When a substantive litigated question in a case is, did a husband make a disclosure of certain information to his wife? a third person who overheard it made is permitted to testify to it. Such testimony is not objectionable as being hearsay in character, nor as an evasion of the statutory rule against the admission of the testimony of husband and wife as to communications between each other.

4. Findings of the jury examined, and held that they show that a conveyance of land belonging to a bank, executed by its executive officers, was made upon a sufficient consideration, and was subsequently ratified by the board of directors, and also that the bank, by parting with the consideration received for the deed, is estopped to repudiate the transaction. (Syllabus by the Court.)

Error from district court, Reno county; M. P. Simmons, Judge.

Action by the State Bank of Chatham, N. Y., against W. E. Hutchinson and others. Judgment for defendants, and plaintiff brings error. Affirmed.

McKinstry & Fairchild, for plaintiff in error. Martin & Roberts and H. Whiteside, for defendants in error.

DOSTER, C. J. This was an action brought by the State Bank of Chatham, N. Y., against W. E. Hutchinson and Annie P. Hutchinson, his wife, upon two promissory notes and separate mortgages securing them. One of the notes was for \$4,000, and the mortgage securing it was given upon property in the city of Hutchinson, part of which constituted the homestead of the Hutchinsons. The other note was for \$6,000, and the mortgage securing it was given upon a section of farming land. The Valley State Bank and the Bank of Hutchinson, being claimants to a mortgage lien upon the section of land, were made defendants to the action. W. E. Hutchinson was the president of the Valley State Bank of Hutchinson. He was indebted to the State Bank of Chatham upon a personal obligation in the sum of \$10,000. As collateral security to his indebtedness, he had transferred certain notes and chattel mortgages upon cattle. One George L. Morris, the president of the plaintiff bank, came to Kansas to investigate the chattel-mortgage collaterals, and adjust the Hutchinson indebtedness. He could not find the cattle described in the mortgages, nor the makers of those instruments. He accused Hutchinson of fraud, and threatened to prosecute him criminally, and cause him to be sent to the penitentiary, unless the indebtedness due to his bank was at once paid or secured. These threats were not made to Hutchinson personally, but were made to one C. B. Wilfley and one John J. Welch, officers of the bank of which Hutchinson was president. They communicated the threats to Hutchinson, who in turn communicated them to his wife. In order to satisfy Morris as agent of the plaintiff bank, and induce him to forego a criminal prosecution against Hutchinson, the latter, together with Wilfley and Welch, the other officers of the Valley State Bank, agreed with Morris to convey to Mrs. Hutchinson a section of farming land owned by the bank, in order that the Hutchinsons might give a mortgage upon it along with their homestead and other city property as security for the debt which Hutchinson owed to the State Bank of Chatham. This conveyance was made. The title to the sec-

tion of land did not stand in the name of the Valley State Bank, but stood in the name of the before-mentioned John J. Welch, one of its officers. Morris, however, had full knowledge that this land belonged to the bank, and that the title to it was held by Welch merely as a trustee. After the conveyance of the land the Hutchinsons executed the above-mentioned mortgage of \$6,000 upon it, and also at the same time executed the mortgage of \$4,000 upon their homestead and other city property. The indebtedness secured by these mortgages was not paid, and action was therefore commenced as before stated. It will be most convenient to separately state and discuss the two causes of action upon the separate notes and mortgages.

The jury found that the note and mortgage of \$4,000 upon the homestead were executed by Mrs. Hutchinson under the duress of her fears excited by Morris' threat to arrest and criminally prosecute her husband. As before stated, this threat was not made to her, nor was it made to her husband, but it was made to her husband's business associates, and was by them communicated to him, and by him to his wife. Counsel for plaintiff in error contend that a plea of duress by threats can only be sustained by proof of threats directly made to the person from whom the unwilling act was required or the involuntary contract extorted; or that if such threat is not thus directly made, but is conveyed through an intermediary, it must be by an agent of the threatener's choosing, specifically designed by him to be an organ of communication. The evidence did not show that any agency for the communication of the threat was selected by Morris, or that he had any specific design that it should be communicated to Mrs. Hutchinson. Notwithstanding this, we feel clear that the threats need not be directly communicated. If one makes threats the natural and reasonable consequence of which is to put another in a state of fear, and if they do put the other in a state of fear, and induce, through the duress of such fear, the performance of an act by him, the one who makes the threats should be held responsible for his wrong. The effect is one which in the law of causal connection proximately results from the unlawful act. Nor need there be, as we think, a specific design in the mind of the wrongdoer to produce the effect which follows. It is sufficient that the effect be one which follows as a natural and reasonable consequence from the unlawful act. In the case of *Taylor v. Jaques*, 106 Mass. 291, it appeared that a promissory note was signed under the duress of fears excited by threats not communicated directly by the creditor to the debtor, but communicated by the former to another, and by him to the debtor. The court held that: "On an issue whether a promissory note was made under duress, evidence is admissible that the person to whom the payee made threats against the maker reported them to the maker, in the absence of the payee,

just before the making of the note." In *Schultz v. Catlin*, 78 Wis. 611, 47 N. W. 946, it was ruled that "a note signed by a sister because of threats by the payee to prosecute her brother for a crime, and in order to avoid such prosecution, cannot be enforced against her by such payee. It is immaterial that the threats were not made directly to the sister, if they were intended to be communicated to her, and were so communicated." The case of *Giddings v. Bank*, 104 Iowa, 676, 74 N. W. 21, is quite like the one we have for consideration. In that case a creditor charged his debtor with being a defaulter in respect to a mutual business trust, and threatened him with a criminal prosecution and imprisonment, unless he and his wife would execute a mortgage on their homestead to secure the amount of the default. The husband communicated the threat to his wife, and under the duress of her fears excited thereby she executed the mortgage. The evidence of this secondary communication, although that of the husband, was received, and held proper. We disagree, however, with that case in one particular. We do not believe that the husband was a competent witness to prove the communication to his wife of the threats which had been made to him. However, the point raised by counsel, and which we have thus far considered only, does not concern the competency of the testimony by which the secondary communication was proved, but it concerns the question whether the communication must be direct, or whether it may be secondary or otherwise more remote. Upon that question the case cited is an authority. The case of *Schultz v. Catlin*, *supra*, intimates that, in order to the reception of the evidence of threats secondarily communicated, there must be a specific design in the mind of the threatener that the communication should be made. In this we do not agree, but believe that the general rule which holds a wrongdoer liable for the consequences which naturally and reasonably follow his act applies in such case as it does in other and analogous ones. It also appears in *Schultz v. Catlin*, just cited, and likewise in *Giddings v. Bank*, *supra*, that the reception of the evidence of the secondary communication was rested somewhat upon the theory of an implied agency in the one to whom the threats were made to act as a medium of communication to the third person. Without holding to the contrary of such theory, we are persuaded that the better ground upon which to rest the rule of admissibility of the evidence is the one which we have above stated.

Counsel for plaintiff in error strenuously object to a portion of Mrs. Hutchinson's testimony, because, as they say, it was given in violation of the statute which prohibits husband or wife testifying to communications which one of them has made to the other. The testimony to which objection was made was, in substance, that the witness heard that her husband was threatened

with a criminal prosecution and sentence to the penitentiary; that in consequence she became alarmed and disturbed in mind, and overpowered in will, and executed the mortgage upon her homestead to avert the threatened calamity. During the examination in chief of Mrs. Hutchinson, the trial court, upon objection, carefully excluded from the jury all of her testimony tending to show a communication to her by her husband. Nothing but the bare fact that she heard of the threats, and the effect they produced upon her mind and will, were allowed to go to the jury in the first instance. Counsel for plaintiff in error, upon their cross-examination, developed the fact that the story she heard of the threats was a communication from her husband, and they then moved to exclude that part of her testimony from the jury. This motion the court denied. Did the testimony thus elicited upon cross-examination justify the exclusion from the jury of the bare statement, made on direct examination, that she had heard of the making of threats against her husband? We have given much thought to the question, and are entirely convinced that the rulings of the trial court were correct. No case involving the precise point has been called to our attention by counsel for either side, nor have we after research ourselves been able to find a case in point. The question, therefore, appears to be one of first impression, and, in the lack of precedent, to be determined upon reason. The witness did not, upon her direct examination, testify to any communication from her husband. She testified only to a fact,—a fact which might have been learned (although such was not the case) from others than her husband. What she stated was not as a communication from her husband, but as a fact, to wit, the story of the threats. The testimony thus far was unobjectionable. Could it be made objectionable by a cross-examination disclosing the sources of the wife's information? Clearly not. To do so would have withdrawn from the consideration of the jury all testimony as to the cause of the making of the homestead mortgage, and would have left the witness' testimony as to a motive for that action without any rational explanation. All that would have been left of the witness' testimony would have been that she made the mortgage, and the state of mind in which she made it. A single word beyond that, to show that her state of mind was induced by a story of threats against her husband, would be, in the theory of counsel for plaintiff in error, incompetent and objectionable, provided the story was heard from the husband. That theory is not sound. It is not supported by any fair interpretation of the statute. The statute forbids the testimony of husband or wife as to conversations between each other, but the bare statement of a wife that she heard that her husband was to be

arrested is not the statement of a conversation. She is entitled to go that far in explanation of the inducement to her action. The substantive litigated question in the case was, did the wife hear alarming stories as to her husband? not the words in which the story was told, nor that it was told to her by her husband. A litigating party cannot deprive his antagonist of the right to prove that substantive fact by showing that the information as to it came from the husband. A statement of the matters testified to by the witness in question, and necessary to be proved, put in the logical order of their development at the trial, shows this: "Q. Did you make the mortgage in suit? A. I did. Q. Why did you make it? A. I was overcome by the fear that unless I did my husband would be arrested and imprisoned. Q. Why did you have such fear? A. I heard that he was accused of a crime and threatened with a prosecution." This was as far as the witness went upon her direct examination. According to counsel for plaintiff in error, a single question and answer upon cross-examination, although in no wise going to the making of the mortgage or the reasons for the making of it, destroys the pertinency of the witness' testimony as to those matters. "Q. From whom did you hear that your husband was threatened? A. I heard it from him." If thereupon the testimony of the witness as to the fact that she had heard of the threats was to be withdrawn from the jury, the benefit of the whole probative connection between cause and effect would be lost, and a necessary link in the chain of proof be destroyed. The statute is not to be so strictly construed and enforced as to produce such a result.

A daughter of the Hutchinsons testified that she overheard the conversation between her father and mother, in which the former disclosed to the latter the threats which Morris had made. Counsel for plaintiff in error also contend against the admissibility of this testimony, upon the ground that it was hearsay in character, and also that its reception was an evasion of the above-mentioned statute, declaring the inadmissibility of evidence of communications between husband and wife. Neither of these contentions is sound. There were three substantive litigated questions in the case—First, were threats made? And, if so, secondly, were they communicated to Mrs. Hutchinson? And, if so, thirdly, did they produce the claimed effect? As to the second of these as well as the first the meritorious question was, had a verbal act been done? That is, had a communication been made? That act, if done, was not incidental or collateral in nature. It was one of the three principal litigated matters in the case, and, being such, the performance of the act was provable by the testimony of any one who, if competent, was a witness to it. The question was not whether Hutchinson's communication to his wife was truthful, but it was

whether the communication had been in fact made. The rule is general that, where a substantive litigated fact is the speech of a person, one who heard the utterance is admitted to testify to it, and the testimony so received is not hearsay. Mr. Wharton, in his work on Evidence (volume 1, § 254), quite epigrammatically summarizes the rule by saying, "Hearsay is admissible when the issue is hearsay." He then further says: "It may happen that a question at issue is whether certain things were said at a particular time, independently of the truth of what is thus said. If so, proof that such things were said is admissible, though hearsay." The same rule is declared in quite similar language in 2 Tayl. Ev. § 576. It is a general rule in the law of evidence that, when the inducing cause of the action of a person is the subject of inquiry, the information upon which he acted may be stated, although it consists of the speech of third persons. A familiar illustration of this rule is afforded in cases of defense against assaults. It is always admissible in such case to show the making of threats by those who overheard them, and their communication to the defendant, upon the strength of which he armed himself, and resisted the assault of his antagonist.

As to the second objection to the reception of the young woman's testimony, viz. that its admission violated the statutory rule of incompetency, but little need be said. The statute is confined to the class of testimony which it in terms forbids, and it extends to nothing beyond. It forbids husband and wife from testifying to communications made by one to the other, but it does not forbid a third person who overheard the conversation from stating it to the court. In *State v. Center*, 35 Vt. 379, *Allison v. Barrow*, 3 Cold. 414, and *Gannon v. People*, 127 Ill. 507, 21 N. E. 525, 11 Am. St. Rep. 147, third persons were permitted to testify to communications overheard by them between husband and wife. In these cases the communications were in the nature of confessions or admissions against interest, but that did not constitute the ground upon which the testimony was received. If the statute prohibits such kind of testimony, it prohibits it upon the ground of the confidential conjugal character of the communication, irrespective of whether the disclosure of the communication by the one who overheard it would make for or against the party.

The young woman, Miss Hutchinson, was permitted to detail a conversation between herself and her mother concerning the communication of the threats which the husband and father had just made. This was not proper, but, on the other hand, it was not harmful, and does not constitute reversible error.

The Valley State Bank and the Bank of Hutchinson joined in a cross petition in error against the plaintiff in error, the Bank of Chatham. The error complained of is the

refusal of the court below to adjudge a title in them to the section of land that was conveyed by Welch, the cashier of the Valley State Bank, to Mrs. Hutchinson, and by her and Hutchinson mortgaged to the plaintiff in error to secure \$6,000 of Hutchinson's indebtedness to the plaintiff in error. It is claimed that this judgment should have been rendered, and that, as to the Valley State Bank and the Bank of Hutchinson, the mortgage to the plaintiff in error should have been held void. This claim is based upon the fact that George L. Morris, the president of the plaintiff in error, knew, at the time of the conveyance by Welch to Mrs. Hutchinson, that the land belonged to the bank, and knew that Welch held the title to it as a trustee only, and also the further fact, as claimed, that the Valley State Bank received no consideration for the conveyance which Welch made. The findings of the jury in relation to these matters are material to be stated. They are as follows: "(15) Was the only consideration for the deed from John J. Welch to Annie P. Hutchinson the transfer to the Valley State Bank of the \$10,000.00 Valley State Bank stock, owned by W. E. Hutchinson, and held by Morris as collateral, and the second mortgage on section three and notes therewith? A. Yes. (16) What was the fair market value of section three, township twenty-six, range seven, on or about the 6th day of January, 1896? A. \$6,544.00." "(26) Did not Hutchinson give the Valley State Bank for said section three, in controversy, a hundred shares of the stock of said bank and notes executed by himself and wife to the amount of ten thousand three hundred and sixty dollars (\$10,360.00), securing same by a second mortgage upon the section three in controversy? A. Yes. (27) Was not the securing by Hutchinson of his other indebtedness to the bank a part of the consideration that caused the transfer of said section 3 to Mrs. Hutchinson by Welch? A. Yes." "(29) Did George L. Morris have any knowledge or notice what the consideration was that Mrs. Hutchinson gave the Valley State Bank for this section 3, in controversy? A. No." "(31) Did George L. Morris have any knowledge or notice of the consideration, if any, that Mr. Hutchinson was to give or did give for the conveyance of this section 3, in controversy? A. No." "(33) Did the Valley State Bank, in its settlement with Hutchinson, obtain from him security for his indebtedness to the bank? A. Yes. (34) Did Ralph Thompson, as president of the bank, record the mortgage securing the ten thousand three hundred and sixty dollars of notes given by Mr. and Mrs. Hutchinson to the bank as part of the purchase price of the section 3, in controversy? A. Yes." "(37) Did not the Valley State Bank subsequently sell and assign for a valuable consideration to the Bank of Hutchinson the notes they had received from Hutchinson and wife as part of the

consideration for the conveyance of this section 3 to Mrs. Hutchinson? A. Yes. (38) Did not the officers and directors of the Valley State Bank at the time it made this sale and assignment to the Bank of Hutchinson have full knowledge of the facts and circumstances under which the bank obtained the notes and mortgages thus transferred and sold? A. Yes. (39) Did not the Bank of Hutchinson or its officers have full knowledge of the facts and circumstances under which the Valley State Bank had obtained the notes and mortgages from Hutchinson, as set out in their answer and cross petition, at the time and before they purchased them from the Valley State Bank? A. No." "(42) Did the Valley State Bank, or the Bank of Hutchinson, or any one else, ever return, or offer to return, to W. E. Hutchinson or wife all the consideration given by them for the purchase of section 3, in controversy? A. No. (43) Was it not part of the consideration that Hutchinson gave for this conveyance of section 3 to his wife that he would resign as president and secure his other indebtedness to the bank? A. Yes. (44) Did not Hutchinson resign from the bank as its president, and give the bank security for his other indebtedness to it? A. Yes. (45) Was not the conveyance of this section 3 to Mrs. Hutchinson, and he and his wife giving notes aggregating ten thousand three hundred and sixty dollars (\$10,360.00), and Hutchinson transferring his hundred shares of stock and his resignation as president of the bank, and his giving security for his other indebtedness to the bank, all in one and the same transaction considered and completed at one and the same time? A. Yes." "(51) Did not the Bank of Hutchinson file answer and cross petition in this suit on the notes given in the Valley State Bank as part of the purchase price of this section 3, in controversy? A. No."

In addition to the above findings, there are some which establish the correctness of the contention of the cross petitioners that Morris knew that the land belonged to the bank, and not to Welch. It is not necessary to quote them. The last-mentioned findings, however, did not establish the whole of the cross petitioners' case. The claimed fact that the Hutchinsons paid no consideration to the Valley State Bank for the conveyance of the land must likewise be established, but as to that the cross petitioners have failed. The above-quoted findings show, contrary to the contention made, that the Hutchinsons did pay a consideration for the land; and they furthermore show, what is perhaps of equal importance, that, irrespective of the ignorance of the directors of the Valley State Bank concerning the conveyance at the time it was made, and their consequent ignorance of the claimed ultra vires act of Welch in making it, or his fraud in making it, they ratified the act of making it.

Findings Nos. 26 and 27, above quoted,

show that the Hutchinsons paid a consideration for the conveyance of the land; and findings Nos. 37 and 38 show that the directors of the Valley State Bank, with full knowledge of all the facts and circumstances under which it obtained the consideration paid by Hutchinson, sold and transferred such consideration to the Bank of Hutchinson. In the face of all this, it is not possible to uphold the contention of the cross petitioners. It is claimed that, so far as the transfer by Hutchinson to the Valley State Bank of the stock held by him in that institution was concerned, it was void, because of the lack of power in a bank to purchase its own stock; and the case of *Bank v. Wulfekuhler*, 19 Kan. 60, is cited as decisive of the proposition. Without undertaking to determine the applicability of the law announced in that case to the facts of this one, but conceding its applicability, the transfer of the stock was not the only consideration paid. It might also be admitted that the resignation of Hutchinson as president of the bank was not a valid consideration for the transfer of the land to him, and it might also be conceded, for argument's sake, that the giving by him of security for his pre-existing indebtedness to the bank was not a sufficient consideration. Conceding all that, there still remains the fact, as found by the jury, that Hutchinson and his wife executed to the bank, as a consideration for the transfer of the land, their notes amounting to \$10,300, and secured such notes by a second mortgage upon the land. These were the notes and this was the mortgage which the Valley State Bank, instead of returning, as it should have done if it desired to repudiate the transaction, kept, after its directors—its board of governing authorities—became possessed of full knowledge of the transaction, and which, after acquiring such knowledge, it sold and transferred to the Bank of Hutchinson. It is no sufficient answer to say that the Hutchinsons were insolvent and unable to pay the purchase price of the land as represented by their notes and mortgage of \$10,300. They were not known to be insolvent so as to justify the charge that the bank officials knew they were getting nothing for their land. The fact by no means appears that they were insolvent, but, on the contrary, it appears, by transactions had a short time thereafter between Hutchinson and his wife, that the former was possessed of a considerable amount of personal property, estimated at about \$9,000 in value, which he transferred to his wife, but which in her hands was liable to the payment of the notes as well as in his, because the notes were signed by both of them. It appears, too, by the finding of the jury, that at the time the second mortgage on the land was given it was worth several hundred dollars more than the first mortgage, notwithstanding the remarkably low estimate of value placed upon it by the jury.

Subsidiary and minor claims of error are made by both the plaintiff in error and the cross petitioners in error. We have given careful consideration to all of them. None of them are availing. The judgment of the court below will be therefore affirmed as against both the complainants in error. All the justices concurring.

(9 Kan.App. 854)

NIPP, Sheriff, v. BOWER.

(Court of Appeals of Kansas, Southern Department, C. D. June 16, 1900.)

REPLEVIN—SERVICE OF WRIT—INSTRUCTIONS.

1. The errors relating to the service of summons and service of writ of replevin set forth. *Held* not sufficient to require a reversal of the case.

2. A general charge given by the court to the jury having fairly presented the proposition involved, the failure of the court to instruct as to a phase of the case upon which an instruction might have been given, but which was not requested, is not ground for reversal. *Phinney v. Bronson*, 23 Pac. 624, 43 Kan. 451. (Syllabus by the Court.)

Error from district court, Cowley county; A. M. Jackson, Judge.

Action by Fred Bower against J. B. Nipp, sheriff. Judgment for plaintiff. Defendant brings error. Affirmed.

J. Mack Love, for plaintiff in error. C. T. Atkinson, for defendant in error.

SCHOONOVER, J. Charles E. Beach was the owner of a stock of groceries, valued at about \$1,000, and engaged in the grocery business. He owed a large number of debts and bills for money borrowed and merchandise purchased. He owed the Farmers' National Bank of Arkansas City \$500, which was past due. This note was also signed by W. S. Upp. Prior to May 22, 1893, a son of W. S. Upp had been in Arkansas City for the purpose of collecting or securing the claim Charles E. Beach owed his father. A settlement was made. The son paid \$200 for Beach, and took a chattel mortgage on Beach's stock of groceries to secure this amount, and \$500 which it is claimed Beach owed his father prior to this time. On the 22d day of May, 1893, W. S. Upp arrived. The settlement made by his son was not satisfactory, and he proposed to purchase the stock of goods. The proposition was accepted by Beach, and a good portion of the night of May 22d was spent in invoicing the stock, which amounted to \$1,073.50. The consideration claimed to have been paid by Upp was the \$500 due the Farmers' National Bank and the \$700 secured by settlement with the son. The indebtedness of Beach to Upp exceeded the amount of the invoice by \$126.50. To secure this amount, Upp took an assignment of Beach's book accounts. A bill of sale was executed, and the goods delivered to Upp, who took possession, and immediately placed the goods in the custody of William Theophilus, his agent, with instructions to sell the stock

at the first opportunity, and, if not sold soon, to ship same to Oklahoma. Upp returned to Oklahoma on the morning of May 23d. About noon on the same day, Fred Bower, the defendant in error, purchased the stock from Theophilus, agent of Upp. Ranney, Alton & Co., creditors of Beach, commenced an action upon their claim, caused an order of attachment to issue, and levied upon the stock of goods. Bower, defendant in error, brought this action in replevin against the sheriff. The sheriff gave a redelivery bond, and retained the goods. The case was tried to a jury. Verdict and judgment for Fred Bower, defendant in error, for the return of the goods or the value thereof. The sheriff brings the case here for review.

The first error assigned is that the trial court erred in overruling the motion of plaintiff in error to quash the summons. It is contended that the summons is irregular and insufficient; that it does not properly describe the defendant in the action. The action is brought against J. B. Nipp, sheriff of Cowley county, Kan. In the summons it is commanded to notify J. B. Nipp, sheriff. In our opinion, the variance is not sufficient to avoid the summons.

It is further contended that the service and return of the summons are fatally defective. Section 14, c. 88, Gen. St. 1897, provides: "Every paper required by law to be served on the sheriff may be served on him in person, or left at his office during his business hours." The return on this summons reads as follows: "Received this writ July 13, 1893, and, as commanded therein, I summoned the following persons of the defendants within named, at the times following, to wit: J. B. Nipp, sheriff, June 24, 1893, by leaving a true certified copy of the within summons at the office of said sheriff, with the undersheriff of said county, on said day, in said Cowley county." The only objection to this return is that it does not affirmatively appear that the summons was left at his office during "his business hours." The return shows a substantial compliance with the law, and is sufficient.

The second error assigned is that the trial court erred in overruling the motion of plaintiff in error to quash the writ of replevin. The writ was issued on the 26th day of May, 1893, and the coroner was required to return the writ on the 5th day of June, 1893. The indorsement on the writ is as follows: "May 29, 10:00 o'clock, 1893. Deputy Sheriff Rothrock accepts service, and then and there gave a redelivery bond for the within goods and chattels in the replevining of said goods. Received this writ May 29, 1893. Service accepted by Deputy Sheriff Rothrock this 29th day of May, 1893, and a redelivery bond filed this 29th day of May, 1893, and approved by me. S. S. McDowell, Coroner." The contention is that the deputy sheriff has not the power and authority to waive or accept service for his principal, the sheriff, and that there

is no statute authorizing the service of such a writ upon the deputy sheriff. Upon this proposition counsel have failed to cite authorities. From the investigation we have been able to make, we are satisfied that the irregularity is not sufficient to require a reversal of the case.

It is further contended that the district court erred in failing to properly instruct the jury on the law applicable to the facts in the case. We have considered the evidence and the instructions given. The jury, in the general instructions, were fully informed as to the issue, and their attention was called to all matters necessary to a determination of the case. No request for special instructions was made, and no special instructions were submitted. The court was not requested to modify, enlarge, or in any way change the instructions given. If the facts justified a further instruction upon any particular phase of the case, it is not called to the attention of the court. In the case of *Phinney v. Bronson*, 43 Kan. 451, 23 Pac. 624, the supreme court say: "A general charge given by the court to the jury having fairly presented the propositions involved, the failure of the court to instruct as to a phase of the case upon which an instruction might have been given, but which was not requested, is not ground for reversal." From our reading of the record, the plaintiff in error had a fair trial. Every step taken appears to have been free from passion or prejudice. To compel a reversal of such a case, the errors should be very grave and material ones. The judgment of the district court will be affirmed.

(10 Kan. A. 580)

TRIMBLE v. MISSOURI, K. & T. RY. CO.
(Court of Appeals of Kansas, Southern Department, E. D. June 13, 1900.)

JURISDICTIONAL AMOUNT—APPEAL.

Where the amount in controversy, as shown by plaintiff's petition and evidence, was less than \$100, an amendment of the petition, after judgment against the plaintiff, laying the amount claimed at more than \$100, did not give this court jurisdiction to review such judgment.

(Syllabus by the Court.)

Error from district court, Allen county; L. Stillwell, Judge.

Action by Samuel Trimble against the Missouri, Kansas & Texas Railway Company. Judgment for defendant, and plaintiff brings error. Dismissed.

Oscar Foust & Son, for plaintiff in error. T. N. Sedgwick and A. H. Campbell, for defendant in error.

PER CURIAM. This action was brought by the plaintiff in error to recover the sum of \$38, the alleged value of a cow belonging to the plaintiff which was killed by an engine of the defendant company at Bayard station, in Allen county. The plaintiff also asked for an at-

torney's fee in the sum of \$25. On the trial it was agreed that, if the plaintiff should recover, the jury might allow him an attorney's fee in that sum. The plaintiff testified that the market value of the cow was \$38. The jury returned a verdict in favor of the plaintiff in accordance with the prayer of his petition, and also made certain special findings of fact. The court sustained the defendant's motion for judgment on the special findings notwithstanding the verdict, and entered judgment in favor of the defendant for costs. The plaintiff then filed a motion for a new trial, which was overruled. Then the plaintiff, over the objection of the defendant, was permitted to amend his petition by alleging the value of the cow to be \$101, and by claiming an attorney's fee of \$75. The amount in controversy in this action when judgment was entered in favor of the defendant, as appears from the evidence of the plaintiff, was less than \$100. The amendment of the petition did not change the amount in controversy. The amendment should not have been allowed, since it did not rest upon "facts proved" in the case. The question of jurisdiction has been raised by the defendant in error. The objection is well taken, and the proceedings in error will be dismissed.

(10 Kan. A. 404)

OSWEGO TP. v. WOODRUFF et al.

(Court of Appeals of Kansas, Southern Department, E. D. June 13, 1900.)

APPEAL—REVIEW.

A special verdict, supported by some evidence approved by the trial court, is conclusive in an appellate court.

(Syllabus by the Court.)

Error from district court, Labette county; A. J. Skidmore, Judge.

Action by Samuel N. Woodruff and another against the township of Oswego. Judgment for plaintiffs, and defendant brings error. Affirmed.

Nelson Case, for plaintiff in error. Kimball & Osgood and Webb & Iden, for defendants in error.

MILTON, J. This action was brought by the defendants in error to recover the sum of \$835.35, theretofore paid by them to the township of Oswego, in Labette county, on demand of its officers. The plaintiffs were sureties on the official bond of one John Blackburn as treasurer of the said township for the year 1891. Blackburn was treasurer for the two succeeding terms, but it appears that he did not give an official bond during either of such terms. In February, 1894, his successor found that Blackburn was short in his accounts as treasurer in the sum of \$835.35, and that the shortage had occurred in a year subsequent to that in which the plaintiffs were sureties on Blackburn's

bond. The township officers thereupon demanded payment of the said sum from Woodruff and Kabrey, and threatened to sue if payment were not promptly made. Yielding to such pressure, Woodruff and Kabrey made the payment; each contributing one-half thereof. Nearly three years thereafter, this action was brought. The petition alleged the foregoing facts, and that the plaintiffs were assured by the township officers "that if they would make up and pay the shortage [of Blackburn as treasurer], and if in fact they were not liable, the township would refund the money to them," and that, relying on said statements, the defendants made such payment. A jury was impaneled to try the following issue: "Was the money (\$835.35) paid by the plaintiffs herein to the defendant under an agreement between the plaintiffs and the then township officers that, if it should be determined that said plaintiffs were not legally chargeable with said sum, then defendant would reimburse or refund the said plaintiffs the sum thereof for which they were not legally chargeable?" The defendant claimed that the only promise made to the plaintiffs was that, if the defalcation should thereafter be found to be a less sum than that paid by them, the township should refund the excess so paid. The jury returned an affirmative answer to the foregoing question, and the court thereupon entered judgment in favor of the plaintiffs below in accordance with the prayer of the petition.

The evidence is conflicting in respect to the alleged agreement on the part of the township to refund. Woodruff, testifying on behalf of the plaintiffs, stated that, in a conference with the township board (Kabrey also being present), witness stated that he said to the board, "Boys, I won't pay a solitary cent of this money unless you agree to refund that money unless we are legally chargeable with it." He further testified that the board sanctioned such statement, and that thereupon the payment was made. Kabrey corroborated Woodruff in respect to the foregoing statement, and also testified that he supposed Woodruff was speaking for both of them; but on cross-examination he stated that he did not himself exact any promise from the board prior to making the payment, and that Woodruff was speaking for himself when he said he would not pay a cent except on the condition named by him. The right of the plaintiffs below to recover depended on proof of the alleged promise to repay. The jury were authorized by the instructions to find for or against both or either of the plaintiffs. They saw the witnesses, and heard them testify. They must have believed that Woodruff did speak for himself and Kabrey, and that the payment made by them was upon the alleged condition. We cannot weigh the evidence. The jury has done that. There was some evidence tending to support the affirmative of

the issue presented. The finding, having received the approval of the trial court, must, under such circumstances, be affirmed.

(10 Kan.App. 391)

CHEROKEE & PITTSBURG COAL & MINING CO. v. DICKSON.

(Court of Appeals of Kansas, Southern Department, E. D. June 13, 1900.)

NEGLIGENCE OF EMPLOYE—OPINION EVIDENCE—SPECIAL FINDING.

1. An employer is bound to exercise reasonable care in selecting and in retaining employees competent to carry on the work in which they are engaged; and proof that a coal-mining company's "pit boss," who had charge of the operation of its mine, had ample time and opportunity to learn of the incompetency of a certain miner therein employed, tends to sustain the allegation that the defendant company had knowledge of the incompetency of such employee.

2. Refusing to permit a witness to answer a hypothetical question which assumes the existence of a material fact not in evidence held not error.

3. A certain special finding, apparently contrary to the evidence, examined, and held not to be in actual conflict therewith.

(Syllabus by the Court.)

Error from district court, Cherokee county; W. L. Simons, Judge.

Action by John Dickson against the Cherokee & Pittsburg Coal & Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiff in error. Morris Cliggitt, for defendant in error.

MILTON, J. This action was commenced in the district court of Crawford county by John Dickson against the Cherokee & Pittsburg Coal & Mining Company to recover damages on account of an injury received in a mine belonging to the company at Frontenac, Kan., while he was in its employ as a miner. The plaintiff's hands and face were severely burned by reason of a shot breaking through the "rib" separating a "room" then being worked by a miner named Gustave Dufresne from the passage called the "smoke entry." The shot was fired at about half past 12 o'clock p. m. on September 19, 1898. The custom was to begin firing at 15 minutes before 12 o'clock noon, and the shots would all be fired by noon. Dickson and two others had eaten their lunch in the main entry near the bottom of the holsting shaft, and Dickson had just started to go to his tool box at the farther end of the smoke entry, when Dufresne fired the shot which caused the injury. It broke through the rib into the smoke entry, and Dickson was knocked down and burned by reason of the explosion. The negligence alleged by the petition was that Dufresne was unskillful and incompetent, and that the defendant company, with knowledge of the unskillfulness and incompetency of Dufresne, negligently retained him as an em-

ployé, and that the pit boss, Elwood, negligently failed to discover that Dufresne, by reason of his unskillfulness and incompetency, had reduced the rib below the safety point in thickness. Verdict and judgment were for the plaintiff below in the sum of \$2,000.

The plaintiff in error contends that the court erred in overruling the demurrer to the evidence of the plaintiff below; in refusing to instruct the jury to return a verdict in favor of the coal company; in admitting incompetent, irrelevant, and improper testimony on behalf of the plaintiff; refusing to admit competent, material, and proper testimony of the defendant; in overruling the defendant's motion for a new trial; and in rendering judgment in favor of the plaintiff, and against the defendant.

The two material questions for consideration in this court are: First. Is there any evidence from which the jury could infer that the plaintiff was incompetent and unskillful? Second. And, if so, is there any evidence that the defendant knew, or with the exercise of ordinary care might have known, that Dufresne was incompetent and unskillful?

The first error assigned challenges the whole of the plaintiff's evidence. The rule is well established in this state that before a demurrer to evidence can be sustained the court must be able to say that admitting and giving due weight to every fact therein which is favorable to the plaintiff, and every inference which the jury might fairly and legally draw from the evidence in favor of the plaintiff, still the plaintiff has utterly failed to prove some one or more of the material facts of his case. *Brown v. Railroad Co.*, 31 Kan. 1, 1 Pac. 605; *Wolf v. Washer*, 32 Kan. 533, 4 Pac. 1036; *Christie v. Barnes*, 33 Kan. 317, 6 Pac. 509; *City of Syracuse v. Reed*, 46 Kan. 520, 26 Pac. 1043. The question of the incompetency and want of skill of Dufresne was for the jury. A master is bound to exercise reasonable care in selecting and retaining servants competent to carry on the business in which they are employed. 7 Am. & Eng. Enc. Law (1st Ed.) 870. In *Railroad Co. v. Doyle*, 18 Kan. 58, which was an action by an employé against his employer for injuries caused by the negligence of a fellow servant, it was held that an allegation that the employer knew of the latter's unfitness and recklessness was sustained by proof showing that such incompetency ought to have been known by the defendant. It was the duty of the pit boss, Elwood, to exercise constant supervision over the miners, and to see that the work was properly done. There was no fixed rule as to when the shots were to be fired, but the custom upon which the miners generally relied had been established, and the shot fired by Dufresne was at a time not in accordance with such custom. The rib should have been kept at a thickness of 10 feet; it was actually

reduced in thickness to about 3 feet by Dufresne. A room should have been about 20 feet in width; Dufresne's room was between 30 and 40 feet wide. Drill holes for shots should have been made parallel with or at an angle from the rib; Dufresne drilled into the rib at times. The side of the wall next to the rib should have been kept reasonably smooth and uniform; the side of Dufresne's room next the rib was exceedingly irregular. These facts were open to the observation of Elwood, and he had ample time and opportunity to learn of them. Other facts might be cited tending to show Dufresne's unskillfulness and incompetency as a miner, but the foregoing are sufficient to show that the court properly overruled the demurrer to the plaintiff's evidence.

For the same reason the requested instruction for a verdict in favor of the defendant was properly overruled. The testimony admitted over the objection of the defendant, and here complained of, was that of the plaintiff himself and of one Arthur Malle. It relates to the manner of mining, carrying forward a room, and putting in shots, and to a conversation between the plaintiff and the pit boss.

The testimony of Dickson concerning the making of a "break-through," whether competent or not, was material, in view of the finding by the jury that Dufresne was not making a break-through at the time the shot which injured the plaintiff was fired. His testimony as to the conversation with Elwood was clearly competent, since it tended to prove knowledge on the part of Elwood of the unskillful work being done by Dufresne.

The objection that the time when the conversation occurred was not stated is met by the fact that Dufresne had been working in the mine about 2½ months before the injury, and Dickson about 1 month. Hence the conversation occurred more than 45 days after Dufresne had begun working in the mine, and after Elwood had become acquainted with the character of his work. There is other testimony indicating that the conversation occurred some time after Dickson had begun to work.

The testimony of the witness Malle was objected to for the reason that it stated the opinion and conclusion of the witness concerning a matter respecting which he was not qualified to testify. We think the objection was not well taken. The witness was an experienced miner, and was testifying from personal knowledge as to the character of the work done by Dufresne in the mine. He was asked if he knew the proper way to get out the coal after the shot was fired, and, over objection, he answered that he knew, and then proceeded to state the proper process. His testimony tended to prove that Dufresne was not a skillful miner.

Counsel for plaintiff in error contend that the court erred in refusing to admit certain testimony of its witness Joseph Wilson. The

witness having answered that he could tell from examining the amount of powder used and the amount of merchantable coal produced by a miner during a considerable length of time, and under ordinary conditions, whether or not such miner was ordinarily skillful, was then asked the following question: "What would you say if you were given that a man in a certain length of time used a certain amount of powder, and produced therefrom a large quantity of coal, or what an average miner produces,—what would you say about the skill of that person?" The question was objected to as being incompetent, irrelevant, and immaterial, and the objection was sustained. It is clear that the objection was properly sustained, since the question does not cover several features connected with mining which are essential to a determination of the question at issue. The witness did not know Dufresne, and had never been in Dufresne's room. Besides this, there was no testimony before the jury showing anything about the quantity of powder that Dufresne used. As a hypothetical question it was improper, since it assumed the existence of a matter material to the formation of a correct opinion about which no testimony had been given. *Davis v. Insurance Co.*, 59 Kan. 74, 52 Pac. 67. It was also objectionable for the reason that it called for direct testimony as to skill or lack of skill of a miner. *Mining Co. v. Dickson*, 55 Kan. 62, 68, 39 Pac. 691.

The testimony of the witness Lawton, as to the skill and competency of Dufresne, judged from the amount and condition of coal mined by the latter, was properly rejected under the authority of the case just cited. In his testimony, which was given in a narrative form, Lawton stated positively that Dufresne was a competent, practical miner, and that he knew this from the amount and condition of the coal that he got out. The statement that Dufresne was a competent miner was entirely improper, and the reason given for the opinion stated was insufficient, since the amount and condition of the coal mined are but a part of the elements forming the basis of a judgment in respect to the competency of the miner.

Other contentions of counsel for plaintiff in error are that certain of the special findings are not sustained by the evidence. The third, the tenth, and the twelfth findings are based upon conflicting evidence. The fourteenth finding could not be completely answered by "Yes" or "No." The answer given is responsive to the first part of the question, and is sustained by the evidence, and in this view the last part of the question was immaterial. From the fifteenth and sixteenth findings it appears that the jury thought "some part" of the plaintiff's duty required him to be at the place where he received the injury as a place of safety from his own shot. As the evidence shows that he arrived at the place where he ate his lunch before his

own shots exploded, and as it was in fact a safe place so far as his own shots were concerned, and as the plaintiff testified that one purpose for starting back was to learn what execution his shot had made, it cannot be said that the findings are without some foundation in the proven facts. The eighth finding, which is that Dufresne had been engaged in the work as a coal miner less than four months, is apparently contrary to the evidence. He had in fact worked in coal mines in Pennsylvania and in Kansas almost eleven months. There was evidence however that he had worked about four months in mining bituminous coal in Kansas, and that his work in the Pennsylvania mines was in anthracite coal; the processes being somewhat different in the two classes of mines. In the Pennsylvania mines, where the veins of coal are much thicker than that at Frontenac, the work was done by drilling and blasting, while at Frontenac the pick was employed. As the witnesses seemed to regard a miner as one who used a pick in his work, and as Dufresne had been engaged in that kind of mining for only four months, this finding is not so far at variance with the evidence as to justify a reversal of the case. We think the trial court did not err in overruling the motion for a new trial, and in rendering judgment upon the verdict in favor of the plaintiff below. The judgment is affirmed.

UNION CASUALTY & SURETY CO. OF ST. LOUIS, MO., v. BAILEY.

(Court of Appeals of Kansas, Southern Department, E. D. June 13, 1900.)

ACCIDENT POLICY—OTHER INSURANCE—KNOWLEDGE OF AGENT.

The evidence in support of one of the material special findings set forth. *Held*, that it is no evidence tending to prove the fact found by the jury.

(Syllabus by the Court.)

Error from district court, Labette county; A. H. Skidmore, Judge.

Action by Nettie J. Bailey against the Union Casualty & Surety Company of St. Louis, Mo. Judgment for plaintiff, and defendant brings error. Reversed.

Keene & Gates, for plaintiff in error. W. D. Atkinson, for defendant in error.

SCHOONOVER, J. In July, 1894, W. A. Bailey made written application to plaintiff in error for an accident insurance policy. The application contained the following: "I hereby apply for an accident policy, and it is understood and agreed that the said policy will be based upon the following statement of facts, which I warrant to be true: * * * (10) I have no other accident insurance in this or any other company, except as herein stated." At the time this application was made and the policy in controversy issued, W. A. Bailey had an accident insurance pol-

icy in full force, against death and loss of time, in the Woodman Accident Association of Lincoln, Neb. In August, 1894, W. A. Bailey sustained accidental injuries, and was paid by plaintiff in error, through its agent, Chan. B. Campbell, the sum of \$110 indemnity upon the policy. This amount was paid to defendant in error, wife of W. A. Bailey. On January 14, 1895, it is claimed, the assured was shot through the right foot from the accidental discharge of a revolver in his overcoat pocket. On January 26, 1896, the assured died, and it is alleged that his death resulted from the wound. On January 31, 1895, the first notice was given to plaintiff in error of the injury sustained by the assured and his death. On the 23d day of July, 1895, this action was commenced in the district court of Labette county by Nettie J. Bailey, as beneficiary in the event of the death of the assured, against the plaintiff in error, to recover upon the accident policy of insurance issued by plaintiff in error to W. A. Bailey, husband of defendant in error. The case was tried to a jury. Verdict and judgment for plaintiff below. Defendant below brings the case here for review.

That the facts may fully appear, and the issues be fully understood, the material instructions given by the trial court are set forth:

"You will observe that the defendant herein does not file its answer to the petition of the plaintiff under oath, and you are instructed, as a matter of law, that under the pleadings in this case it is admitted that the defendant is a corporation duly organized and existing under and by virtue of the laws of the state of Missouri; that on the 23d day of July, 1894, the defendant was duly authorized to transact its business in the state of Kansas; that on said 23d day of July, 1894, the firm of Othick & Campbell, of Ft. Scott, Kansas, was the duly-appointed, constituted, and acting agent of said defendant, having authority to issue and countersign policies of insurance for the defendant, and that on the 23d day of July, 1894, the defendant, the Union Casualty & Surety Company of St. Louis, Missouri, in consideration of the warranties made in the application for a policy of insurance, and in consideration of the sum of \$20 paid by W. A. Bailey, executed by its president and secretary, and countersigned by its agents, Othick & Campbell, of Ft. Scott, Kansas, and delivered to said William A. Bailey, accident policy No. 113,557; the same being the policy for \$2,000 sued upon in this action. It is further admitted by the pleadings in this case that one Chan. B. Campbell, at the time of the injury and death of William A. Bailey, was the acting and authorized agent of defendant at Ft. Scott, Kansas. You are instructed that the plaintiff, in order to recover in this case, must satisfy your minds, by that which you regard as the fair weight of the testimony offered herein, that the assured,

William A. Bailey, is dead; that he died from bodily injuries sustained through external, violent, and accidental means, and within ninety days from the date of sustaining such injuries, independent from all other causes; that such injury was received within twelve months next succeeding July 23, 1894; that the plaintiff in this case is the widow of said William A. Bailey, and the beneficiary in said policy named, which policy is herein sued upon; that plaintiff gave or caused to be given to the defendant notice of such injury, and affirmative proof of such death of said William A. Bailey, as is required in said policy, to which notice and proof of death your attention will hereafter be directed. The term 'accidental,' as used in the policy herein sued upon, is used in its ordinary sense, and in that sense it means happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected; and, if you find from the evidence in this case that said William A. Bailey sustained bodily injuries from external and violent means, the presumption of law is that such injury was accidental, until such presumption is broken down or overcome by some evidence to the contrary. You are further instructed that if you find from the evidence herein that the said William A. Bailey sustained bodily injuries through external, violent, and accidental means, and if you further find from the evidence that he died within ninety days of receiving such injuries, to entitle the plaintiff to recover from the defendant upon said policy you must further find from a fair weight of the evidence that such death occurred from such bodily injuries independent and apart from all other causes. If other causes than the alleged injuries produced death, there can be no recovery. If an efficient, adequate cause be found, it must be deemed the true cause, unless some other cause, not incident to it, but independent of it, is shown to have intervened between it and the result. If, for example, the deceased sustained injury to an organ, and that necessarily produced inflammation or a disordered condition of the injured part, and in consequence the injured party died, the death could be properly attributed to the original injury. In other words, if these results followed the injury, as its necessary consequence, and would not have taken place had it not been for the injury, the injury could be said to be the sole cause of death. But if an independent disease or disorder supervened upon an injury (that is, the disease or derangement of the parts not necessarily produced by the injury), or if the alleged injury merely brought into activity a then existing but dormant disease or disorder, and the death of the deceased resulted wholly or in part from such disease or disorder, then it could not be said that the injury was the sole cause of death, independent from all other causes. If you find from the evidence that the said William A. Bailey did not die from bodily injury

sustained through external, violent, and accidental means, or, if by such means, and death did not occur within ninety days from the date of such injury, independent of all other causes, in either event your verdict will be for the defendant. If you find from the evidence the alleged injury of William A. Bailey to have been from voluntary exposure to unnecessary danger, except incurred in an attempt to save human life, your verdict will be for the defendant.

"The insurance policy sued upon in this action provides that immediate written notice must be given to the company, at St. Louis, Missouri, of any accident or injury for which a claim is to be made, with full particulars thereof, and full name and address of assured. It is further provided that affirmative proof of death must also be furnished to said defendant company within two months from time of death, and further provided that claims not brought in accordance with such provisions will be forfeited to the company. A compliance with these provisions, within the terms and meaning of such policy as to such notice and proof, is necessary on the part of the plaintiff before she can recover of defendant in this action, unless you shall find from the evidence such requirements had been waived by the defendant or its authorized agent. The term 'immediate notice,' as used in said policy, means such notice given within a reasonable time, and with due diligence, taking into consideration all the circumstances and surroundings at such time, which is a matter for you to determine from the evidence. As to the question whether or not the plaintiff in this case made and presented to the defendant, within two months from the death of William A. Bailey, affirmative proof of death, as provided by the terms of the policy herein sued upon, you will determine from the evidence submitted to you.

"You are instructed that as to the claim of defendant that the policy herein sued upon is void for the reason that William A. Bailey at the time of making application made false statements or warranties, in this: that, at the time of making application, stated that he had no other accident insurance in this (defendant) or any other company, that if you find from the evidence herein that William A. Bailey executed and delivered an application for the policy herein sued upon, and you further find from the evidence said William A. Bailey therein made any false statements or warranties, then your verdict will be for the defendant, unless you find from the evidence that the defendant waived the same. You are instructed that the defendant may waive any of its rights to declare said policy void, if it so elects; and whether or not defendant did waive any such rights is a question for you, gentlemen of the jury, to determine from the evidence. And you are instructed that if you find from the evidence in this case that, at the time of the issuing of the policy in suit, Chan. B. Campbell, the authorized and

acting agent of the defendant herein, had knowledge of the existence of any outstanding policy of insurance by an accident association, and, with such knowledge upon his part, signed and delivered to the deceased, William A. Bailey, the policy sued upon in this action, and knew at such time that the warranties made in such application were false in that particular and untrue, then the defendant company would waive the right to such defense upon such policy. Under the laws of this state, an agent authorized to issue policies of insurance and consummate the contract binds his principal (the company) by any act, agreement, representation, or waiver, within the ordinary scope and limit of insurance business, which is not known by the assured to be outside the authority granted to the agent. You are further instructed that, by the stipulation and agreement of the plaintiff and defendant in the above-entitled action, on the said July 23, 1894, the date of the application on which the policy sued upon in this action was issued, the said William A. Bailey at that time had a valid and existing accident insurance in the Woodman Accident Association of Lincoln, Nebraska. If you believe from the evidence offered in this case that the defendant paid to said William A. Bailey \$110 on the policy sued on herein, that fact is not a waiver of the fact that the said William A. Bailey had other accident insurance, in the Woodman Accident Association of Lincoln, Nebraska, unless you further find from the evidence that, at the time the said \$110 was paid by defendant to the said William A. Bailey, the said defendant knew at that time that the warranty as to other insurance was false and untrue. The defendant and its agents are presumed, as a matter of law, to have relied on said application at the time they issued their said policy sued on herein.

"And, gentlemen of the jury, before the plaintiff can recover in this action it is incumbent upon her to prove that the death of the said William A. Bailey resulted from the wound as alleged, independent of all other causes; and if you believe from the evidence herein that the mitral valve of the heart of the said William A. Bailey was in any wise affected or diseased, and that that contributed to his death, or mingled with other causes in producing his death, you will return a verdict in favor of the defendant; and if you find from the evidence that either of the lungs of the said William A. Bailey were diseased or affected, and that that disease or affection was not caused by the gunshot wound in the foot, and further believe that the said diseased lung or lungs, together with other causes, tended to produce the death of said William A. Bailey, then your verdict should also be for the defendant herein. The plaintiff has offered in this case the verified statements alleged to have been sent to the defendant for the purpose of showing the death of William A. Bailey; also, proof to

show that the accident had occurred as alleged in the petition. You are instructed that such proof has only been received, and is to be considered by you only, for the purpose—First, of establishing the notice of the accident; and, second, to show affirmative proof of death of said Bailey. You have observed that some of the witnesses who have testified in this case have given testimony as medical experts, and have given their opinions as to the cause of the death of William A. Bailey; and, in reference to such expert testimony, you are instructed that the opinions of such experts are to be considered by you in connection with all the other testimony in the case, but you are not bound to act upon them to the entire exclusion of other testimony. Take them into consideration, give them just weight, and, from the entire evidence offered in the case, determine for yourselves whether or not William A. Bailey came to his death by reason of the injury claimed, viz. the gunshot wound, independent of all other causes."

The special questions submitted to the jury by plaintiff in error, and their answers thereto, are as follows: "(1) Do you find from the evidence that on January 14, 1893, William A. Bailey sustained injury in the right foot? Answer. Yes. (2) Do you find from the evidence such injury to have been a pistol-shot wound? Answer. Yes. (3) Do you find from the evidence such wound to have been sustained through external, violent, and accidental means? Answer. Yes. (4) Do you find from the evidence that said William A. Bailey died from the effect of said wound, independent of all other causes? Answer. Yes. (5) Do you find from the evidence that defendant's agent Chan. B. Campbell, at the time of taking the application upon which the policy sued upon was issued, knew W. A. Bailey held a certificate in the Woodman Accident Association? Answer. Yes. (6) Do you find from the evidence that in 1894, and prior to William A. Bailey receiving \$110 indemnity from defendant upon the policy sued upon herein, defendant and Chan. B. Campbell, agent for the defendant, were informed and knew that William A. Bailey at the time held accident certificate for \$1,000 in the Woodman Accident Association of Lincoln, Nebraska? Answer. Yes. (7) If you answer the next two preceding questions in the affirmative, do you find from the evidence that by such knowledge, and subsequent payment of indemnity, defendant waived its right to declare said policy herein sued upon void from any failure on the part of William A. Bailey to mention or make known said certificate in his application? Answer. Yes. (8) Do you find from the evidence that plaintiff, under all the circumstances in this case, gave to defendant notice of the injury and resulting death of William A. Bailey within the requirements therefor of the policy sued upon in this action? Answer. Yes. (9) Do you

find from the evidence that defendant, through Chan. B. Campbell, its agent, waived the time, the manner, and necessity of giving further notice to defendant by plaintiff of the injury and death of William A. Bailey than the notice received by said Campbell? Answer. Yes. (10) Do you find from the evidence the proof of death of William A. Bailey by plaintiff given to defendant to have been sufficient to meet the requirements of the policy? Answer. Yes. (11) Do you find from the evidence that the injury sustained by William A. Bailey was self-inflicted? Answer. No. (12) Do you find from the evidence that, at the time William A. Bailey was injured, said injury was from voluntary exposure to unnecessary danger? Answer. No."

The instructions, considered as an entirety, in a comprehensive manner inform the jury as to what material facts must be found in order to recover or to bar a recovery. It is clear, from a consideration of the special questions, that the jury find for the defendant in error (plaintiff below) upon every point necessary for a recovery.

It is contended by counsel for plaintiff in error that the answer to special question No. 5 is not supported by any competent evidence. The only evidence contained in the record that in any way can be construed as tending to prove that Chan. B. Campbell, agent of plaintiff in error at the time of the taking of the application upon which the policy sued upon was issued, knew W. A. Bailey held a certificate in the Woodman Accident Association, is as follows: "Q. I ask you to state whether or not, on any of the occasions that you were at the office of Mr. Campbell [meaning some time after the accident of August, 1894], there was any conversation had concerning a policy which Mr. Bailey held in the Woodman Accident Association. A. Yes, sir. Q. Now, state what that conversation was. A. I [meaning defendant in error] asked him [meaning Chan. Campbell] if he had gotten the money from the company, and he said that they had not sent it, but he knew we would hear from them soon. I told him that we had not heard from the Woodman yet, and that the money would be acceptable; and he said he knew the companies would pay, because it was more to their interest to pay, and he said he had told Mr. Bailey that the Woodman, as well as his own, were both good companies. Q. State what, if anything, he said about the time of this conversation with Mr. Bailey. A. I don't think he said exactly when the time was, but it was about the time the policy was taken out, I think. I know he said that was when it was,—at the time the policy was taken out." This declaration of the agent is no evidence of the fact that Campbell knew at the time the policy in question was issued that Bailey held a policy in the Woodman Accident Association. The policy sued upon being an accident policy, Bailey's warranty in

the application therefor that he held no other accident insurance was material. The finding cannot be upheld under the instructions of the court, which are not complained of in the brief of counsel. This finding should be sustained by competent evidence before the plaintiff below would be entitled to recover. Many errors are assigned and discussed, but, for the reasons given, the judgment of the district court will be reversed.

(10 Kan. App. 388)

JOHNSON v. BIG CREEK TP., NEOSHO COUNTY.

(Court of Appeals of Kansas, Southern Department, E. D. June 13, 1900.)

APPEAL—REVIEW—ADMISSIONS.

The court having correctly decided that the petition, as modified by the oral statements and admissions of the plaintiff's counsel, did not state a cause of action, *held*, that no question concerning the sufficiency of the petition as it originally stood can properly be considered in proceedings to review such decision.

(Syllabus by the Court.)

Error from district court, Neosho county; L. Stillwell, Judge.

Action by Delos Johnson against Big Creek township, Neosho county. Judgment for defendant, and plaintiff brings error. Affirmed.

J. L. Denison, for plaintiff in error. Cates & Shinn, for defendant in error.

MILTON, J. This action was brought by the plaintiff in error to recover the sum of \$112.99. The petition alleged that in August, 1895, an agreement was entered into between the board of county commissioners of Neosho county and the trustees of the townships of Big Creek and Erie, in said county, to the effect that the said county commissioners would cause a bridge to be constructed across a stream called "Big Creek" at a point where the public highway between said townships crossed the creek, if the two townships would cause the necessary approaches to the bridge to be built; that the townships accepted the proposition, and agreed to construct the approaches, it being agreed between the said trustees that Big Creek township would construct the east approach, and Erie township the west approach; that thereupon the township of Erie constructed the west approach to the bridge; that the trustee of Big Creek township, "then and there having full power and authority in that behalf, by a verbal contract duly entered into by and between said trustee and this plaintiff, authorized and employed plaintiff to construct said east approach, * * * and promised and agreed for and in behalf of said township that said township of Big Creek would pay to said plaintiff the fair and reasonable cost and expense of constructing the same; that plaintiff, pursuant to such contract with said trustees of Big Creek township, proceeded to and did construct said east approach to said

bridge, and fully performed all the conditions and stipulations of said contract on his part to be done and performed, and said bridge and said approach so constructed by said plaintiff as aforesaid has become a portion of the public highway on the township line between said townships of Big Creek and Erie, and has been adopted and is now used by the public as and for a public highway."

The defendant answered as follows: "The defendant for its answer to the petition of the plaintiff admits that the defendant is a municipal corporation duly organized under the laws of the state of Kansas; that its said board of county commissioners caused to be constructed a bridge over Big creek, on the highway dividing said township of Big Creek from the township of Erie, as in the said petition alleged; but defendant denies each and every other material allegation in said petition contained."

At the trial defendant objected to the introduction of any evidence under the petition. Thereupon the following colloquy between the court and the counsel for the plaintiff below occurred: "The Court: Mr. Dennison, I will ask you a question: Will you claim in this case a right to recover against the township on a contract with the township trustee alone, or will you claim a contract with the township board? Mr. Dennison: We will claim a quantum meruit; that it was authorized to be done by the township trustee; that the plaintiff, relying upon the instruction of the township trustee, proceeded to do the work. That will be the facts in the case. The Court: Will you claim any contract with the township board? Mr. Dennison: No, sir; these are the facts. I want to be fair with the court, and say just what our contract is, and what we can prove. If the court holds that we cannot recover on that kind of a contract, then there is no use of bothering with the case. The Court: The reason why I asked the question, after the specific allegations about the contract being made between the plaintiff and the trustee of the township, it is further alleged that the trustee had full power and authority to make the contract, which might be susceptible of rather a broad construction when the objection is made to the petition as it is now made; but in view of the answers that you have made me, that you will rely on an alleged contract entered into with the township trustee and not the township board, I am prepared to state how it strikes me. Mr. Dennison: I want to state the facts to the court. There will be no use going into the trial if our petition does not state a legal cause of action. The evidence will show that the township trustee directed the work to be done; that the plaintiff proceeded and constructed it upon that authority; that he had no contract with the board as a board. These are the facts in the case, and, if the court is prepared to pass upon that, we can just as well settle that now as at any time."

Thereupon the court sustained the objection to the introduction of evidence under the petition, and rendered judgment in favor of the defendant township for costs.

From the foregoing, and from the journal entry of judgment, it is evident that the trial court regarded the admissions and statements of plaintiff's counsel not only as presenting his theory of the case, but also as modifying the allegations of the petition. Viewed in this light, the ruling and judgment are correct. No question based on the petition, unmodified by such statements and admissions, can properly be considered in this court. The judgment of the district court will be affirmed.

(10 Kan.App. 401)

ST. LOUIS & S. F. RY. CO. v. BROWN.

(Court of Appeals of Kansas, Southern Department. E. D. June 13, 1900.)

JURISDICTIONAL AMOUNT—WAIVER OF JURISDICTION.

1. The amount claimed by plaintiff determines the question of jurisdiction, and interest, if demanded, is part of plaintiff's claim.

2. Want of jurisdiction of the subject-matter cannot be waived by any act of the parties, and the question will be considered by an appellate court, though not raised in the court below.

(Syllabus by the Court.)

Error from district court, Cherokee county; W. R. Cowley, Judge pro tem.

Action by George W. Brown against the St. Louis & San Francisco Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Gleed, Ware & Gleed (D. E. Palmer, of counsel), for plaintiff in error. E. M. Tracewell and C. A. McNeill, for defendant in error.

SCHOONOVER, J. Defendant in error, as plaintiff, brought this action before a justice of the peace to recover damages for a fire alleged to have been set out by a locomotive through the negligence of plaintiff in error. In the bill of particulars filed by plaintiff, judgment for \$290, with interest thereon from October 28, 1891, and costs of suit, was demanded. The bill of particulars was filed December 8, 1891, and, including interest, the amount of plaintiff's demand was \$301. Judgment was rendered for plaintiff, and defendant appealed to the district court of Cherokee county, where the case was tried to a jury, which returned a verdict for plaintiff. The court entered judgment upon the verdict, and the defendant brings the case here.

Plaintiff in error contends that the subject-matter of the action was not within the jurisdiction of the justice of the peace, because the amount claimed was in excess of \$300. Counsel for defendant in error, however, insist that, as this question was not raised in either the justice or district court, it is too

late to raise it here. It is well settled that the claim for interest is a part of plaintiff's demand, and that the amount claimed governs the question of jurisdiction. *State v. Superior Court of King Co. (Wash.)* 37 Pac. 489; *Adams v. Bank (Neb.)* 76 N. W. 421; *Ball v. Biggam*, 43 Kan. 327, 25 Pac. 565; *Kemper v. Lord*, 6 Kan. App. 64, 49 Pac. 638; *Culley v. Laybrook*, 8 Ind. 285; *President, etc., v. Pearson*, 14 Gray, 521; *Wells, Jur.* § 105. It is also well settled that the question of jurisdiction, when it relates to the subject-matter of the action, may be raised for the first time in the appellate court. *Hill v. Tionesta Tp. (Pa.)* 19 Atl. 855; *Klaise v. State*, 27 Wis. 462; *Safe Co. v. Kelly (Wis.)* 47 N. W. 187; *Brondberg v. Babbott*, 14 Neb. 517, 16 N. W. 845; *Collins v. Keller (N. J. Sup.)* 34 Atl. 753. The cases cited by defendant in error have been examined, and found not applicable to the facts in this case. The courts have observed a broad distinction between cases involving the question of jurisdiction of subject-matter, and cases involving the question of jurisdiction of the person. In the former cases it has been uniformly held that jurisdiction cannot be acquired under any circumstances. It has been held that jurisdiction cannot be acquired even upon the express agreement of the parties. In the latter cases it has been held, with an equal degree of uniformity, that the question is one of personal privilege, and can be waived by act of the parties, as by appearing generally, etc. In the case of *Ball v. Biggam*, supra, our supreme court says: "The plaintiffs concede that ordinarily the jurisdiction that the district court obtains by virtue of an appeal is simply that of the justice court, but they claim that because the defendant appealed, and sought the district court as the forum in which to try the action, he has waived this rule. The jurisdiction of the district court is wholly and exclusively appellate. Its original jurisdiction is not invoked at all. If the justice court was without jurisdiction, it follows that the district court was also without jurisdiction. If the court had no jurisdiction over the subject-matter of the controversy, objection could be made at any time during the trial in the district court. The judgment before the justice, being coram non judge, was void, and could have been enjoined in attempt to collect the same by execution." Also: "The taking of an appeal would waive any question of jurisdiction of the person, and all irregularities in the appeal, but there was no waiver of the jurisdiction of the court of the subject-matter by defendant appealing." If the district court could not acquire jurisdiction, it follows that the judgment rendered in the district court was void, and this court certainly cannot acquire jurisdiction to review a void judgment. The judgment of the district court is reversed, and the case remanded for further proceedings in accordance with the foregoing views.

(10 Kan.App. 467)

CUNNINGHAM et al. v. SMITH et al.

(Court of Appeals of Kansas, Southern Department, E. D. June 13, 1900.)

STATUTORY NEW TRIAL.

Section 6, art. 2, c. 96, Gen. St. 1897, authorizing a new trial, applies only when suit is brought for the possession of real property, and does not apply to an action brought by one in possession, against a person claiming an adverse interest, for the determination thereof.

(Syllabus by the Court.)

Error from district court, Elk county; O. W. Shinn, Judge.

Action by Jackson and Jemima Cunningham against K. S. Smith and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

James Shultz, for plaintiffs in error. L. Scott, for defendants in error.

SCHOONOVER, J. This action was brought by plaintiffs in error, as plaintiffs, against defendants in error, as defendants, in the district court of Elk county, to obtain a decree setting aside a former judgment of such court, foreclosing a mortgage upon certain real estate occupied by plaintiffs as a homestead, and to have the title of plaintiffs thereto quieted. The only question presented to us is, were the plaintiffs entitled, as a matter of right, to a second trial in the court below, under the provisions of section 6, art. 2, c. 96, Gen. St. 1897? The record shows that plaintiffs were, at the time the action was commenced, in possession of the premises in question, and this action does not come within the class of actions for the recovery of real property. In similar cases our supreme court has held that the defeated party was not entitled, as a matter of right, to a second trial. *Swartzell v. Rogers*, 3 Kan. 374; *Northrup v. Romary*, 6 Kan. 240; *Blackford v. Loveridge*, 10 Kan. 101; *Main v. Payne*, 17 Kan. 610. The judgment of the district court is affirmed.

(10 Kan.App. 389)

SMITH v. WALLACE et al.

(Court of Appeals of Kansas, Southern Department, E. D. June 13, 1900.)

APPEAL—REVIEW.

The evidence in this case examined. Held, that it is sufficient to uphold the findings and judgment of the trial court.

(Syllabus by the Court.)

Error from district court, Woodson county; L. Stillwell, Judge.

Action by William Smith against L. W. Wallace and others. Judgment for defendants, and plaintiff brings error. Affirmed.

L. E. & J. M. Kellogg, for plaintiff in error. Lamb & Hogueland, for defendants in error.

SCHOONOVER, J. This was a foreclosure proceeding brought by William Smith, plaintiff in error, in the district court of Woodson

county, to foreclose a mortgage given by one L. W. Wallace to the Emporia Investment Company, which mortgage was by the investment company assigned to Smith. Some time after executing the mortgage, Wallace sold the land to William H. Morris, who assumed payment of the mortgage. Prior to the commencement of this action, Mr. Morris died, and by will left the land to his widow, Nancy E. Morris, one of the defendants in error herein. About the time that the mortgage became due, Mr. Morris made application to the Emporia Investment Company for an extension on \$500 of the mortgage indebtedness; the total indebtedness amounting to \$1,000. The investment company submitted the application to Mr. Smith, the assignee of the mortgage, and he consented to make the arrangement. Mr. Morris paid \$500 to the investment company upon the understanding that Mr. Smith was to grant an extension of three years upon the remaining \$500. The company became insolvent, and the money was never sent to Mr. Smith or returned to Mr. Morris. Smith brought suit, and in his petition demanded judgment for \$1,000, the amount of the mortgage indebtedness. Defendants, as one defense, set up the payment of \$500 to the Emporia Investment Company; and the question which we are called upon to decide is, did the company receive the money as the agent of Smith or as the agent of Morris? We have carefully examined the record, and find upon this question a conflict of evidence. There is, however, evidence which, in our opinion, tends to show that the investment company acted as the agent of Smith; and, under the well-settled rule of practice, we cannot weigh conflicting evidence. As there is some evidence tending to show that the company acted as agent of Smith, the judgment of the district court must be upheld.

Plaintiff in error also objects to the introduction of certain evidence, but, so far as the objection can now be considered by us, we think that such evidence was admissible for the purpose of showing general agency. No error appearing, the judgment of the district court will be affirmed.

(9 Kan.App. 337)

HUTCHISON v. YAHN et al.

(Court of Appeals of Kansas, Southern Department, W. D. June 19, 1900.)

FORECLOSURE SALE.

Where the decree of foreclosure and the order of sale required that the land involved be sold in specific parcels, and it was sold, but the sale notice failed to describe or designate such parcels, held, that the sale was voidable.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by Francis Yalin and others against J. G. Hutchison. Judgment for plaintiffs, and defendant brings error. Reversed.

J. G. Hutchison, in pro. per. E. W. Cunningham, for defendants in error.

MILTON, J. This proceeding in error is based upon the overruling of a motion to set aside a sheriff's sale of real property made in a foreclosure action. Various grounds are set forth in the motion, and numerous errors are assigned in the petition in error. We have carefully considered the various contentions of the plaintiff in error, and have concluded that none of them can be upheld, except that as to the sufficiency of the notice of sale. The decree of foreclosure required the land, which had been mortgaged as an entire tract, and afterwards transferred and held as two separate parcels (one of 50 acres, and one of 20 acres), to be sold as separate parcels (first, the 50-acre tract, and then, if necessary in order to satisfy the judgment, the 20-acre tract). The order of sale conformed to the decree in all respects. The notice stated that the sheriff would "sell separately, at public auction, to the highest bidder, for cash, the following real property, situate in Lyon county, Kansas, to wit"; describing all the land by metes and bounds, as a single tract. The statute does not prescribe what a notice of sale of real estate shall contain, except that time and place of sale shall be stated. It is certain, however, that a correct description of the land must be given in the notice, and that it should contain enough to inform the general public of the location and extent of the real property to be sold. The order of sale in this case was in fact a special execution, and the sale notice should have conformed to it fully. The order commanded that the property be sold in two specific parcels. The notice did not specify the parcels, and no one would be able to tell from the description given in the notice the nature of the separation into parcels for purposes of sale contemplated by the officer. When several distinct parcels or lots of land are to be sold under an execution, it is the duty of the officer to offer them separately, so that bidding may be encouraged and competition increased. *Bell v. Taylor*, 14 Kan. 277. For the same reason, it is equally proper to hold that, where the decree requires sale of the land in parcels, the notice shall so specify. The order of the district court overruling the motion to set aside the sale will be reversed, and the cause remanded for further proceedings.

(9 Kan.App. 835)

RIDENOUR-BAKER GROCERY CO. v. PERKINS.

(Court of Appeals of Kansas, Southern Department, W. D. June 19, 1900.)

ESTOPPEL-CHATTEL MORTGAGE-EVIDENCE.

The trial court ruled that the defendant below, by reason of its demanding and receiving a bill of sale, in the nature of a chattel mortgage, covering the goods involved in the controversy, was estopped to claim ownership thereof under a prior bill of sale from plaintiff's vendor. *Held* not error; and, further, *held*, that evidence offered by defendant concerning a state of facts existing prior to

plaintiff's purchase of the goods was properly excluded.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by Maud Perkins against the Ridenour-Baker Grocery Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Madden Bros., for plaintiff in error. J. Harvey Frith, for defendant in error.

MILTON, J. This action was commenced on September 1, 1896, by the defendant in error, to rescind a bill of sale, in the nature of a chattel mortgage for \$222.63, executed by the defendant in error and one G. C. Thompson, and purporting to transfer to the plaintiff in error a stock of groceries and millinery located in the city of Emporia. The petition alleged that the defendant's agent, by means of false and fraudulent representations, had induced the plaintiff to execute and deliver the bill of sale in question; the principal representation being that defendant held a prior and valid bill of sale, given by Thompson, from whom plaintiff purchased the grocery stock, and that unless the plaintiff would give a bill of sale covering her entire stock, to secure the payment of the indebtedness due from Thompson to the defendant, the latter would seize the stock of goods under a prior bill of sale. The petition sufficiently alleged a cause of action for the rescission prayed for, and the plaintiff's evidence tended to prove the essential allegations of the petition. The defendant sought to show that the plaintiff purchased the goods from Thompson with knowledge of the defendant's rights in the premises; the claim being that, at the time of such purchase, Thompson was in possession of the goods as defendant's agent, under the unrecorded bill of sale theretofore given by Thompson. The court held the defendant estopped by its conduct, and especially by demanding and receiving the bill of sale from the plaintiff, to deny the plaintiff's ownership of the goods. The defendant also endeavored to prove that, after the plaintiff had obtained full knowledge of the facts upon which her alleged right of rescission rested, she had ratified and confirmed the bill of sale. The jury returned a verdict for the plaintiff, and expressly found that the execution of the bill of sale by the plaintiff was secured by fraud, and that the plaintiff never ratified the same. Judgment for the rescission of the bill of sale was thereupon entered.

It is claimed that the court erred in the exclusion of certain evidence offered by the defendant to prove that, when the plaintiff purchased the goods from Thompson, the latter was holding them as agent of the defendant under the first bill of sale. Holding as we do that the trial court did not err in declaring the defendant estopped to deny the plaintiff's title at and prior to the time she

made the bill of sale, we also hold that the offered evidence was properly excluded, since it related to a state of facts existing prior to plaintiff's purchase of the goods. The instructions given appear to have properly submitted the essential facts in controversy to the jury for decision, while the instructions refused were either inapplicable, or were sufficiently embodied in those given. The verdict rests upon conflicting evidence. We have found no error sufficient to justify a reversal of the judgment. It is affirmed.

(9 Kan.App. 870)

SCOTT et al. v. BROWN.

(Court of Appeals of Kansas, Southern Department, C. D. June 16, 1900.)

APPEAL—RECORD—CERTIFICATE OF CLERK.

Where a case is brought to this court upon a transcript, the clerk's certificate thereto must show, in substance, at least, that it is a true and complete transcript of the record of the proceedings had in such case in the district court. A certificate which merely states that the transcript contains true and correct copies of certain papers (naming them) is insufficient. (Syllabus by the Court.)

Error from district court, Cowley county.

Action by M. A. Brown against M. M. Scott and others. Judgment for plaintiff, and defendants bring error. Dismissed.

Dalton & Dalton, for plaintiffs in error.
Madden & Buckman, for defendant in error.

SCHOONOVER, J. This was an action of replevin brought by defendant in error, as plaintiff, in the district court of Cowley county, to recover possession of certain personal property from plaintiffs in error (defendants below). The case is brought to this court upon what purports to be a transcript of the record of the proceedings of the district court, and defendant in error contends that the clerk's certificate to such purported transcript is insufficient, and asks that the case be dismissed. The certificate is as follows: "I, Charles C. Craig, clerk of the district court in and for said county and state, do hereby certify that the within and foregoing is a full, true, and correct copy of the petition, motion to strike out parts of petition, journal entry overruling said motion to strike out, separate demurrer of defendants, answer, journal entry of trial, verdict, motion for new trial, and journal entry overruling motion for a new trial, in the case of M. A. Brown vs. M. M. Scott et al. (No. 8,027), as the same appears of record in my office. In witness whereof, I have hereunto set my hand and affixed the seal of said court at my office, in the city of Winfield, this 6th day of August, 1897. Chas. C. Craig, Clerk Dist. Court Cowley County, Kans." This certificate is not sufficient. The clerk merely certifies that the papers which make up the purported transcript are true and correct copies. The clerk must certify, in substance, at least, that the record contains a true and

complete transcript of the record of the proceedings in the case. *Westbrook v. Schmaus*, 51 Kan. 214, 32 Pac. 802; *Heaston v. Miller*, 1 Kan. App. 157, 41 Pac. 976; *Eldridge v. Deets*, 4 Kan. App. 241, 45 Pac. 948. The petition in error is dismissed.

(10 Kan.App. 884)

GANO et al. v. MARTIN.

(Court of Appeals of Kansas, Southern Department, E. D. June 13, 1900.)

SUBROGATION—LIMITATIONS.

G. and his wife borrowed money from a loan company, and, to secure such loan, gave a mortgage upon real estate owned by the wife; the proceeds of such loan being used to pay off a mortgage held by M. upon such real estate. Prior to the execution and delivery of the mortgage given to the loan company, the wife had been adjudged insane, and the husband appointed as her guardian. The fact of the wife's insanity was fraudulently concealed from the loan company, and it had no actual notice of such insanity. Payments of interest were made upon the mortgage given to the loan company within less than five years prior to the commencement of foreclosure proceedings upon such mortgage. *Held*, that the company was subrogated to the lien of the original mortgage, and that the fraudulent concealment of the wife's insanity prevented the statute of limitations from running until the discovery of the fraud; and *held*, further, that the payment of interest by G. was sufficient to toll the statute.

(Syllabus by the Court.)

Error from district court, Miami county;
John T. Burris, Judge.

Action by Lorenzo A. Martin against William Gano personally and as guardian of Mary E. Gano. Judgment for plaintiff, and defendants bring error. Affirmed.

Sperry Baker, B. F. Simpson, and John C. Sheridan, for plaintiffs in error. Beardsley & Gregory and Sheldon & Sheldon, for defendant in error.

SCHOONOVER, J. In the year 1886, Mary E. Gano and William Gano, her husband, to secure a note of \$1,200, due in two years, made, executed, and delivered to J. T. Murtagh a mortgage on lots 4 and 5, block 126, in Paola, Miami county, owned by Mary E. Gano, and occupied by herself and husband as a homestead. On the 3d day of May, 1887, Mary E. Gano was by the probate court of Miami county adjudged to be a person of unsound mind, and letters of guardianship were duly issued to William Gano, her husband, who gave bond and entered upon the duties of such guardianship. In 1889, the Murtagh mortgage being due and unpaid, William Gano applied to the Jarvis-Conklin Mortgage Trust Company for a loan with which to pay off such mortgage. The application was in writing, and was signed, apparently, by both Mr. and Mrs. Gano. The record does not show that the insanity of Mrs. Gano was disclosed to the company, or that it had any actual knowledge of such insanity and the guardianship of Mr. Gano.

Upon this application the company made a loan, which was used in paying off the Murtagh mortgage, the Ganos giving their note, and mortgage upon the property covered by the Murtagh mortgage, to the company to secure such loan. This note and mortgage were afterwards assigned to the defendant in error herein, Lorenzo Martin. On July 8, 1895, the note and mortgage being due and unpaid, Martin began foreclosure proceedings in the district court of Miami county. To the petition filed by plaintiff, the defendants answered setting up as their defense the finding of the probate court of Miami county adjudging Mrs. Gano to be a person of unsound mind and incompetent to transact business, and it was also pleaded that Mr. Gano had been appointed her guardian. The plaintiff replied, and alleged that the mortgage company made the loan in good faith, for the purpose of paying off a prior mortgage, and without any knowledge of the insanity of Mrs. Gano; that the loan was made upon the written application of William Gano, which in no way disclosed the insanity, and upon a written abstract of title, which was furnished by said William and Mary E. Gano, and which failed to show the probate proceedings by which Mrs. Gano was adjudged to be insane; that said abstract of title was by the mortgage company submitted to counsel learned in the law, and it was certified to by counsel to show clear title in Mary E. Gano, subject to the prior mortgage of \$1,200, which was to be taken up by the new loan; that said William Gano and Mary E. Gano fraudulently concealed from the mortgage company, and all persons representing it, the fact of insanity, and that the plaintiff never knew or suspected any such insanity until the same was alleged in the answer. Plaintiff prayed that, in case the court should find the note and mortgage sued upon to be void, then that he be subrogated to the lien of the prior note and mortgage, and that said lien be foreclosed. The case was tried to the court, which found that the averments contained in the petition of plaintiff were true, and that plaintiff was entitled to be subrogated to the lien of the original mortgage. Judgment was rendered in favor of plaintiff, and the defendants bring the case here.

The judgment appears to have been rendered upon the theory that the note and mortgage given to the Jarvis-Conklin Mortgage Trust Company were void because of the insanity of Mrs. Gano, and that the mortgage company was therefore subrogated to the rights of the holder of the original mortgage, which was paid off out of the proceeds of the loan made by the company. Plaintiffs in error concede that Martin was probably subrogated to the rights of the holder of the original mortgage, but contend that the cause was barred by the statute of limitations as to such holder, and was therefore barred as to Martin, upon the prin-

ciple that subrogation carries with it no greater rights than the creditor possesses. If, as counsel for plaintiffs in error states, this case involved the question as to whether or no the equitable right of subrogation is subject to the bar of the statute of limitations, and this question alone, we would have no difficulty in reaching a decision; but, as we view the case, this is not the question. It is agreed by the parties that payments of interest were made on the mortgage given to the Jarvis-Conklin Mortgage Company, and the record shows that the last payment of interest was made less than five years before this action was brought. What, if any, was the effect of such payments? Would the effect be to toll the statute as to the original note and mortgage? It was averred by plaintiff that defendants fraudulently concealed the fact that Mrs. Gano had been adjudged insane, and this averment the court found to be true. What, if any, was the effect of such fraudulent concealment? Would it suspend the running of the statute of limitations until the discovery of the fraud? This is an equitable proceeding, and we are not to indulge in nice discriminations. One thing appears from the record very clearly, and that is that the equities are with the plaintiff. Defendants fraudulently concealed the fact of Mrs. Gano's insanity. The mortgage company, in ignorance of such insanity, made a loan and took a mortgage upon Mrs. Gano's property. The proceeds of the loan were used to pay off a prior mortgage. The mortgage given to the mortgage company was absolutely void.—never had any legal effect,—and the mortgage company became subrogated to the rights of the holder of the original mortgage at the time it was paid out of the proceeds of the loan made by the company. Martin, the assignee, believing that he held a valid mortgage, failed to assert his rights under the original mortgage until a time when the rights of the original holder of such mortgage would have been barred. His failure to so assert his rights was due to the fraudulent concealment by defendants of facts which rendered his (plaintiff's) mortgage void. Must we now hold that defendants can take refuge behind their own wrong? We think not. Equity and justice impel us to hold that the statute of limitations did not begin to run until the discovery of the fraud, which was not until the filing of the answer of defendants, and, under this view of the case, the cause was brought in time.

We think, also, that the payment of interest by William Gano was sufficient to toll the statute. The new mortgage was void, but equity kept alive the lien of the old mortgage for the benefit of the mortgage company and its assignee, Martin. Equity would require that the defendants be credited with the payments made, upon the ground that "he who seeks equity must do

equity." The payments certainly were made in recognition of an existing obligation. The only obligation existing was that evidenced by the original note and mortgage, and plaintiff had been subrogated to all the rights of the original holder of these, or, as counsel for plaintiff expressed it, Martin was placed in the shoes of Murtagh, the original holder. We think, in view of all the facts and circumstances, we are justified in holding that these payments were sufficient to toll the statute. The judgment of the district court is affirmed.

STOVER v. STOVER.

(Supreme Court of Idaho. June 2, 1900.)

ACTION FOR DIVORCE—DISMISSAL—MOTION—ERROR.

1. It is error for the district court to refuse to enter an order dismissing an action brought by a wife for divorce when the plaintiff applies therefor, and there is no affirmative relief sought by the defendant by way of cross complaint or counterclaim.

2. It is the policy of the law to discourage divorces; hence where the plaintiff in a divorce suit asks to dismiss, and no counter cause of action is set up in a cross complaint or counterclaim, the refusal of the court to make the order dismissing the action is reversible error.

(Syllabus by the Court.)

Appeal from district court, Blaine county; C. O. Stockslager, Judge.

Action by Clarinda B. Stover against James A. Stover. Judgment for defendant, and plaintiff appeals. Reversed.

Silas W. Moody and Hawley, Puckett & Hawley, for appellant.

QUARLES, J. This is the second time that this cause has been before this court on appeal. Upon a decision of the first appeal (see *Stover v. Stover*, 56 Pac. 263), we held that the cross complaint of the respondent did not state a cause of action, and that the respondent was not entitled thereunder to the affirmative relief granted him by the judgment, and reversed the judgment. Upon the return of this cause to the lower court the plaintiff moved to dismiss her action, but her motion was denied, and the lower court refused to permit the plaintiff to dismiss her action. Two days thereafter the respondent (defendant below) was permitted to and did file an amended answer and cross complaint, and answer was filed to said amended cross complaint, and the court called a jury, which was impaneled to try the issues, which were found in favor of the respondent; whereupon judgment was entered in his favor, from which this appeal is prosecuted.

A number of errors are specified by appellant, but we deem it necessary to consider only one of them, viz. the refusal of the trial court to enter judgment dismissing the action. There being no cross complaint nor counterclaim stating a cause of action and

seeking affirmative relief in the case, the plaintiff had the right, under section 5354, Rev. St., as matter of course, to dismiss her action. If there were any costs that had not been paid, the court might have required their payment forthwith as a condition precedent, but no such showing is made. As we held in *Boyd v. Steele*, 59 Pac. 21, neither the court nor clerk can prevent such dismissal.

The action of the trial court in denying said motion appears to be arbitrary, and no reason appears in the record as to why the motion to dismiss was denied. The plaintiff being the wife who is seeking a divorce, we will not presume that there were costs unpaid, which would, apparently, deny her a plain, unequivocal right given by statute.

But the most important consideration that induces us to conclude that said motion should have been, under the conditions of the pleadings, sustained, is the well-settled rule that it is the policy of the law to discourage divorce suits, and not to encourage them. This rule was violated by the lower court in this cause. Plaintiff wanted to quit the litigation. She asked to dismiss her action. The court denied her the right to do so. Two days afterwards an amended cross complaint was filed by the defendant, and upon which he was afterwards granted a judgment of divorce. It might have been proper, as above suggested, for the court to have required the plaintiff to first pay any costs that might have then been unpaid; but the record does not show that there were any such costs, and no reason whatever is shown for the court's action. Judgment reversed, and the cause remanded to the district court, with instructions to enter an order dismissing the action as of the date said motion to dismiss was made, to wit, June 20, 1899. Costs awarded to appellant.

HUSTON, O. J., and SULLIVAN, J., concur.

STATE v. MURPHY.

(Supreme Court of Idaho. June 2, 1900.)

CRIMINAL LAW—VERDICT—IMPEACHMENT.

The verdict of a jury in a criminal case cannot be impeached by the affidavit of a third person as to statements by a juror detailing the case to which an exhibit, taken to the jury room upon suggestion of counsel for the defendant, was put by the jury.

(Syllabus by the Court.)

Appeal from district court, Owyhee county; George H. Stewart, Judge.

Cornelius B. Murphy was convicted of murder, and appeals. Affirmed.

Hawley, Puckett & Hawley, for appellant. S. H. Hays, Atty. Gen., for the State.

HUSTON, C. J. The defendant was convicted of murder in the second degree, and from the judgment and the order overruling defendant's motion for a new trial, this ap-

peal is taken. There are several assignments of error in the record, but upon the argument before us counsel for appellant presented but one, predicated upon the following facts: Upon the trial the revolver with which the homicide was alleged to have been committed was put in evidence, and upon suggestion of counsel for the defendant the jury were permitted to take it with them when they retired to consider on their verdict. It is now urged that the jury made an improper use of the revolver; that by examination and inspection they discovered some mysterious contrivance or combination therein by which the defendant had secured to himself "a sure thing" in the event of his coming in contact with the deceased. Aside from the fact that the circumstances of the homicide entirely negative any such proposition, the evidence by which it is sought to be established is entirely inadmissible for any such purpose, to wit, the affidavit of a third party as to the statements made by a member of the jury in his presence after the trial. The contention that the verdict of a jury can be impeached in this manner, if recognized, would render jury trials a mere mockery of the law. Finding no error in the record, the judgment of the district court is affirmed.

QUARLES and SULLIVAN, JJ., concur.

STATE v. KRUGER et al.

(Supreme Court of Idaho. June 1, 1900.)

CRIMINAL LAW—CIRCUMSTANTIAL EVIDENCE —BURDEN OF PROOF.

1. In the trial of a criminal case, where the evidence depended upon for a conviction is circumstantial, every fact necessary to connect the defendant with the commission of the alleged crime must be established to the satisfaction of the jury beyond a reasonable doubt, but this does not impose upon the prosecution the burden of proving every collateral or corroborative fact or circumstance in the case beyond a reasonable doubt.

2. Definition of a "reasonable doubt," as given in this case, affirmed.

(Syllabus by the Court.)

Appeal from district court, Blaine county; C. O. Stockslager, Judge.

Frank Kruger and others were convicted of burglary, and from a judgment and an order denying a new trial they appeal. Affirmed.

Lytleton Price, for appellants. S. H. Hays, Atty. Gen., for the State.

HUSTON, C. J. The defendants were convicted of the crime of burglary. From the judgment and the order denying new trial the appeal is taken. The appellants specify seven errors alleged to have been committed by the trial court in the trial of this case. We will consider them in the order in which they are presented by the appellants' brief.

The first error alleged is that the court erred in instructing the jury as shown at

folios 37 and 38 of the record, relating to accessories. That instruction was a simple recital of the provisions of the statute; nothing more, nothing less. It might have been an act of supererogation on the part of the court, but it cannot be seriously claimed that it was prejudicial error.

The second error alleged is that as shown at the latter part of folio 39, p. 15, of the record, where the court instructed the jury that "the prosecution must prove that one or more of the defendants did break into the store building," etc. We have examined the record carefully in regard to this specification of error, and are unable to see wherein there is anything upon which to predicate error.

The third assignment of error is more strenuously dwelt upon by counsel for appellants. It is alleged that the court instructed the jury that "it was not necessary for the prosecution to prove each link in the chain of circumstances relied upon to get the conviction." Too often in the administration of the criminal law the intent and purpose of the law is subverted, and the ends of justice defeated, in the recognition by courts of subtle refinements of definition; and in their attempts to make that plainer which to the ordinary mind is plain enough, in the direct words of the law, they befog and obscure the true intent and meaning of the law, and thereby impede, and too often defeat, the ends of justice. This assignment of error is predicated upon that portion of the charge contained in the following words (folios 40, 41, transcript): "While it is necessary for the prosecution to prove all these necessary allegations, yet it is not necessary for the prosecution to prove each link in the chain of circumstances relied upon for a conviction; it is sufficient if, taking the testimony altogether, you are satisfied beyond a reasonable doubt of the defendants' guilt." Counsel for appellants contends that this instruction is reversible error, and cites numerous authorities in support of his contention, first among which is the case of *Com. v. Webster*, 5 Cush. 295. In that case the learned judge (Chief Justice Shaw) who delivered the opinion says, in speaking of the proof necessary to warrant a conviction upon circumstantial evidence: "The next consideration is that each fact which is necessary to the conclusion must be distinctly and independently proved by competent evidence. I say every fact necessary to the conclusion, because it may and often does happen that in making out a case on circumstantial evidence many facts are given in evidence, not because they are necessary to the conclusion sought to be proved, but to show that they are consistent with it, and not repugnant and go to rebut any contrary presumption." Apply the rule here laid down to the case under consideration. The burglary is shown. It was committed in the nighttime, near the window through which entry was made into the building. Tracks were visible. These tracks were followed for some miles, occasionally lost, and

then again discovered. Peculiarities in the tracks tended to identify them as being those made by defendants. Following these tracks, the parties in pursuit come upon the defendants, secreted, or, at least, partially hidden, in the brush, or by the roadside, in a section of country remote from a general thoroughfare. Upon examination of their persons and clothing, money corresponding in character and amount to that lost by the burglary was found. This money was secreted,—sewn into their garments; some attempted to be hidden near where the defendants were discovered. A shirt stud, identified as having been in the burglarized safe, was found in the possession of defendants. The attempt to explain the conditions by the defendants was so flimsy and unsatisfactory as evidently had no weight with the jury. These were the circumstances which, in the opinion of the jury, were sufficient to establish the guilt of defendants.

Counsel for appellants contend that the proof of the following of the tracks was not satisfactory or conclusive; that at several points the tracks were lost, and only found again after a lapse of several miles. Objection is also made that the money found upon the defendants was not specifically identified as that taken from the burglarized safe; that, while the shirt stud found in the possession of defendants was identified, it was not shown to have been the one placed in the safe by the owner. It matters not how the defendants were traced,—whether by information, or by following tracks supposed to be theirs. The facts connecting them with the alleged crime were the condition and circumstances under which they were found; that they had upon them money of an amount and character corresponding with that taken from the safe; that the same was secreted, and concealed, or attempted to be, in a manner not consistent with an honest acquisition. The evidence in regard to the shirt stud, it seems to us, is sufficient to establish its identification. Both of the McGowans identify it as having belonged to their father; that he kept it, with other articles of jewelry, in a box of a certain description; that upon his deathbed, neither of his sons being present, he left word with a third party that the box, with its contents, was deposited in the safe of Bashford. Bashford testifies that he received the box, but did not examine the contents. The failure by the defendants to give any satisfactory explanation of these facts consistent with innocence on their part all tended to establish guilt. But counsel insists that this evidence was not sufficient to establish the guilt of the defendants "beyond a reasonable doubt." Perhaps not in the mind of counsel, but it seems to have done so with the jury.

But counsel insists that the definition of a "reasonable doubt" as given by the court is not correct, and that the failure of the court to give a correct definition is reversible error. Next to a resort to evidence of previous good

reputation, the last refuge of a defendant in criminal cases is a criticism of the trial court's definition of a "reasonable doubt," and the persistency of this contention has been accentuated by the efforts of trial courts to make that plainer by elaboration which is plain enough in itself. We do not think it an undue stretch of credulity for the trial court to assume that a person possessed of intelligence sufficient to permit his retention upon a jury in the trial of a criminal case may be presumed to understand the meaning of a reasonable doubt, when he is informed by the court that "it must be a doubt arising from the evidence in the case, and not derivable from, or dependent upon, any extraneous fact or circumstance." Chief Justice Shaw, in the celebrated Webster Case, *supra*, says, speaking of a "reasonable doubt": "It is a term often used, probably pretty well understood, but not easily defined;" and there is where all the difficulty arises. The desire to shed more light upon that which is already sufficiently luminous inevitably results in practical obscurity. If it is apparent from the record that the definition of a "reasonable doubt," as given by the trial court, has tended to impair or prejudice any right of the defendant, such action of the trial court should be corrected here; but, from a most careful scrutiny of the instructions contained in the record in this case, we are constrained to say that every right of the defendants under the law was fully accorded and protected. Besides, the definition of a "reasonable doubt," as given by the court in this case, was recognized and affirmed by this court in *People v. Dewey*, 2 Idaho, 79, 6 Pac. 103, and, while conceding that the decision in that case is subject to criticism, we do not feel authorized to repudiate it.

The introduction in evidence of the piece of cloth said to have been found at Pole Corral, where it was supposed the defendants had stopped, and which piece of cloth fitted into a rent, and agreed in character and texture with the lining of the coat of the defendant Daugherty, is objected to. This could not be called "a link in the chain of circumstances" connecting defendants with the crime charged. It was merely a corroborative circumstance, which might or might not have weight with the jury.

In regard to the action of the trial court in pronouncing sentence in this case, we can only say the statute fixes the limits of punishment for the offense of which a defendant has been convicted, and within the limits so prescribed the trial court has discretion, and we do not think that the exercise of such discretion is reviewable in this court. If the punishment prescribed is out of proportion to the crime of which the party has been convicted, its correction lies with another tribunal provided by law. Not finding reversible error in the record, the judgment of the district court is affirmed.

QUARLES and SULLIVAN, JJ., concur.

WYOMING NAT. BANK OF LARAMIE v.
BROWN et al.

(Supreme Court of Wyoming. June 29, 1900.)

IMPAIRING OBLIGATION OF CONTRACTS—RE-
DUCING INTEREST ON JUDGMENT.

1. A prior contract on which a judgment is based is not impaired by a law reducing the rate of interest on the judgment, as the contract is extinguished by the judgment.

2. Act Feb. 11, 1895, reducing interest on all judgments, applies to a judgment already existing only from the time of its passage, as the judgment creditor has a vested right to the interest accruing on his judgment up to the date of the change in the law.

On petition for rehearing. Denied.

For former opinion, see 53 Pac. 291.

POTTER, C. J. The plaintiff has applied for a rehearing in this case. The points urged in counsel's brief are practically the same as those insisted on at the original hearing, and they were then fully considered by the court, although the opinion may not have specifically referred to them. Upon a careful review of the questions involved, and an examination of the cases cited by counsel in his present brief, we are satisfied with the correctness of the conclusions already announced. 7 Wyo. 494, 53 Pac. 291. By the great preponderance and weight of authority, a judgment is not a contract, within the meaning of the constitutional prohibition against laws impairing the obligation of contracts. 1 Black, Judgm. §§ 7-11.

But counsel insists that the prior contract lends its force and obligation to the judgment to such an extent that it is impaired by a law reducing the rate of interest upon the judgment. We do not think so. The cases cited upon that point are inapplicable, except those adopting the view that the judgment is itself a contract. The contract has been merged in the judgment, or, as has been said, it has been extinguished by the judgment, which is a higher security. "The liability of the debtor no longer rests upon his voluntary agreement, but upon the adjudication of the court into which the former has passed." McDonald v. Dickson, 87 N. C. 404. A familiar principle will serve to clearly illustrate this. It is well settled that a judgment carries only such a rate of interest as may be established by law, notwithstanding that the contract or cause of action on which it was founded may bear a higher rate; and this is so because of the merger of the contract in the judgment, and thereafter the law, and not the parties, prescribes the interest. 2 Black, Judgm. § 982. The legislature recognized this principle by the proviso of the section of the law of 1895 under consideration, whereby it is enacted that when a judgment shall be founded upon a contract, verbal or written, by the terms

whereof a rate of interest less than 8 per cent. shall have been agreed upon, the rate upon the judgment shall be the same as that provided for by the contract, but no such provision is made in the case of a judgment upon a contract bearing a rate greater than that ordinarily allowed upon judgments. In such case the rate of 8 per cent. governs the judgment. It is true, as stated by Brown in his work on Judgments (section 11), that statutes have been declared invalid, as obnoxious to the inhibition against the impairment of the obligation of contracts, which vacated judgments, granted new trials, enacted shorter statutes of limitation, greater exemptions of the debtor's property, and the like; not, however, because they impaired the judgment, but on the ground that they destroyed the remedy on the original contract. And as to that class of cases the court in Morley v. Railway Co., 146 U. S. 162, 13 Sup. Ct. 54, 36 L. Ed. 925, declared them inapplicable to the consideration of a statute reducing the rate of interest upon judgments. Much that was said in the original opinion in discussing the principles underlying interest upon judgments is also pertinent here, and demonstrates the difference, in respect to interest, between the contract and a judgment founded thereon.

It is further urged that the statute of 1895 ought not to be construed as affecting judgments already existing, because of the provision that judgments shall bear interest at the prescribed rate "from the date of the rendition thereof." It is insisted that the use of the language quoted discloses an intention that the act should have effect only upon judgments recovered subsequent to the passage of the act. Inasmuch as the law previously in force allowing interest upon judgments was expressly repealed by the act of 1895, and there is no exception in the statute, we think it must be construed, at least the clause of the section preceding the proviso, as covering the case of all judgments, whether rendered before or after the date of the passage of the act. That is the only law authorizing interest upon judgments after its date. But it will not be so construed as reducing the rate prior to the time of the enactment of the statute. The judgment creditor has a vested right to the interest which accrued upon his judgment under the law then in force up to the date of the change in the law. Hence, as to judgments already existing, the rate, under the act of 1895, should be applied only from the time of its passage. This question was taken into consideration when our conclusions were originally announced, and the answer to the reserved question accorded with the view above expressed. Rehearing will be denied.

CORN and KNIGHT, JJ., concur.

**FIRST NAT. BANK OF ROCK SPRINGS,
WYO., v. FOSTER.**

(Supreme Court of Wyoming. June 25, 1900.)

JURY—VERDICT—UNANIMITY—APPEAL—INSTRUCTION—REVIEW.

1. Const. art. 1, § 9, provides that the right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts not of record may consist of less than 12 men, as may be prescribed by law. Rev. St. 1899, § 3651, provides that in all civil cases which shall be tried by jury three-fourths of the jurors may return a verdict, which shall have the same effect as if returned by all the jurors. *Held*, that this section of the constitution did not authorize the legislature to dispense with the unanimity of a verdict, and the statute was void.

2. Though no exception was taken to an instruction that three-fourths of a jury may return a verdict, where the receiving and entering of such a verdict was objected to, and exception taken to the overruling of the objection, it brings the question of the validity of such a verdict regularly before the court on appeal.

Error to district court, Sweetwater county; David F. Craig, Judge.

Action by Richard Foster against the First National Bank of Rock Springs, Wyo. From a judgment in favor of plaintiff, defendant brings error. Reversed.

D. A. Reavill, for plaintiff in error. John H. Chiles, for defendant in error.

CORN, J. Defendant in error brought suit against plaintiff in error upon a lost certificate of deposit. Under the instruction of the court that three-fourths of the jury might concur in and return a verdict, a verdict for the plaintiff was returned signed by ten of the jurors, the other two refusing to concur. The defendant below objected to the verdict being received, for the reason that it was not unanimous, and therefore not a lawful verdict. The objection was overruled, and the verdict entered, and the defendant took its exception. Our declaration of rights (article 1, § 9, of the constitution) provides: "The right of trial by jury shall remain inviolate in criminal cases, but a jury in civil cases in all courts, not of record, may consist of less than twelve men, as may be prescribed by law. Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the legislature may change, regulate or abolish the grand jury system." Section 3651, Rev. St. 1899, provides that: "In all civil cases in any of the courts of the state of Wyoming, which shall be tried by a jury, three-fourths of the number of the jurors sitting in any such case may concur in and return a verdict in said case, and such verdict shall have the same force and effect as though found and returned by all the jurors sitting in said case; but whenever such verdict is found and returned by a less number than twelve, said verdict shall be signed by each juror concurring therein." The plaintiff in error insists that the statute

is in violation of the section of the constitution above quoted, and this is the only important question presented. No other of the state constitutions, so far as we are advised, contains precisely the same provision as ours, except that of Colorado. But the general question here involved has repeatedly been before the courts of this country for consideration, and certain propositions which lie at the threshold of the discussion are well settled. It is conceded that in almost all of the states the legislature may lawfully exercise not only such powers as are specifically enumerated, but that it is invested with the entire legislative power of the state, except as restrained by the provisions of the constitution. And our constitution, in line with most of the others (article 3, § 1), provides that "the legislative power shall be vested in a senate and house of representatives, which shall be designated 'the legislature of the state of Wyoming.'" It is also so well settled as to require no reference to authorities that when the constitution secures to litigants the right of trial by jury the legislature has no power to deny or impair such right. The courts have uniformly held also that the word "jury," as used in our constitutions, when not otherwise modified, means a common-law jury composed of 12 men, whose verdict shall be unanimous. As stated by the supreme court of Minnesota: "The expression 'trial by jury' is as old as Magna Charta, and has obtained a definite historical meaning, which is well understood by all English-speaking peoples; and for that reason no American constitution has ever assumed to define it. We are therefore relegated to the history of the common law to ascertain its meaning. The essential and substantive attributes or elements of jury trial are, and always have been, number, impartiality, and unanimity. The jury must consist of twelve. They must be impartial and indifferent between the parties; and their verdict must be unanimous." *Lommen v. Gaslight Co.*, 65 Minn. 196, 68 N. W. 53, 33 L. R. A. 437. An extended list of the cases is given in the note to *State v. Bates* (Utah) 43 L. R. A. 48 (s. c. 47 Pac. 78). It is unquestioned, also, that at the adoption of the constitution the right existed in Wyoming as at common law; that is, in felonies and in all common-law cases in the district court—our court of general common-law jurisdiction—the right was to an impartial jury of 12 men and a unanimous verdict. It is also conceded that the people of the state had the power by their constitution to preserve or abrogate the right, or make such modifications of it, and establish such modes of trial, as might be deemed expedient. These general propositions being settled, the question before us is to ascertain to what extent the right of trial by jury, as above defined, is preserved by the section of the declaration of rights above quoted. As to the right in criminal cases there is no room for construction. The language is ex-

press that it shall remain inviolate; that is, that a person charged with crime has the right, as heretofore, to demand a trial by 12 impartial men, whose verdict must be unanimous in order to support a judgment. In civil cases the language is also express as to the matter of number,—one of the three essentials of a jury trial at common-law,—and the legislature is empowered to provide by law for juries consisting of less than 12. There is no room for construction. But there is no specific mention in the section or anywhere in the constitution of the third essential of unanimity. Is it, then, to be deemed a matter unprovided for, a right not preserved, leaving the legislature at full liberty to enact such laws upon the subject as it may deem proper, unrestrained by the constitution? We do not think so. The whole section must be construed together. The subject of it is the right of trial by jury, and we think the intention of the framers reasonably appears to have been to preserve the right inviolate in criminal cases, and to point out, by way of permission to the legislature, wherein the common-law right might be invaded by statute in civil cases. It is as if the constitution had said: "With reference to the right of trial by jury it is provided that in criminal cases it shall remain in all respects as heretofore. In civil cases it shall remain as heretofore, except that the legislature may provide for a number less than twelve to constitute a jury." There is no other reasonable construction; for, if a rule is to be applied that the legislature have power to enact any laws upon the subject unless prohibited in express language, then they may entirely abolish the right and practice of trial by jury in civil cases, for they are not expressly prohibited from so doing. Yet there appears nowhere in the constitution any intention to abrogate the right or to substitute any other mode of trial. But the form of statement, when viewed in the light of the surroundings, makes it manifest that the intention was to preserve the right. The provision in regard to number is by way of permission, indicating clearly that in the judgment of the framers of the constitution permission was necessary. It is also stated as an exception, the word "but" being used in its very customary meaning of "except." That it is stated as an exception is also shown by the use of the word "jury" itself. It cannot be supposed that the convention were ignorant of the legal meaning of the word, but they must be presumed to have used it in its correct legal sense of a body of 12 impartial men, whose verdict must be unanimous. And it is evident they did so use it. It is so used in the first clause securing the right inviolate in criminal cases. The provision that the number may be less than "twelve" is clear evidence that the word as used referred to the body universally known to be composed of 12 men. It is permission to the legislature to make a

designated change in the common-law jury; to reduce the common-law number, 12. It is not essential that a prohibition upon the legislature should be in express terms. It may be by implication. Page v. Allen, 58 Pa. St. 345. It will scarcely be contended that an act would be valid providing for the trial of causes by a jury chosen by the plaintiff, or by the party by whom the jury was first demanded, thus disregarding the element of impartiality. Yet by the argument of counsel there is no prohibition upon such legislation. And it is, indeed, no more prohibited than a disregard of the element of unanimity is prohibited. Neither is prohibited except by the use of the word "jury," the plainly implied provision for "trial by jury," which, as matter of definition, necessarily involve and include both impartiality and unanimity of verdict. This view is fortified by reference to the remainder of the section (section 9, art. 1, Const.) in regard to grand juries: "Hereafter a grand jury may consist of twelve men, any nine of whom concurring may find an indictment, but the legislature may change, regulate or abolish the grand jury system." Here it was deemed necessary, if the grand-jury system was to be changed or abolished by law, that the legislature should have express permission to take such action. But any such permission to change, regulate, or abolish the system of trial by jury is conspicuous by its absence. The reasonable conclusion is that there was no intention to give it, or to permit any interference with the right to the ancient, customary, and familiar mode of trial except in the one particular pointed out. Some other states adopting constitutions in comparatively recent years have provided for the change in the jury system attempted in the act under consideration. But in every case, so far as our investigation has extended, the change has been made either by a direct constitutional provision, or by specific authority contained in the constitution empowering the legislature to make it. Only in Colorado and this state has the attempt been made to accomplish the purpose by legislative enactment without express constitutional sanction. The question has not been directly passed upon by the Colorado court. But in *Huston v. Wadsworth*, 5 Colo. 213, the question was as to the power of the trial court to refer a common-law action without the consent of the parties. And in sustaining the procedure the supreme court of that state say: "Section 23 of the bill of rights, referred to in the appellant's brief, secures the right of trial by jury in criminal cases, but imposes no restriction upon the legislature in respect to the trial of civil causes." Subsequently a bill in substance the same as section 3651 of our statutes was pending before the legislature, and, upon its being referred to the attorney general, his opinion was that it was in conflict with the clause of the constitution above quoted. Upon a

further reference to the supreme court for their opinion, they say that the language of the court, as constituted when the decision in *Huston v. Wadsworth* was rendered, supports the constitutionality of the act. But under their rule in such cases they decline either to question or sanction the correctness of that opinion in an ex parte proceeding. In re Senate Bill No. 142 (Colo. Sup.) 56 Pac. 564. The most that can be said, therefore, perhaps is that the question of the constitutionality of the act is undetermined in Colorado. In order to sustain the constitutionality of this section of the statute, it is necessary for this court to say that there is no right of trial by jury in civil cases under the constitution in this state, but that each succeeding session of the legislature may invent and establish any mode of trial that the whim of the hour or any supposed exigencies of convenience or economy might dictate. Under such a ruling it would be competent for the legislature to provide that the judge of the district should call into court the partisan board of county commissioners, and submit to them for decision by a majority vote all civil causes pending in any county. It is perfectly clear that no such revolutionary destruction of ancient landmarks was ever contemplated. The whole tenor of the instrument makes it plain that the ancient method of trial by jury was not to be abandoned, but was to be retained and preserved except as designated in the constitution itself, and what the essentials of that method are is not a matter of construction or conjecture. We think the statute is clearly unconstitutional.

It is further objected that no exception was taken to the instruction of the court that three-fourths of the jury might return a verdict, and that the defendant must be held to have waived its right. But the receiving and entering of the verdict were objected to, and exception taken to the decision of the court in overruling the objection. This exception brings the question regularly before this court for its decision, and the most that can be claimed is that the erroneous instruction will not be considered as a ground of reversal. The judgment will be reversed, and the cause remanded for a new trial.

POTTER, C. J., and KNIGHT, J., concur.

POWER et al. v. SLA et al.

(Supreme Court of Montana. June 25, 1900.)

MINING CLAIMS—FORFEITURE—ASSESSMENT WORK—LOCATION—DEMURRER TO COUNTERCLAIM.

1. Since Rev. St. U. S. § 2324, authorizes the expenditure required to be made on lode mining claims to be either in work and labor or improvements, it is not sufficient for defendants, claiming under a relocation after an alleged forfeiture by plaintiffs, to allege as such

forfeiture that plaintiffs failed during certain years to perform \$100 worth of work and labor on the claim, but they must also negative the expenditure of that amount in improvements.

2. Under Comp. St. Mont. 1887, div. 5, § 1477, requiring locators of mining claims to make and file for record with the county recorder a declaratory statement thereof on oath, it is not sufficient for defendants, claiming under a location after an alleged forfeiture by plaintiffs, to allege simply that they have caused a record notice of their location to be made, for this is a mere conclusion, and does not suggest that the notice was ever verified, or put on record in the proper county.

3. The fact that a demurrer to an answer denominates it a "defense" instead of a "counterclaim" will be regarded in the appellate court as immaterial, where both counsel and the trial court have treated it as attacking the pleading as a counterclaim.

4. Where a demurrer is interposed to a counterclaim on the ground that it does not state facts sufficient to constitute a cause of action, this being a ground of demurrer under Code Civ. Proc. § 680, subd. 6, it is sufficient to state the objection in the language of that subdivision.

Appeal from district court, Lewis and Clarke county; Henry N. Blake, Judge.

Action in ejectment, brought by T. C. Power and John B. Wilson against James Sla and Con Kelly. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

Action in ejectment involving the ownership and possession of the Clementh, Union Jack, and Blue Boy contiguous lode mining claims, situate in Lewis and Clarke county, and designated by the United States surveyor general at Helena as mineral surveys Nos. 1,743, 2,206, and 2,207. The complaint states first a cause of action in the usual form, and then in a second count alleges grounds for equitable relief by way of injunction to prevent trespassing by defendants pending the litigation. The defendants join issue upon all the allegations except as to their hostile possession of the ground embraced in the Clementh lode mining claim. Of this they claim to be the beneficial owners. They then proceed to set up an equitable defense by way of "cross complaint," by which it is sought to have plaintiffs declared trustees of the legal title to the Clementh claim for the benefit of defendants, and to compel a transfer of this title to them by suitable conveyance. The facts upon which they seek this relief are alleged as follows: "(1) That on the 10th day of April, 1886, plaintiffs claimed to be in the actual occupation and possession of that certain quartz lode mining claim known and designated as the 'Clementh Quartz Lode Mining Claim,' situate in Ten Mile (unorganized) mining district in Lewis and Clarke county, Montana, under a location and record thereof theretofore claimed to be made, in accordance with the regulations of said district and the laws of the United States and of the said territory in such case made and provided by their grantors and predecessors in interest. (2) That on the 10th day of April, 1886, the said plaintiffs made their application in the United

States land office at Helena, in said territory, now state, of Montana, for a patent for said premises, the same being designated 'Survey No. 1,743' and 'Mineral Application No. 1,002'; and that, notwithstanding said plaintiffs were so claiming to be in possession thereof, and entitled to the possession thereof, they failed and neglected to do and perform one hundred dollars' worth of work or labor thereon, or any work or labor thereon, during the years 1889, 1890, and 1891, on account whereof said mining claim became open for relocation in the same manner as if no location had ever been made of the same, and said application abandoned. (3) That while the said premises were thus a part of the unoccupied and unappropriated lands of the United States, and open to relocation, and before the said plaintiffs, or their grantors, or the original locators thereof, or their successors in interest, had resumed work upon said premises, defendant James Sla and one R. Burridge, being then citizens of the United States of America, on the 22d day of July, 1892, entered upon and discovered upon said claim a vein or lode, bearing gold, silver, and lead, with two well-defined walls, and distinctly marked the boundaries of the said premises as a new location, under the name herein-after mentioned, upon the ground, so that said boundaries could be readily traced, and did, on the 23d day of July, 1892, cause a record notice of their said location to be made, which contained the names of the locators, the date of the location, and such description of said claim by reference to permanent monuments as would and did identify the same, and which was designated and named the 'Minnehaha Lode Mining Claim,' and which is more particularly described as follows, to wit: 'That certain quartz lode mining claim designated as the "Minnehaha Lode Mining Claim," situate in Ten Mile (unorganized) mining district, Lewis and Clarke county, Montana, about six hundred feet east of Sand creek, and about three miles west of Ten Mile creek, and more particularly described as follows: Beginning at the discovery and running eighty-five feet southwest to post No. 1; thence running three hundred feet southeast to post No. 2; thence fifteen hundred feet in a northeast direction to post No. 3; thence six hundred feet north to post No. 4; thence fifteen hundred feet southwest to post No. 5; thence three hundred feet southeast to post No. 1, the place of beginning,'—on account whereof defendant James Sla and said R. Burridge became possessed and entitled to the possession thereof. (4) That said R. Burridge conveyed and transferred all of his right, title, and interest in said premises to defendant Con Kelly, and that ever since the location and recordation of said mining claim and the possession and right of possession thereof by said defendants and their predecessors in interest they have done and performed work and labor thereon required to be done and

performed, and in all respects complied with the regulations of said mining district and the laws of the United States and the said state of Montana; and that, notwithstanding plaintiffs had forfeited their possession and right of possession of said premises as aforesaid, they did, by virtue of their said application and publication of notice theretofore given on the 11th day of April, 1886, and for sixty days thereafter, as by law required, and without any new application or notice, on the 25th day of November, 1892, enter and pay for said Clementh lode claim as aforesaid, being mineral entry No. 2,774, and on the 6th day of June, 1893, obtained a United States patent therefor, being patent No. 23,010, and which said premises are more particularly described in said patent, to which reference is made,—all of which said proceedings had on or before November 25, 1892, were without the knowledge, acquiescence, or consent of defendants or their predecessors in interest." Then follow the additional allegations that defendants and their predecessors in interest have in all respects complied with the law so as to entitle them to a patent; that no notice of application for patent for plaintiffs was ever given after the Clementh lode had become subject to relocation; that the United States land department erroneously proceeded to issue patent to plaintiffs without notice to defendants or their predecessors, and without any hearing; that the rights of the defendants were never considered or passed upon by said land department; that the plaintiffs and their predecessors in interest had full knowledge of the fact of the location of the property by defendants and their predecessors, and well knew that the defendants claimed the same by virtue of their location aforesaid; that, so knowing of defendants' claims, they fraudulently proceeded to obtain patent for the said Clementh lode without the knowledge of defendants or their predecessors in interest; that the defendants and their predecessors in fact had no knowledge of the plaintiffs' application; that the plaintiffs' patent was secretly obtained while the defendants were in the actual, quiet, and peaceable occupation and possession of the premises aforesaid, and were entitled to the entire beneficial interest therein; that by reason of the erroneous issuance of the patent aforesaid to plaintiffs they have acquired an apparent legal title to said premises which, in equity and good conscience, belongs to defendants; that plaintiffs hold such title for the exclusive use and behoof of the defendants; that there are no claimants to said land, or any part thereof; that under the law applicable to mineral lands of the United States, after the expiration of the notice of the application for a patent by plaintiffs, the only mode of ascertaining whether or not the work and labor for the years 1889, 1890, and 1891 had been done and performed by the plaintiffs was by requiring them to give a new notice

as if said application was an original one; that by mistake in the interpretation of the law and the principles applicable thereto the officers of the United States land department dispensed with the publication of such notice; that, if said notice had been given, the defendants would have been afforded an opportunity to interpose their adverse claim, and to fully and completely establish the validity of the same; and that by reason of the interpretation so erroneously made of the law, and the mistake on the part of the officers of the land department in not requiring a republication of notice as aforesaid, the defendants were deprived of their opportunity of being heard. Judgment is demanded that the plaintiffs be enjoined from the prosecution of their suit, that they be declared trustees of the legal title to the ground embraced by the Clementh lode for the use and benefit of defendants, and that they be directed to transfer the title to defendants by a suitable and proper conveyance. To the "cross complaint" plaintiffs interposed a general demurrer, which was sustained. No amendment being made, a trial was had upon the issues made by the denials of defendants, which resulted in a verdict and judgment for plaintiffs. Defendants appeal from the judgment.

Toole, Bach & Toole, for appellants. Walsh & Newman, for respondents.

BRANTLY, C. J. (after stating the facts). The only question presented upon this appeal arises upon the correctness of the action of the district court upon the demurrer. It is conceded by the appellants that the proceedings of the land department of the United States in the disposition of the public lands are judicial in their character, and that the determinations therein by the proper officers, acting within their jurisdiction, upon questions of fact, or of mixed law and fact, are conclusive upon the courts, and cannot be revised or disturbed by them. The contention is made, however, that the courts, while recognizing the dignity of a patent from the government, may, nevertheless, through their equitable powers, control and limit its operation in accordance with the principles of common justice as between the grantee of the legal title under the patent and others who have the beneficial interest in the land conveyed; that section 2322 of the Revised Statutes of the United States secures to the locator of a mining claim valuable property rights which cannot be taken away by the government or any person except by due process of law which affords reasonable notice and an opportunity to be heard; that when a valid relocation of a claim has been made after forfeiture of the original location pending a suspended application for patent by failure on the part of the applicant to do annual representation work pending the suspended proceedings, and before payment to

the government by the applicant, the relocation wipes out the original location completely, and gives to the second locator all the rights conferred by the original location; and that if, after the relocation is completed, the first locator proceeds under his suspended application to make payment, and thus secures a patent without publication of an additional notice, and without the knowledge of the second locator, a wrong is thus committed upon the second locator, which a court of equity will redress by holding the patentee a trustee for the second locator. This argument proceeds upon the assumption that it is incumbent upon the officers of the land department under these circumstances to require a new notice to be published when the proceedings for patent are resumed, and that the failure in this particular on their part is such a mistaken application of the law to the facts of the case that a court of equity ought to intervene and correct the wrong thus done by decreeing the legal title to the rightful owner. This is upon the principle that one who wrongfully obtains the title to land which, in equity and good conscience, belongs to another—whether it be done in good faith or not—will be charged as trustee for the latter.

It is well settled that under our system equitable defenses, like the one sought to be invoked here, as well as defenses at law, may be interposed in actions in ejectment. In such cases, however, the answer is in the nature of an original bill in equity, and must contain all the allegations necessary to constitute the defense or warrant the relief sought. *Reece v. Roush*, 2 Mont. 586; *Lamme v. Dodson*, 4 Mont. 560, 2 Pac. 298. It must disclose a case which, if established by proof, would constitute a bar to plaintiff's case, and justify a decree granting appropriate affirmative relief to defendant, such as is demanded in this case. Assuming, for the purpose of this discussion, without deciding the question, that the law is as defendants assert it to be, and that this court would be warranted, in a proper case, in granting appropriate relief, the defendants do not disclose a case calling for its application. It is incumbent upon them to show such facts as that it will appear therefrom that they have connected themselves with the original source of title in the government, and that their rights are injuriously affected by the existence of the patent. They must show such equities in themselves as will control the legal title in plaintiffs' hands. *Foss v. Hinkell*, 78 Cal. 158, 20 Pac. 393; *Chapman v. Quinn*, 56 Cal. 266; *Mining Co. v. Tinney (Nev.)* 35 Pac. 89; *Hermocilla v. Hubbell*, 89 Cal. 5, 26 Pac. 611; *Boggs v. Mining Co.*, 14 Cal. 279; *Van Wyck v. Knevals*, 106 U. S. 360, 1 Sup. Ct. 336, 27 L. Ed. 201; *Ard v. Brandon*, 156 U. S. 537, 15 Sup. Ct. 406, 39 L. Ed. 523; *Smelting Co. v. Kemp*, 104 U. S. 636, 26 L. Ed. 875; *Morre v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Steel v. Refining Co.*, 106 U. S. 447, 1 Sup. Ct. 389,

27 L. Ed. 226; *Johnson v. Towsley*, 80 U. S. 72, 20 L. Ed. 485; *Sparks v. Pierce*, 115 U. S. 408, 6 Sup. Ct. 102, 29 L. Ed. 428; *Deffenback v. Hawke*, 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423. Making the statement in another form, the defendants stand in no attitude to question the title of plaintiffs unless by their allegations they present facts showing not only that at the time the patent was issued to plaintiffs they (plaintiffs) were not entitled to it by reason of their failure to perform the conditions required by law, but also that they themselves have performed all the conditions necessary to entitle them to demand a patent from the government. The rule is deduced from the cases cited that, after the patent has passed to the entryman, mere strangers will not be heard to question the validity of the proceedings by which the patent was obtained. In such cases the government only can contest its validity in proceedings properly brought to set it aside.

The defendants, in order to show their right to a patent, attempt to allege a forfeiture by the plaintiffs during the years 1889, 1890, and 1891, and a relocation of the ground covered by the Clementh lode by Sla and Burridge in 1892 under the name of the "Minnehaha Lode." Their averment in this connection is that "they [plaintiffs] failed and neglected to do and perform one hundred dollars' worth of work or labor, or any work or labor, thereon during these years." The language of the statute (Rev. St. U. S. § 2324) is: "On each claim * * * not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." It is the well-settled doctrine that the annual expenditure required by the foregoing provision may be made either in labor or improvements put upon the claim itself, or upon one of a group of contiguous claims to which the particular claim belongs, or, in some instances, upon adjoining ground not included in any claim. 2 Lindl. Mines, §§ 629-631; *Smelting Co. v. Kemp*, supra; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; *Book v. Mining Co. (C. C.)* 58 Fed. 106; Rev. St. U. S. § 2324. The outlay is to be regarded as made upon the claim, within the meaning of the statute, whenever it is made for the development of the claim, and to facilitate the extraction of the minerals it may contain. *Smelting Co. v. Kemp*, supra. The plea of forfeiture is in the nature of a confession and avoidance. It admits a prior right in the plaintiff, which would have continued but for the entry and location by the defendant, which, under the mining law, has terminated it. *Morenhaut v. Wilson*, 52 Cal. 263. One who relies upon such a plea, must set forth the facts upon which he relies to overturn the prior right of his adversary, and establish them by clear and convincing proof. *Renshaw v. Switzer*, 6 Mont. 464, 13 Pac. 127; *Wulf v. Manuel*, 9 Mont. 286, 23 Pac. 723; *Mattingly v. Lewishohn*, 13 Mont. 508, 35 Pac. 111; *Strasburger*

v. Beecher, 20 Mont. 143, 49 Pac. 740; *Hammer v. Milling Co.*, 130 U. S. 291, 9 Sup. Ct. 543, 32 L. Ed. 964. He assumes the burden of pleading and proving that the prior owner has done none of the acts which, under the statute, he may do to preserve his right. The allegation quoted from the answer is not sufficient. True, it negatives the doing of any "work or labor" upon the Clementh claim during the years 1889, 1890, and 1891, and this constructively excludes the idea that any expenditure was made in this way on any adjoining ground for the benefit of the claim; but the terms "work" and "labor" are not synonymous with the term "improvements." The former have reference to prospecting and excavating for the purpose of development; while the latter, though comprehensive enough to include everything signified by the former, has reference also to tangible, material additions to the claim in the way of machinery, buildings, and other structures put in place or erected for the purpose of developing the property and extracting minerals contained in it. Therefore, merely to negative in the pleading that \$100 worth of labor has been done during the year, and to establish this by proof, be it ever so clear and convincing, is not sufficient to warrant a finding of a forfeiture. The pleading must also negative the second alternative, so as to admit proof showing a non-performance in that particular. The allegations of the answer are directed to the first alternative only. Under them, proof would not be admissible to show that plaintiffs did not, during the years named, put upon the surface of the claim, or upon adjoining ground, machinery, buildings, or other structures which were designed to be used and could be used for the purpose of aiding in the extraction of ores from the Clementh claim. In this respect, therefore, the statements in the answer are insufficient, and the demurrer was properly sustained.

The demurrer was also properly sustained on another ground, for not only was it incumbent upon defendants to properly plead and prove a forfeiture on the part of plaintiffs, but also to allege facts sufficient to show that they were themselves entitled to demand a patent from the government. They attempt to allege the facts showing their location of the Minnehaha lode, but fail in two particulars to show a valid location. The statute (Comp. St. Mont. 1887, div. 5, § 1477) provides: "Any person or persons who shall hereafter discover any mining claim upon any vein or lode bearing gold, silver * * * or other valuable deposits, * * * shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery or location is made, a declaratory statement thereof, in writing, on oath made before some person authorized by law to administer oaths, describing such claim in the manner provided by the laws of the United

States." It is nowhere alleged in the answer that the required declaration was ever made and filed with the recorder of Lewis and Clarke county or elsewhere. The allegation on this subject is that Sla and Burridge "did, on the 23d day of July, 1892, cause a record notice to be made." This statement is at best a conclusion, and, in the connection in which it is made, can be held to mean no more than that some sort of a notice in writing was made. It does not suggest that the notice was ever verified, or put upon record in the proper county. Nor is it aided in any respect by the subsequent averment that defendants have fully complied with the laws of the United States and the state of Montana, and are entitled to a patent. This is but a conclusion, and embodies no fact to supply the omissions made in the foregoing allegations. The answer, therefore, fails to show that defendants so connected themselves with the government that they may assert title in themselves at the time plaintiffs' patent was issued, and that their rights have been injuriously affected by an erroneous application of the law by the officers of the land department. No matter what notice should have been given by these officers, the defendants do not disclose facts sufficient to show that they were other than strangers to the title, and cannot be heard to complain.

The defendants, in their reply brief, argue that the questions raised by the plaintiffs as to the sufficiency of the allegations contained in the affirmative answer should not be considered, because the demurrer denominates it a "defense" instead of a "counterclaim," and does not distinctly specify objections to it, as required by section 715 of the Code of Civil Procedure. This part of the answer is in form and substance an equitable counterclaim, and not a defense. Bliss, Code Pl. § 349. It properly belongs to the class of counterclaims mentioned in section 714 of the Code of Civil Procedure, as distinguished from defenses and counterclaims mentioned in section 711, and should have been attacked accordingly. Both counsel and the trial court, however, treated the demurrer as an attack upon the pleading as a counterclaim instead of a defense. It is, therefore, of no moment in this court that the demurrer does not correctly name the pleading which it sought to attack.

Nor can counsel be sustained in the contention that the demurrer is insufficient in that it does not point out specific objections to the answer. Section 715, supra, provides that the demurrer to a counterclaim may specify the objections to it in the same way as when interposed to a complaint. Section 681 of the Code of Civil Procedure provides that, when the demurrer to a complaint is upon the ground mentioned in subdivision 6 of section 680, which enumerates the grounds of demurrer to a complaint, the objection may be stated in the language of

that subdivision. The judgment of the district court is affirmed. Affirmed.

PIGOTT, J., concura. WORD, J., not sitting.

OWEN v. POMONA LAND & WATER CO. (L. A. 637.)

(Supreme Court of California. June 15, 1900.)

APPEAL AND ERROR—NEW TRIAL—REVIEW—RAILROAD LANDS—CONFLICTING CONGRESSIONAL GRANTS—VENDOR AND PURCHASER—SALE—RESCISSION—TENDER—WAIVER—LACHES—PROMISE TO PERFORM—MATTERS NOT IN ISSUE—ERROR—APPRAISEMENT—STIPULATION—FAILURE OF TITLE—VALUE OF IMPROVEMENTS—HARMLESS ERROR—EVIDENCE.

1. Under Code Civ. Proc. §§ 656, 657, defining a new trial as "a re-examination of an issue of fact in the same court after a trial and decision," the supreme court, on appeal from an order denying a motion for a new trial, may review questions as to the sufficiency of the evidence to support the findings and errors of law excepted to, occurring during the trial, but cannot consider the sufficiency of the complaint, nor whether or not the findings support the judgment.

2. By Act Cong. July 27, 1866, land was granted to a railroad company, and by Act Cong. March 3, 1871, the same land was granted to a different railroad company. By decisions of the supreme court, the railroad company claiming under the prior grant was held to be the owner of the land. Held, that a grantee of the company claiming under the subsequent grant obtained no title, and a purchaser from it was entitled to rescind a contract of sale, irrespective of acts of congress attempting to cure title in such company.

3. Under Civ. Code, § 1501, providing that all objections to the mode of an offer of performance are waived by the creditor if not stated when the offer is made; and under Code Civ. Proc. § 2070, providing that a person to whom a tender is made must specify at the time any objection he may have, or be deemed to have waived it,—where a grantee in a contract of sale tendered to his grantor possession of land the title to which had failed, but coupled with the tender a condition that the grantor should first pay him the value of improvements thereon, to which condition the grantor did not object at the time, the defect in the tender was waived, and the rescission was good.

4. Where a grantor's title was derived from one of two conflicting congressional grants, the other of which had been held to be paramount by decisions of the federal supreme court, the fact that this grantee waited from January, 1894, to August, 1896, before he rescinded the contract of sale for failure of title, in reliance on the grantor's repeated promises to obtain an act of congress to cure the defect, and to fix up the title, was not such an unreasonable delay as to amount to laches.

5. Where, in a suit to rescind a sale of real estate for failure of title, and of stock in a corporation for misrepresentation, the complaint alleged that plaintiff had no knowledge of such defect, and relied on defendant's representations and guaranties, which allegations were not denied in the answer, the trial court was justified in finding that such allegations were true.

6. Where, in a suit to recover the value of improvements placed on real estate, the parties stipulated to submit the valuation to appraisers, and such appraisement and stipulation were offered in evidence, on which the

court based its finding of value, complaint could not be made on appeal that there was no evidence to support the finding.

7. Civ. Code, § 3306, providing that, in case of bad faith, the detriment caused by the breach of an agreement to convey real estate shall be the difference between the price agreed and the value of the estate at the time of the breach, did not apply to an action to rescind a contract of sale of land for failure of title, and plaintiff was entitled to recover the value of improvements placed on the real estate, regardless of whether or not they enhanced the value of the real estate in a corresponding amount.

8. Where the parties to a suit to rescind a contract for the sale of land and corporate stock stipulated that defendant corporation had published a prospectus of its lands, one of which plaintiff received, it was harmless error to admit the stipulation in evidence, over defendant's objection that the prospectus was incompetent, where the prospectus itself was not offered.

9. In a suit to rescind a contract for the sale of real estate for failure of title and of corporate stock for misrepresentation, the court properly admitted in evidence an application for the purchase, signed by plaintiff and defendant corporation, which contained representations as to the stock, and recited that a portion of the purchase price of the land and stock was paid, and that the balance was to be paid within 10 days after certificate of title, as the recitals tended to prove an agreement to give a good title, and the application was properly construed with the contract.

10. Where a complaint to rescind a sale of real estate for failure of title alleged a tender of the balance due on the purchase money, which the answer did not deny, and the parties had stipulated that such tender was in fact made, it was not error to exclude evidence offered by defendant to show that the tender was but a mere pretense.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by John A. Owen against the Pomona Land & Water Company to rescind a sale of land and corporate stock for failure of title and breach of warranty. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John S. Chapman and A. P. Nichols, for appellant. Otis & Gregg and John A. Owen, for respondent.

COOPER, C. This action was brought to rescind and cancel a contract for the sale of certain land and stock in a corporation, and to recover the amount paid by plaintiff upon the purchase price, with interest, and the value of certain improvements and amounts paid for taxes, and for a decree that the plaintiff has a lien upon the premises for the amount that may be found to be due. Plaintiff recovered judgment, and defendant made a motion for a new trial, which was denied. This appeal is from the order denying defendant's motion, and comes here on the judgment roll and a statement of the case.

Upon this appeal we cannot consider the sufficiency of the complaint, nor whether or not the findings support the judgment. We can only consider questions as to the suffi-

ciency of the evidence to support the findings and errors of law occurring during the trial, and excepted to by the defendant. *Brisson v. Brisson*, 90 Cal. 327, 27 Pac. 186; *Water Co. v. Gage*, 108 Cal. 243, 41 Pac. 290. As the discussion is thus narrowed, we will consider the main propositions in what we deem to be their regular order, regardless of the arrangement in the briefs of counsel.

The defendant had, by agreement in writing, covenanted to convey to plaintiff, by good and sufficient conveyance, the lands described in the complaint, and certain corporate stock representing 2.032 inches of water, at the time therein stated, and upon payment of the amount therein named. Under this agreement the plaintiff went into possession of the land described in the contract, erected valuable improvements thereon, and made certain partial payments therefor. The complaint alleges that the title of defendant to the land has failed, that it could not convey a valid title, that plaintiff rescinded the contract, and that he has been damaged in a large amount. One of the most important questions to be determined is as to whether or not the title of defendant failed, or was not a valid and sufficient one. The court found that the defendant "did not have, has not now, and never did have, any valid title to the lands described in said contract, or to any part thereof." Several pages of defendant's brief are devoted to the argument that this finding is not supported by the evidence. The finding is based upon a stipulation agreed to by the defendant, and introduced in evidence, which is as follows: "That the lands involved in this action are part of those included in the provisions of the act of congress of July 27, 1866, purporting to grant them to the Atlantic & Pacific Railroad Company, and also in the act of congress of March 3, 1871, purporting to grant them to the Southern Pacific Railroad Company; that, under the supposed authority of said act of March 3, 1871, a patent was issued by the president of the United States, April 14, 1879, purporting to grant said lands to said Southern Pacific Railroad Company, which patent is recorded in the office of the recorder of said San Bernardino county, and which patent was in the usual form; that the said Southern Pacific Railroad Company on the 18th of May, 1882, entered into a contract with one M. L. Wicks to convey to him the lands in question; that afterwards said Wicks assigned said contract to defendant, who afterwards complied with the terms thereof, and said Southern Pacific Railroad Company, on the 18th of November, 1886, executed a deed which purports to convey said lands to defendant; said deed is recorded in Book 51 of Deeds, at page 16, in said recorder's office (defendant's Exhibit I); that defendant's only right and title to said lands is that derived under the chain of title above set forth, which such remedial legislation, if such legislation is necessary to the establish-

ment of title of defendant, as may be found in any act of congress applicable to the case."

It will be seen from the stipulation that defendant's only title is derived from the Southern Pacific Railroad Company, and that the lands were included in the prior grant of congress of July 27, 1866, granting them to the Atlantic & Pacific Railroad Company.

It has been held by the supreme court of the United States that the title to those lands passed to the Atlantic & Pacific Railroad Company by the prior grant, and that the Southern Pacific Railroad Company had no title thereto (*U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; *Id.*, 146 U. S. 615, 13 Sup. Ct. 163, 36 L. Ed. 1104); and it was expressly so held by this court in *Railroad Co. v. Painter*, 113 Cal. 251, 45 Pac. 320. It is not necessary to decide the question as to whether the defendant's title could have been cured and confirmed under the acts of congress of 1887, or of March 2, 1896. It does not appear that it was so cured or confirmed, and it was not the duty of plaintiff to take any steps to perfect defendant's title. Under the contract the plaintiff was entitled to a valid title. He was entitled to a title unincumbered, and without any palpable defects, free from litigation and grave doubts. *Easton v. Montgomery*, 90 Cal. 814, 27 Pac. 280; *Turner v. McDonald*, 76 Cal. 179, 18 Pac. 262.

Defendant devotes a large part of his brief in endeavoring to show that finding numbered 26 is not supported by the evidence. This finding is to the effect that plaintiff, after discovering the defect in defendant's title, rescinded the contract, and tendered to defendant a reconveyance and possession of the property, upon the defendant paying plaintiff the amount due him for improvements and payments made on account of the purchase. The finding is quite lengthy, covering some seven folios of the transcript, and contains all the probative facts which are claimed to show that plaintiff rescinded the contract. It is claimed that the evidence is insufficient to justify the finding. We have examined the evidence, and we think it sufficient. The probative facts claimed to show that the contract was rescinded are fully found and set forth. As to whether or not they did amount in law to a rescission cannot be considered on this appeal. It is found that no objection was at any time made as to the character or form of the rescission. When plaintiff tendered defendant possession upon conditions, if there were objections to the conditions the defendant waived them by not specifying them. *Civ. Code*, § 1501; *Code Civ. Proc.* § 2076; *Kofoed v. Gordon*, 122 Cal. 320, 54 Pac. 1115.

It is claimed that the plaintiff did not rescind in time, and was therefore guilty of laches. The court found in the conclusions of law that plaintiff had not been guilty of laches in the rescission of the contract. This conclusion is based upon the other facts

found, and upon the facts admitted by the pleadings, and we think is fully justified. The complaint alleges that on the day fixed in the contract, to wit, January, 1894, plaintiff offered to, and was ready and willing to, make final payment for the said lands upon the defendant giving him a good title; that immediately thereafter defendant "commenced to assure plaintiff, and from time to time promised him, it could and would acquire title to said lands for plaintiff; that plaintiff need have no concern or do anything about it, that it would be all right"; that plaintiff relied upon such promises and assurances, and believed that defendant would, under the acts of congress, perfect its title to said lands. These promises are expressly admitted by defendant in its answer. The testimony of plaintiff is that the reason he did not rescind sooner was that he believed and relied upon these promises. We do not think, under the circumstances, that the delay was unreasonable. *Freeman v. Kleffer*, 101 Cal. 254, 35 Pac. 767; *Callender v. Colegrove*, 17 Conn. 28.

The fifth finding is to the effect that the plaintiff had no knowledge of the title to said land or the amount of water represented by the stock agreed to be conveyed to plaintiff, except as he was informed of the same by the defendant. It is said that there is no evidence in the record to support this finding. Plaintiff testified that he had no knowledge of the defect in the title until some time in 1898. The complaint alleges that plaintiff had no knowledge of the title except as informed by defendant, and that he relied upon the representations and guaranties of defendant. The answer does not deny that plaintiff had no knowledge of the amount of water represented by the stock, nor does it deny that plaintiff relied upon the representations as to title made to him by defendant. The finding that the value of the improvements made by the plaintiff upon the land was \$6,250 is challenged as being unsupported by the evidence. The parties entered into a written stipulation that appraisers named should appraise and fix the value of the improvements. The appraisers did fix the value at \$6,250, and the stipulation and appraisal were admitted in evidence. The evidence supports the finding.

In the seventh finding it is found that by reason of the improvements the premises were worth \$6,250 more than they would have been without the improvements. It is earnestly urged that this finding is not supported by the evidence. Under the view we take of the case, the finding is wholly immaterial. If the plaintiff in good faith, relying on his contract, and without fault on his part, placed improvements upon the land of the value of \$6,250, and the defendant failed to carry out its contract under such circumstances as to justify the plaintiff in rescinding, then plaintiff was entitled to recover the value of his improvements, regard-

less of the question as to whether or not they made the place worth \$6,250 more than it would have been without them. *Maupin, Real Est. p. 668; 2 Suth. Dam. (2d Ed.) §§ 587, 589, and notes; Gates v. McLean, 70 Cal. 50, 11 Pac. 489; Worley v. Nethercott, 91 Cal. 517, 27 Pac. 767.*

This is not an action merely to recover damages for the breach of an agreement to convey, and therefore section 3306, Civ. Code, does not lay down the rule as to the amount to which plaintiff is entitled to recover in this action.

To discuss the many objections to the 37 separate findings in this record would serve no useful purpose. We have discussed the principal and most vital findings, and as to the others they are supported by the evidence in all cases where they are material. We would not be justified in reversing a case because of insufficiency of evidence to sustain a finding which is not material.

During the trial the parties stipulated "that the pamphlet filed herewith, marked 'Plaintiff's Exhibit B,' entitled, 'Southern California: Pomona, Illustrated and Described,' was published by the defendant in 1888, and circulated by it from that time for several years among those visiting Pomona and contemplating the purchase of lands near that place, and that plaintiff received from the defendant one or more copies thereof before January 14, 1891." Plaintiff offered in evidence the stipulation, and defendant objected upon the ground that the pamphlet was irrelevant and immaterial, and the objection was overruled. It does not appear that the pamphlet was ever offered or read in evidence. The objection was to the stipulation, and without the pamphlet the stipulation certainly was harmless. The record does not even show that the stipulation was read in evidence. A similar stipulation was made with regard to an application to purchase the lands, which application was signed by plaintiff and the agents of defendant, marked "Plaintiff's Exhibit C." Plaintiff offered, in connection with the last stipulation, said Exhibit C, and defendant objected to both the stipulation and the exhibit. Conceding that Exhibit C was read in evidence, which does not appear from the record, we do not think the ruling error. It tended to show that defendant represented to plaintiff that the stock would convey or carry with it 2.032 inches of water. It showed when the first \$150 was paid upon the contract to purchase. It showed that the first payment was to be made within 10 days after certificate of title. This certainly tended to prove the agreement to give a good and sufficient title. The application of plaintiff to purchase was made and dated on the same day as the contract or agreement to sell. It described the same land, and was in fact part of the same transaction. Both the application and the contract should be read together. If they are in any respects inconsistent, they should, if possible, be recon-

ciled. If they are precisely the same, then no injury could possibly have been done by admitting the application in evidence.

When plaintiff was on the stand as a witness the defendant asked him several questions in cross-examination as to where he got the money with which to make the alleged tender in August, 1896, and if in fact he did not have one of the directors of the bank go with him with the money to make a mere show of a tender. The court properly sustained objections to those questions. The tender was alleged in the complaint, and not denied in the answer. And it was stipulated "that one several offers, tenders, and propositions purporting to have been then and there made were in fact so made by the respective parties hereto." We have examined the other alleged errors of law, and we find no error to the injury of defendant that would justify a reversal of the case. We advise that the order be affirmed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(129 Cal. 14)

In re HICKEY'S ESTATE. (S. F. 1,900.)¹
(Supreme Court of California. June 15, 1900.)
EXECUTORS AND ADMINISTRATORS—ACCOUNTING—VACATION OF ORDERS—OBJECTIONS TO JURISDICTION.

Objections to the jurisdiction to vacate an order settling the final account of an administrator and distributing the estate are not sustained by proof that the notice of the motion for the order was ambiguous in not referring specifically to the order intended to be vacated, when two were made on the same day; that no affidavit of merits accompanied the notice; and that the applicants failed to prove that the order vacated was taken against them "either through mistake, inadvertence, surprise, or excusable neglect," as provided in Code Civ. Proc. § 473,—since such facts go only to the sufficiency of the showing, and not to the jurisdiction.

Department 2. Appeal from superior court, city and county of San Francisco.

In the matter of the estate of Emmet Martin Hickey, deceased. From two orders of the court, A. C. Freese, administrator, appeals. Orders affirmed.

J. D. Sullivan, for appellant. E. C. Harrison, for respondent.

McFARLAND, J. The transcript shows two appeals by A. C. Freese, administrator of the above estate,—one from an order of the court made September 23, 1898, and filed on the 30th of said month, settling the final account of the administrator; and the other, made and filed at the same time, setting apart the residue of the estate to the minor heirs, William E. Hickey and Francis T. Hickey. No objection is made to the correctness of these orders, provided the court had jurisdiction to make them; but the contention of

¹ Rehearing denied July 14, 1900.

appellant is that the court had theretofore, on December 21, 1896, made its order and decree settling the final account and distributing the estate; that it had subsequently made an order setting aside and annulling the said former order and decree, and that the order setting aside the same was without jurisdiction and invalid; and that, therefore, the court had no jurisdiction to make the orders appealed from.

The order vacating the original order and decree was made, on motion of respondents, under section 473, Code Civ. Proc., which expressly gives the power to a court to relieve a party from a judgment or order taken against him on account of his "mistake, inadvertence," etc., provided that application therefor be made within a reasonable time, not exceeding six months after the judgment or order; and, as the application in the case at bar was made in the same month in which the original order was made, and within a few days thereafter, there is no question as to reasonable time. The court, therefore, clearly had general jurisdiction to make the order. The objections of the appellant to the validity of the order are: First, that the notice of the motion for the order was ambiguous in this: that on said 21st of December, 1896, another order had been made in the estate of Hickey decreeing that due notice had been given the creditors, and that the notice of motion to vacate might be construed as referring to the order decreeing notice, and not to the order settling the account; second, that no affidavit of merits accompanied the notice; and, third, that respondents failed to prove that the order sought to be vacated was taken against them "through their mistake, inadvertence, surprise, or excusable neglect." Waiving the question whether upon the whole proceeding, if the order were now being reviewed on appeal, there were any of the alleged defects in the matters objected to, still the objections go only to the sufficiency of the showing, and not to the jurisdiction. As there is no appeal allowed from a probate order vacating a former order, it was evidently supposed by the code makers that an appeal from the final order subsequently made would afford ample remedy. See *In re Hickey's Estate*, 121 Cal. 378, 53 Pac. 818. The orders appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(129 Cal. 17)

ST. VINCENT'S INSTITUTE FOR THE INSANE v. DAVIS. (S. F. 1,231.)¹

(Supreme Court of California. June 15, 1900.)

HUSBAND AND WIFE—HOSPITAL—DEMAND BY HUSBAND—REFUSAL—GOOD FAITH—BURDEN OF PROOF—NECESSARIES—LIABILITY OF HUSBAND.

1. Under Civ. Code, § 174, providing that, if a husband neglects to support his wife, any person may supply her with necessities, and recover from the husband therefor, where de-

fendant's insane wife was taken to a hospital, to which he went and demanded that she be delivered to him, which the hospital authorities refused to do, the burden of proving that the demand was not made in good faith was on the plaintiff hospital; and, failing to show bad faith, it could not recover for necessities furnished her.

2. Under Civ. Code, § 174, providing that, if a husband neglects to support his wife, any person may supply her with necessities, and recover from the husband therefor, where an insane wife was taken to a hospital, to which the husband went and demanded that she be delivered to him, which the hospital authorities refused to do, there was not such neglect on the part of the husband as to warrant a recovery from him for necessities furnished the wife at such hospital.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by St. Vincent's Institute for the Insane against John T. Davis for necessities furnished to his wife. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

T. Z. Blakeman, for appellant. Reddy, Campbell & Metson, for respondent.

TEMPLE, J. Among other things, it is alleged in the complaint that plaintiff has continuously since the 1st day of June, 1894, at the instance and request of defendant, kept and cared for the insane wife of defendant, providing for her suitable boarding, lodging, clothing, washing, medicine, and medical and other attendance, the reasonable value of which is \$12 per week, and \$100 per year for clothing. In the answer all the material allegations of the complaint are denied, and in addition it is alleged that, during all the times in the complaint mentioned, defendant has been able, willing, and anxious to provide for his said wife at his own home, in California, and on the 28th of June, 1894, demanded of the plaintiff that it deliver to him the person of his said wife, and that plaintiff, without cause or excuse, refused to comply with said demand. The court found as a fact that plaintiff had kept and cared for the wife of the defendant as alleged, except that the court did not find that such service was rendered at the request of the defendant, or that he promised to pay its reasonable or other value. It found, also, that defendant "on the 28th day of June, 1894, desiring in good faith to care for his said wife elsewhere, demanded of plaintiff, at its institution in the city of St. Louis, that said plaintiff forthwith deliver to him said insane wife; that said plaintiff, without legal cause or excuse, refused to comply with said demand, and against the will of defendant has since retained the said wife of defendant in its custody." Judgment was for defendant.

Upon a motion for a new trial, it was contended on behalf of plaintiff that there was no proof that the offer of defendant to provide for his wife elsewhere was made in good faith. This contention cannot be sustained. The burden was upon the plaintiff.

¹ Rehearing denied July 14, 1900.

Some suspicion was cast upon the motives of the defendant, but it cannot be said that there was no evidence tending to show good faith.

Section 174 of the Civil Code provides that, when a husband fails to make adequate provision for the support of his wife, then (except in certain cases) any person may supply her with necessaries, and recover the value thereof from the husband. Whoever supplies such necessaries must, in order to recover, show such neglect on the part of the husband. That was not shown in this case.

The plaintiff was not injured by the refusal to admit in evidence the judgment rendered in the United States circuit court. Had it been competent evidence of all that plaintiff claims for it, its case would not have been aided. Admit all these facts, and it still has no case. Judgment and order affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

129 Cal. 20

ST. VINCENT'S INSTITUTION FOR THE INSANE v. DAVIS. (S. F. 1,282.) ¹

(Supreme Court of California. June 15, 1900.)

HUSBAND AND WIFE—INSANE WIFE—CARE IN HOSPITAL—KNOWLEDGE OF HUSBAND—NECESSARIES—HUSBAND'S LIABILITY—ABANDONMENT—RELIEF BY STRANGER—EVIDENCE—COPY OF LETTER—OBJECTION—PRESUMPTION—DEPOSITION—TRIAL.

1. Under Civ. Code, § 174, providing that, where a husband fails to support his wife, any person may supply her with necessaries, and recover therefor from the husband, the fact that a husband did not know that his insane wife was being cared for in an institution for the insane did not relieve him from liability for her board and clothing therein.

2. Under Civ. Code, § 174, providing that, where a husband fails to support his wife, any person may supply her with necessaries, and recover therefor from the husband, where a resident of the state left his demented wife at a hotel in a small town in Illinois, in a helpless condition, he was liable to a person who supplied her with necessaries, though such person did not know of the husband's existence, or that the woman was married.

3. An objection to the introduction of a copy of a letter addressed to defendant, on the grounds that it was incompetent, irrelevant, and immaterial, and that there was no evidence that the person who mailed the letter knew the defendant's address, or that defendant received it, was not specific enough to predicate error on the ground that it was inadmissible as being a copy.

4. The uncontroverted testimony of a witness that in 1877 she was secretary of plaintiff corporation, and knew that an offered copy was a copy of a letter written by the plaintiff, "addressed to defendant, mailed to him at his address, postage prepaid," was sufficient to support a finding that witness knew the address of defendant, and that the letter was properly addressed and mailed to him.

5. Under Code Civ. Proc. § 1963, subd. 24, providing that a letter duly directed and mailed shall be presumed to have been received unless its receipt is controverted, where a husband had previously kept his insane wife at a hospital, and had corresponded with the officials with regard to her, it would be presumed that a letter directed to him by the hospital author-

ities was received by him; he not denying its receipt.

6. Under Code Civ. Proc. § 2032, providing that, on the completion of a deposition, it must be carefully read to the witness, it is no objection to a deposition taken outside the state that the certificate fails to show that the deposition was read to a witness, as such statute applies only to depositions taken in the state.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by St. Vincent's Institution for the Insane against John T. Davis for necessaries furnished to his wife. From a judgment in favor of plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

Reddy, Campbell & Metson, for appellant. T. Z. Blakeman, for respondent.

TEMPLE, J. Plaintiff sues to recover for boarding and clothing the insane wife of defendant from June 28, 1891, to June 2, 1894. Plaintiff recovered judgment, and this appeal is from the judgment, and an order refusing a new trial.

The first contention is that the evidence was insufficient to sustain the finding that the service was rendered on the credit of defendant. It is argued that it does not appear that defendant was even aware that she was being kept and provided for by plaintiff at all. Even if he had no such knowledge, it would not follow that the defendant is not liable, or that the service was not rendered at his implied request. There is evidence which tends to prove that defendant in 1877 took his wife from the institution where he had himself placed her, and that within a day or two thereafter she was found, deserted and destitute, in a small town in the state of Illinois. She was at the time so far demented that she could give no account of herself. She did not know her name, or where she came from. She was found at a hotel, with a trunk, and could not have got there with the trunk alone. The presumption is very strong that the defendant left her there, intending that her identity should be lost, that she might no longer be a charge upon him. Under such circumstances, the husband would be liable for necessaries, even though the parties supplying them did not know of his existence, or that she was a married woman. Section 174, Civ. Code; *Davis v. Institution for Insane*, 9 C. C. A. 501, 61 Fed. 277, and cases there cited.

Appellant contends that the finding to the effect that the service was rendered at the request of the defendant is supported only by the copy of a letter addressed to the defendant in October, 1877, by the president of the plaintiff, which is a corporation, and that such copy was improperly admitted. The objections made to the evidence were that it was incompetent, irrelevant, and immaterial, and "there was no evidence that the person who mailed the letter knew the address of J. T. Davis, and there was no

¹ Rehearing denied July 11, 1900.

evidence that J. T. Davis ever received the letter." Supposing the letter to have been received, it was neither irrelevant, incompetent, nor immaterial. The objection is, therefore, in reality, that it was not shown that defendant ever received the letter of which it was a copy. As to its being a copy, rather than the original, no such objection was specifically made; and as it is quite probable that, if such objection had been made at the trial, the defect could have been cured, we are not inclined to entertain it now.

Sister Isadore Minter testified that she was the secretary of the plaintiff in 1877, and she knew the copy offered was a copy of a letter written by the president, "addressed to J. T. Davis, mailed to him at his address, postage prepaid." This is a brief statement, and the evidence might have been amplified by a cross-examination. We may imagine that it could have been made to appear upon such cross-examination of the witness that she did not know the address of defendant, or even that she did not know to what point the letter was sent. But that she did is implied, and we cannot disturb the finding. Davis had himself had his wife boarded and cared for at the hospital before August, 1877; and the presumption is that he had corresponded with the Sisters upon the subject, and that his address was well known to them. The letter having been properly addressed and mailed to him, it is presumed that he received it. Subdivision 24, § 1962. Code Civ. Proc.

Objection is made to the reception in evidence of certain depositions taken for plaintiff at St. Louis, Mo., on the ground that the certificate fails to state that the deposition, when completed, was read over to the witness, and corrected by the witness if he so desired, as required by section 2032 of the Code of Civil Procedure. That section applies only to depositions taken in this state, and therefore does not reach this case. The judgment and order are affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

SIMON et al. v. MATSON et al.

(Supreme Court of Nevada. June 28, 1900.)

APPEAL AND ERROR—NOTICE OF APPEAL—SERVICE BY MAIL—SUFFICIENCY—TRIAL—EVIDENCE.

1. Under Civ. Prac. Act, §§ 497, 498, authorizing service of notices and other papers by mail by deposit in the post office and extending the time of such service one day for each 25 miles distance, service of a notice of appeal is completed on its deposit in the post office, since the extension of time provided does not apply to a notice of appeal for which no such time to enable action to be taken thereon is necessary.

2. Where, to recover for ore, it was necessary to prove that it was taken from a certain mine, and the only witness on such point, on being recalled, and shown a diagram of an

adjacent mine, testified that it was taken from such adjacent mine, a verdict for the plaintiff was contrary to the evidence, and a judgment based thereon must be reversed.

Appeal from district court, White Pine county; G. F. Talbot, Judge.

Action by Gus Simon and others against William Matson and others. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

F. X. Murphy and E. S. Farrington, for appellants. Thomas Wren, for respondents.

BELKNAP, J. Respondents move to dismiss the appeal for the reason that the undertaking on appeal was filed before the copy of the notice of appeal was served. The action was tried at Ely, in White Pine county. One of the attorneys of appellants resides at that place. The attorney for respondents resides at Reno, in Washoe county. The distance from Ely to Reno is upward of 400 miles. There is a regular mail communication between the places. The attorney for appellants filed the notice of appeal December 13, 1898, and mailed a copy, postage paid, at Ely, on the same day, addressed to the respondents' attorney at Reno. There is no contention as to the facts. The question is, at what time did the service take place? The provisions of the civil practice act applicable, are as follows:

"Sec. 497. Service by mail may be made, when the person making the service and the person upon whom it is to be made, reside at different places, between which there is a regular communication by mail.

"Sec. 498. In case of service by mail, the notice or other paper shall be deposited in the post office, addressed to the person upon whom it is to be served, at his place of residence, and the postage paid. And in such case the time of service shall be increased one day for every twenty-five miles distance between the place of deposit and place of address."

Sections 3592, 3593, Comp. Laws.

Appellants claim that the notice was served by depositing a copy in the post office. Respondents contend that, as the service was by mail, it was not complete until 18 days from the time of the deposit, as the statute increases the time of service one day for each 25 miles of the distance between the place of deposit and place of address. If respondents' contention is the law, the notice of appeal was not served until after the filing of the undertaking upon appeal, and the appeal should be dismissed. When the deposit is made in the post office under the provisions above set forth, nothing further is required, and the service is complete. The purpose of the statute in extending the time of the service one day for every 25 miles between the place of deposit and the place of address is to give the party receiving the notice or other paper time to act upon it if action is required. No time is required for

action upon a notice of appeal by the notice, and the statute does not contemplate such a case. The motion is denied.

Numerous specifications of error are made. In the view that we have taken it will only be necessary to consider the question whether the verdict of the jury is contrary to the evidence. It appears that the Comanche mining claim was located in the year 1878; that some time thereafter the Homestake mining claim was located. The claims run in a northerly and southerly direction. Between them was an unappropriated piece of mining ground about 300 feet in width at its southerly end, running to a point at the north, caused by the convergence of the west line of the Homestake, and the east side line of the Comanche. This piece of ground, apparently triangular in shape, was located by the plaintiffs as the Last Chance mining claim. They claimed that the 32 tons of ore in controversy were taken out of this ground. It is admitted that, to have entitled them to the verdict, it was incumbent upon them to have established the fact by the testimony. Mr. Roberts, one of the plaintiffs, was the only witness who testified in their behalf in this respect. In his testimony in chief he said that the ore was taken out of the Last Chance mine in the year 1897, but, upon being recalled, and shown the diagram of Comanche mine as surveyed by Mr. Pardy, October 11, 1898, testified that "the ore in dispute was taken from that part of the ground which is represented on this map by the word 'ore' written in pencil, just west of the east side line" (of the Comanche). Considering the testimony as a whole, it was contrary to the verdict rendered, and the judgment must be reversed, and cause remanded for a new trial. It is so ordered.

BONNIFIELD, C. J., and MASSEY, J., concur.

CLARK v. CLARK.

(Court of Appeals of Colorado. June 11, 1900.)
DIVORCE SUIT—ALIMONY—SEPARATE ACTION—
APPEAL—JURISDICTION.

Where a husband sued for divorce, and the wife, in a separate proceeding, secured a judgment for alimony pending the divorce suit, from which judgment the husband appealed to the district court, but after the husband had obtained a divorce in the county court the alimony proceeding was retransferred, by agreement, from the district court to the county court for determination, together with a question as to the custody of children, such alimony proceeding was an incident to the divorce suit, and the court of appeals had no jurisdiction to review the same.

Appeal from Arapahoe county court.

Suit for divorce by Newton Clark against Emma Clark. From a judgment for alimony in favor of defendant, plaintiff appeals. Dismissed.

E. I. Stirman, for appellant.

BISSELI, P. J. This action for divorce was begun in the county court of Arapahoe county, and a decree of divorce prayed. There was an answer and a cross complaint. Apparently preceding these proceedings there was an application for alimony, based on a separate proceeding, setting up divers facts, and thereon the court ordered the plaintiff to pay \$20 per month during the litigation. From this order thus made in the county court an appeal was taken, under the statute, to the district court. While this particular feature of the controversy was pending in the district court the main divorce suit was tried in the other tribunal, and a verdict returned in favor of the plaintiff, adjudging the defendant guilty and the plaintiff not guilty, as appeared in the cross complaint. After this verdict, by stipulation of counsel and of parties, the alimony portion of the suit was retransferred to the county court for determination. Therein further proceedings were had respecting alimony and the custody of the children and the final decree. Whether the latter statement be or be not true, we do not verify by an examination of the record, since it is wholly unimportant to the determination of this appeal. The statement exhibits the fact that the order concerning alimony was made in a suit brought to obtain a divorce, and wherein the plaintiff became entitled to his decree by the verdict of the jury. The claim for alimony, and the court's order respecting it, were incidents to the suit; and this court, therefore, under the recent decisions, is totally without jurisdiction. *Mercer v. Mercer* (Colo. App.) 57 Pac. 750; *Elckhoff v. Elckhoff* (Colo. App.) 59 Pac. 411; *Mercer v. Mercer* (Colo. Sup.) 60 Pac. 349. Therein all matters presented by this appeal have been determined adversely to the appellant, and it has been held by both courts that in an action of this description, and under these circumstances, this court is without jurisdiction to review the decree or the judgment for alimony. The appeal is therefore dismissed. Dismissed.

CRYSTAL PALACE FLOURING-MILLS CO. v. BUTTERFIELD.

(Court of Appeals of Colorado. June 11, 1900.)
STATUTE OF FRAUDS—SALE OF GOODS—SUFFICIENCY OF WRITING—TENDER—DAMAGES—PLEADING.

1. Where a contract for the sale of grain, evidenced by letters and telegrams between the parties, is definite as to the kind and quantity to be sold, the price to be paid, and the time and place of delivery, it is a sufficient memorandum in writing subscribed by the parties to be charged, required by Gen. St. § 1521, when no part of the goods is accepted and received by the buyer, and no part of the purchase money paid.

2. No tender of the price is necessary to enable a buyer to maintain a suit to recover damages for the seller's failure to deliver the goods, where the contract of sale gives the

seller no right to demand payment in advance, and the goods would not have been delivered even if a tender had been made.

3. A complaint alleging that, by reason of a seller's breach of his contract to deliver a certain quantity of grain at a certain price, the buyer has been deprived of divers profits which otherwise would have accrued from the delivery thereof, and has sustained damages in certain sums, without alleging what the market value was at the agreed time and place of delivery, is good as against a general demurrer, or a motion to exclude evidence of loss of profits.

Appeal from district court, Arapahoe county.

Action by the Crystal Palace Flouring-Mills Company against L. Butterfield. From a judgment for defendant, plaintiff appeals. Reversed.

F. E. Gregg, for appellant. Rogers & Stair, for appellee.

THOMSON, J. When this case came on for trial the court sustained an objection by the defendant to the introduction of any evidence, and entered judgment of dismissal against the plaintiff. The ground of the motion, and the reason assigned for the judgment, were that the complaint did not state facts sufficient to constitute a cause of action. The court, in rendering its judgment, stated its ground of objection to the complaint specifically as follows: "That the contract set out in the complaint herein was a contract for the delivery of grain at Denver, Colorado, and that the contract provides for payment for the said grain at Denver, Colo., and that the complaint should have alleged that tender of the money for the purchase price of said grain was made to defendant at Denver, Colo., before bringing this action." That objection, and two others, namely, that the contract was within the statute of frauds, and therefore void, and that the allegation of damage was insufficient, are presented to us by the argument of counsel.

The contract, as it was set forth in the complaint, consisted of a number of letters and telegrams which passed between the parties. The following is the history of the correspondence as given in that pleading: On the 26th day of September, 1896, the defendant sent by mail a letter to the plaintiff as follows: "Denver, Colo., Sept. 26th, 1896. The Crystal Palace Flour Mills, Weatherford, Texas—Gentlemen: At the request of the agent of the Santa Fé R. R. at Denver, I am sending you to-day, under a separate cover, a sample of our Colorado wheat, marked 'No. 1.' All of our wheat here is hard spring wheat, and will average 50 lbs.; and at to-day's rate I could sell this wheat to you at 70½c. at Weatherford, but I hope to be able to get a lower rate, by at least 10c. per hundred, or 6c. per bushel, in a day or two. If you can use this wheat, please wire me, and I will gather up 5,000 bu. or 10,000 bu., and, if possible to get a

lower rate, I will let you know at once. Please let me hear from you at once. Wheat is very strong East, and is advancing every day. Yours, truly, L. Butterfield." The plaintiff received this letter three days afterwards, and immediately telegraphed the following answer: "Weatherford, Texas, 9/29, 1896. To L. Butterfield, Denver, Colo.: Sample and quotation twenty-sixth received. Ship three thousand anyway, and ten thousand if you get ten cents lower freight rate. Draw through First Nat. Bank. Crystal Palace Flouring-Mills Co." To this telegram the defendant on the next day replied by wire as follows: "Denver, Colo., 30. To Crystal Flour Mills, Weatherford, Tex.: Will ship three thousand. If get lower rate, will advise. L. Butterfield." At the same time the defendant wrote and mailed to the plaintiff the following letter: "Denver, Colo., Sept. 30th, 1896. Crystal Palace Flour Mills, Weatherford, Texas—Gentlemen: I have your message of the 29th, saying sample received; will take 3,000 bushels at price, 76½c f. o. b. Weatherford, and, if I can get a lower rate, will take more; and to draw through the First National Bank. All right. I am trying to get a lower rate, and so wired you this morning, and advised that I would ship the 3,000 bushels, and, as soon as I can get a lower rate, will advise you. I will know to-morrow or next day. I will get the wheat off as soon as possible, but it may be delayed a few days on account of a carnival here in Denver the last of this week and all the next week, that is creating a great deal of excitement, but I will get it off as soon as possible. I hope to be able to sell you a good many cars of wheat. Yours, truly, L. Butterfield." On the 19th day of October, 1896, the plaintiff telegraphed the defendant as follows: "Weatherford, Texas, 10/19, 1896. To L. Butterfield, Denver, Colo.: Wire immediately, our expense, when you will ship our wheat. Crystal Palace Flouring-Mills Co." The defendant replied to this by the following telegram: "Denver, Colo., Oct. 20, 1896. To Crystal Palace Flour Mills, Weatherford, Texas: Wheat off this week. Offer five thousand more, ninety Weatherford. L. Butterfield." Afterwards, on the 19th day of November, 1896, the defendant sent by mail to the plaintiff the following letter: "Denver, Colo., November 9th, 1896. The Crystal Palace Flour Mills, Weatherford, Texas—Gentlemen: I am just in receipt of yours of the 6th. I am sorry to disappoint you on the wheat, but the railroad promised me, at the time I wired you about the wheat, that they would make me a rate of 25c. into Texas. Now they have gone back on me, and I am not going to be able to ship it. Yours, truly, L. Butterfield."

The statute requires that every contract for the sale of chattels, for the price of \$50 or more, if no part of the goods is accepted and received by the buyer, and no part of the purchase money is paid by him, shall be evi-

denced by a note or memorandum in writing subscribed by the parties to be charged. Gen. St. § 1521. But it is not necessary that the terms of the agreement shall all be contained on one piece of paper. The memorandum may consist of several writings, and so the contract which the parties have made may be gathered from letters which have passed in correspondence between them. *Beckwith v. Talbot*, 2 Colo. 639; *Id.*, 95 U. S. 289, 24 L. Ed. 406; *Browne, St. Frauds*, § 346b. Referring to the correspondence before us, we find that the defendant proposed to sell wheat to the plaintiff at 76½ cents per bushel, delivered at Weatherford, Tex.; that the offer was accepted; and that the plaintiff ordered, and the defendant agreed to ship, 3,000 bushels on those terms, during the week of October 20, 1896. Here was a complete contract. It was definite as to the number of bushels sold, the price to be paid, and the time of delivery. It is difficult to see how there could have been a more complete compliance with the demands of the statute. Defendant's counsel, in support of their contention that the letters and telegrams before us do not constitute a sufficient memorandum of the contract, refer us to the case of *Ellis v. Railroad Co.*, 7 Colo. App. 350, 43 Pac. 457. But it requires only a superficial comparison of the writing considered in that case, with the contract before us, to see the fundamental difference between the two. The following was the comment of the court upon that memorandum: "There was no agreement to supply a certain definite thing, or a certain number of articles, of a particular description, of the various sorts specified; nor did the railroad company agree to accept specific articles, of a given number or quantity." The contract before us is open to no such criticism.

The claim that, to enable the plaintiff to maintain his suit, it should have first tendered to the defendant the purchase price of the grain, and that, to make the complaint good, it should have averred such tender, is equally untenable. The mode and time of payment were fixed by the contract. It was the duty of the defendant to ship the wheat, and, having done so, he was authorized to draw on the plaintiff for the amount due. His contract gave him no right to demand payment in advance, and it is evident from his letter of November 9th that, even if the money had been tendered, the wheat would not have been delivered. No tender was necessary to fix the defendant's liability.

The complaint, after setting forth the contract and its breach, concluded as follows: "That thereby plaintiff has been deprived of divers great gains and profits which otherwise would have accrued to it from the delivery of the said wheat to it as aforesaid, and has sustained damage to the amount of \$900." Now it is said that the facts out of which the damage arose should have been specifically stated. The complaint makes the

damage consist in the loss of the profits which the plaintiff would have derived if the contract had been performed. These profits would have been the excess in value of the wheat where it was to have been delivered, and at the time it should have been delivered, over the price agreed to be paid for it; and, while greater particularity of statement might be desirable, the meaning of the allegation is not open to question. It advised the defendant that the plaintiff proposed to prove that, if these 3,000 bushels of wheat had been delivered in accordance with the agreement, there could have been realized for the shipment \$900 more than the contract price. The plaintiff might have stated what the market value was at the agreed time and place of delivery, and, perhaps, to have done so would have been more finished pleading; but the allegation, as we have it, could have been satisfied only by proof of that value, and was good as against a general demurrer, or this motion to exclude evidence. It was error to forestall a trial, and the judgment must be reversed. Reversed.

STATTON v. STONE.

(Court of Appeals of Colorado. June 11, 1900.)

BILLS AND NOTES—BONA FIDE PURCHASERS—ALTERATION—WANT OF CONSIDERATION.

1. One who has signed and put into circulation a negotiable note containing an unfilled blank, thus rendering a change in the instrument increasing his liability, not discernible in its appearance, easy of execution, cannot be heard to allege that it was altered, or that the plaintiff paid no consideration for it, in a suit by one who has taken it after maturity from a bona fide purchaser.

2. Want or failure of consideration cannot be averred against an innocent purchaser of a negotiable note before maturity.

Appeal from district court, Rio Grande county.

Action by William O. Statton against John H. Stone. From a judgment for defendant, plaintiff appeals. Reversed.

Charles M. Corlett, for appellant. Jesse Stephenson, for appellee.

THOMSON, J. The complaint alleged the execution by the defendant, John H. Stone, of a promissory note for \$200, payable on the 1st day of September, 1896, to himself; the indorsement and delivery of the note by him to the Mutual Life Insurance Company of New York; its transfer, before its maturity, by the company, to the State Bank of Monte Vista; and its subsequent transfer by the bank to the plaintiff, William O. Statton. Nonpayment was averred, and judgment prayed. The answer alleged that a material alteration was made in the note by the insurance company after it had passed from the hands of the plaintiff, and while the company owned and held it; that the alteration consisted in so filling certain blanks as to make the note payable with interest

from date until paid at the rate of 10 per cent. per annum. An alleged copy of the note as it was when the company received it is contained in the answer, and with reference to interest its language was as follows: "With interest at the rate of — per cent. per annum from — until paid." The alteration charged was the insertion of the figure "10" in the first blank, and the insertion of the word "date" in the second. The answer admitted that the bank was a purchaser of the note, for value, before its maturity, but averred that it was transferred to the plaintiff after it became due, and that he paid no consideration for it. The answer stated further that the note was delivered to the company in consideration of its agreement to issue to the defendant a policy of insurance upon his life, but that the company had failed to perform its agreement. The plaintiff demurred to the answer on the ground that the facts which it stated did not constitute a defense. The demurrer was overruled. The defendant prevailed at the trial, and the plaintiff appealed.

The defendant testified that the consideration of the note was the agreement of the agent of the Mutual Life Insurance Company to issue two policies on his life for \$5,000 each; that he signed a blank application, and trusted the agent to fill it out; that it was not filled out in accordance with his directions, the applicant's age being exaggerated, thus increasing the amount to be paid as premium; that because of this error he refused to receive the policies; that no rate of interest was originally specified in the note; that the word "date" was in it when he signed it, but that the figure "10" was not; and that in verifying an answer which stated that both the figure and the word were absent he was mistaken. The other evidence leaves it in considerable doubt whether the note was not completely filled at the time of its execution, but leaves it entirely clear that when the bank bought the note there was nothing in its appearance to excite suspicion, and that the bank was an innocent purchaser of the paper. At the close of the trial, the plaintiff requested the court to direct a verdict in his favor. The request was refused, and a number of instructions given, concerning which all that need be said is that there was nothing in the case to justify them. The answer stated no defense, and none appeared in the proof. Both on the pleadings and evidence the plaintiff was entitled to the judgment. The demurrer should have been sustained; but, as it was not, and a trial was had, upon the evidence the court should have instructed the jury to find for the plaintiff. The difference between the testimony of the defendant and his answer was immaterial. Whether he delivered the note with one unfilled blank, as he testified, or two, as he answered, is of no manner of importance. According to both answer and testimony, he signed and put into

circulation a negotiable promissory note, unfilled as to one or more blanks, thus rendering easy of execution a change in the instrument increasing his liability, but not discernible in the appearance of the paper. Having, by his gross negligence, put it into the power of the agent of the insurance company to impose upon the bank, and to obtain its money upon the faith of his signature to a note regular and honest in its appearance, he cannot be heard to allege in this suit that it was altered. *Rainbolt v. Eddy*, 34 Iowa, 440; *Davidson v. Lanier*, 4 Wall. 447, 18 L. Ed. 380; *Angle v. Insurance Co.*, 92 U. S. 330, 23 L. Ed. 556; *Yocum v. Smith*, 63 Ill. 321; *Garrard v. Haddan*, 67 Pa. St. 82; *Abbott v. Rose*, 62 Me. 194; *Van Duzer v. Howe*, 21 N. Y. 531; *Blakey v. Johnson*, 13 Bush, 197. "Whenever one of two parties must suffer by the act of a third, he who has enabled that third person to occasion the loss must sustain it himself rather than the other innocent party." *Wyman v. Bank*, 5 Colo. 30. We are referred to the decision of *Hoopes v. Collingwood*, 10 Colo. 107, 13 Pac. 909, as announcing a different doctrine, but that it does not will be seen by a glance at the opinion. There the bank, in whose behalf the suit was brought, made the alteration in the note. Instead of being an innocent purchaser of the paper after the alteration was made, it was itself the guilty party, and the court righteously held that its wrongful act precluded a recovery in its favor. It is true that the plaintiff took the note after its maturity, but he acquired the title which the bank had, and that was good. All the rights and remedies of the bank in connection with the paper passed to the plaintiff with the transfer; and it is immaterial what, if anything, he paid the bank for the note. The legal title was in him, so that he could maintain the suit in his own name, and the consideration or want of consideration of the transfer is something into which the defendant has no right to inquire. *Walsh v. Allen*, 6 Colo. App. 303, 40 Pac. 473. It is also entirely unimportant whether the insurance company performed its agreement with the defendant or not. Want of consideration or failure of consideration cannot be averred against an innocent purchaser of negotiable paper before its maturity. The court erred before the trial in overruling the demurrer to the answer, and it erred after the trial in refusing to direct a verdict for the plaintiff. Let the judgment be reversed. Reversed.

FOSTER v. CITY OF GREELEY.

(Court of Appeals of Colorado. June 11, 1900.)
MASTER AND SERVANT—PERSONAL INJURIES
—PLEADING—COMPLAINT.

Where the complaint, in an action for injuries received in a trench while in defendant's employ, alleges defendant's negligence in the construction of the trench, in consequence of

which it was a dangerous place, the ignorance of plaintiff as to its condition, and the injuries which he suffered by reason of the premises, while in the performance of his duty to his employer, it states a cause of action against defendant.

Error to district court, Weld county.

Action by Herbert M. Foster against the city of Greeley for damages for injuries received while in defendant's employ. Judgment dismissing complaint, and plaintiff brings error. Reversed.

Thompson & Thompson and Patton & Esteb, for plaintiff in error. C. D. Todd and H. E. Churchill, for defendant in error.

THOMSON, J. The complaint alleged that the defendant, the city of Greeley, a municipal corporation, undertook the relaying of a drain on one of its streets; that in the prosecution of the work it dug a trench along the street about three feet wide and six feet deep for the reception of the new tiling; that the plaintiff was employed in the work as a day laborer by the defendant, and was placed by the defendant under the control of one H. P. Heath, to whose orders he was subject; that the defendant excavated and constructed the trench in a careless and negligent manner, and negligently failed to provide the proper safeguards against its falling in, so that it became an unsafe place in which to work; that while it was, to the knowledge of the defendant, in such unsafe condition, the plaintiff, not knowing that it was in any degree dangerous, in the course of his employment, and in obedience to the orders of Heath, went down into the trench, and while there, in the performance of his duties, and without fault or neglect on his own part, one of the walls of the trench fell in, carrying with it certain curbing on that side, striking the plaintiff with great force and violence, pinning him under the material which it brought with it, burying him beneath a great quantity of sand and clay, and inflicting upon him severe and permanent injuries. The defendant answered that the injuries received by the plaintiff were so received in consequence of his own negligence and want of care. The plaintiff replied denying the charge of negligence made by the answer. When the jury was impaneled, the defendant objected to the introduction of any evidence by the plaintiff, on the ground that his complaint did not state a cause of action. The motion was sustained, and judgment dismissing the suit entered. The plaintiff brings error.

We are unable to see wherein the complaint fails to state a complete cause of action. The relation which Heath sustained to the city is the subject of considerable discussion by counsel; it being asserted on one side, and denied on the other, that he was the representative of the city, and that his act in ordering the plaintiff into the trench, thereby exposing him to danger, was the

act of the city. There is no statement in the complaint from which it might be inferred that Heath was a vice principal, or that his relation to the plaintiff was other than that of fellow servant. But we do not regard the question as of any importance in this case.

The city owed a duty to the plaintiff to use reasonable care to prevent him from being exposed to unnecessary hazard, and if through its negligence the trench was an unsafe place in which to work, and he went into it in ignorance of its condition, the corporation is liable for the injuries he received. *Mellors v. Shaw*, 1 Best & S. 437; *Paulmier v. Railroad Co.*, 34 N. J. Law, 151; *Huddleston v. Machine Shop*, 106 Mass. 282; *Baxter v. Roberts*, 44 Cal. 187; *Elevator Co. v. Mitchell* (Colo. Sup.) 58 Pac. 23. To fasten a liability upon the defendant for the accident by which the plaintiff was injured, the complaint fulfills every requirement of the law. It alleges the negligence of the defendant in the construction of the trench, in consequence of which negligence the trench became a place of danger, the ignorance of the plaintiff respecting its condition, and the injuries which he suffered by reason of the premises while in the performance of his duty to his employer. The case should have been tried. The judgment is reversed. Reversed.

TILLEY et al. v. MONTELIUS PIANO CO.

(Court of Appeals of Colorado. June 11, 1900.)

SALES—RESCISSION OF CONTRACT—WARRANTY—BREACH—STATUS QUO—TRIAL—CONDUCT OF JUDGE—INSTRUCTIONS—MEASURE OF DAMAGES.

1. The return of a piano by plaintiffs to the seller for purposes of repair does not constitute an attempt to restore the status quo, in furtherance of a purpose to rescind the contract of sale.

2. After the jury had retired, the following query was sent to the judge by the foreman: "Will the following verdict be admissible: We, the jury, find the issues herein joined for the defendant; and further find that the plaintiff be allowed \$25 for repairing said piano." The court replied that it would not. This was done in the absence of counsel on both sides. *Held*, that since the query was simply in relation to the form of the verdict, and did not involve the giving of information on any point of law arising in the case, the action of the court was not reversible error, under Code, § 192, providing that, after the jury have retired for deliberation, if they wish to be informed on a point of law arising in the cause, they may be brought into court, and the information given in the presence of the parties or their counsel.

3. Where, in an action based on the rescission of a contract of sale of a piano, there was no evidence of an attempted rescission until the bringing of the action, two years after the sale, it was not error for the court to instruct, as matter of law, that there had been no rescission.

4. Although an instruction may be erroneous, plaintiffs cannot take advantage of the error, where it was in their favor.

5. The measure of damages, in an action for breach of a warranty in the sale of a piano, is

the difference between the purchase price and the actual value in its defective condition,—and if the purchase price has been only partially paid, but the payment exceeds the value of the instrument, then the excess of such payments over the value.

Appeal from Arapahoe county court.

Action by L. B. Tilley and Jennie C. Tilley against the Montellus Piano Company for breach of a warranty in the sale of a piano. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

T. W. Hoyt, for appellants. Thomas B. Stuart and Charles A. Murray, for appellee.

WILSON, J. About August, 1895, the plaintiffs purchased from the defendant company a piano for the sum of \$385, of which \$50 was paid in cash, and the remainder was to be paid in monthly installments of \$10 each; the deferred payments being secured by a chattel mortgage upon the instrument. At the time of sale a general verbal warranty was given by Mr. Montellus, who made the sale, on behalf of his company, to the effect that the piano "was all right; that he would guaranty it for five years, and keep it in tune for the space of one year." About three months after the sale the plaintiffs testified that they noticed that the case began to crack, showing small hair lines, and that it kept on cracking "till it got to be very bad." Of this they notified the defendant at various times, and requested, as they say, that it be repaired. Nothing seems to have been done in the matter, with the exception that upon one or two occasions the defendant sent one of its employes to the plaintiffs' house to examine the instrument. It does not appear, however, what, if anything, this employe did in the way of repairs. In the meantime plaintiffs continued to pay their monthly installments until some time in the summer of 1897, when they gave a new mortgage and new notes for the remaining indebtedness. Thereafter Mr. Tilley testified that he continued to make complaints, and finally, in the fall of 1897, at his request, the defendant sent for the piano, and took it to its place of business, for the purpose of seeing what, if anything, could be done for it, and, if possible, to repair it. While the instrument was still so in possession of the defendant, about December, 1897, the plaintiffs commenced suit against the defendant company to recover the sum of \$235, being the full amount which they had paid on the purchase price. The action having been commenced in a justice court, there were no written pleadings, and hence the character and nature of the suit can be determined only from a consideration of the evidence.

The action could not be maintained upon the ground of a rescission of the contract for several reasons: (1) It was not begun in time; at least, there were no acts on the part of the plaintiffs, within the proper

time, showing any intention to rescind. It is a settled principle of the law of contracts that, in order to rescind, the parties so desiring must act with some degree of promptness after they have discovered or have knowledge of the fact entitling them to rescind. Where there have been acts of acquiescence, with full knowledge of the facts, it cannot be done. Bish. Cont. § 680. Here the parties admit that they discovered the defects within three months after the purchase, and yet they did not bring suit for more than two years thereafter. In addition to this, during all this time they made the monthly payments required, retained possession of the instrument, and were in constant use of it; each and all of which were acts of acquiescence, showing an affirmance of the contract. (2) There was no attempt to restore the status quo, conceding even that no notice was necessary to the other party before suit could have been commenced upon a rescission of the contract; in other words, that the notice of the suit would be sufficient notice of this fact. Plaintiffs contend that, the piano being in possession of the defendant, the status quo was restored. It was in defendant's possession, however, only for the purpose of repair, and we think that, upon principle and reason, such a return of the instrument was not effective for the purpose of rescission. While they might have instituted the suit without notice, the delivery of the instrument to the defendant for the purpose of repair was, if anything, a notice to defendant of intention to affirm the sale. *Kase v. John*, 10 Watts, 107.

The suit was upon a breach of warranty, and, in fact, counsel seem to concede this by almost entirely basing their argument upon this theory. Numerous errors are assigned, all of which, however, it will not be necessary to consider. The principal one upon which plaintiffs seem to rely is based upon the alleged misconduct of the court. It appears that, after the jury had retired, a written communication was conveyed to the court by the bailiff in charge, which read as follows: "To the Honorable Judge, County Court: Will the following verdict be admissible: 'We, the jury, find the issues herein joined for the defendant; and further find that the plaintiff be allowed \$25 for repairing said piano.' Chas. F. Puff, Foreman." To this, the court answered, "No," and this answer was returned to the jury by said bailiff orally. It is admitted that all of this occurred in the absence of counsel on both sides. Counsel urgently insist that this was reversible error, being in direct violation of the express provisions of Code, § 192, which reads as follows: "After the jury have retired for deliberation, if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into the court; upon their being brought into court, the information required shall be given in the presence

of, or after notice to, the parties or counsel." This section, like all other Code provisions, must be given a reasonable construction, and in applying this we think that, if there was error at all, it was wholly without prejudice. The requirement of the section is that, if the jury desire to be informed upon any point of law arising in the cause, they shall be brought into court, etc. Now, the question here propounded was not in reference to any question which could guide or influence the jury in the determination of their verdict for either party. It had reference, apparently, to the form of the verdict. The court merely told them, and correctly so, that they could not return a verdict for both parties. If they had desired to allow plaintiffs the sum of \$25, they were at liberty to have done so, under the positive directions and instructions of the court, by returning a verdict in their favor for that amount of damages. This Code section, as we construe it, is intended simply to apply to such instructions or communications from the court to the jury as might bear upon the issues of the case, and influence it in its determination for the one party or the other. We do not think that the section was intended to reach, or would embrace, such communications as could not be construed to be instructions as to the law in the case, and were manifestly harmless in their character. This was such a communication. At least, there was no showing of possible prejudice, and none can be reasonably presumed. *Thayer v. Van Fleet*, 5 Johns. 111; *Kerr v. Hammer* (Sup.) 15 N. Y. Supp. 605. In Code, § 190, it is provided that when the jury retire for deliberation they shall be kept together in a room provided for them, etc. In several cases which have arisen upon the jury being permitted to separate in violation of this section, our supreme court has held that, even in criminal cases, it is not sufficient ground to sustain a motion for a new trial, in the absence of some showing of possible injury. *Jones v. People*, 6 Colo. 452; *Dozenback v. Raymer*, 13 Colo. 451, 22 Pac. 787. The principle involved is, in our opinion, the same as in the question before us. Whether there was a breach of the warranty was a question of fact to be determined by the jury. It was found in favor of the defendant. The evidence was conflicting, but it was amply sufficient to sustain the verdict, and, under the well-settled rule, this verdict is binding upon this court.

The plaintiffs assign as error the giving by the court of the following instruction: "You are further instructed that the evidence in this case shows that there has been no rescission of the contract, and therefore the title to the piano is still in the plaintiffs, and it is still absolutely their property. In such case, if you find that there was a warranty, and that there has been a breach thereof, the measure of damages would be

the difference between the value of the piano as purchased by them and its value in its defective condition, if you find there is such defective condition." We have already discussed the question as to the rescission of the contract, and, under the views which we have expressed, the court did not err in declaring that there had been no rescission. Possibly, the latter part of the instruction, as to the measure of damages, may not have been strictly correct, the purchase price not having been entirely paid; but, if there was error, it was in favor of plaintiffs, and they cannot complain. Under this instruction, they might have been entitled to a verdict for the amount of the difference between the purchase price of the piano and its value in its defective condition. This is, possibly, more than the plaintiffs would have been entitled to had the jury found in their favor; but, as we have said, the error, if there was any at all, would be in favor of the plaintiffs, and they are not entitled to now object.

Instruction No. 1, asked by the plaintiffs and refused by the court, was to the effect that if the jury believed that the defendant gave a general warranty, without any reservations or exceptions, then, and in that case, the warranty would cover everything appertaining to said instrument. We are of opinion that the instruction, as asked for, was entirely too broad, and would have had a serious tendency to mislead; but it is unnecessary to discuss the question. The court did give an instruction practically to the same effect, and, even if erroneous, the plaintiffs, of course, cannot complain; it being asked for by them, and being in their favor. The court expressly told the jury "that a general warranty that covers the property in general, without any exceptions, would be a warranty against all defects," etc.

Plaintiffs also assign error upon the refusal of the court to give an instruction asked by them to the effect that, if the jury believed the breach of warranty had taken place, "then, in that case, the defendant company is liable for the full amount of money paid by the plaintiffs, and it would make no difference whatever how difficult it would have been for the defendant company to have complied with the warranty." It would have been gross error if the court had given this instruction. The action being upon breach of warranty, the defendant was liable only, if liable at all, for the difference between the purchase price of the instrument and its actual value in its defective condition, if the purchase price had been entirely paid; or, if not, if the payment exceeded the value of the instrument, the measure of damages would have been such excess only. *Schumann v. Wager* (Or.) 58 Pac. 770.

We have considered the chief assignments of error which counsel have discussed, and upon which they have seemed mostly to

rely. There are a number of others, but they are of minor importance, and we deem it unnecessary to extend this opinion by a discussion of them. We have given attention to them, but in no case do we find any sufficiently prejudicial and material, even if error was committed, to justify a reversal of the judgment. For these reasons the judgment will be affirmed. Affirmed.

RISTINE v. BLOCKER.

(Court of Appeals of Colorado. June 11, 1900.)

CARRIERS—PASSENGER—EJECTION—EXEMPLARY DAMAGES—EVIDENCE.

1. Under Sess. Laws 1889, p. 64, providing that in all civil actions for damages for a wrong done to the person, attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury may award exemplary damages, such damages cannot be assessed against a carrier for the wrongful ejection of a passenger by its servant, unless the act is ordered or afterwards affirmed; and an instruction that exemplary damages for an ejection under circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights or feelings, could be awarded, is error.

2. Plaintiff, an employé of another road, had no ticket, and attempted to ride on a card issued by the Brotherhood of Railway Trainmen, which the conductor on defendant's train refused to receive, on the ground that the rules of the company forbade it, and demanded payment of fare. The conductor stopped the train, and put plaintiff off. The evidence as to whether plaintiff offered to pay fare before the train was stopped, if the conductor would give a receipt for it, so that it could be returned when he proved his right to ride on the card, was conflicting. *Held*, that the evidence did not show that the conductor exhibited any malice or insulted plaintiff, or acted with reckless disregard of his rights, and such question should not have been submitted to the jury.

Appeal from district court, Arapahoe county.

Action by Galbraith B. Blocker against George W. Ristine, receiver of the Colorado Midland Railroad Company, to recover damages for ejection from one of defendant's trains. Judgment for plaintiff, and defendant appeals. Reversed.

Blocker came to Divide, over the line of a connecting road, and attempted to become a passenger on the Colorado Midland when its train reached that station. He took passage and continued to ride until he was put off the train at a switch shortly out of the station. The circumstances of his ejection were matters of proof by various witnesses. The whole controversy grew out of Blocker's attempt to ride on the train without the payment of his fare. He was an employé of another railroad corporation running out of Chicago, and had in some way been hurt, and was in Colorado. We shall not attempt to state pro and con the contention of the plaintiff and of the road, nor balance the one against the other. The statement will be confined to those facts

which are necessary to exhibit the controversy, and the general basis to which counsel attempt to apply conflicting rulings upon a much-disputed question. Blocker had no ticket. He tried to induce the conductor to permit him to ride on what is called among railway men a "Traveling Card." It purported to have been issued in 1897 by the Brotherhood of Railway Trainmen, and certified that he was a member of the Brotherhood in good standing, and entitled to fraternal courtesies. His occupation was stated as that of a brakeman. The card bore date in 1896. He stated that he did not have his 1897 card with him, but that they were exactly similar, except as to dates. The conductor refused to receive it, or to allow him to ride on it; stating that the rules of the company did not permit the recognition of cards as passes or as permits to ride without the payment of fare. Blocker insists that there was an altercation between him and the conductor about it. When the conductor refused to recognize the card, he insists he produced the money, and wanted the conductor to hold it until he got to the Springs, when he would get a pass, or, if he did not get a pass, the conductor could then take out the fare. This the conductor refused to do. Blocker was noisy and quarrelsome and insistent about it, and the discussion led to quite a controversy. The principal matter about which there is a dispute between Blocker and one or two of his witnesses and the conductor and others is as to Blocker's tender of the money, or his offer to pay fare, providing the conductor would give a receipt for the money, so that he could get the money back when he got to the Springs, or some other point where his right would be recognized. Blocker insists he tendered the money and offered to pay the fare if the conductor would give him a receipt. This is denied. The matter is in hopeless conflict, though it is probably settled adversely to the company's contention by the verdict. This the counsel for the company concedes, and admits the only question properly predicable on the record is one of law. Possibly this is true, though we do not believe the proof warranted the instruction which is complained of. At all events, the conductor assumed that Blocker refused to pay his fare, insisting on his right to ride on the traveling card, and, acting thereon, the conductor went forward and rang the bell to stop the train. When he came back and told Blocker that this was the place where he got off, Blocker wanted to pay his fare, which the conductor refused to receive; contending that, under the rules of the company, when he had once stopped the train he could not afterwards receive the fare. Waiving any further discussion of the testimony, save as to a few suggestions which may appear in the opinion, it need only be stated the case was submitted to the jury on instructions which in the main are

uncomplained of, save as to one which is made by both counsel, and rightly, as the majority believe, the pivotal question in the case. When the court instructed the jury, first reciting the respective contentions of the parties, and then stating the law controlling the rights of the prospective passenger and the right and the duty of the company, the court charged them, substantially, that exemplary or punitive damages were allowable in this state when the injury complained of was attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings. This rule of law was several times repeated, but always in substantially this form, and in practically the language of the statute. The company insists that this was error. The statute by which the appellee defends the instruction was passed in February, 1889, and is found in the Session Laws of that date, at page 64. It not having heretofore been construed, we will consider it. It consists of one section, and is: "That in all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party, award him reasonable exemplary damages." The jury rendered a general verdict for the plaintiff for \$500. From the judgment the defendant appealed.

Rogers, Cuthbert & Ellis and George C. Preston, for appellant. Patterson, Richardson & Hawkins, for appellee.

BISSELL, P. J. (after stating the facts). On this record we are confronted with the inquiry whether a railroad company can be mulcted in exemplary or punitive damages for the acts of a conductor done while he is engaged in the performance of his duties. Prior to the enactment of the statute, it would not have been debatable. Long ago, in elaborate and fully-considered opinions, reviewing the whole subject, the supreme court decided that exemplary damages could not be recovered in civil actions sounding in tort where the injury done admitted of a criminal prosecution. The court went no further in the Hobbs Case, 7 Colo. 541, 5 Pac. 119, than to inhibit the recovery of these damages in such actions. The learned court, however, very gravely suggested it was a doubtful proposition whether they could be recovered in the other large class of actions in tort, even though the act would not subject the offender to a criminal prosecution. Subsequently the same court, though then differently constituted, extended the doctrine, and denied the assessment of punitive damages in any civil action sounding in tort,

though the proof might show the injury was committed wantonly and maliciously. We may therefore safely conclude it was the opinion of that tribunal that these damages might not be had in any action of this description. Thereby it became the settled law of Colorado, and remained such until the passage of the act. *Murphy v. Hobbs*, 7 Colo. 541, 5 Pac. 119; *Railway Co. v. Yeager*, 11 Colo. 345, 18 Pac. 211.

It will be observed the passage of this act followed the Yeager decision within less than a year, and may be taken as probably a professional, and certainly as a legislative, reversal of the rule which these two cases established. Under these circumstances, we must accept the statute as expressive of the will of the people, observe it in all cases to which it is applicable, and apply it whenever the occasion arises and we can see the case as made is brought clearly within the terms of the enactment. The question as presented to us by the appellant assumes the form of a clear-cut discussion of the question whether a corporation can ever be held liable to respond to such damages in any action sounding in tort where the injury complained of resulted from the acts of its agent. On the other hand, the appellee has not only met the appellant on his own ground and discussed this broad inquiry, but he has invoked the statute, and insists that it has established another rule, and permits the assessment of punitive damages in such actions. In the view which we take of the statute and its proper construction, we must necessarily support the statement of our convictions respecting it, and its true meaning, and measurably, at least, discuss what counsel have made a pivotal inquiry. To give both counsel due credit, we may observe they have with great zeal and industry collated all the leading authorities which the books present on both sides of this question; not omitting the learned and memorable controversy between Prof. Greenleaf and Mr. Sedgwick, and calling, also, to our attention the learned, yet somewhat vituperative and unjudicial, discussion to be found in some of the later text-books. Recurring to the statute: The appellee naturally lays great stress on the breadth and universality of the language of the act. It begins, "In all civil actions" (Sess. Laws 1889, p. 64); and he argues with great zeal, and not without acumen, that no exception can be found in civil actions sounding in tort, because the terms of the statute *ex vigore* apply to all civil actions, providing the action or actions be brought to recover for injuries done to the person or to personal or real property, and the injuries are attended by the circumstances designated in the statute. Those circumstances, of course, are fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings. Counsel might have gone even further, and on the word "circumstances" constructed a trouble-

some argument deducible from the use of that peculiar word. They might have ingenuously contended that it was the legislative intention to prescribe a rule which should permit the assessment of such damages wherever fraud could be alleged and established, malice proven, insults shown, or wherever the facts exhibited a wanton and reckless disregard of the injured party's rights and feelings. We confess that the first examination of the statute very much inclined us to accept this contention. Mature reflection and a careful examination of the authorities have led us to believe this construction unwarranted by the terms of the act, and that it would be a construction which, followed to its legitimate conclusion, would lead to a legal absurdity. This we shall proceed to demonstrate more by the logical process known as the *reductio ad absurdum* than by the more usual course of an argument on the facts supported by the citation of authority. To bring about this result, we need only state a principle recognized by all the authors who have written on the law of torts, and recognized by all the decisions wherein the subject has been considered, and applied to the class of cases to which we shall refer. To begin with, if we concede that exemplary damages are recoverable in all civil actions sounding in tort for wrongs done to the person, to personal property, or to realty, it further appearing that the circumstances show the elements which the statute makes conditions precedent to their recovery, we shall run up against, and be compelled to overthrow, a principle which is probably as well settled as any in the law. Ever since 1818, at least in this country, it has been the law that exemplary or punitive damages cannot be awarded except against one who has participated in the offense. *The Amiable Nancy*, 3 Wheat. 546, 4 L. Ed. 456. The rule was reiterated and reaffirmed in the only case to which we shall hereafter refer on the main question under consideration. All the cases discussing the question proceed on the hypothesis that punitive damages are not awarded by way of compensation to the sufferer, but are visited as a punishment on the offender, and to serve as a warning to subsequent wrongdoers. Such being the fundamental basis of the doctrine, it has always been adjudged, and we have been cited to no case, and know of none, wherein a principal has been held liable for exemplary damages because of the wanton and oppressive act or of the malicious intent of his agent. Numerous instances could be easily cited which would instantly suggest to the professional mind the folly of holding that a principal can be thus mulcted for the acts of his agent which were not committed under his express mandate, unless he subsequently confirmed and ratified them. If the warehouseman sends his teamster to deliver goods, and he recklessly, and in wanton disregard of another's rights, takes advantage of a situation,

runs into his neighbor, and smashes his wagon, and the neighbor be hurt, the warehouseman doubtless may be compelled to compensate the injured party, but he could never be made liable to punitive damages because the wrong done was recklessly done by his servant, even though he was then engaged in the performance of a duty which the master had laid on him. If the driver of a milk wagon, in a reckless attempt for speedy service, or because of anger and malice entertained against a rival driver, runs into him, and occasions damage to either the driver or the owner's property, the servant being then engaged in the performance of his duty, the principal is doubtless liable to make the other whole, and compensate the driver for his personal injuries, but he could not be punished for the wrong which the servant committed. If the holder of a chattel mortgage delivers the instrument to an agent, and tells him to take possession of the property, which he may lawfully do on its maturity, and the agent, in the performance of his duty, wantonly executes it in reckless disregard of the other's rights, and subjects the mortgagor to insult, even though he may do it with malice, the innocent mortgagee, having given no commands to that end, nor having afterwards confirmed the acts of his agent, might be held liable for any injury done to the mortgagor, but he could not be mulcted in exemplary damages because of the method of the agent's performance, or the malice by which he was actuated. The plowman sent by the farmer to plow a field might, by careless and reckless disregard of the adjacent proprietor's rights, work serious injury to his orchard or to his ditch, yet, no matter what might be the circumstances attending the performance by the servant of the duty, the master could only be held to respond for the actual damages sustained, unless there was something in the terms of the order, the necessary or implied method of its performance, or the subsequent adoption of the acts, which would charge him with responsibility for the character of the servant's acts.

These illustrations might be multiplied indefinitely, and each as fully and as strongly exhibit a case wherein exemplary damages could not be assessed. Notwithstanding this, it would still follow, if we accept the natural language of the statute, and the construction insisted on by the appellee, that such damages might be recovered because the suit was a civil action. It was brought for a wrong done to the person, or for an injury to personal or real property, and the wrong and the injury were attended by circumstances showing some one or more of the conditions precedent nominated in the statute. All this being true, it follows the statute is to be interpreted according to the rules and principles of law applicable to such actions, and we must therefrom gather and determine whether within the law of tort we can find a prin-

ciple which controls the question of recovery in certain classes of actions to which the statute can be applied. Otherwise we should be doing violence, not only to the principle of the strict construction of an act, but the other co-ordinate and equally controlling one, that a statute is to be construed in the light of the circumstances of its enactment, the wrong it was intended to remedy, and the relief which it was intended to afford. As we look at it, the legislature did not intend to enact into a statute the broad principle that exemplary damages might be recovered in all actions of tort for an injury either to the person or to personal or real property. It would be gravely doubtful whether an act in this broad form and of this far-reaching scope would not be violative of well-settled constitutional principles. This we need not consider, for evidently the legislature had no such purpose and no such object in view when they passed the law. It provided that under certain circumstances these damages might be assessed. This was in accord with well-settled principles of law, which have long been recognized, though, according to many decisions, of doubtful expediency and propriety. In attempting to define and limit the word "all," appearing in the first line of the section, the legislature said these damages could only be recovered where the wrong done was accompanied by certain circumstances. We may look now to the words used by the legislature in order to determine the circumstances under which such damages are properly assessable. The words adopted by the legislators are common and familiar ones, having a definite signification in ordinary parlance, and they require no construction to ascertain their force or their meaning. The words are "fraud, malice, insult, wanton or reckless disregard of the injured party's rights." It must occur to every thinker and to every lawyer, when he considers the phraseology of the act, that these words are commonly used only in reference to an individual who commits a wrong, or who is in some way an actor in the wrong, either by direct performance, or by what would make him equally responsible, as where the agent may have been authorized to act under a mandate which either directly or by implication warrants him to act in the manner in which he has performed, or that which is equally available, where the principal afterwards confirms what has been done by the representative. If one brings a suit, and alleges fraud, he must, of necessity, establish the commission of that thing by the one whom he selects as a defendant. If he would recover damages because of the malicious act of another, it must be the malicious act of him who is sued. It is clearly settled that there can be no wanton and reckless disregard of an injured party's rights except by the one who exhibits it in the commission of the wrong which is the subject-matter of the action.

It is for this reason, and this only, that the courts have always held that the principal is not liable for such damages where the act has been done by his agent without authority directly or impliedly given, or he has not subsequently adopted the act. Such damages are justifiable only in an action against the wrongdoer, and not in actions against those who are only consequentially liable because of their relation to the offender. The *Prentice Case*, to which we shall refer, fully illustrates this doctrine, and cites many cases in support of it which are enough for the purposes of this opinion, and which can be referred to by those who are seeking the basis of its support. As was said in a well-considered case, *Haines v. Schultz*, 50 N. J. Law, 481, 14 Atl. 488, approved in *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97: "The right to award them rests primarily upon a single ground,—wrongful motive. It is the wrongful personal intention to injure that calls forth the penalty." I could multiply authorities and add numerous quotations in support of this principle, but it would in no measure add to the force and strength of the opinion or to the reputation of the author. I should only be guilty of prolixity, which is a judicial vice. We therefore conclude the legislature did not intend to enact that in all civil actions for wrongs done to the person or to property exemplary damages might be assessed, but only in those cases where the circumstances show fraud, malice, insult, or a wanton, reckless disregard of the injured party's rights or feelings. We also conclude, on well-settled principles, this can only occur where the suit is brought directly against the wrongdoer, who alone can exhibit the intent, and to whom alone can be imputed, and against whom only can be proved, the fraud, the malice, the insult, or the wantonness which is a condition precedent to the assessment of such damages. The statute, therefore, does not extend to actions brought against a principal for wrongs committed by his servant, unless the record exhibits a mandate from which the authority to thus act can be deduced, or the principal afterwards confirms what has been done.

Such being our conclusion, we are next to determine whether the statute can be deemed applicable to suits brought against corporations for the acts of its agent. Whether this could or could not have been done under the law prior to the statute is a vexed, disputed, troublesome, indeterminable question. The only thing that the court to which the question is presented can do is to accept that line which commends itself to their judgment, and the one which, as they conceive, is the most strongly supported by the most cogent reasoning of courts whose decisions control, if they do not entirely satisfy, the judgment of the deciding tribunal. As we suggested at the outset, counsel have presented both lines, and no leading or con-

trolling case has been overlooked by either. We confess that we pay little heed to the views of authors, however distinguished, unless they are supported by what we regard as the controlling authorities. Bias, professional training, and antecedent experience largely influence their discussion, and it would be unwise for courts to permit themselves to be much influenced by anything other than the particular reasons which they may have been able to cull from the decisions, and possibly, in a few instances, evolve from their own consideration. It is quite possible the judicial decisions of the various states may be nearly equal in number and in force, and may occupy the same plane of judicial distinction. This we do not propose to determine, though the matter is urged as an argument. Speaking for myself principally, but being entirely authorized thereunto by the entire court, I desire to emphasize the position which I have often taken, that wherever there is a debatable question, and there are two lines of authority, and one is supported by the supreme court of the United States, and the other condemned by it, we accept the decision of that tribunal. Adopting the language of that court, the inquiry suggested is "Can a railroad corporation be charged with punitive or exemplary damages for the illegal, wanton, oppressive conduct of a conductor of one of its trains towards the passenger?" It was answered in the negative. The opinion was supported by a copious citation of the leading authorities. It was a full and elaborate examination of the whole subject, and, in the light of the principles on which the doctrine permitting punitive damages to be assessed is declared, the court adjudged the rule inapplicable in suits against a railroad corporation for the acts of its agents. Considering that the right rests on the proof of intent, the learned court decided such damages were not recoverable in this sort of an action, and under these circumstances, against a railroad company. *Railway Co. v. Prentice*, 147 U. S. 101, 13 Sup. Ct. 261, 37 L. Ed. 97.

When we conclude the statute neither directs nor permits the assessment of such damages against a principal for the wrong done by his agent, as we have already demonstrated, it follows the same rule should be applied, the same principle invoked, and the same result reached, in an action brought against a railroad company, when the basis for the assessment of exemplary damages is to be found only in circumstances showing fraud, malice, insult, or reckless disregard of consequences by the agent, in which the employer, the railroad company, could not participate. Admitting always the exception unless there be some order, direction, or affirmation which is a prerequisite in the case of a suit against an individual principal, the rule must be the same in both

cases. We therefore conclude for these reasons the court erred in its instructions to the jury. It is quite true in *Tramway Co. v. Cloud*, 6 Colo. App. 445, 40 Pac. 779, there may be found expressions which would seem to indicate it was the conviction of the court, or, at least, of the author, that such damages might be recovered in this class of actions. The question, however, was neither presented nor argued as it has been in this case, nor did the court undertake to decide it. What was said was the result more of a cursory suggestion than the result of an elaborate and careful examination, which this case has received.

If we had not reached this conclusion respecting the law, we are very frank to say that a careful examination of the record and of the testimony would lead us to hold that there was no sufficient evidence of either fraud, malice, or insult, or of a wanton disregard of Blocker's rights, to permit the submission of the question to the jury. Judge THOMSON expresses no opinion on the rule heretofore discussed and laid down, but puts his concurrence on this precise ground. There was a dispute between Blocker and the conductor. It is a matter of considerable doubt under the testimony, regardless of the verdict of the jury, whether Blocker tendered his fare prior to the time that the conductor stopped the train or pulled the bell to stop it. Whichever might be true, we do not believe the conductor exhibited any malice or insulted Blocker, or that he acted with a reckless disregard of his rights. If he put him off by reason of the misunderstanding, and if he failed to apprehend that Blocker intended to tender him his fare, it would not necessarily follow punitive damages could be assessed. Blocker was undoubtedly attempting to ride without paying his fare. He was insisting on his right to ride on his membership in the Brotherhood of Railway Trainmen. He was likewise endeavoring to compel the conductor to hold his money as security until he got to the Springs, to avoid the payment of \$1.00, which, if it had been promptly tendered, would have undoubtedly been received, a receipt given to him for it, and thereon he could have recovered the money, if he was entitled to ride free. There is enough in the case to lead us to believe this question ought never to have been submitted to the jury. We should have put the decision on this ground alone, and refused to discuss the other, but for the fact that the principal inquiry is legitimately suggested by the instructions, and is so earnestly pressed on our attention for decision by both counsel that we felt it our duty to determine it, rather than to evade it and place our decision on the latter basis. For the reasons heretofore expressed, this judgment must be reversed, and the case sent back for a new trial. Reversed.

ALLEN v. FLORENCE & C. C. R. CO.

(Court of Appeals of Colorado. June 11, 1900.)

RAILROADS — INJURIES — TEAM — FRIGHT — ESCAPING STEAM — CONTRIBUTORY NEGLIGENCE — SUFFICIENCY OF EVIDENCE — QUESTION FOR JURY.

Plaintiff, a teamster, engaged in unloading lumber from cars, was about to cross defendant's bridge, which was arranged to accommodate both trains and teams, looked before crossing, and saw an engine about 300 feet from the approach to the bridge moving towards it about "as fast as a man would walk," and, knowing that his team was gentle, started to cross the bridge. The team had reached the approach on the opposite side, when the engine, nearing the bridge, began to let off steam. The team became frightened, and in attempting to escape plaintiff was struck by the wagon wheel, and thrown on the track in front of the engine, sustaining severe injuries. There was a conflict in the evidence as to the distance between the engine and the team when plaintiff tried to escape. *Held*, that plaintiff's conduct in attempting to cross, and in waiting before attempting to escape, did not constitute contributory negligence as matter of law, but the question should have been submitted to the jury.

Error to district court, El Paso county.

Action by Rhodes Allen against the Florence & Cripple Creek Railroad Company for injuries sustained by reason of defendant's negligence. From a judgment of nonsuit, plaintiff brings error. Reversed.

Brooks, Stimson, Willcox & Campbell and E. F. Gray, for plaintiff in error. Blackmer & McAllister and Tyson S. Dines, for defendant in error.

WILSON, J. By this action plaintiff sought to recover damages for personal injuries alleged to have been received and suffered by him through the negligence of the defendant railroad company. At the conclusion of the evidence offered on behalf of plaintiff, the court, on motion, granted a nonsuit, and to this plaintiff assigns error. The motion for nonsuit was based and sustained solely upon the ground of plaintiff's contributory negligence. This court is therefore relieved from the consideration of the facts, and much of the argument of counsel, which bear upon the question of defendant's negligence. The sole question presented is, did the evidence disclose such contributory negligence of plaintiff as would necessarily bar his recovery? This must be considered with reference to the fundamental principle that a motion for a nonsuit admits the truth of plaintiff's evidence, and every legitimate inference which may be drawn from it. *Hanley v. Construction Co.* (Cal.) 59 Pac. 577.

Having reached the conclusion that the granting of a nonsuit was error, and that the cause must be remanded for a further trial, we will, from a sense of justice to both parties, refer only to such evidence as may be necessary to disclose the facts upon which our decision is based, and shall refrain, so far as possible, from an expression

of our opinion as to its weight or consequence.

It appears from the evidence that the defendant company was the owner of a bridge across a small creek which ran through its yard in the town of Cripple Creek. It was 47½ feet in length, and elevated 15 feet above the creek. In the center defendant had its main and a side track, and on each side of these were planked driveways for wagons, each about 16 feet in width. At the southeast end, where the accident in question occurred, was an approach the full width of the bridge, extending 12 feet from it, built up on each side with stone masonry to a height of from 5 to 6 feet above the gulch at the end of the bridge, and east of this approach was a wide, open roadway north, east, and south. Neither the sides of the bridge nor of the approach had any railing or other guard or protection. The plaintiff was a teamster, and was upon the day of the accident—as he had been for a number of months previous—engaged in unloading freight from the cars of defendant in its yard, and transporting it to its consignees. In the afternoon of the accident, while employed in his usual business, he was going to the yard of defendant for the purpose of unloading from its cars some lumber. The team, a pair of mules, shown by plaintiff's testimony to have been gentle, and to have been engaged in this business about the yards of defendant for a number of months, was being driven by a competent driver in the employ of plaintiff. The wagon had no box upon it, being prepared for hauling lumber. The stakes of the hind bolster were bound round and spanned across with ropes and chains one or two feet above the bolster. Plaintiff was sitting between the hind wheels on the hind bounds or reach, his feet hanging down on the right-hand or off side, with the binding pole behind him. The driver sat on the front bolster, with his feet on the front bounds. It was necessary in the route which plaintiff usually traveled, and which was the most direct road, to cross the bridge we have referred to, in order to reach the lumber which plaintiff was intending to unload and haul. As the team approached the bridge, plaintiff, knowing that it was just past the time for the arrival of one of defendant's passenger trains, looked to see whether there was any engine about, and saw defendant's engine, with a baggage car attached, at a distance of about 300 feet from the approach to the bridge, moving slowly, about as fast as a man would walk, in that direction. Plaintiff, thinking, as he said, that he had ample time to cross the bridge and approach before the arrival of the engine, told the driver to go on. The team had crossed the bridge, and had just reached the approach, when, as plaintiff testified, the engineer, then nearing the bridge, commenced to let off steam from the cylinder cocks of the en-

gine. At this, the mules became frightened and stopped. Upon attempting to urge them forward, the engine still coming towards them, and steam still being emitted continuously, they began to rear and plunge. The subsequent occurrences are best described in the language of the plaintiff himself: "They just stopped still, and cocked up their heads, and I looked up, and saw the train coming. My driver raised up and pulled on the lines to drive them. As he did that, they pulled over on one side to turn off the embankment, and the train was still coming, and the team kept going back and forth. As I saw the train coming, I thought I was in a dangerous place, and I stepped off. I thought I could get over the hind end of the wagon, but as I tried to do that the team plunged, and I stepped out between the wheels. I made an effort to go between the engine and the mules. There was plenty of room then, because the team bore down towards the embankment at that time, but as I did that they flew up in front of the engine, and I saw there was no place there. So I turned around, and thought I was quick-footed enough to get out behind. I went back, and got about to the edge of the hind wheel, but the mules were plunging, and the wheel knocked me in front of the cowcatcher. * * * I noticed the steam escaping from the cylinder cocks when it was coming up from the first switch. * * * Q. Just at the time you jumped off, what did they do at that time, or just before that time? A. They were rearing and plunging, and about cramping the wagon off into the creek, about eighteen feet down, and it looked like the mules, wagon, and all were going off into the creek. Q. Was that the condition at the time you jumped off? A. Yes, sir." And, further: "Q. When the mule team first stopped they did not lunge back and forth, did they? A. No, sir; they stopped still. * * * Q. How long did you sit there until you thought you were in danger, and tried to get away? A. A few seconds. * * * The mules pushed one way, and then the other, in the first place, and then he [driver] raised up and tried to drive them. Q. The mules had begun to rear and plunge before you got off your seat? A. Yes, sir; they just commenced. * * * Q. They never reared and plunged until after the driver touched them with the whip? A. No, sir; not until after he raised up and tried to drive them. Then they began to rear and pitch and plunge. Q. Was it after you got off your seat on the wagon? A. It was just about that time. It was all done so quick that I can't tell every second what occurred." Plaintiff got out between the wheels, and started to run out in front, but this avenue of escape was blocked by the sudden turning of the mules. He then turned, and ran back. As he reached the rear end of the wagon, the mules, backing suddenly, cramped the wagon to one side, caus-

ing one of the wheels to strike him with force sufficient to throw him on the railroad track, where he was caught under the pilot and pony trucks of the engine, and dragged and rolled nearly across the bridge. This was, in substance, the testimony of plaintiff, and it was confirmed substantially by that of several witnesses who saw the occurrence.

Negligence is, generally speaking, a question of fact, and, as such, must, under our system of jurisprudence, be submitted to, and determined by, a jury. It sometimes becomes a question of law, but this is only in rare instances; it is the exception to the rule. When this does occur, depends upon the circumstances of each particular case, and this is true whether the question concerns the negligence of the defendant or the contributory negligence of the plaintiff. The same rule applies to both. There are, however, certain fundamental and general rules, well settled and firmly established, which are applicable to all such cases, and which must be observed by a court before it attempts to take the question from a jury. There have been repeated decisions in this jurisdiction, both by this court and by the supreme court, as to when, in cases of this character, a court is warranted in granting a nonsuit at the stage of the trial when it was granted in the present case. The rule thus established is, in substance, that the court must not invade the province of the jury, except in the clearest of cases, and will not grant a nonsuit on the ground of contributory negligence, unless the evidence, in the most favorable light in which it may reasonably be considered in behalf of the plaintiff, shows that the plaintiff was guilty of negligence which contributed to cause the injury as alleged, and without which the injury might not have happened. *Moffatt v. Tenney*, 17 Colo. 191, 30 Pac. 348; *Railroad Co. v. Martin*, 7 Colo. 590, 4 Pac. 1118; *Lord v. Refining Co.*, 12 Colo. 393, 21 Pac. 148; *Jackson v. Crilly*, 16 Colo. 107, 26 Pac. 331; *Solly v. Clayton*, 12 Colo. 33, 20 Pac. 351; *Empson Packing Co. v. Vaughn* (Colo. Sup.) 59 Pac. 749; *City of Denver v. Soloman*, 2 Colo. App. 540, 31 Pac. 509; *Walters v. Light Co.*, 12 Colo. App. 149, 54 Pac. 962. In the *Empson Packing Co. Case*, supra (a very recent case), the court said: "When the determination of the question of negligence depends upon inferences which may be drawn from facts and circumstances of a character that different minds may honestly draw different conclusions therefrom, the question should be left to the jury." In the *Walters Case*, supra, this court said: "However, conduct may be so palpably imprudent and reckless as to leave no room for a difference of opinion concerning its character, and then, there being no facts to find, deliberation by a jury is unnecessary, and the court may apply the law directly to the case before it. But where, upon facts in its possession, the character of the conduct is in any degree involved

in doubt, it is never proper for the court to withdraw the question of negligence from the jury." In fact, the rule as established in this state is, in substance, that if the evidence is such that reasonable men might fairly differ upon the question as to whether there was contributory negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men would draw the same conclusion from them that the question becomes one of law for the court. As concisely expressed in *City of Denver v. Solomon*, supra: "In order to justify the court in withdrawing the case from the jury, the facts of the case should not only be undisputed, but the conclusion to be drawn from those facts indisputable." This rule is quite generally established and followed by the courts of all the states, and the sound and conclusive reason for it has been thus stated by the distinguished Judge Cooley in *Railroad Co. v. Van Steinburg*, 17 Mich. 99: "The case, however, must be a very clear one which would justify the court in taking upon itself this responsibility; for, when the judge decides that a want of due care is not shown, he necessarily fixes in his own mind the standard of ordinary prudence, and, measuring the plaintiff's conduct by that, turns him out of court upon his opinion of what a reasonably prudent man ought to have done under the circumstances. He thus makes his own opinion of what would be generally regarded as prudence a definite rule of law. It is quite possible that if the same question of prudence were submitted to a jury collected from the different occupations of society, and, perhaps, better competent to judge of the common opinion, he might find them differing with him as to the ordinary standard of proper care. The next judge, trying a similar case, may also be of a different opinion, and, because the case is not clear, hold that to be a question of fact which the first has ruled to be one of law. Indeed, I think the cases are not so numerous as has been sometimes supposed in which a judge could feel at liberty to take the question of the plaintiff's negligence away from the jury."

Applying this well settled rule to the evidence produced on the part of the plaintiff, we think it quite clear that the court erred in sustaining the motion for a nonsuit. There was in no sense, as we view it, such a case as came within the rule which we have stated. The plaintiff had undoubtedly made out a *prima facie* case,—how strong it is not proper for us to say, but it was sufficient without the production of any evidence on the part of defendant to have sustained a verdict and judgment in his behalf.

It cannot be successfully contended that there was shown by the evidence contributory negligence on the part of plaintiff sufficient to bar a recovery on the ground that the bridge was the sole property of the defendant, and was situated upon its premises;

that plaintiff had no right to use it; and that, if he did, he assumed all risks incident to such use. On the contrary, the testimony strongly tended to show that plaintiff was rightly upon the premises by the permission and invitation of the defendant company, and that the wagonways on the bridge were constructed for the identical use to which plaintiff was putting them at the time of the accident.

It is urged that it was negligence on the part of plaintiff to have driven on the bridge when he saw a locomotive in the yards approaching him, as he admitted was the case. There was, however, testimony tending to show that under ordinary circumstances, and but for the fright of the mules caused by the escaping steam, the locomotive was at such a distance that plaintiff's team had ample time and would have crossed the bridge and the approach before the engine reached it. Here was therefore presented a state of facts from which different minds might have drawn different conclusions, and in such a case, according to all of the authorities, the question was one of fact for a jury, and not of law for the court.

It is urged by defendant that one who voluntarily drives his team upon the property of a railroad company, or in proximity to its engines while in operation, must be charged with knowledge of the sounds and noises that are ordinarily incident to such operation, and that he assumes the risk of his team becoming frightened by such noises. This is true as a general rule, but even then it is well settled that where unusual and unnecessary noises are made, or noises are made in a wrongful and negligent manner, the company may be liable for injuries done in consequence thereof. *Railway Co. v. Box*, 81 Tex. 670, 17 S. W. 375; 1 Thomp. Neg. 352. There was testimony to the effect that the blowing off of steam in this instance was unnecessary, and, in any event, it was unnecessary to have continued this blowing off of steam until the bridge was reached,—a fact which is charged to have been the chief and proximate cause of the accident. The numerous authorities which counsel for defendant cite upon this point are themselves all to the effect that if the opening of the valves was unnecessary, and was done under such circumstances as to imply a failure to exercise that care which a prudent and careful man would exercise under similar circumstances, the liability of the railroad company would attach. Here again were circumstances appearing from the testimony from which different minds might draw different conclusions, and the question did not, at least at that stage of the trial, become a question of law for the court.

Did the evidence presented clearly show that the plaintiff was chargeable with negligence in waiting too long before he attempted to escape? It may be said that the testimony does not definitely designate the location of the approaching engine with reference

to the location of the mules at the time when the plaintiff alighted from the wagon and attempted to make his escape from the danger. A number of witnesses, in addition to plaintiff, testified upon this point, and all differed somewhat as to the apparent distance between the approaching locomotive and the mules at this time. This was not surprising, because it was wholly a matter of conjecture or guesswork, and that, too, under exciting circumstances and rapidly transpiring events. But the mere fact that there was this difference in judgment shows that it was a question of fact, upon which the court was not authorized to substitute its judgment for that of a jury.

Was the plaintiff negligent in the manner in which he attempted to escape? It is urged that when he alighted from the wagon he could easily have avoided all danger by running to the rear instead of to the front as he did. "A party suddenly realizing that he is in danger from the negligence of another is not to be charged with contributory negligence for every error of judgment, when practically instantaneous action is required." *Transit Co. v. Dwyer*, 20 Colo. 130, 36 Pac. 1108; *Mining Co. v. McDonald*, 14 Colo. 191, 23 Pac. 346; *Railway Co. v. Kelley*, 4 Colo. App. 325, 35 Pac. 923.

Finally, however, even conceding that plaintiff was negligent in attempting to drive across the bridge at the time when he did; also that he was a trespasser; and that he was negligent in not sooner attempting to make his escape,—yet the defendant might still be liable for damages. If plaintiff was at the time of, or immediately preceding, the accident in a position of peril, exposing him to the danger of bodily injury, and the defendant's engineer with knowledge of this exposed condition, by the exercise of ordinary care, might have prevented the injury, it was his duty to do so, and, failing in this, the plaintiff could recover. *Transit Co. v. Dwyer*, supra; *Mining Co. v. Robertson*, 22 Colo. 491, 45 Pac. 406; *Transit Co. v. Dwyer*, 3 Colo. App. 408, 33 Pac. 815; 2 *Thomp. Neg.* § 1108; *Coasting Co. v. Tolson*, 139 U. S. 558, 11 Sup. Ct. 655, 35 L. Ed. 273. In the last cited case the court said: "Under such circumstances the defendant's negligence would be the proximate, direct, and efficient cause of the injury." There was some testimony which would have justified the application of this rule, and which tended to show the liability of defendant on this account. Several witnesses testified that the frightened action of the mules, and the exposed condition and peril of the team and the men upon the wagon, were plainly visible to the engineer upon the locomotive for some distance before reaching the approach of the bridge; that he was leaning out of the cab window, and looking directly towards the bridge, and yet he continued the noise of blowing off steam, and failed to stop his engine, although it was going at such a slow rate of speed that

he might have done so within a distance of six feet. There being some testimony to this effect, the court was not warranted in sustaining the motion for a nonsuit, even though, as we have said, the previous negligence of plaintiff may have been conceded.

We have, as we stated in the outset, quoted as little from the evidence as possible, and have endeavored to intimate no opinion as to the conclusiveness of its legal effect, because we did not desire to embarrass or prejudice the parties in the subsequent trial of the case. For the reasons which we have given, the judgment must be reversed, and the cause remanded for further proceedings in accordance herewith. Such will be the order. Reversed.

BOARD OF COM'RS OF ARAPAHOE COUNTY v. ROCKY MOUNTAIN NEWS PRINTING CO.

(Court of Appeals of Colorado. June 11, 1900.)

TAXATION—ASSOCIATED PRESS MEMBERSHIP—PERSONAL PROPERTY—CONSTITUTIONAL LAW—STATUTES—ASSESSOR—APPRAISEMENT—CREDITS—PROPERTY NOT ASSESSED—DISTRAINT AND SALE—EFFECT—COUNTY COMMISSIONERS—UNJUST TAXATION—RAISING ASSESSMENT—INTANGIBLE PROPERTY.

1. Const. art. 10, § 3, provides that all taxes shall be levied and collected under general laws which shall secure a just valuation of all "property, real or personal," for taxation. *Mills' Ann. St.* § 3765, provides that all property, real and personal, within the state, not exempt by law, shall be taxed. Section 3782 defines personal property to include everything which is the subject of ownership not included within the term "real estate." *Held*, that a newspaper's contract of membership in an association, the object of which was a reciprocal exchange of local and general news, such newspaper paying its proportion of the expense incident to the maintenance of the association, but having no right of exclusive use of its membership, and no power to assign the same without the consent of the association, was not personal property, and therefore was not taxable.

2. *Mills' Ann. St.* § 3769, provides that all taxable property shall be assessed at its full cash value. Section 3782 defines the meaning of "full cash value" to be "the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor." *Held*, that the value of a newspaper's contract of membership in an associated press, represented by nondividend paying shares of stock kept in the possession of the association, and not assignable without its consent, the sole object of such association being to distribute the news of the country to its members, was not ascertainable, or subject to appraisal, within the meaning of section 3782, and the county commissioners had no power to arbitrarily fix a valuation thereof for taxation.

3. Such contract or membership was not taxable as a "credit," within *Mills' Ann. St.* § 3782, providing that for the purposes of taxation the term "credit" shall include every claim and demand for money, labor, or other valuable thing.

4. Though *Mills' Ann. St.* § 3771, authorizes the county treasurer to distrain and sell personal property other than that taxed for the payment of personal property taxes, such statute does not have the effect of creating a statutory method for collecting taxes on in-

tangible things by placing tangible property at the disposal of the treasurer to enforce its payment, and therefore would not warrant the levy of a tax on a newspaper's contract with or membership in an associated press.

5. The fact that a newspaper publishing company, in paying taxes on the actual value of its tangible property, was being assessed less than its just proportion of taxation, did not warrant the county commissioners in raising its assessment on a basis of its contract with or membership in an associated press, such contract or membership being property intangible, and nontaxable.

Error to district court, Arapahoe county.

Action by the Rocky Mountain News Printing Company against the board of county commissioners of the county of Arapahoe to set aside an assessment of personal property. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Goudy & Twitchell, for plaintiff in error. L. B. France, E. F. Richardson, and H. N. Hawkins, for defendant in error.

WILSON, J. This suit involves the question whether, under existing laws, a newspaper membership in or contract with the Associated Press is subject to taxation. In 1896, within the proper time required by law, the Rocky Mountain News Printing Company, proprietor and publisher of the Rocky Mountain News, a daily newspaper, defendant in error, made out and returned to the assessor of Arapahoe county a schedule showing the taxable property of which it was possessed in said county on May 1st of that year. Thereafter the assessor, without the consent of said company, added to the schedule another item, as follows: "The Western Associated Press, \$25,000." Upon the subsequent sitting of the county commissioners as a board of equalization the matter was brought before them by the company, and resulted in a resolution by said board by which the item (there, however, designated as "Contract Associated Press") was valued and assessed at \$20,000, making a reduction of \$5,000. From this action of the commissioners the News Company appealed, as provided by law, to the district court. There the finding and judgment was in favor of the News Company, and from this the county appeals to this court. In the petition of the News Company to the board of equalization, the nature and character of the association known as "The Western Associated Press," and of the petitioner's relation thereto, are thus set forth: "Sixth. Your petitioner claims that the amount of such assessment is unjustly, erroneously, improperly, and unlawfully assessed; that the same is not property, but that the true description of the matter attempted to be assessed by the words 'The Western Associated Press' and the words 'Contract Associated Press' is as follows: Prior to the incorporation of the company now known as 'The Associated Press,' the owners of certain leading newspapers scattered all over the United States maintained a relation of

comity with each other whereby the news gathered by any one, where the same was of a general and public nature, was wired to each of the other members of said newspaper fraternity. Such action arose out of the desire on the part of the newspapers in different localities to secure the news from foreign localities at the lowest possible expense, and the furnishing of such news so gathered by any paper local to a certain community was furnished to each of the other papers in accordance with a general understanding that such other newspaper would reciprocate as to the news in their localities. It was found that it would be more convenient to organize a central bureau for the receipt and dissemination of such news from and to the various newspapers which had theretofore been furnishing the news in the manner herein indicated, and so a corporation was organized known as 'The Associated Press,' in the state of Illinois, having its headquarters in the city of Chicago, and the members of the newspaper fraternity hereinbefore alluded to, of whom your petitioner was one, took certain shares of stock in said company, which in the case of your petitioner was the sum of eight shares at fifty dollars a share, amounting to the sum of four hundred dollars. The said company was not formed for pecuniary profit, and is a nondividend paying organization, and only issued sufficient of its stock for the purpose of securing sufficient capital to maintain a central and such branch bureaus for the receipt and dissemination of news as was thought advisable. That of the stock so issued to your petitioner the said corporation holds each and every share thereof in the city of Chicago, state of Illinois, and that said stock is not, and never can be, worth an amount in excess of its par value, and is taxable, if at all, in the county of Cook, in the state of Illinois, and not elsewhere. That said stock does not entitle the owner thereof to the receipt of news from said bureau, but the receipt of news is regulated by virtue of the same arrangement which was in existence before the said company was formed; the only difference being that now the newspapers gather such news, and, instead of furnishing it directly to their contemporaries, forward it first to said central bureau, from which bureau it is disseminated to all of the owners of newspapers who are members of said association of newspapers. That the only value which said membership has arises from the fact that the said various newspapers so scattered throughout the United States are willing to contribute the news of their respective localities through such central bureau to the newspapers of the city of Denver in consideration of the fact that the newspapers of the city of Denver will contribute the news of that locality to the said former newspapers." The allegations of fact there stated were sustained by the evidence. It further appeared from the evidence that

the stock subscribed for by the members of the association is retained by the officers at Chicago, and is nontransferable, except by the consent of the board of directors; that it can never be assigned except to some newspaper which the board of directors will consent shall go on the roll of membership; that it is also held by the association to effectively enforce the clauses in the by-laws providing for the forfeiture, under certain conditions, of membership rights; that the organization has agents all over the United States, who telegraph items of news to the central office at Chicago, and thence it is wired to the different cities where there are members of the association; each newspaper on the roll of membership is also required to furnish to the agents of the association the news it has gathered during the day, thus insuring a complete interchange of news among the members of the association; that the expenses are equitably apportioned so as to make each member bear his just share of the cost of obtaining the news, a weekly assessment being levied for this purpose, such assessment upon the petitioner at the time of this attempted assessment being \$175 per week; that this assessment, however, is not a fixed one, being changed from time to time as the necessities of the case may demand; and that each member has a voice in the management and control of the association. The petitioner contends that the assessment of this item was erroneous, and presents two legal questions for determination: (1) Is the membership in or contract with the Associated Press held by the defendant in error property within the meaning of the revenue laws of the state of Colorado? (2) Assuming that it is "property," has the legislature provided any way by which a correct valuation may be arrived at, or is there any practicable way by which a just valuation of it may be reached, and if so, then what is its valuation?

Before entering upon a discussion of these questions, it may be well to state as a fundamental and universally recognized principle that the power of taxation is an incident to sovereignty, and that, as such, it belongs to the legislative department to determine the persons and objects to be taxed, subject to constitutional limitations, and to provide the necessary mode and provisions for making the law effective. *Yunker v. Nichols*, 1 Colo. 567; *Stanley v. Mining Co.*, 6 Colo. 419. In other words, regardless of the constitutional provisions, the legislative branch of the state would have power to provide for the taxation of property, and where constitutional provisions upon the subject do exist they are to be regarded as limitations and restrictions upon the legislative power. It is also settled in this jurisdiction, however it may be in others, that, although courts should not favorably consider objections to statutes framed in the interest of the public revenue, and providing for an exercise of

the taxing power, except upon clear and convincing grounds, yet it is equally fundamental that great caution is to be exercised in construing a law imposing taxation, in order to arrive at the intention of the law-giver, for it is the intention that is to be enforced. *People v. Henderson*, 12 Colo. 371, 21 Pac. 144; *Stanley v. Mining Co.*, *supra*. In the latter case it was said by the court: "Where the object is plain, and the language unequivocal, the effect must be given to the law by the courts, but burdens are never to be imposed upon citizens upon vague or doubtful interpretations. It has been well said 'that the legislature is ever at hand to explain its own meaning, and to express more clearly what has been obscurely expressed,'"—citing *Cooley, Tax'n*, 201-203. The word "property," in its broad, general signification, means everything which is susceptible of ownership. In order, however, to constitute ownership, the right to the thing must present certain distinctive qualities. Anderson defines property to be "that which is one's own; something that belongs or inheres exclusively in an individual person. * * * The right of property is that sole and despotic dominion which one man claims and exercises over the external things of the world in total exclusion of the rights of every other individual in the universe. The absolute right of private property consists in the free use, enjoyment, and disposal of all one's acquisitions without any control or diminution save only by the law of the land. * * * Everything which has an exchangeable value is property. The right of property includes the power to dispose of it according to the will of the owner. Labor is property,"—citing to this point the *Slaughter-House Cases*, 16 Wall. 127, 21 L. Ed. 394. And. Law Dict. tit. "Property." A well-known text writer defines the word briefly as "the exclusive right of possessing, enjoying, and disposing of lands and chattels." *Smith, Pers. Prop.* p. 1. In *Bank v. Hines*, 3 Ohio St. 8, the court says: "Those things which constitute the subject-matter of private property are such as the owner may exercise exclusive dominion over in the use, enjoyment, and disposal of them without any control or diminution save only by the laws of the land. 1 Wend. Bl. 138. It is a fundamental principle that 'property,' considered as an exclusive right to things, contains not only a right to use those things, but a right to dispose of them either by exchanging them for other things or by giving them away to any other person without any valuable consideration in return, or even of throwing them away, which is usually called relinquishing them. *Ruth. Inst.* 20 Puff. c. 9, b. 7. It is said that capability of alienation or disposal either by sale, devise, or abandonment is an essential incident to property. 2 Kent, Comm. 317." In *Wynehamer v. People*, 13 N. Y. 396, Judge Comstock, speaking for the court of appeals, says: "Nor can I

find any definition of property which does not include the power of disposition and sale, as well as the right of private use and enjoyment. Thus Blackstone says (1 Bl. Comm. 138): "The third absolute right of every Englishman is that of property, which consists in the free use, enjoyment, and disposal of all his acquisitions without any control or diminution save only by the laws of the land." Chancellor Kent says (2 Kent, Comm. 320): "The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself;" and again (page 326): "The power of alienation of property is a necessary incident to the right, and was dictated by mutual convenience and mutual wants." * * * These definitions are in accordance with the general sense of mankind. Indeed, if any one can define property eliminated of its attributes, incapable of sale, and placed without the protection of the law, it were well that the attempt should be made." It will thus be seen that, in order to constitute property which is subject to ownership, as the terms are used in their broad sense, there must exist not only the right of use and enjoyment, but the exclusive right to alienate or transfer. There may be, of course, a qualified and restricted ownership of property; but where the word is used without anything in the context to show that it is intended to be used in a restricted or qualified sense, it must be taken to have been used in its broader and more general and extended signification or sense. *People v. Eddy*, 43 Cal. 336; *Same v. Hibernia Bank*, 51 Cal. 243.

Section 3, art. 10, of our state constitution provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws which shall prescribe such regulations, and shall secure a just valuation for taxation of all property, real and personal," etc. It is manifest that three things were attempted to be required: (1) That all taxes should be uniform upon the same class of subjects; (2) that they should be levied and collected under general laws; (3) that such general laws should prescribe such regulations as would secure a just valuation for taxation of all property, real and personal. There is nothing in the context to indicate in the slightest degree that the word "property," as used in this section, was used in any other than its broad and general sense as defined by the authorities which we have cited. Neither, however, was there anything in this section, or in any other section of the revenue article of the constitution, imposing upon the legislature any restrictions or limitations so as to preclude it, if it should see fit, from extending and enlarging the list of taxable subjects so as to embrace tangible and intangible things which might not be property under the broad

definition of the word, and which might be the subjects of qualified ownership only. It is proper, therefore, to refer to the statutory provisions bearing upon the subject, in order that we may see to what extent, if any, the legislature has availed itself of this privilege. Section 3765, *Mills' Ann. St.*, provides that all property, both real and personal, within the state, not expressly exempt by law, shall be subject to taxation. Section 3760 requires all taxable property to be listed and valued each year, and to be assessed at its full cash value. Section 3771 provides that taxes levied upon personal property shall be a perpetual lien upon such property, and that, if such tax be not paid within the proper time, the county treasurer shall collect the same by distress and sale of any of the personal property so taxed, or of any other personal property of the person assessed. Section 3782 defines the meaning of terms used in the revenue act. Among others, it defines "personal property" to include everything which is the subject of ownership not included within the term "real estate." It defines "full cash value" to mean "the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor." Section 3788 makes it the duty of the assessor to assess all personal property which is situate in his county on the 1st day of May in the current year, and every person is required to list his personal property in the county where the same is situated on said date. Section 3792 specifies the manner in which property shall be listed. We do not find in any of these sections anything to suggest an intent to use the word "property" in any other save in its broad sense as heretofore defined, unless it be in its reference to the assessment of credits, and this can by no possibility embrace that which is sought to be taxed in the case under consideration. We may concede—yea, we do concede—the contention of the county that the intent of the constitution and legislative enactments was to render liable to taxation all property within the state the subject of ownership. But that is not the question to be determined. The vital question is, what is property which is the subject of ownership within the intent and meaning of the statutes and the constitution? It is self-evident that, if the definitions of property which we have cited are correct,—and that cannot be disputed,—then the thing here sought to be taxed is not embraced within the provisions either of the constitution or of the statute. It is further self-evident that it is not embraced within any special provision of the statute. On the contrary, an examination of the character of the thing sought to be taxed, and an attempted application to it of the revenue provisions of the statute, considering them as a whole, exclude the idea of any legislative intent or purpose to include it. This contract with or membership in the Associated Press

held by the petitioner lacked the two most essential elements to constitute it "property" as the term is used in the constitution and statutes. The petitioner had no right to its exclusive use or enjoyment, because this was subject to certain varying conditions imposed by the board of directors of the association, and by this board might be defeated or taken from it at any time. The petitioner had no right whatever to assign it, unless with the consent of this board of directors. Even the eight shares of stock which it was compelled to purchase in order to become a member of the association—an admission fee, as it were—were not delivered to the petitioner, but were held by the association as a guaranty of the performance by petitioner of its agreements. The membership was more in the nature of a privilege. It simply authorized the petitioner to receive from the association, of which petitioner was itself a part, certain news, so long as it complied with the rules of the association, and paid its estimated share of the sum necessary to gather and supply such news. That it does not come within the meaning of the revenue statutes is, we think, clearly apparent. It could not be levied upon and sold by the county treasurer to pay the tax upon it. It is true that the statute provides that the treasurer may levy upon any other personal property of the person assessed in order to collect the tax, but we think this provision is only a cumulative remedy, intended to give the treasurer the power to levy upon other personal property for greater certainty or convenience of collection, or in the event of the removal or destruction of the personal property taxed, or of some other unforeseen contingency. We think the only reasonable construction of the statute is that it was the intent to levy a tax only upon property which could itself be responsible for the tax, except it be in the nature of credits, which are specially provided for. The membership under consideration more nearly resembles the membership in a voluntary association for mutual benefit, or in a stock board, where the member does not have the privilege of selling or assigning his "seat" without the consent of the association. It has been expressly held by the California supreme court that such a membership as the latter is not taxable property. *City & County of San Francisco v. Anderson* (1894) 103 Cal. 70, 38 Pac. 1034. The court said: "It is a mere right to belong to a certain association with the latter's consent, and to enjoy certain personal privileges and advantages which flow from membership of such association. Those privileges and advantages cannot be transferred without the consent of the association, and a forced sale of them would not give to the purchaser the right to occupy said 'seat.' It is too impalpable to go into any category of taxable property." By the terms of section 3782, this membership or contract, if property at all, is personal property, and

must be assessed at its full cash value; this being defined as meaning "the amount at which the property would be appraised if taken in payment of a just debt due from a solvent debtor." This would be impossible as to the membership or contract under consideration, because it has no public market value, and it could not be appraised as required by the statute, for the reason that it could not be taken in payment of a debt. It could not even be assigned by the holder in order to pay a debt, nor be subjected to a judgment against him. There being no possible means of ascertaining its value, it must be left to the arbitrary determination of the assessor or of the board of county commissioners. They might as well fix the amount at \$100,000 as at \$20,000. The board of commissioners this year might think the latter amount was fair and reasonable, but the board next year might think that the former amount was the proper sum to be assessed. We cannot concede that it was the intent of the legislature to thus make the rights and property of citizens subject to and dependent upon the arbitrary will of any official or set of officials.

Again, all personal property must be assessed where it is on May 1st of the current year. Where would this be assessed? The statute makes no provision for it. It provides for the assessment of credits at the place where the owner resides at such time. Even if this applied here, this contract has two parties to it; one the Press Association, and the other the News Company. Each has an interest in it. Under its terms each is charged with some obligation and duty to the other. Who is the owner of it, and to whom should it be assessed, if assessable at all? One valuable rule of statutory construction where there is ground for dispute as to the intent of the legislature and meaning of the statute is to consider the results of any certain construction. It is always presumed that the legislature in the enactment of a statute seeks to attain reasonable results and practical objects. If the construction here contended for by the county is correct, then every contract between individuals which might be of value, or from which some pecuniary benefit or profit is derived, would be subject to taxation, however personal in their nature such contracts might be. For instance, a newspaper might have a contract with some man of great reputation and pre-eminent ability to act as its editor in chief. By reason of this it might acquire a largely increased number of subscribers, increased patronage, and an increased amount of advertisements, by which it would receive large pecuniary profits. Can it be contended for a moment that such contract for the personal services of an editor would be subject to taxation? If so, by whom and how could the value of the contract be fixed or determined? If such a contract were taxable, the same rule would

embrace all contracts for labor. The mere possession of real estate, a right of action, a right of appeal, have all been held in a qualified sense to be property. In the Slaughter-House Cases, cited above, labor was held to be property. No one will contend, however, that these, or any of them, are subject to taxation under our statutes.

The contention of the county that the petitioner was not paying its just proportion of taxation, because its net profits during the year were largely out of proportion to the amount of actual, visible, tangible property which it owned and listed in its schedule given to the assessor is without any force whatever. If the argument were of any effect in any case, who could determine what proportion of these profits were due to and flowed from the contract with the Associated Press. The attempted argument proceeds upon the fallacious assumption that the publication of the press dispatches alone contributes to and creates the profits of a newspaper. It is a matter, however, of common knowledge that there must be a variety of other things concurring to make a newspaper profitable. The skill and ability with which it is edited, the enterprise and energy which it displays in the securing and publication of local news, the mechanical make-up of the paper, and its typographical appearance are all matters which have material and important bearing upon the success of a newspaper. Counsel for the county have cited us to some authorities upon which they strongly rely in support of their contentions. The leading ones are: *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683, and on petition for rehearing, 166 U. S. 185, 17 Sup. Ct. 604, 41 L. Ed. 965; *State v. Anderson*, 90 Wis. 558, 63 N. W. 746; *Hotel Co. v. Lieb*, 83 Ill. 605. These are certainly authorities worthy of the highest consideration, and, if they settled the questions involved in this case, we would not, unless for extraordinary reasons, hesitate to follow them, although the cases in the federal court were decided by a nearly evenly divided court. They are not in point, however. The two Ohio cases in the United States supreme court grew out of what is called the "Nichols Law." This state statute expressly provided that in the assessment and taxation of an express or other company the board of assessors, in arriving at the value thereof, should take into consideration all of its property, tangible and intangible; and further provided a specific rule for arriving at such valuation of intangible property. The state supreme court held the statute to be constitutional and valid. The question raised, considered, and determined in the federal supreme court was whether the law was "repugnant to the constitution of the United States because in violation of the commerce clause of that instrument, and because operating to deprive appellants of their prop-

erty without due process of law and of the equal protection of the laws." Statutory provisions similar to the Nichols law have been adopted in Indiana, Kentucky, and Arkansas, authorities from which jurisdictions have also been cited to us. None of these authorities touch upon the pivotal question in this case, and the only question upon which we express an opinion. Here we have no statute similar in character to the Nichols law, and the only question to be determined by this court is whether, under our statutes as they now exist, the membership or contract under consideration is subject to taxation. We positively disclaim any intention to express any intimation or opinion as to what the legislature might or might not do. We are concerned only with what it has done. We may heartily approve of everything that the majority of the United States supreme court have said in commendation of the justice and equity of the provisions of the Nichols law, and yet hold that the alleged property here sought to be taxed is not taxable under existing laws. The Wisconsin case involved the question as to the liability to taxation of the franchise of a corporation. This does not arise in the case at bar. A franchise is defined to be "a particular privilege conferred upon individuals by grant from the government." *Londoner v. People*, 15 Colo. 247, 25 Pac. 183; 3 Kent, Comm. 458. As applied to corporations it constitutes its right to do business, and also, in so doing, to exercise certain special powers and privileges which do not belong to citizens of the country generally of common right, and is vested in the corporate entity. The Illinois case arose under a statute which required corporations to list, in addition to their tangible property and the valuation thereof, the amount and market or actual value of their capital stock, and their total indebtedness, and thereupon it was the duty of the state board of equalization to ascertain and determine therefrom "the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company." The chief point upon which the case turned was the claim of the corporation that the listing by it of its capital stock, etc., was a necessary condition precedent to the validity of the assessment and valuation fixed by the state board, and that this had not been done by reason of the fact that it had not been furnished by the assessor or auditor, with the instructions or forms in conformity with which such listing was required to be made, nor had such list been demanded of it. For this and the additional reason that the valuation and assessment of its capital stock were alleged to have been grossly unequal, unfair, and oppressive it was urged by the corporation that the tax levied upon the capital stock was absolutely void. It will be readily seen that the only question involved in the

case at bar, as we view and determine it, did not arise in that case. There the statute in express terms provided for the assessment, valuation, and taxation of the property the tax upon which was in dispute. Some authorities have been cited to us bearing upon the right to assess for taxation purposes an entire newspaper plant, including all of its property and property rights as a unit, even though the assessed valuation should exceed the value of all real estate and tangible personal property belonging to the newspaper company and connected with the business and management of the paper. That proposition is not involved in the case before us, and hence we express no opinion upon it. For the reasons given, we are of opinion that the membership in or contract with the Associated Press held by the News Company was not property subject to taxation within the intent, provisions, or meaning of either the constitution or of the statutes as now existing, and that hence the judgment of the district court was correct. It will be affirmed. Affirmed.

(9 Kan.App. 826)

SODEN v. ROTH.

(Court of Appeals of Kansas, Southern Department, W. D. June 19, 1900.)

FORCIBLE ENTRY AND DETAINER—RES JUDICATA.

The action of forcible entry and detainer is of a summary character, and the legislature has expressly provided that judgments in such actions, either before a justice of the peace or in the district court, shall not be a bar to any after action brought by either party. *Waite v. Teeters*, 14 Pac. 146, 36 Kan. 604.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by L. W. Roth against Mrs. S. F. Soden. Judgment for plaintiff, and defendant brings error. Affirmed.

I. E. Lambert and L. B. & J. M. Kellogg, for plaintiff in error. Madden Bros., for defendant in error.

SCHOONOVER. J. Mrs. S. F. Soden, plaintiff in error, was the owner of the farm in controversy. L. W. Roth, defendant in error, had been her tenant for the year 1893. He had a written lease terminating March 1, 1894. For the year 1894, by oral agreement, this lease was extended for another year, terminating, by its terms, March 1, 1895. She served a written notice on defendant in error to quit the premises. This was followed by a second notice, in writing, to quit, which was served on March 15, 1895. On March 22, 1895, Mrs. Soden commenced an action in justice court for forcible detainer against L. W. Roth, alleging an unlawful detainer of the premises after a peaceable entry as her tenant. The unlawful detention was claimed to have been from

March 1, 1895. The case was tried, and a verdict and judgment for the plaintiff for the restitution of the premises. A writ of restitution was duly served, and possession of the farm restored to Mrs. Soden. No appeal was taken from the judgment rendered in justice court. Afterwards, L. W. Roth commenced this suit in the district court of Lyon county. The issues are fairly stated by the trial court as follows: "This action is brought to recover \$873, which is claimed for damages sustained by plaintiff by reason of the defendant having wrongfully deprived him of the possession and use of certain lands occupied by him as her tenant, and for certain improvements alleged to have been put on the place of the defendant, which plaintiff claims he had a right to take away, but which plaintiff in error refused to permit him to remove, and converted the same to her own use."

The principal question presented is, was the defendant in error's right of recovery barred by the judgment in the forcible entry and detainer suit between the same parties? The action of forcible entry and detainer is of a summary character, and the legislature has expressly provided that judgments in such actions, either before a justice of the peace or in the district court, shall not be a bar to any after action brought by either party. *Waite v. Teeters*, 36 Kan. 606, 14 Pac. 146. This section is broad, but its meaning cannot be construed to be that a party on being defeated could immediately commence another action, and so ad infinitum. The right of possession, which is the only question that can be litigated in a case of forcible entry and detainer, when determined may be set up in a plea of res adjudicata. In the case under consideration the plaintiff is not seeking possession of the land, but damages for the rental value, improvements made, seed furnished, etc. It is true that it was decided in the former case that he was not entitled to possession, and it is now contended that he could suffer no damages for the use or rental value of premises to which he did not have the right of possession; but, under the statute relating to judgments in actions of forcible entry and detainer, we do not think the former judgment can be set up as a bar to this action. The judgment of the district court will be affirmed.

(9 Kan.App. 832)

REES et al. v. HIGGINS.

(Court of Appeals of Kansas, Southern Department, C. D. June 19, 1900.)

REPLEVIN—TITLE TO REALTY.

It is not proper to make a replevin action the means of litigating and determining the title to real property as between the original owner and the tax-title claimant in adverse possession of the premises under a tax deed valid on its face.

(Syllabus by the Court.)

Error from district court, Butler county; C. W. Shinn, Judge.

Action by M. P. Higgins against Margaret E. Rees and others. Judgment for plaintiff, and defendants bring error. Reversed.

H. W. Schumacher and E. N. Smith, for plaintiffs in error. M. P. Higgins, for defendant in error.

MILTON, J. This is an action in replevin brought by M. P. Higgins to recover the possession of a dwelling house in the city of Eldorado, Kan.; the plaintiff alleging ownership of the house, and of the lot from which the house was removed by the defendants Margaret E. Rees and her husband, William Rees. George W. Smith, one of the defendants below, acted only as an employé of the other defendants in the work of removing the house from the lot to the nearest street. Margaret E. Rees claimed the right to the possession of the house and the ownership of the lot under a tax deed issued on the 6th day of September, 1897, based on a tax certificate assigned to her on the 2d of that month by the clerk of Butler county. Immediately after procuring the tax deed, William Rees, as the agent for his wife, took actual possession of the property so conveyed, the house being vacant and untenanted, and not having been occupied by Higgins, or by any one under him, for about 18 months prior to the date of the deed. It is one of the controverted questions in this court whether demand for the possession of the house was made by the plaintiff after or before it was actually removed from the lot. While the findings of the court are not entirely clear on this point, we think they show that demand was made after such removal. The defendants Rees and Rees actually removed the house to another lot, and placed it on a permanent foundation, and thereafter occupied it as a family residence. Judgment was rendered in the alternative in favor of the plaintiff below, the court finding the value of the house to be \$150. The court made findings of fact, and the evidence is not presented in the record. On the trial the plaintiff's title prior to the issuing of the tax deed was not questioned, but the validity of the tax deed was disputed, and oral evidence was introduced for the purpose of proving its invalidity. The tax deed stated a consideration greater by 48 cents than the amount recited as having been paid to the county treasurer for the assignment of the tax certificate, and the court found that the difference was made up of the costs of advertising the land in the redemption notice and the fee for assignment of the tax certificate. For this reason the court held the tax deed to be invalid, and its judgment in favor of the plaintiff was based on the findings of the foregoing facts.

We think the court erred in its judgment. It appears from the findings that the tax deed was on its face valid; hence it pur-

ported to vest in the grantee an absolute estate in fee simple in the land which it conveyed. Section 197, c. 158, Gen. St. 1897. As such grantee, Margaret E. Rees became entitled to the immediate possession of the property, which at the date of the execution of the deed was vacant and unoccupied. She entered into possession of the premises, and at the date of the commencement of this action was in possession thereof, holding the same adversely to the plaintiff, in good faith and under claim and color of title. It was not proper, therefore, to make the replevin action the means of litigating and determining the title to the real property as between the conflicting claimants. *Cobbey*, Repl. § 374; *Halleck v. Mixer*, 16 Cal. 579; *Caldwell v. Custard*, 7 Kan. 303, 307; *Rathbone v. Boyd*, 30 Kan. 485, 2 Pac. 664. The case of *Green v. Railroad Co.* (Kan. App.) 56 Pac. 136, is not in conflict with the conclusion here reached. The judgment of the district court will be reversed, and the cause remanded, with instructions to enter judgment in favor of the plaintiffs in error for costs.

(9 Kan. App. 828)

PHENIX INS. CO. OF BROOKLYN, N. Y., v. SMITH.

(Court of Appeals of Kansas, Southern Department, W. D. June 19, 1900.)

INSURANCE—CONDITIONS—INCUMBRANCES.

"A policy of insurance provided that, upon the commencement of foreclosure proceedings against, * * * or the existence of a mechanic's or judgment lien against, * * * without written notice to and the consent of the company indorsed hereon, this policy shall in each and every instance be void." The policy also contained a provision to the effect that "should the property be sold or incumbered, or otherwise disposed of, written notice should be given to the company of such sale, incumbrance, or disposal, and its assent thereto indorsed thereon; otherwise, the insurance on such property should immediately terminate." *Held*, that the policy was not forfeited by the recovery of a judgment in invitum against the insured during the life of the policy, and prior to the destruction of the property insured, and that the provision against incumbrances is construed to mean voluntary incumbrances only.

(Syllabus by the Court.)

Error from district court, Marion county; O. L. Moore, Judge.

Action by Marion Smith against the Phenix Insurance Company of Brooklyn, N. Y. Judgment for plaintiff, and defendant brings error. Affirmed.

Jackson & Jackson, for plaintiff in error. King & Kelley and S. Burkholder, for defendant in error.

SCHOONOVER, J. This was an action upon a policy of insurance which contained, among others, the following provisions: "(1) * * * If the property be sold or transferred in whole or in part, or upon the commencement of foreclosure proceedings against, or a sale under a deed of trust, or the exist-

ence of a mechanic's or judgment lien upon, or the issue or levy of an execution against any of the property herein described, * * * without written notice to and consent of the company indorsed hereon, this policy shall in each and every instance be void." "(4) If the interest of the assured in the property be other than unconditional, exclusive ownership, and, if it be real property, if it be other than an absolutely fee-simple title, or if any other person or persons have any interest whatever in the property described, whether it be real or personal property, or if the building insured or containing the property insured by this policy stands on leased ground, or if there be a mortgage or other incumbrance thereon, building or contents, or any part thereof, whether inquired about or not, it must be so notified to the company, and be so expressed in the written part of the policy; otherwise, the policy shall be void. When the property insured (or, if it be a building, or machinery therein, the land upon which it stands) shall be sold or incumbered, or otherwise disposed of, written notice shall be given to the company of such sale or incumbrance or disposal, and its assent thereto indorsed thereon; otherwise, this insurance on said property shall immediately terminate." The insurance company admitted the making of the policy, and the destruction by fire of the insured property, but denied that the policy was in force at the time the property was destroyed. The record shows that prior to the fire a judgment had been rendered against the insured in the United States circuit court for the district of Kansas, and it is contended by plaintiff in error that such judgment rendered the policy void, because of the provisions of the policy above set out. The provisions in question provide for a forfeiture, and must therefore be strictly construed, and in case of indefiniteness or ambiguity every doubt must be resolved in favor of the insured. *Dover Glass-Works Co. v. American Fire Ins. Co.* (Del. Err. & App.) 29 Atl. 1039; 1 Wood, Ins. § 60. The record shows, also, that the judgment was procured in invitum, and it is urged by counsel for defendant in error that the provisions in question relate only to voluntary acts of the insured. An insurance company has a right to impose terms and conditions under which it will issue its policies, and if such terms are not illegal or contrary to public policy, and are expressed clearly and definitely, so as to be easily comprehended by a person of ordinary understanding, there is, in principle, no reason why they should not be upheld. But such provisions must be clothed in language so plain and clear that the insured cannot be mistaken or misled as to the burdens and duties thereby imposed upon him. The insurer, being the party who draws the

contract, must see to it that all conditions are plain, easily understood, and free from ambiguity. We see no reason why a provision that a policy should be rendered void by a judgment recovered in invitum should not be upheld, provided such provision was so clearly expressed that no other construction could be placed upon it. Keeping in view the principles above set out, let us examine the provisions in question. The only part of paragraph 1 that has any bearing upon the case is embraced in the following language: "* * * or upon the commencement of foreclosure proceedings against, * * * or the existence of a mechanic's lien upon, * * * without written notice to and the consent of the company indorsed hereon, this policy shall, in each and every instance, be void." This language we take to be tantamount to a provision that before the commencement of the foreclosure proceedings, or before the attaching of a judgment lien, notice must be given to the company, and its consent obtained; otherwise, the policy shall be void. Thus construed, the policy is brought within the rule as laid down in the cases of *Dover Glass-Works Co. v. American Fire Ins. Co.* (Del. Err. & App.) 29 Atl. 1039, and *Gerling v. Agricultural Ins. Co.* (W. Va.) 20 S. E. 691, in which it was held that similar provisions had reference only to judgments confessed, and other voluntary incumbrances. An examination of paragraph 4 shows that, with the exception of the last sentence, it has reference to the condition of the title of and incumbrances upon the property at the time the policy was issued. That part of the paragraph that has any application to this case is as follows: "When the property insured * * * shall be sold or incumbered, or otherwise disposed of, written notice shall be given to the company of such sale, incumbrance, or disposal, and its assent thereto indorsed thereon; otherwise, this insurance on said property shall immediately terminate." When we consider the relation in which the word "incumbered" is used, it seems reasonable to conclude that it has reference to voluntary incumbrances only. Certainly the insured would be warranted in placing such a construction upon the word. We have examined many authorities, and find that the courts have almost uniformly held that the word "incumbered," as used in provisions similar to those under consideration, meant voluntary incumbrances. See *Hosford v. Insurance Co.*, 127 U. S. 404, 8 Sup. Ct. 1202, 32 L. Ed. 198; *Phoenix Ins. Co. v. Pickel* (Ind.) 21 N. E. 546, and cases there cited. Under this construction, the policy would not be forfeited by the lien of a judgment procured in invitum, and the judgment of the district court will therefore be affirmed.

(9 Kan. App. 853)

**FLEMING & AYREST CO. OF CHICAGO
v. EVANS et al.**

(Court of Appeals of Kansas, Southern Department, C. D. June 16, 1900.)

PAYMENT—EVIDENCE—DRAFT SENT BY MAIL.

A. inclosed a draft in an envelope which was properly stamped, and addressed to B. at Chicago, Ill. A. knew the street and number of B., but did not, so far as the evidence shows, place any address upon the envelope but A.'s name and the words "Chicago, Ill." *Held*, that the letter was not so addressed that a jury would be warranted in drawing an inference that it was actually received by B.

(Syllabus by the Court.)

Error from district court, Lyon county; W. A. Randolph, Judge.

Action by the Fleming & Ayrest Company against J. E. Evans and Jonathan Thomas. Judgment for defendants, and plaintiff brings error. Reversed.

J. Harvey Frith, for plaintiff in error. H. D. Dickson, for defendants in error.

SCHOONOVER, J. Evans & Thomas, the defendants in error herein, bought on credit a bill of lumber of the Fleming & Ayrest Company, a firm doing business in the city of Seattle, Wash. The account was by them assigned to the Fleming & Ayrest Company of Chicago, who duly notified Evans & Thomas of such assignment. The two companies were separate and independent concerns; none of the members in either having any interest in the other, although their names were identical, except as to the designation of their respective locations. It appears that the Chicago concern had a contract with the Seattle company to purchase its accounts east of the Rocky Mountains. The Fleming & Ayrest Company of Chicago brought suit to recover upon the account. Defendants pleaded payment, and also alleged that the Chicago company was organized for the purpose of handling the accounts of the Seattle company, and thereby cheating and defrauding the creditors and customers of said Seattle company. The case was tried to a jury, which returned a verdict for the defendants. A motion for a new trial was by the court overruled, and judgment rendered for defendants. Plaintiff brings the case here.

Several grounds of error are assigned by plaintiff in error, but we think that the case turns on the question, was there some evidence to support the verdict? Defendants below introduced evidence to prove that they bought a draft for the amount of the account, and that such draft was indorsed to the Fleming & Ayrest Company, and inclosed in an envelope properly stamped, and addressed to Chicago, Ill. Upon the trial it seems to have been contended by plaintiff that the letter had by mistake been sent to the Fleming & Ayrest Company at Seattle, Wash., and that, as this company was an independent concern, payment had not been made to the Chicago company. We find nothing

ing whatever in the record to show that the two companies were in any way connected. Mr. Carey, president of the Chicago company, testified that the account had not been paid. The account and assignment were admitted by defendants, and the only issue was as to payment. Admitting that a draft for the amount of the account was purchased, indorsed to the Fleming & Ayrest Company, and inclosed in an envelope properly stamped, addressed to Chicago, Ill., and deposited in the post office, it does not follow that payment was proven. As a general rule, the duty lies on the debtor to pay his debt to his creditor personally, or to his authorized agent. The burden of proof to show payment of a debt is not sustained by proof that a letter containing the requisite amount was duly deposited in the post office. The debtor must go further. He must show that the creditor authorized this mode of remittance, either by express assent or direction, or by a usage and course of dealing from which such assent may be fairly inferred. 2 Greenl. Ev. § 525; Gurney v. Howe, 69 Am. Dec. 299; Burr v. Sickles, 65 Am. Dec. 437. We have carefully examined the record, but find no evidence tending to show that the Fleming & Ayrest Company of Chicago authorized defendants in error to make remittance by mail, nor is there evidence of such usage and course of dealing that assent may fairly be inferred. So far as the evidence shows, defendants in error had not, prior to this particular transaction, done any business with such company, and had never before made a remittance to that company by mail or in any other manner. It is true that a letter properly addressed, stamped, and deposited in the post office, is presumed to have been received by the person to whom it is directed. Perhaps it is more nearly accurate to say that the fact that a letter properly addressed is deposited in the post office, with postage prepaid, is prima facie evidence that the person to whom it is addressed received it, and that the inference based on the fact that letters usually reach their destination may be overcome by other evidence, it being a question for the jury. Mr. Carey, who was president of the Fleming & Ayrest Company of Chicago, testified that the account had not been paid. Upon the question as to whether or no the positive testimony of the party addressed, that he did not receive the letter, is sufficient to overcome the presumption that the letter was in fact received, we find a conflict of opinion. The supreme court of Washington has held that such presumption is overcome by direct testimony of the person to whom the letter is sent that it was not received (Ault v. Association, 47 Pac. 13), while the supreme court of Alabama has held that it is for the jury to determine whether the presumption is overcome by such evidence. Steiner v. Ellis (Ala.) 7 South. 803. We are inclined to favor the rule laid down in the Alabama case, as being the better one,

but do not base our decision upon that question. The evidence shows that the draft was mailed by a Mr. West, who was the book-keeper for defendants in error. West testified that he noticed the assignment stamped upon the invoice received by Evans & Thomas, and that he read the address of the Chicago company. The assignment was as follows: "The above and foregoing account has been transferred by us to the Fleming & Ayrest Company of Chicago, to whom payment thereof is to be made, at 218 Home Insurance Building, Chicago, Ill. Fleming & Ayrest Company, Seattle, by E. A. Ayrest, Secretary." In answer to the question "What address did you put on the envelope?" West replied, "Chicago, Ill." We do not think that the letter was so addressed that the jury would be warranted in drawing an inference that it was actually received by the Fleming & Ayrest Company of Chicago. In a large city like Chicago, it frequently happens that there is more than one firm bearing the same name. It is a general custom in such a city to deliver mail to the street and number of the person addressed, and, if mail is not so addressed, it not frequently happens that it is not received by the person for whom it is intended. The presumption that a letter is received by the person to whom it is addressed should have some reasonable limitation placed upon it, and we do not think that evidence that a letter was simply addressed to Chicago, Ill., would be sufficient to support an inference that the letter was actually received. If the draft had been indorsed to the Fleming & Ayrest Company of Chicago, and inclosed in an envelope addressed to such company at 218 Home Insurance Building, Chicago, Ill., the question of payment would probably not have arisen. We think that the motion for a new trial should have been sustained, and the judgment of the district court is therefore reversed.

(9 Kan.App. 863)

WESTERN UNION TEL. CO. v. GETTO-McCLUNG BOOT & SHOE CO.

(Court of Appeals of Kansas, Southern Department, C. D. June 16, 1900.)

TELEGRAM—DELAY IN DELIVERY—EVIDENCE—ATTACHMENT—INSTRUCTION.

1. In an action to recover damages resulting from failure to deliver promptly a telegram addressed to the plaintiff's attorneys, and concerning the bringing of an attachment action, *held*, that a statement respecting such failure made by the agent of the telegraph company at the receiving office to the said attorneys when handing them the telegram, three days after its date, was a part of the *res gestæ*, and was properly admitted in evidence.

2. Section 3, c. 17, Gould's Dig. Ark. 1858, enlarged the apparent scope of section 1 thereof so that an attachment might be obtained, not only against one who was a nonresident, but also against one who was about to remove out of the state, or about to remove his goods and effects out of the state, or who was secreting himself so that the ordinary process of law could not be served upon him.

3. An instruction must be good as asked, or it is not error to refuse it. *Dickson v. Randal*, 19 Kan. 215.

(Syllabus by the Court.)

Error from district court, Sedgwick county; D. M. Dale, Judge.

Action by the Getto-McClung Boot & Shoe Company against the Western Union Telegraph Company. Judgment for plaintiff, and defendant brings error. **Affirmed.**

Stanley, Vermillion & Evans, for plaintiff in error. Sankey & Campbell, for defendant in error.

MILTON, J. In this action the defendants in error, a firm doing business at Wichita, Kan., recovered judgment against the plaintiff in error in the sum of \$711.71 on account of alleged negligence of the latter in failing to deliver a telegram. The telegram was sent on February 21, 1890, by Shepherd, Grove & Shepherd, attorneys at Muskogee, I. T., to Sankey, Campbell & Amidon, at Wichita, Kan., concerning a proposed attachment action by the shoe company against Darling Bros., who were merchants at Oklahoma City, and debtors to the shoe company in the sum of \$502.50 for goods sold and delivered. At that time the United States court at Muskogee had jurisdiction in such actions over the territory known as "Oklahoma," in which Oklahoma City was situated, under the act of congress of March 1, 1889, which extended the laws of the state of Arkansas covering civil causes over that territory. The attorneys at Wichita, representing the shoe company, sent the said claim to the attorneys at Muskogee on February 18, 1890, with instructions to begin an attachment action thereon against Darling Bros. On February 21st thereafter, Shepherd, Grove & Shepherd delivered to the agent of the telegraph company at Muskogee the message in question for transmission. It reads: "Have bank wire C. W. Turner here to furnish bond. Costs will be thirty-four dollars. Will draw for same." On the 24th of the month the Wichita attorneys received a letter from Shepherd, Grove & Shepherd asking why there was no response to their telegram. Thereupon Mr. Amidon and Mr. Campbell visited the local office of the telegraph company at Wichita, and, in answer to inquiries, were shown by the manager of the office the message as there received. The telegraph company's agent admitted that "a blunder had been made," and claimed that the failure to deliver the message was the fault of an office boy. The message was actually put into the hands of Amidon & Campbell at that time, but it is not shown in the record that they carried it away from the telegraph office. The Muskogee attorneys were prepared on the 21st of February to file the attachment action, and the testimony tends to show that, if the message had been promptly delivered to the attorneys at Wichita, the attachment

bond would have been arranged for and given and the suit filed on that day. It was further shown that, if the suit had been filed in the United States court at Muskogee on the 21st of February, it would have been practicable for the United States marshal, personally or by deputy, to have attached the goods of Darling Bros. at Oklahoma City on the 24th of that month. After seeing the telegram, Sankey, Campbell & Amidon arranged, through a Wichita bank, by wire, to furnish an attachment bond for the action, and the same was given, a suit begun on February 26, 1890, an attachment order issued therein, and the same delivered to the United States marshal for service. The goods of Darling Bros. were not found or levied upon by the marshal under the order; having been shipped from Oklahoma City on February 26th, consigned to the Arkansas City Investment Company, which, by its representative, J. L. Huey, received such goods at Arkansas City, Kan., on February 27th, and removed the same from the car late at night. Huey had previously obtained from Darling Bros. a bill of sale, dated February 5, 1890, transferring to him all the merchandise belonging to Darling Bros., and described as being situated in Oklahoma City and in El Reno City. The purported consideration of the bill of sale was \$3,500, and the testimony on behalf of the defendant indicated that the bill of sale was intended as a mortgage to cover existing indebtedness. The attachment law of Arkansas, as introduced in evidence, was sections 1-6, 9, c. 17, Gould's Dig. Ark. 1858. The first section reads: "In all cases of absent or absconding debtors who may have property real or personal in this state, the creditors may proceed against the same in the following manner, to wit." Section 2 relates to the filing of the "declaration, petition or other statement" in writing against the debtor. Section 3 reads: "The creditor shall at the time of filing the declaration of his claim, also file an affidavit of himself, or some other person for him, stating that the defendant in the declaration or statement mentioned, is justly indebted to such plaintiff in a sum exceeding one hundred dollars, the amount of which demand shall be stated in such affidavit, and also that the defendant is not a resident of this state, or that he is about to remove out of this state, or that he is about to remove his goods and effects out of this state, or that he so secretes himself that an ordinary process of law cannot be served on him." Section 4 mentions the officers before whom the affidavit may be made, and section 5 provides for the filing of an attachment bond. Section 6 declares that, "on the requisites hereinbefore prescribed being complied with, the clerk shall issue a writ of attachment," etc. Section 9 relates to the custody of the attached property. There was evidence on behalf of the plaintiff below tending to prove that on or about the 16th of February, 1890, the stock of goods in the

store of Darling Bros. at Oklahoma City was in a disturbed and disarranged condition; the appearance thereof indicating that part of such stock was being packed, or being prepared for packing, in boxes. A member of the shoe company and one of their attorneys were led by the appearance of the said stock and of the store to suspect a design on the part of Darling Bros. to remove the goods from Oklahoma City, and such suspicion was one of the chief causes for the attempted attachment proceedings.

The principal errors assigned by the plaintiff in error are that the court admitted incompetent evidence; that improper instructions were given, and proper instructions were refused; and error in overruling defendant's demurrer to the plaintiff's evidence.

The alleged incompetent evidence which was received over the objection of the defendant below was the testimony of Mr. Amidon and Mr. Campbell, attorneys for the shoe company, concerning declarations of the telegraph company's agent at Wichita at the time the witnesses visited the telegraph office to inquire concerning the telegram. Counsel for plaintiff in error say that it is not shown that the person with whom these witnesses had the conversation testified to was in charge of defendant's office, or had any connection with its business, prior to the date that the conversation occurred; that such conversation was not a part of the *res gestæ*, as it was not shown to have been between the witnesses and a person having connection with the receiving of the telegram, and such conversation related to a past transaction, and therefore the declarations of the agent, if he was an agent of the telegraph company, could not bind the latter. The testimony showed that the defendant's agent gave the telegram in question into the hands of the witnesses to whom the same had been addressed and sent, and that the declarations of the agent were made in connection with such delivery of the message. The trial court regarded such declarations as being a part of the *res gestæ*. We see no reason to doubt the correctness of this view. The principal facts respecting the message were that it was delivered at Muskogee for transmission by the defendant company, and that it was finally by the defendant's agent at Wichita placed in the hands of the persons to whom it was addressed. The witness Campbell testified without objection on the part of the defendant that its agent at Wichita admitted that a blunder had been made in regard to the delivery of the telegram. What the agent said in addition to this appears to have been immaterial, and we think no harm could have resulted to the defendant from the admission of the testimony complained of.

A careful comparison of the instructions refused with those given leads to the conclusion that the trial court substantially covered all the declarations of law contained in

the former which could properly have been given to the jury. Special stress is laid by counsel for plaintiff in error on the failure of the court to give requested instructions Nos. 10, 14, and 8. The first-named instruction reads: "The statute relating to an attachment, which it is claimed was in force at Oklahoma City during the year 1890, was the statute of Arkansas, which has been introduced in evidence; and the same only permitted an attachment against absent or absconding debtors. And in this case, before you could find any damages in favor of the plaintiffs by reason of failure to have an order of attachment levied upon the property of the Darling Bros. at Oklahoma City, you must be satisfied from a preponderance of the testimony that the members of the said firm were either absent from the territory in which Oklahoma City was then situated, or that they were absconding therefrom." In view of the evidence, the instruction was properly refused. Section 3 of the Arkansas Statutes, supra, enlarges the apparent scope of section 1 thereof. In 1 Shinn, *Attachm.* p. 156, in considering the cases in which an attachment will lie against nonresidents, it is said: "In Arkansas it will lie, not only against one who is a nonresident, but against one who is about to remove out of the state, or is about to remove his goods and effects out of the state, or who is secreting himself so that the ordinary process of law cannot be served upon him;" citing *Mandel v. Peet*, 18 Ark. 236, which construes the law in question. Requested instruction No. 14 is substantially covered by the instructions given. Requested instruction No. 8 was objectionable for several reasons, but principally because it assumed to inform the jury what the evidence tended to prove. "As asked, the instruction was improper. An instruction must be good as asked, or it is not error to refuse it." *Dickson v. Randal*, 19 Kan. 215. See, also, *Mayberry v. Kelley*, 1 Kan. 110; *Douglass v. Wolf*, 6 Kan. 88; *Insurance Co. v. Berry*, 8 Kan. 159; *State v. Cassidy*, 12 Kan. 551. We find no reversible error in the record. The verdict of the jury being supported by some competent evidence, and having received the approval of the trial court, the judgment will be affirmed.

(10 Kan. App. 98)

PALMER et al. v. HUDSON RIVER STATE HOSPITAL.

(Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.)

INSANE PERSONS—SUPPORT—NOTARY PUBLIC—QUALIFICATIONS—FOREIGN STATUTES.

1. To charge the estate of an insane person with the expense of maintenance and for necessities furnished, it is not requisite that there be an express promise to pay therefor, either by the insane person or guardian.

2. A notary public is not disqualified to take depositions, under the provisions of section 350 of the Code, by reason of the fact alone that he is the bookkeeper of the plaintiff.

3. It is competent to prove the law of an-

other state by the testimony of a person learned therein.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by the Hudson River State Hospital against Sarah Palmer and W. E. Palmer. Judgment for plaintiff, and defendants bring error. Affirmed.

John T. Little, for plaintiffs in error. I. O. Pickering, for defendant in error.

MAHAN, P. J. There is no merit in the motion to dismiss. The case was made and served within the time fixed by the court. It was settled and signed by the proper officer within a year from the date of judgment. There is no introductory matter in the case-made; e. g.: "This is a case-made," or "This is the petition that was filed in the court below, in which the trial was had," or "This is the answer," etc. However, it discloses the cause and the issues joined in the controversy, and the court's rulings, giving day and date, and there is an acknowledgment of service as a case-made; a long list of suggestions of amendments running through the entire record, which were allowed. We do not believe in being too precise and technical in construing these records, so as to avoid hearing parties on the merits of their controversies, when the controverted questions of law are fairly presented thereby. There are no strictly formal assignments of error, as required by the rules of the court, but the brief presents clearly the grounds of contention.

In the first place, it is contended that there must have been an express contract between the hospital and the insane person, or her guardian, to make her estate liable for her necessary maintenance and care. We do not so understand the law. On the contrary, the estate of an insane person is liable for necessities furnished him upon an implied contract. Hence the second count of the answer, which denied the making of any express contract for necessities either by the insane person or her guardian, stated no defense to the cause of action set out in the petition, and the demurrer thereto was properly sustained. See *People v. Ettenson*, 60 Kan. 858, 56 Pac. 749. No statute was necessary to create a liability on her part for such benefits received by her.

There is sufficient evidence of the plaintiff's capacity to maintain the suit as a corporation.

The notary who took the deposition read on the trial was not disqualified by the provisions of section 350 of the Code. No objection was made at the time the deposition was taken that he was disqualified by being partial to plaintiff or prejudiced against the defendant. The mere fact that he was bookkeeper for the hospital did not disqualify him, as a person having an interest in the event of the suit.

The admission of Dr. Bamford's evidence regarding the record of the hospital was not so prejudicial to the defense as to be reversible error, and the evidence in that regard was elicited by the defense upon cross-examination, and not concerning any matter testified to upon his examination in chief.

It is admissible to prove the law of another state by persons learned therein.

There is but one other contention presented by the briefs of plaintiff in error. The insane person, Mrs. Sarah Palmer, was a citizen of Kansas, on a visit to relatives in New York. Her husband and children were domiciled in Kansas, and were able, and it was their duty, to support her. She had been theretofore adjudged insane by the probate court of Johnson county, Kan. She was admitted to the New York hospital, plaintiff, as an indigent insane person, and maintained and cared for by the hospital, and the expense thereof paid from an appropriation made by the legislature of New York to provide an asylum for its indigent insane. No charge was made for this service and expense, either to the husband in his lifetime or to the wife. She entered the asylum, the last time in 1893, and was taken therefrom by her son in 1896. For the last period of service, recovery is sought. It is contended that inasmuch as she was admitted as an indigent insane person, under the provisions of the New York statute, and her care and maintenance paid for by the state, and no direct charge made therefor, the state is now entitled to indemnity from her property in Kansas. It is plain that the state of New York did not intend to provide for Kansas insane as a charity. When its agents discovered that they had been providing an asylum to a person not entitled thereto as a lawful right, and that the recipient was able to refund to the state its expense therein, the law of New York made it their duty, in the name of the hospital, to sue to recover it. The judgment is affirmed.

(9 Kan. A. 886,

GRESIENGER v. McCARTER, Sheriff.

(Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.)

EXECUTION—ISSUANCE.

A sale on an execution issued by the clerk of a district court on a judgment rendered in another county will be enjoined.

Error from district court, Smith county; R. M. Pickler, Judge.

Action by August Gresienger against Comodore McCarter, sheriff. Judgment for defendant on demurrer. Plaintiff brings error. Reversed.

Webb McNall, for plaintiff in error. L. C. Uhl, for defendant in error.

PER CURIAM. This was an action of injunction brought in the district court of Smith county against the defendant in error,

as the sheriff of said county, to restrain him from proceeding to collect, under an execution in his hands, certain moneys therein stated. A temporary injunction was granted, and at a final hearing a demurrer to the petition was sustained on the ground that it did not state facts sufficient to constitute a cause of action, and the temporary injunction was dissolved. To reverse this, the case is brought here. The sale sought to be enjoined was upon an execution issued by the clerk of the district court of Smith county upon a judgment rendered in Wyandotte county, which is expressly prohibited by statute. The judgment of the district court is reversed, and the case remanded for further proceedings.

(10 Kan. A. 93)

McCLUNG et al. v. HOHL.

(Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.)

JUDGMENT—RES JUDICATA—ESTOPPEL—LIS PENDENS.

1. A judgment dismissing a case because the petition does not state facts sufficient to constitute a cause of action against the defendants either on demurrer or motion thereto is not a bar to a subsequent suit on the same cause of action wherein the omitted allegations are supplied.

2. A party to a suit, who obtains the dismissal thereof upon demurrer or motion on the ground that material allegations are not in the petition, will not be heard to say in a subsequent suit on the same cause of action that the petition did contain them, for the purpose of claiming a bar by the judgment of dismissal.

3. This rule applies to a purchaser of the subject-matter of the suit after the judgment of dismissal, and who claims to have relied thereon as a bar to any other action.

4. The provisions of section 81 of the Code of Civil Procedure apply to cases pending in this court upon petition in error, so that pending the case in this court no third person can acquire an interest in the subject-matter of the suit as against the rights of the plaintiff thereto; nor is it requisite that a supersedeas bond be given by the plaintiff in the case in order to give force to the provisions of said section.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; W. G. Holt, Judge.

Action by Rosalia Hohl against Clarence C. McClung and others. Judgment for plaintiff. Defendants bring error. Affirmed.

J. A. Smith and T. P. Anderson, for plaintiffs in error. Hutchings & Keplinger, for defendant in error.

MAHAN, P. J. This was an action by the defendant in error to foreclose a mortgage against the grantee of the mortgagors. The Wyandotte common pleas sustained a motion to dismiss on the ground that the petition stated no cause of action against the grantees. This judgment was reversed July 10, 1890. 53 Pac. 676. Pending the proceedings in error, the defendants conveyed the land to Peter Orr, and he conveyed to Robinson, Robinson to Grogan, and he to the

McClungs. Robinson mortgaged to Jackson. When the case was returned to the common pleas court for a new trial, the plaintiff, Hohl, filed an amended petition bringing in as parties defendant these subsequent grantees, alleging conveyance to them subject to her mortgage. Issues were framed upon answers filed, and the case submitted on an agreed statement of facts, and judgment was given plaintiff foreclosing her mortgage against the defendants by sale of property. From this judgment the McClungs and Jackson prosecute error, and assign the following grounds: "(1) That the court erred in giving judgment for plaintiff on the agreed statement of facts. (2) In overruling their motion for judgment on the statement of facts. (3) In denying their motion for a new trial."

One contention only is presented by these assignments. The plaintiffs in error claim that they are bona fide purchasers for value, and are protected by the provisions of sections 77 and 467 of the Code. It is admitted that all the conveyances by which the title was passed from the original defendants to them were made after the proceedings in error were commenced, and that each grantee, including plaintiffs in error, had actual knowledge of the pendency of the proceedings in error and the purpose and nature thereof. We content ourselves with saying that the facts of the case do not bring them within the provisions of either section 77 or 467 of the Code. The provisions of section 77 apply to cases where judgment was rendered upon constructive service, and application is made by the defendants to set it aside, and permit them to make a defense. In such cases it is provided that the setting aside the judgment to permit defense to be made shall not affect the title to any property being the subject of the judgment, and which by or in consequence of the judgment shall have passed to a purchaser in good faith. In this class of cases, after petition filed for a new trial and service of summons thereon, as provided by the statute, no one could become a purchaser in good faith, within the meaning of the section, if the judgment should be set aside, and the defendants below succeed. Section 467, by its terms, applies to cases where lands have been sold under the terms of the judgment, or on execution issued on the judgment. The plaintiffs in error took title to the land subject to Mrs. Hohl's mortgage lien. The judgment dismissing the case for want of sufficient allegations of fact to constitute a cause of action did not in terms or by its legal effect discharge this lien, or render it unavailable to Mrs. Hohl as against the Reeds, or the plaintiffs in error claiming through them. Had she elected to abide the judgment of dismissal, and had brought immediately a new action containing the necessary allegations which were absent from her former petition, it could not have been

urged by the Reeds, or those claiming under them, that the former petition was sufficient, or that the added allegation or allegations were not essentially additional allegations, and necessary to constitute a cause of action on the mortgage against them. They would not be permitted to thus play fast and loose with the court, as was said by the supreme court in *McLaughlin v. Doane*, 40 Kan. 394, 19 Pac. 853. It was on this basis the plaintiffs in error were required to take notice of the effect of the common pleas judgment at the time they bought the property. It was also the subject-matter of litigation between Mrs. Hohl and their grantors at the time they purchased, and under the provisions of section 81 of the Code they could not acquire a title that would affect the rights of Mrs. Hohl. That section does not attempt to define or limit the doctrine of *lis pendens* as it existed, but does provide when an action shall be held to be pending so as to render the doctrine of *lis pendens* applicable. See *Smith v. Kimball*, 36 Kan. 474, 13 Pac. 801. It is immaterial whether you call the proceedings in error an original action or a continuation of the one begun in the common pleas court. An action was pending in a court of record between the grantors of the plaintiffs in error and Mrs. Hohl, by the result of which not only the Reeds, but all parties acquiring rights in the subject-matter of the suit pending the suit are bound. Counsel for plaintiffs in error say as to this that it does not hold, because no supersedeas bond was filed to stay the execution of the judgment of dismissal, and cite us to *Evans v. Kahr*, 60 Kan. 725, 57 Pac. 950, 58 Pac. 467. The application of the provisions of section 81 does not depend on the filing of any supersedeas or other bond. That case (*Evans v. Kahr*, *supra*) was governed by the provisions of section 467, and there was no opportunity to apply the doctrine of *lis pendens* there. So said the supreme court in that case.

Contending that the judgment of dismissal was *res adjudicata*, and had the effect to release the land from Mrs. Hohl's claim of mortgage lien, and that hence no subsequent action could have been sustained by her to foreclose it, and that in purchasing the property the grantees of Reeds and others had a right to so regard it, counsel cite *Brown v. Kirkbride*, 19 Kan. 588; *McLaughlin v. Doane*, 40 Kan. 392, 19 Pac. 853. In *Brown v. Kirkbride*, on page 590, the court recognizes the distinction so clearly drawn by the United States supreme court in *Gould v. Railroad Co.*, 91 U. S. 526, 23 L. Ed. 416, wherein it is said: "But if the plaintiff falls on demurrer to his first action from the omission of an essential allegation in his declaration which is supplied in his second suit, the judgment in the first suit is not a bar to the second." We cannot see, in view of this rule, how the plaintiffs in error can derive a grain of comfort from

McLaughlin v. Doane. See, also, Moore v. Dunn, 41 Ohio St. 62. The judgment is affirmed.

(10 Kan.App. 105)

ANTHONY v. MOTT et al.

(Court of Appeals of Kansas. Northern Department, C. D. June 18, 1900.)

MORTGAGE—ASSUMPTION—PAYMENT—BURDEN OF PROOF.

1. The purchaser of mortgaged real estate, who assumed the payment of the incumbrance, though not by the terms of the conveyance, may charge his grantee with the payment of the mortgage debt.

2. The plea of payment is an affirmative plea, and the burden of proof is upon the party pleading payment.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thomson, Judge.

Action by Rose L. Anthony against Charles R. Mott and Howard P. Anthony. Judgment for defendants, and plaintiff brings error. Modified.

The plaintiff in error, Rose L. Anthony, as plaintiff, brought her action against Peter Stauffer, David Starkweather, David Harsh, trustee, W. P. Ingram, and Charles R. Mott and Howard P. Anthony as administrators of the estate of Cynthia Anthony, deceased, to quiet her title to certain real estate in Pottawatomie county. Service by publication only was had upon all of the defendants. Judgment quieting her title was rendered upon default on December 20, 1897. The defendants in error Mott and Anthony, as administrators, on August 1, 1898, filed their motion to open up the judgment, and that they be permitted to defend, which was accordingly done. These defendants filed their answer and cross petition. In the meantime plaintiff in error sold the real estate in question to Schwarz and Crossnickle. The purchasers were made parties to the action upon motion of Mott and Anthony, as administrators, and filed their answer to the cross petition. The plaintiff in error filed her reply to the cross petition of Mott and Anthony, who also filed their replies to the answers of Schwarz and Crossnickle. Upon the issues thus joined the cause was called for trial, a jury being waived. Thereupon Mott and Anthony dismissed their cross petition as to Schwarz and Crossnickle. The cause proceeded to trial upon the petition of Rose L. Anthony, cross petition of the defendants Mott and Anthony as administrators, and the reply. The trial court made its findings of fact and conclusions of law in writing as follows: "First, that the mortgage set forth by said defendant executors as having been made by George H. Anthony to Cynthia Anthony was assumed by George T. Anthony, since deceased; second, that the same was thereafter assumed by the plaintiff herein in a certain deed made to her of the lands therein described by said George T. Anthony; third, that at the time of the

commencement of this action the note secured by said mortgage was in full force and virtue, so far as the same had not been paid; fourth, that prior to the commencement of this action the plaintiff had made payments thereon aggregating the sum of \$530.20; fifth, that at this date there is due and owing the defendant executors of said Cynthia Anthony the sum of \$124.32." The court rendered judgment in favor of Mott and Anthony, as administrators, against Rose L. Anthony for \$124.32 and costs, the judgment to draw interest at the rate of 10 per cent. per annum. The plaintiff, as plaintiff in error, prepared her case-made, presents the record to this court for review, and alleges error in the proceedings of the trial court. The plaintiff excepted to the first, third, and fifth findings of fact and the judgment; filed her motion for a new trial, which was overruled; and as plaintiff in error presents the record to this court for review.

Benson & Smart, for plaintiff in error. W. S. Jenks, for defendants in error.

McELROY, J. (after stating the facts). The questions presented by the assignments of error and by the argument of counsel we will take up in order: That, as George T. Anthony never assumed or agreed to pay this mortgage debt, the assumption of the same by his grantee was without consideration, and not binding upon her. George H. Anthony and wife, on the 1st day of October, 1875, executed and delivered their promissory note to Cynthia Anthony, whereby they promised to pay to her order, five years after date, the sum of \$1,127.33. For the purpose of securing the payment thereof they executed their real-estate mortgage upon the S. W. ¼ of section 14, and the S. E. ¼ of section 15, township 7, range 11. George H. Anthony and wife, on the 30th day of December, 1887, conveyed the same lands to George T. Anthony "in consideration of the sum of \$1 and other valuable consideration to them in hand paid." George T. Anthony, on the 3d day of August, 1896, conveyed the same lands to his wife, Rose L. Anthony. This last deed recites "that the premises are free, clear, discharged, and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments, and incumbrances of what nature or kind soever, except one certain mortgage to Cynthia Anthony, on which there is a balance due of \$610.40, and which grantee is to assume and discharge." By the terms of the deed of conveyance made by George H. Anthony and wife to George T. Anthony the grantee did not assume or agree to pay the mortgage indebtedness. However, after the lands were conveyed to him he made various payments of interest and principal upon the note and mortgage. He prepared and delivered to Cynthia Anthony a statement of account, in which he char-

ged himself with this indebtedness. He also entered into a written agreement with her that the rate of interest from a certain date—presumably from the date the lands were conveyed to him—should be 7 per cent. It appears that at all times after he purchased the lands he treated this mortgage debt as if he was the payor. The testimony of George H. Anthony is sufficient to lead one to the conclusion that this indebtedness was assumed by his grantee as a part of the purchase money. If George T. Anthony was legally liable for the payment of the amount due upon the mortgage, he had a right to charge his grantee with its payment as a part of the consideration for the conveyance of the lands to her. The first, second, and third findings are supported by evidence, and are the proper conclusions under the evidence.

The only remaining question for consideration is as to whether this was paid prior to the commencement of the action. The amount due on principal and interest August 3, 1896, was \$610.40. The plea of payment is an affirmative plea, and the burden of proof is on the party who asserts payment. The record shows and the court found payments as follows: September 1, 1896, by draft, \$30.20; October 7, 1896, by draft, \$400; March 18, 1897, by draft, \$100,—making a total payment of \$530.20. The plaintiff in error contends that she paid March 24, 1897, by drafts from Streeter's Bank of Westmoreland, \$100. The evidence as to this last payment is very unsatisfactory. There is some testimony in the record tending to show that this was the draft of March 18th, which had been returned for indorsement. We are unable to say which of these contentions are correct. The burden of proof being upon the plaintiff in error to establish the fact of payment, she must prove the alleged payment by a preponderance of the testimony. The trial court found against the plaintiff upon this contention, and we are unable to say that the court erred; hence the findings in this regard are conclusive. The court found that the judgment should bear interest at the rate of 10 per cent. This was error. The judgment should bear interest at 7 per cent. This matter does not appear to have been brought to the attention of the trial court. The judgment will be modified so that it will draw interest at the rate of 7 per cent. and affirmed as modified. All concur.

(9 Kan. App. 471)

EASTWOOD v. CARTER et al.

(Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.)

SHERIFF'S RETURN—IMPEACHMENT.

A sheriff's return with respect to the service of original process may be impeached so far as it states jurisdictional facts, where the facts stated are not within the personal knowledge of the officer, but as to all matters stated in his return which are within the officer's per-

sonal knowledge the return is conclusive as between the parties to the action.

(Syllabus by the Court.)

Error from district court, Jewell county; R. M. Pickler, Judge.

Action by William Eastwood against Henry R. Carter and J. W. Cubbison. Judgment for defendants, and plaintiff brings error. Affirmed.

G. H. Bailey, for plaintiff in error. F. R. Forrest and Eben. P. Hotchkiss, for defendants in error.

McELROY, J. This action was brought by William Eastwood, the plaintiff in error as plaintiff below, against Henry B. Carter and J. W. Cubbison, to set aside a judgment rendered against him in favor of Carter, and to enjoin the defendants from selling property upon an execution issued thereon. A trial was had before the court without a jury, which resulted in findings and judgment for the defendants against the plaintiff for costs of suit. A motion for a new trial was overruled, the plaintiff excepted, and presents the record to this court for review.

It appears that on the 31st day of January, 1898, Carter brought an action in the district court of Jewell county against William Eastwood for the recovery of \$411.25 upon a promissory note, together with interest at 10 per cent. from August 3, 1895; that on that date a summons, in form and substance as required by the statute, was duly issued and delivered to the sheriff for service. The summons was indorsed as follows: "No. 2,578. Summons. —, Plaintiff, vs. —, Defendant. Suit brought for the recovery of money. Amount claimed, \$411.25, with interest from the 3d day of August, 1895, at the rate of 10 per cent. per annum. J. M. Livengood, Clerk District Court." The summons was returned within the time prescribed, with the following certificate of service indorsed thereon: "State of Kansas, Jewell County—ss.: I received this writ the 31st day of January, 1898, and on January 31, 1898, served the same by delivering a copy thereof, with the indorsements thereon, duly certified, to the within-named Wm. Eastwood, personally. J. W. Cubbison, Sheriff. O. H. Durand, Undersheriff." The defendant Eastwood made no appearance in the trial court. Judgment was rendered against him for the sum of \$522.22, with interest and costs of suit. An execution was duly issued upon the judgment, which was placed in the hands of Cubbison as sheriff, who levied upon and was about to sell the property of the judgment debtor. This action was instituted.

Upon the trial the plaintiff in error sought to show by oral testimony, and by a copy of the summons served, that there was no indorsement of the amount for which plaintiff claimed judgment. The only question presented is as to whether the court erred in excluding this testimony or no. The original sum-

mons, in substance, form, and as to indorsements, contained all that the statute required. The officer's return shows that he served the summons by delivering a copy thereof, with the indorsements thereon, duly certified, to the defendant personally. The only question, therefore, arises upon the action of the trial court in refusing to permit the plaintiff in this manner to impeach the officer's return.

A sheriff's return, with respect to service of original process, may be impeached so far as it states facts upon which jurisdiction depends, where the facts stated do not come within the personal knowledge of the sheriff. In the case at bar the sheriff in his return states that he served the summons by delivering a copy thereof, with the indorsements thereon, duly certified, to the defendant personally. The manner of service made by the officer was within his personal knowledge, and his return in this respect is conclusive as between the parties. The return cannot be questioned in an action brought to enjoin the enforcement of the judgment based upon such service. The authorities relied upon by the plaintiff in error are not applicable to the question under consideration. The question presented has been determined by the supreme court adversely to the plaintiff in error in *Goddard v. Harbour*, 56 Kan. 749, 44 Pac. 1055. The court properly excluded the offered evidence. The judgment is affirmed. All the judges concurring.

STATE v. DEVES.

(Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.)

CRIMINAL LAW—TRIAL.

Under Gen. St. 1897, c. 102, § 216, providing that neglect or refusal of a person accused to testify shall not be referred to by the prosecuting attorney, where defendant failed to testify, remarks by the prosecuting attorney, in an address to the jury, as to why the "gentlemen" did not impeach the witness for the prosecution, is ground for reversal.

Appeal from district court, Dickinson county; O. L. Moore, Judge.

Charles Deves was convicted of illegal sale of liquors, and appeals. Reversed.

R. H. Kane and W. S. Roork, for appellant. S. S. Smith and Allen & Towner, for the State.

PER CURIAM. The appellant, Charles Deves, was charged, jointly with one Anthony King, with the unlawful sale of intoxicating liquors upon two counts, and in a third count with maintaining a nuisance, under the prohibitory liquor law. His co-defendant, King, was acquitted, and the appellant was found guilty upon the second count of the information, and acquitted upon the first and third. His motion for a new trial was overruled. The only evidence which in any manner tends to support the verdict was that of one L. E. Humphrey. This witness

testified that for 15 years he resided in the town of Chapman, where the offense was alleged to have been committed; that he was acquainted with the defendants; that he saw them on the 18th day of October, 1899, in their place of business; that he purchased from them one half pint of whisky for the sum of 25 cents. There is no detailed statement as to what, if anything, the appellant did in connection with this sale of liquors. The testimony is wholly insufficient to support the verdict.

During the closing argument of counsel for the prosecution the assistant prosecutor made some statements to which the defendant excepted; whereupon the attorney stated, "I was not alluding to the failure of the defendants to take the stand," or, as stated by other witnesses, "I was not referring to the defendants' not testifying." The attorney who made the closing argument for the prosecution says that in his address to the jury, among other things, he said: "Why didn't the gentlemen bring forward witnesses to impeach the old man? Why didn't they [meaning the lawyers for the defendants] deny it [meaning, why didn't the lawyers deny that the old man, Sage, was an honored and respected citizen, whose character and reputation was good and above reproach, by putting witnesses on the stand who would impeach his general reputation for truth and veracity]?"—at which time counsel for defendants took exception to his remarks, and he immediately addressed the court as follows, "I was not referring to the defendants' denying it." Neither of the defendants testified upon the trial.

Section 218, c. 102, Gen. St. 1897, provides: "The neglect or refusal of the person on trial to testify, or of a witness to testify in behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place." Any reference by an attorney prosecuting in a criminal case, in his address to the jury, to the fact that defendant has neglected, failed, or refused to testify, constitutes misconduct. A party lawfully before the court for trial upon a criminal charge is entitled to a fair trial under the forms of law before he may be convicted. For the reasons hereinbefore stated, defendant is entitled to a new trial, and the court erred in overruling the motion for a new trial. The judgment is reversed, and case remanded for a new trial.

(9 Kan. App. 467)

THAYER v. MARTIN et al.

(Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.)

ESTOPPEL IN PAIS.

A landowner who obtains possession of certain premises by reason of a notice containing certain admissions as to the right of

the occupant to crops growing thereon is estopped from denying the correctness of the admissions so made, to the prejudice of said occupant, who relied thereon.

(Syllabus by the Court.)

Error from district court, Dickinson county; O. L. Moore, Judge.

Action by R. H. Thayer against D. W. Martin and Annie J. Martin. Judgment for defendants, and plaintiff brings error. Affirmed.

Hurd & Hurd, for plaintiff in error. C. S. Crawford, for defendants in error.

WELLS, J. Prior to the 20th day of August, A. D. 1898, the plaintiff was the owner of a section of land in Dickinson county, state of Kansas, which was occupied by the defendants in error as his tenants. The lease was in writing, and by its terms expired on the 1st day of March, 1899. On the 28th day of August, 1898, the parties to this action (the plaintiff in error acting by George Merrill, his agent) made a contract in writing by the terms of which the plaintiff in error agreed that if the defendants in error would make certain payments and perform certain covenants, in said instrument in writing mentioned, the plaintiff in error would convey said section of land to the defendants in error. By the terms of said contract the defendants in error agreed to pay the plaintiff in error \$8,320,—\$100 in cash, \$900 on or before November 15, 1898, and \$1,000 on March 1, 1899, at which time a deed was to be executed, and a mortgage taken back for \$6,320, the balance of the purchase money. The contract provided: "And in case of the failure of the said party of the second part to make either of the payments or to perform any of the covenants on their part hereby made and entered into, this contract shall, at the option of the party of the first part, be forfeited and determined, and the party of the second part shall forfeit all payments made by them on this contract, and said payments shall be retained by said party of the first part in full satisfaction and in liquidation of all damages by him sustained, and he shall have the right to re-enter and take possession of the premises aforesaid." After the payment of \$100 at the time of the execution of the contract, no further payments were made; and during the month of September, 1898, and after the execution of said contract of purchase, and before the maturity of the first time payment, the defendants in error planted a crop of wheat on the land. The defendants in error failed to make the payment of \$900 at maturity, on the 15th day of November, 1898, and notified the plaintiff in error that they would not make the payment of \$1,000 to mature on the 1st day of March, 1899. On the 28th day of February, 1899, the plaintiff in error, by George Merrill, his agent, served the defendants in error with a notice in writing as follows: "Notice. To David W. Martin and Annie J. Martin:

You are hereby notified that you have failed to pay the \$900.00 on or before the 15th day of November, 1898, according to the terms of a contract for the purchase of all of section 34, township 15 south, of range 1 east of the sixth principal meridian, in Dickinson county, state of Kansas, entered into between you and me on the 20th day of August, 1898. You are hereby notified that I hereby elect that said contract be forfeited and determined, and that I shall retain the same in full satisfaction and in liquidation of all damages by me sustained to this date. R. H. Thayer, by George Merrill, Agent. Dated Abilene, Kansas, February 28, 1899." And at the same time and in the same manner another notice was served on the defendants, of which the following is a copy: "Notice. To David W. Martin and Annie J. Martin: You are hereby notified that your lease on the following described premises, situated in Dickinson county, state of Kansas, to wit, all of section thirty-four in township 15 south, of range one east of the sixth principal meridian, will expire on to-morrow, March 1st, 1899, and that I will expect possession of said premises at that time, according to the terms of said lease. You will, of course, be permitted to enter upon the land for the purpose of harvesting the crop of fall wheat you now have planted; but I shall expect the full and complete possession of all the buildings, and of all the land not planted to fall wheat. R. H. Thayer, by George Merrill, Agent. Dated Abilene, Kansas, Feb. 28, 1899." A few days afterwards the defendants in error moved off the place. The wheat referred to in the last notice was ready to harvest about July 3, 1899; and the defendants in error claimed the same, and were about to harvest and remove it from the place, when they were enjoined from so doing. This injunction was afterwards vacated, and by stipulation of parties the wheat was marketed, and proceeds deposited in a bank, to await the final adjudication of their respective rights thereto. Upon a final hearing the court held that the plaintiff was entitled to one-third of the money, and the defendants to two-thirds thereof, and divided the costs. To reverse this judgment, the case is brought to this court.

The first, second, and third specifications of error relate to the notice to quit, and the admission therein that the defendants had the right to re-enter and harvest the wheat, and that under said notice they left the premises. This was competent evidence, and the notice amounted to an admission of the defendants' right to the wheat; and they accepted under it, and complied with its demands, and had a right to rely upon its terms, if the plaintiff authorized the same, or if the defendants had a right to rely thereon as the act of the plaintiff. All the business in relation to the land in question between the plaintiff and defendants was, on behalf of the plaintiff, with the agent who

served this notice; and, as said notice was within the apparent scope of his agency, the principal is bound thereby. Besides, in this case the agent was expressly authorized to employ counsel, which he did, and the notice in question was prepared and served under his direction.

We do not find anything in the record to authorize the court to award one-third of the proceeds to the plaintiff. It would appear to be the landlord's share under the lease, but the lease, or its terms upon this subject, does not appear. However, of this the plaintiff cannot complain. It may be that the contract of sale terminated the lease, and upon a forfeiture thereof the rights of the defendants in the land were absolutely forfeited, or it may be that even under the lease the lessee would not have any right to the crops harvested at the time of the termination of the tenancy; but the plaintiff elected otherwise, and, having made that election, and the other party accepting under its terms, the plaintiff is bound thereby. The judgment of the district court is affirmed.

(10 Kan.App. 101)

GREENWALT et al. v. BASTIAN.

(Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.)

ANCILLARY EXECUTOR—SUIT BY EXECUTOR.

B., a resident of Pennsylvania, died at her home. testate. Her will was duly probated, and the executor mentioned therein qualified. Said executor instituted an action in the district court of Brown county, Kan., against a resident of said county, upon a promissory note given by him, for borrowed money, to the testate in her lifetime. Afterwards an ancillary administrator with the will annexed was appointed by the probate court of Brown county, but said estate owed no debts and had no property in said county, except the claim sued on. The ancillary administrator claimed to be entitled to the proceeds of the note, and prayed judgment therefor. *Held*, that judgment was properly rendered on said note in favor of the executor.

(Syllabus by the Court.)

Error from district court, Brown county; W. I. Stuart, Judge.

Action by Morris Bastian against A. J. Greenwalt and Elizabeth Greenwalt. Judgment for plaintiff. Defendants bring error. Affirmed.

James Falloon, for plaintiffs in error.
Means & Smith, for defendant in error.

WELLS, J. On February 12, 1898, Mary E. Bastian, a resident of Lehigh county, Pa., died testate. Her will, which was duly admitted to probate in said county, appointed Morris Bastian, the defendant in error, the executor of her said will, and he duly qualified as such. On March 20, 1899, the said executor began an action in the district court of Brown county, Kan., against A. J. Greenwalt for \$1,000 and interest, due on a certain promissory note given by the said A.

J. Greenwalt to the said Mary Bastian in her lifetime. To the petition filed in said action the said A. J. Greenwalt answered by setting up a copy of the will of the said Mary Bastian, and alleging that by the terms thereof the note sued on and the sum due thereon belong to the wife of the said defendant, Lizzie Greenwalt, to use during the period of her natural life, and that he was willing to pay the same to her, and praying that the said Lizzie Greenwalt be made a party defendant. On May 23, 1899, the said Lizzie Greenwalt, as Elizabeth Greenwalt, was appointed and qualified as administrator of the estate of said Mary Bastian in Brown county, Kan., and returned an inventory of said estate, showing no debts or assets of said estate in said county, except the note herein sued on, and asking to be substituted as plaintiff herein, which was by the court refused on June 3, 1899; and thereupon, by consent of parties, she was by the court made a party defendant therein. An amended petition was filed, and an answer thereto, and to said answer a demurrer was interposed by the plaintiff, and sustained by the court. The defendants electing to stand on their said answer, judgment was rendered for the plaintiff, and the case brought here for review.

It was said in *Moore v. Jordon*, 36 Kan. 274, 13 Pac. 339: "The principal administration, to which all others are subordinate, is at the domicile of the intestate, and the universally recognized rule of law is that the succession to and distribution of personal estate are governed by the laws of the place where the intestate was domiciled at the time of his death." The supreme court of the United States, in *Wilkins v. Ellett*, 9 Wall. 740, 19 L. Ed. 586, uses this language: "It has long been settled, and is a principle of universal jurisprudence in all civilized nations, that the personal estate of the deceased is to be regarded, for the purpose of succession and distribution, wherever situated, as having no other locality than that of his domicile; and if he dies intestate the succession is governed by the law of the place where he was domiciled at the time of his decease, and not by the conflicting laws of the various places where the property happened at the time to be situated. 2 Kent, Comm. 429; Story, Conf. Laws, § 379. The original administrator, therefore, with letters taken out at the place of the domicile, is invested with the title to all the personal property of the deceased, for the purpose of collecting the effects of the estate, paying the debts, and making distribution of the residue according to the law of the place, or directions of the will, as the case may be. It is true that, if any portion of the estate is situated in another country, he cannot recover possession by suit without taking out letters of administration from the proper tribunal in that country, as the original letters can confer upon him no

extraterritorial authority. The difficulty does not lie in any defect of title to the possession, but in a limitation or qualification of the general principles in respect to personal property by the comity of nations, founded upon the policy of the foreign country to protect the interest of its home creditors. These letters are regarded as merely ancillary to the original letters, as to the collection and distribution of the effects, and generally are simply made subservient to the claims of the domestic creditors; the residuum being transmitted to the probate court of the country of the domicile, for the final settlement of the estate." Section 147, c. 107, Gen. St. 1897, reads: "An executor or administrator duly appointed in any other state or country may sue or be sued in any court in this state, in his capacity of executor or administrator, in like manner and under like restrictions as a nonresident may sue or be sued." Under this authority the plaintiff in the district court began this action. There were no debts of the deceased in this state requiring the protection of the court, and there was nothing to be done but to collect the assets of the estate, and distribute it under the provisions of the will. This should be done by the authority and under the control of the court at the domicile of the deceased, and all questions as to the construction of the will, and the execution of the trust therein reposed, must be adjudicated there. The judgment of the district court is affirmed.

URQUIDE v. FLANAGAN et al.

(Supreme Court of Idaho. May 29, 1900.)

TITLE BY PRESCRIPTION—ADVERSE POSSESSION—PAYMENT OF TAXES.

Where U. purchased land of F., which is inclosed by a fence, and within said inclosure is a small tract of land, not within the description of the deeds given by F. to U., which small tract is in the possession of, and occupied, used, and claimed by, U. for a period of 14 years, he exercising acts of control and ownership thereover, and where it appears from the record that such tract of land had not been assessed for taxation according to law or at all, held sufficient to establish adverse possession, under the provisions of section 4043, Rev. St.

(Syllabus by the Court.)

Appeal from district court, Ada county; George H. Stewart, Judge.

Action by Jesus Urquide against James Flanagan and Rufus Fontes. Judgment for defendants, and plaintiff appeals. Reversed.

Hawley, Puckett & Hawley, for appellant. Fremont Wood and Edgar Wilson, for respondent Flanagan. Brown & Cahalan, for respondent Fontes.

SULLIVAN, J. This suit was brought to quiet title to a triangular piece of land situated in block 29, Boise City. The complaint alleges that the plaintiff is owner in fee and

also has had actual possession of the land in controversy, adverse to defendants, for more than five years prior to the commencement of this action. It appears from the record that the defendant Flanagan conveyed to the plaintiff, who is the appellant here, by deed dated July 25, 1882, all of lots 4 and 5, block 29, Boise City, lying north of the ditch of Boise Valley Ditch Company. Also, a deed from said Flanagan to the appellant, dated November 10, 1883, conveying to appellant all of lots 3 and 6 in said block 29, lying north of said ditch, being 50 feet front, each, on the alley; also, a strip of land, 10 feet wide, lying easterly of and adjoining said lot 6, and running from the southerly end of First street southerly, along the easterly line of Boise City and said lot 6, to said ditch. Plats of Boise City dated 1867 and 1890, respectively, were introduced in evidence. The record also shows that said First street was never opened or extended southerly from Main street, and that the alley indicated as running through said block 29 has never been opened across the land in controversy; that, at the time of the purchase of said premises, they were inclosed by a fence, which inclosure also included the land in dispute; that said fence was constructed by the grantors of respondent Flanagan; that said fence has never been removed, but on several occasions has been repaired by appellant, and that at the time of the commencement of this action it was substantially where it was originally constructed; that appellant had for many years maintained a gate on said 10 feet of ground, leading from said lots to Main street, which, when closed, inclosed the tract in dispute, in common with said four lots; that since November 10, 1883, the appellant has been in possession of all land in said inclosure, including the tract in dispute, and has exercised control, dominion, and ownership over the same, and since that date has used the same in connection with his business as a packer, as a corral in which to keep his pack horses and mules and to store his packing paraphernalia, and has resided upon said premises since 1882. We have searched the record in vain for evidence showing, or even tending to show, that Flanagan had claimed any interest in, or had exercised any acts of control or ownership over, said tract in dispute, since the date of the last deed from him to appellant, to wit, November 10, 1883, and since he surrendered the possession thereof to appellant, down to the year 1897. Thus, for 14 years (from 1883 to 1897) the appellant was in the actual possession of the land in dispute, had it inclosed with a substantial fence, and claimed it as his own, adversely to respondent and the rest of the world. In 1897 appellant erected a small building on the land in dispute, and immediately thereafter respondent notified him to remove said building; and from that time on there have been numerous disputes over the rights of the parties to said disputed

tract, both claiming to be the owners thereof. On the foregoing facts, the court found that respondent Flanagan was at the commencement of this suit, and for more than five years before that time, and thence continuously up to that time, had been in the quiet and peaceable possession and occupation of the land in dispute, and that said respondent entered into the possession of said disputed tract March 4, 1881, claiming it in his own right, and that he had ever since that date been in the possession of the same, using and claiming the same in his own right from that date to the present time adversely to all the world, and especially as against appellant. There is not a scintilla of evidence in the record sustaining said findings of fact, so far as the possession of said disputed tract is concerned, from November 10, 1883, down to the commencement of this suit. Said findings are not supported by the evidence, and the court erred in making them; and the same is true of findings numbered 3, 4, 5, 6, and 10.

After respondent had conveyed to appellant said lots 3 and 6, and the 10-foot strip bordering on said lot 6, and extending to Main street (November 10, 1883), the tract in dispute was entirely surrounded by the land conveyed to appellant, and the land owned by the city and conveyed to respondent Fontes, and was completely segregated from the land conveyed to respondent Flanagan by Thomas Davis. It was inclosed by the fence above referred to, in common with said lots 3, 4, 5, and 6, and was in the possession and under the absolute and exclusive control of appellant for about 14 years; and during all of that time the respondent Flanagan did not have the possession of it, and, so far as the record shows, claimed no right, title, or interest therein. These facts indicate at least that he intended to convey to appellant the land in dispute, as during all of that time he left him in the quiet, peaceable, and exclusive possession thereof.

It is contended by counsel for respondent that title was not acquired by appellant by adverse possession, for the reasons—First, that he did not hold open and notorious possession under claim of right; and, second, he failed to pay taxes as required by section 4043, Rev. St. That section provides that, for the purpose of constituting adverse possession, land is deemed to have been possessed and occupied (1) where it has been protected by a substantial fence; (2) where it has been usually cultivated or improved. And it provides that in no case shall adverse possession be considered established, under the provisions of the Code, unless it shall be shown that the land has been occupied and claimed for a period of five years continuously, and that the party or persons, their predecessors and grantors, have paid all taxes which have been levied and assessed upon such land according to law. That the land in dispute has been protected by a substan-

tial inclosure, and has been occupied and claimed by appellant for a period of about 14 years prior to 1897, are clearly shown by the evidence; and we think the record sufficiently shows that said land had not been assessed according to law during that period, and until 1897, when it was assessed to appellant, who paid the taxes so assessed. As above stated, it was entirely segregated from other land sold and conveyed to the respondent Flanagan by Davis, and the statement that Flanagan had paid taxes on all land conveyed to him by deeds from Davis, except such as was embraced in deeds from Flanagan, is not sufficient; being too vague, indefinite, and uncertain to show that the land in dispute was ever assessed according to law. And we think the reasonable inference from all of the evidence is that the land in dispute was not, from 1883 to 1897, assessed according to law. If it was, we conclude that it was assessed as part of said lots 3, 4, 5, and 6, and appellant paid the taxes thereon. The judgment is reversed, and the cause remanded. Costs of this appeal are awarded to appellant.

HUSTON, C. J., and QUARLES, J., concur.

RANDALL v. KELSEY et al.

(Supreme Court of Idaho. May 29, 1900.)

JURORS' FEES—DEPOSIT.

Under the statutes of this state a court is not authorized to make a rule requiring a litigant to deposit jurors' fees, as a condition precedent to the right to a trial by jury. (Syllabus by the Court.)

Appeal from district court, Elmore county; C. O. Stockslager, Judge.

Action by C. B. Randall against Charles R. Kelsey and others. Judgment for plaintiff, and defendants appeal. Reversed.

W. C. Howie, for appellants. E. M. Wolfe, for respondent.

SULLIVAN, J. This action was brought in the probate court of Elmore county to recover \$48.25. The defendants answered, putting in issue the material allegations of the complaint, and, by way of cross complaint, set up an alleged cause of action against the plaintiff. When the cause came on for trial, the defendants demanded a jury. The court thereupon refused to issue a venire for a jury unless the defendants would deposit with the court sufficient money to pay the fees of the jurors. The defendants refused to make such deposit, and the court proceeded to try the case without a jury, and thereafter entered judgment in favor of the plaintiff. The defendants thereupon took an appeal from said judgment, on questions of law alone, to the district court, by which court said judgment was affirmed. This appeal is from the judgment.

The only question for decision is, did the

probate court have power, under the law, to require the defendants to deposit sufficient money to pay the jurors' fees, as a condition precedent to the right to have a jury trial? We answer this question in the negative. We have no statute requiring the deposit of jurors' fees with the court, as a condition precedent to the right of a party to have a jury in cases that come under justice court practice. Nor have we any statute authorizing courts to make a rule to that effect. Many of the states have statutes authorizing the courts to require a deposit of jurors' fees, as a condition precedent to the right to have a jury trial; and a number of the cases cited by counsel for respondent in support of his position are under such statutes, and for that reason are not in point. There appears to be some conflict in the decisions from California on the question under consideration. See *Conneau v. Geis* (Cal.) 14 Pac. 580; *Bank v. Sherer* (Cal.) 41 Pac. 415; *Adams v. Crawford* (Cal.) 48 Pac. 488; *Biggs v. Lloyd* (Cal.) 11 Pac. 831. Section 6138, Rev. St., and the act amendatory thereof (Sess. Laws 1899, p. 180), provide that jurors in justices and probate courts are entitled to receive two dollars per day for each day actually engaged in the trial of a case, and that such fees shall be taxed as costs against the opposing party. Now, if the law contemplated and required jurors' fees to be paid in advance, and the losing party has already paid them, why tax them against such party? Why tax them at all? That provision of the statute would indicate that a deposit of such fees was not intended as a prerequisite to the right to trial by jury. The law of this state permits certain officers and witnesses to demand their fees in advance, and they need not perform the desired service until such fees be paid, but such is not the law when applied to a litigant where a jury is desired. The judgment of the trial court is reversed, and the cause remanded for further proceedings. Costs of this appeal are awarded to the appellant.

HUSTON, C. J., and QUARLES, J., concur.

NORTHWESTERN & P. HYPOTHEEK BANK v. RAUCH et al.

(Supreme Court of Idaho. May 23, 1900.)

SEPARATE PROPERTY—COMMUNITY PROPERTY —MORTGAGE BY HUSBAND—WIFE'S FAILURE TO ACKNOWLEDGE.

1. Property purchased in the name of the wife, partly with funds of her separate estate, and partly with money borrowed during the existence of the community, is the separate estate of the wife, to the extent to which funds of her separate estate are used, and community property to the extent to which such borrowed money is used, in its purchase.

2. As a rule, property purchased with money borrowed by either spouse during the existence of the community is community property.

3. The husband may incur by mortgage,

without the wife joining him, an undivided interest in lands not a homestead, nor used as a residence, which belong to the community, although the wife may have a separate estate in said lands.

(Syllabus by the Court.)

Appeal from district court, Latah county; W. G. Piper, Judge.

Action by the Northwestern & Pacific Hypotheek Bank against A. Rauch and others. Judgment for plaintiff, and defendants Rauch and wife appeal. Reversed.

Geo. W. Goode and L. N. B. Anderson, for appellants. Forney & Moore, for respondent.

QUARLES, J. This action was brought by the respondent to foreclose a mortgage upon certain real estate. Judgment was rendered in favor of the respondent, from which the appellants appealed to this court; and upon said appeal said judgment was reversed by this court, principally upon the ground that the evidence shows that Margaret Rauch, wife of the mortgagor, A. Rauch, did not acknowledge such mortgage. See *Bank v. Rauch* (Idaho) 51 Pac. 764. Upon a retrial the district court found that the mortgaged property was at the time of the execution of the mortgage community property; and on this ground the court determined that the execution of the mortgage by the wife was unnecessary, and that the mortgage, having been executed and acknowledged by the husband, A. Rauch, was valid. Judgment of foreclosure was again entered in favor of respondent, from which the said mortgagors, A. Rauch and wife, appealed. The only new feature presented by this appeal is the question of the character of the estate of the wife in the mortgaged property. The title to said property is, and was at the date of the execution of the mortgage, in the wife, Margaret Rauch. After a careful consideration of the evidence in the record, we are fully convinced that the said finding of the court that the mortgaged property is and was community property is contrary to the evidence. The evidence shows that said mortgaged property was purchased at the sum of \$2,750; that a portion of the purchase price, to wit, \$745.60, was paid out of the loan made by respondent, to secure which the mortgage was given, and the balance, \$2,004.40, was paid out of the separate estate of the wife, — money which she inherited and received from her father's estate. Hence said finding is erroneous, and constitutes reversible error.

The court should have found the facts as above stated. The finding that the mortgaged property is community property is a conclusion of law, and not a statement of facts. It follows that the property was and is partly community property, and partly the separate estate of the wife, Margaret Rauch, — that part purchased with the borrowed money, to wit, 745¢-2750, or about .271+ per cent. of the mortgaged property. There is

no showing whatever to the effect that the mortgaged premises were at the date of the mortgage a homestead, or occupied by the mortgagors as a residence. Hence we must regard them as not being a homestead, or used as a residence. If a residence, the wife's execution and acknowledgment of the mortgage were necessary to its validity. Yet that is matter of defense, to be alleged and proven by the appellants. Under our statutes, community property, not a homestead or occupied as a residence, may be alienated or incumbered by the husband without the wife joining in the conveyance of incumbrance. If the mortgaged property was entirely community property, the mortgage would be valid. It must follow that, the said property being community property in part, the mortgage created a lien in favor of the respondent upon that portion which is community, but created no lien upon that portion thereof which is the separate estate of Mrs. Ranch. Judgment reversed, and the cause remanded for further proceedings consistent with this opinion. Costs awarded to appellants.

HUSTON, C. J., and SULLIVAN, J., concur.

STATE v. WHITE.

(Supreme Court of Idaho. May 23, 1900.)

CRIMINAL LAW—DEPOSITIONS—INSTRUCTIONS.

1. It is not error to admit in evidence a deposition taken under the provisions of section 7588, Rev. St., in a criminal case.

2. In a trial for assault with intent to murder, the neglect of the trial court to instruct the jury that they may find the defendant guilty of any lower offense included within the main charges cannot be sustained as error, where the record does not show that such a charge was requested by defendant. *People v. Biles*, 6 Pac. 120, 2 Idaho, 103, affirmed.

(Syllabus by the Court.)

Appeal from district court, Nez Perce county; Edgar C. Steele, Judge.

James White was convicted of assault with intent to kill, and appeals. Affirmed.

Geo. W. Tannahill and James W. Reid, for appellant. S. H. Hays, Atty. Gen., for the State.

HUSTON, C. J. The defendant was convicted of an assault with intent to commit murder. This appeal is from the judgment of conviction, and from the order overruling defendant's motion for a new trial. Some 20 assignments of error are urged.

The first is that the court erred in overruling defendant's motion for a continuance. The granting of a continuance is largely in the discretion of the trial court, and, as the record in this case does not contain the ground upon which the motion was predicated, we cannot say that there was an abuse of discretion.

The second, third, fourth, and fifth assignments of error refer to the deposition of Jo-

seph Whitaker, the party upon whom the alleged assault was committed. This deposition was taken under the provisions of section 7588, Rev. St. The defendant was present at the taking of the deposition, in person and by counsel, who cross-examined the witness on behalf of defendant at length. The deposition was taken—the examination had—before the judge of the trial court. It is contended by counsel for defendant that the admission in evidence of the deposition in this case was error, under the decision of this court in *State v. Potter*, 57 Pac. 431. In that case we held that the admitting in evidence of the depositions taken on the preliminary examination of the person charged was not permissible, under our statutes, while section 7588, above referred to, makes provision for the taking of the testimony of a witness in a case like the one we are considering. Neither the letter nor the reasoning in *State v. Potter*, supra, apply to this case. If the contention of counsel for defendant is to obtain, then section 7588, Rev. St., is a delusion and a snare, and can only serve the purpose of enabling the guilty to escape punishment.

Defendant's contention that the court erred in not charging the jury that they might find defendant guilty of any of the lesser offenses included in the charge of assault with intent to murder is settled by this court in *People v. Biles*, 2 Idaho, 103, 6 Pac. 120.

We have examined the instructions given and refused by the court, and find no error therein prejudicial to the defendant. The judgment of the district court is affirmed.

QUARLES and SULLIVAN, JJ., concur.

WILLIAMS v. OLDEN.

(Supreme Court of Idaho. May 21, 1900.)

ATTACHMENT—LEVY—SERVICE.

1. Under the provisions of subdivision 3, § 4307, Rev. St., the levy of a writ of attachment must be in substantial compliance with the provisions of said section, in order to create a lien.

2. Where the statute requires copies of the writ, description of the property, and notice of levy to be served on the occupant, if there be one, and, if there be none, the posting of such copies in a conspicuous place on the land levied upon, it is not a sufficient compliance with said provisions to serve such copies on the owner, who is not an occupant of the land.

(Syllabus by the Court.)

Appeal from district court, Ada county; George H. Stewart, Judge.

Action by S. W. Williams against B. F. Olden. Judgment for defendant, and plaintiff appeals. Reversed.

J. L. Niday, for appellant. B. F. Olden, for respondent.

SULLIVAN, J. This is an action to quiet title, and was submitted to the trial court on stipulated facts, and judgment was entered

in favor of the defendant, who is the respondent here.

The only question submitted for decision is whether a valid levy of a writ of attachment can be made on land, not containing an occupant, by filing with the recorder of the county in which the land is situated a copy of the writ, together with a description of the land attached, and a notice that it is attached, and by leaving a similar copy of the writ, description, and notice with the defendant, who does not reside on the land. Section 4307, Rev. St., provides, *inter alia*, as follows: "The sheriff to whom the writ is directed and delivered, must execute the same without delay, and if the undertaking mentioned in section 4305 be not given, as follows: (1) Real property, standing upon the records of the county in the name of the defendant, must be attached, by filing with the recorder of the county a copy of the writ, together with a description of the property attached and a notice that it is attached; and by leaving a similar copy of the writ, description and notice with an occupant of the property, if there is one, if not, then by posting the same in a conspicuous place on the property attached." It will be observed that said section provides the specific acts that must be done and performed by the officer in levying the writ, and among other acts it provides that the officer must leave a copy of the writ, description, and notice with an occupant of the property, if there be one; if not, then he must post a copy of such writ, description, and notice in a conspicuous place on the property attached. A substantial compliance with the said provisions is necessary to make a valid levy, and the personal service of a copy of the writ, description, and notice on the defendant in the action, who is not an occupant of the land sought to be attached, is not equivalent to the posting of such copies in a conspicuous place on the land. Had the legislature intended that personal service would satisfy the requirements of that provision of the law, it certainly would have used terms clearly expressing its intention. In *Watt v. Wright* (Cal.) 5 Pac. 96 (which was a case involving substantially the same question as the one at bar), the supreme court of California said: "The failure of the officer to do these things, as required by law, was fatal to the validity of the levy by attachment;" and that the acts done by the officer were insufficient to create a lien upon the property. See, also, *Steinfeld v. Menager* (Ariz.) 53 Pac. 495. While some of the California cases held that a strict compliance with the provisions of the statute is required to create a lien, this court does not go to that extent. We hold that a substantial compliance is all our statute requires in said matter. In *Bank v. Sonnellner* (Idaho) 51 Pac. 993, this court held in the levy of a writ of an attachment that, if the acts required by the statute are not performed by the officer, there is no levy of

the writ. Respondent cites in support of his contention *Bank v. Lleuallen*, 39 Pac. 1108, decided by this court. While the statement in this case may be obscure and misleading as to the levy of the attachment and the notice filed with the recorder being sufficient to give notice, still the only question raised in that case was as to the contents of the notice. The record in that case shows that copies of the writ, description of the land, and notice that the land was attached were posted in a conspicuous place on the land, and the court did not intend to convey the idea that a filing of such copies with the county recorder was all that was required by the law to make a valid levy of the writ. The notice itself was attacked on the ground that it was not as full and complete as the law required. No question was raised as to the performance of the acts required by the officer in the levy of the writ.

It is also contended by respondent that, as the defendant failed to appear and move to discharge said writ, he waived all defects in the levy thereof, and that the entry of the judgment cured any and all defects, if any there were, in the levy. We cannot agree with that contention. While the entry of judgment may cure some defects in the issuance of the writ, such entry will not cure defects in a levy of the writ, and make what was no lien a valid one. No lien is created unless the service of the writ is made in substantial compliance with the requirements of the statutes. The judgment is reversed, and the cause remanded for further proceedings in conformity with the views expressed in this opinion. Costs are awarded to appellant.

HUSTON, C. J., and QUARLES, J., concur.

POCATELLO WATER CO., Limited, v. STANDLEY.

(Supreme Court of Idaho. May 24, 1900.)

PROPERTY DEDICATED TO PUBLIC USE—RULES AND REGULATIONS—RIGHTS OF WATER COMPANY—RIGHTS OF PLUMBERS—DUTY TO PUBLIC.

1. When a water company undertakes the performance of a public duty, it devotes its property used for that purpose to a public use, and may make such reasonable regulations for the conduct of such business as may be necessary.

2. Held, that a rule reserving the right to the company to make all taps of its mains and pipes is a reasonable one.

3. Held, under its franchise it is required to lay all mains and pipes in the streets and alleys of the city of Pocatello necessary to accomplish the purpose for which said franchise was granted, and, on proper demand, to tap and connect such mains or pipes with the private pipes of citizens of said city at the line of its franchise limits, to wit, the side lines of said streets and alleys.

4. Held, that such connections and pipes within said limits so laid by the company are part of the property of said company, and necessary to complete its said waterworks system, and

necessary to accomplish the purposes for which said franchise was granted.

5. The water company has no authority to enter upon the private property of the citizen, and lay its water pipes, or to dictate to the citizen who shall lay his private water pipes for him. Nor can it refuse to connect its water pipes with the private water pipes of a citizen that are laid to the line of its franchise limits, on the ground that such private pipes were laid by a plumber not selected by it.

6. *Held*, that the company must lay all necessary water pipes within its franchise limits at its own expense.

(Syllabus by the Court.)

Appeal from district court, Bannock county; Joseph C. Rich, Judge.

Action by the Pocatello Water Company, Limited, against James A. Standley, to enjoin defendant from tapping plaintiff's water mains. Judgment for plaintiff, and defendant appeals. *Affirmed*.

J. W. Eden and D. W. Standrod, for appellant. Thos. F. Terrell, Winters & Guheen, and Hawley, Puckett & Hawley, for respondent.

SULLIVAN, J. This action was brought by the respondent company against the appellant, who is by occupation a plumber, to enjoin and restrain him from in any manner tapping the mains and laterals of the respondent's water system, or from in any manner interfering with or molesting its valves, cocks, shutoffs, or other property or appliances, or from approaching within such distance of its mains or laterals, by excavation or otherwise, as will subject the same to injury or damage by freezing or being broken by exposure. It is alleged in the complaint and admitted in the answer that respondent has been lawfully granted a franchise by the city of Pocatello to maintain and operate a complete system of waterworks, and the right of way over, along, and under all of the streets, alleys, and public highways of said city for the purpose of laying its mains, pipes, laterals, and conduits through which to furnish said city and its inhabitants with water for municipal and domestic purposes. It is also admitted that the respondent accepted said franchise, and has laid its mains, pipes, and conduits, and has complied with the terms of said franchise in the construction of said system of waterworks, and has been supplying said city and its inhabitants with water by means of said system for many years. The appellant is a plumber, and engaged in the plumbing business in said city, and claims the right to go upon said streets and alleys within the franchise limits of the respondent, and tap its mains and laterals, and make connection therewith for prospective consumers of water who have employed him to lay pipes for them. It is not the prospective consumer of water that is complaining in this action, and it is not claimed that respondent has at any time failed or neglected to make the proper connection between the private pipes and the com-

pany's main and furnish or supply water to any one upon reasonable demand or notice; and it is conceded by respondent that it is its duty to make such connection and supply water to any and all persons residing in said city who desire it. The real point in issue is, can the respondent prevent the appellant by injunction from tapping its mains and laterals, and connecting therewith private service pipes leading from such connections to the private premises of persons desiring to use the water supplied by said company, when the company has not refused to make such taps or connections? That is the issue presented by the pleadings, and on motion by counsel for respondent the court below granted judgment on the pleadings, from which this appeal is taken.

It is conceded at the outset that the waterworks constructed under said franchise were dedicated to a public use, and are subject to public regulations; but it is not conceded that by such dedication the owners abandoned control and reasonable management thereof. Respondent was granted its corporate existence to enable it to serve the public. The duty devolves upon it to furnish water, for reasonable compensation, to its inhabitants, without unjust discrimination, and the power is in the city, or a citizen thereof, under the law to enforce the performance of that duty. Under its charter the respondent company is permitted to control and use its property for the purposes contemplated, and to make such reasonable rules and regulations for the conduct of its business as may be just to their patrons. The record shows that respondent has made rules for the conduct of its business, and one of its rules contains the following clause, to wit: "Taps. All taps are made by the company on the application of the plumbers. Notice that taps are wanted must be filed in writing, stating the number of the street, the name of the applicant, name of the plumber, and time wanted. Notice must be given at least 24 hours previous to the time when excavation is begun." By that rule the company is required to make all "taps," and it seems to the court that that is a reasonable regulation. The company would be responsible in damages arising from the defective tapping of its mains and pipes, and it is but right that it should do that work, or supervise the doing of it. Great damages might result from a defective "tap," and the company be responsible in damages therefor. *Light Co. v. Bishop*, 81 Ill. App. 493. If the responsibility rests on the company to keep its mains and pipes in good repair, so that no damage shall result therefrom, it must have reasonable and sufficient control over them for that purpose.

The fact that private property is affected with a public use does not confer upon the citizen the right to interfere with the management and control of the property. Such management and control is vested in the owner,

subject only to the law that authorized and granted the franchise. Under the said franchise the respondent has been granted the right to lay its mains and pipes "over, along, and under" the streets, alleys, and highways of said city for the purpose of supplying said city and its inhabitants with a sufficiency of pure water. It had the authority to lay all of the mains and pipes in said streets and alleys necessary to accomplish the purposes for which said franchise was granted. It is obliged to lay its mains and pipes in said streets and alleys, and deliver water to the consumers at its franchise limits, and to the line of the premises of the consumer, if such premises border on said franchise limits. The respondent has been granted a valuable right—that of laying its mains and laterals in the streets and alleys of the city—in consideration that it will furnish water to said city and its inhabitants. The company is under obligation to lay its pipes in the streets and alleys so as to make the water accessible to the citizen for his private use. It is given the right, within its franchise limits, to lay all pipes and make all connections with its mains and laterals. Beyond those limits it has no authority to enter upon the private premises of a citizen and lay its pipes. Neither has the citizen any right to enter within the franchise limits of the company, and in any manner interfere with its mains and pipes. When the company undertook the performance of this public duty, it devoted its property, including its mains and laterals, to a public use; and, while it will be permitted to control and use its property for the purposes contemplated, it cannot refuse to connect its mains with the water pipe of the citizen needing water, or dictate to the citizen who shall lay the necessary pipes on his own private premises. The only question, however, before us on this appeal is, has the company the sole right to tap its mains and laterals whenever that is necessary to be done to furnish private citizens with water? We answer that question in the affirmative. Considering that the company has the control of its property for the purposes named in the franchise, and the liability of the company arising from defective tapping of its pipes, we think it reasonable and just that it be permitted to make all taps, as provided by said rule, and such material as is necessary to be used in making such taps, and the pipes used in conveying the water from the tap to the franchise limit of the street or alley having been furnished by the company belong to it, and are a part of its system. It cannot compel the user of water to pay for such work or pipes, but it may require him to pay a reasonable compensation for furnishing him the water. In other words, the company cannot compel the citizen to pay for a part of the system of waterworks it has agreed to construct, but it must construct its own system within its franchise limits, at its own expense. It cannot compel

the user of water to pay for any part of such system. Beyond the franchise limits, the user of water must lay his own water pipes at his expense, and within such limits the company must lay all pipes at its expense.

Counsel for appellant rely upon *Franke v. Water-Supply Co.*, 88 Ky. 467, 11 S. W. 432, 718, 4 L. R. A. 265. By consent of counsel a copy of the petition and amended petition or complaint were submitted to the court for its inspection. It is alleged therein, among other things: That the city of Paducah gave the water company exclusive right to dig up the streets, alleys, and sidewalks of said city for the purpose of laying its water mains, conduits, and water pipes, and that defendant owns all of the pipes in the main part of the streets and alleys out to the curbstone on the edge of the sidewalk, but does not claim to own any part of the pipes from the curbstones to the abutting lots; and all of the pipes from the curbing along the sidewalk across the sidewalk on into the lots and houses are owned by and are the property of the owners of the lots; and that said pipes, from the curbstone to said houses, are kept in repair by such owners. That the water company adopted an unreasonable rule, by which said company requires all plumbers to obtain a license from it, and give a bond in the sum of \$1,000. That thereafter the plaintiff made contracts with citizens to do their plumbing within their lots and across the pavement or sidewalk to the curbstone, but was compelled to cancel said contracts because the water company refused to give a permit to cross the sidewalk, and also refused to connect its mains or pipes with any plumbing the plaintiff might do. That plaintiff informed his employers of those facts, and also informed them if they would get the permit for him to lay their pipes across the sidewalk to the curbstone, and would get the company to connect its water mains with the pipes so laid by him, he would do the work. That they each made application for the permit, and also for the company to connect its mains with such pipes after they were laid by the plaintiff, all of which was refused by the company, unless they would get some other plumber than plaintiff to do their plumbing. In that case the water company refused to connect its mains with any plumbing done by plaintiff. In the case at bar the water company seeks to enjoin the defendant from tapping its mains. It has not refused to make the proper tap, and to connect the mains with any plumbing defendant has done or may do. It has not refused to tap its main. It has only refused to permit the appellant to tap it. While in the Kentucky case above cited the water company refused to connect its mains with any pipes put in by said plumber. In that case the court says: "It is insisted that the company, under its charter, can select the person who is to contract with the citizens, and that no one without a license from that corporation can dis-

charge such a duty." And the court rightly holds that the city could not delegate the power to said corporation to determine who shall exercise the trade of a plumber, and dictate to the citizens as to whom they must employ to do their plumbing. The petition in that case clearly shows that the water company refused to permit the plumber to lay the pipes of private parties across the sidewalk to the curbstone, where they could be connected with the company's mains, and also refused to connect the mains with any pipes laid by him. There is language in the opinion that would indicate that the question as to whether the plumber had the right to make the connection was put in issue by the pleadings, but the petition shows that such could not have been the case, as it is alleged in the petition that the water company refused to connect said mains with any plumbing done by the plaintiff. The issues in that case were not the same as the issue in the case at bar. No question as to the authority of the city to delegate to the water company power to grant licenses to plumbers is involved in the case at bar. The judgment of the court below is affirmed, with costs in favor of respondent.

HUSTON, C. J., and QUARLES, J., concur.

TAYLOR v. CANYON COUNTY.

(Supreme Court of Idaho. May 29, 1900.)

CLAIM AGAINST COUNTY—ALLEGATIONS OF COMPLAINT—APPOINTMENT OF AND COMPENSATION OF DEPUTY SHERIFFS—CONSTITUTIONAL LAW—REPEAL OF STATUTE.

1. When a claim against the county is not allowed for the reason that it is not a charge against the county, and its form and proper presentation is not questioned, it is not necessary for the complaint to allege that the requirements of the statute as to form of claim and proper presentation thereof have been complied with.

2. Under the provisions of section 6, art. 18, Const. Idaho, as it existed before amendment, where the board of county commissioners, upon proper application and proof, empowered the sheriff to appoint a deputy, and fixed such deputy's salary, the salary is a charge against the county.

3. Said section was not intended to repeal section 1815, Rev. St., so far as the latter section authorizes certain county officers to appoint deputies, but only to prohibit the salaries of such deputies from becoming a charge against the county.

4. Under the provisions of section 6 of the constitution the only deputies of county officers whose salaries are a charge against the county are those who, from necessity, the board have authorized to be appointed, and their salaries fixed by the board.

(Syllabus by the Court.)

Appeal from district court, Canyon county; George H. Stewart, Judge.

Action by William H. Taylor against Canyon county. Judgment for defendant, and plaintiff appeals. Reversed.

N. M. Rulck, for appellant. S. H. Hays, Atty. Gen., and Frank J. Smith, for respondent.

SULLIVAN, J. This action was brought by the appellant, the sheriff of Canyon county, to recover from said county \$890, alleged to be due him for deputy hire for the year 1897. It is alleged in the second amended complaint that on application of the appellant, as sheriff of said county, the board of county commissioners of said county, after a hearing of the evidence thereon, found that a necessity existed for a deputy, and said application was granted, and the salary of such deputy was fixed by said board at \$75 per month; that under said authority a deputy was employed, and served in said capacity for 11 months and 26 days, and that such service at the rate of \$75 per month amounted to \$890, which sum said sheriff had paid to said deputy, and thereafter filed his claim against the county for the same (including therein \$160 more than that sum, which is fully explained in the complaint, and it no wise affects the questions involved in this case). The board disallowed said claim on the ground that it was not a charge against the county. Thereupon this suit was brought. A demurrer was filed to the second amended complaint on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court. Plaintiff refused to further plead, and judgment of dismissal and for costs was entered against him. This appeal is from the judgment.

The attorney general contends that in an action on a claim against the county the allegations of the complaint must cover all matters required by the statutes in relation to the presentation of such claim to the board of county commissioners, and their rejection of the same. There would be some force in that contention if the record showed that the claim was rejected because of its form or presentation in not meeting the requirements of the statute, but in the case at bar the claim was rejected on the sole ground that it was not a charge against the county. The form of the claim and its proper presentation were not questioned, and, as the only question is whether it is a charge against the county, the allegations of the complaint are sufficient. It is conceded that the trial court sustained said demurrer on the ground that the various decisions of this court held that the salary of a deputy authorized to be hired by resolution of the board of county commissioners was not a charge against the county beyond the fees turned into the county treasury by his principal. That the various county officers must be self-sustaining, unless the fees failed to amount to the minimum prescribed by law. There are certain opinions rendered by this court from which the above conclusions may reasonably be drawn. But it is contended with great ability by counsel for appellant that the opinions above referred to do not go to the extent claimed by counsel for respondent, and that, if they do, the provisions of the state constitution in regard to the salaries of county of-

ties do not warrant them. While the opinions referred to do not directly hold that such deputies' salaries are not charges against the county, they tend strongly in that direction, and justified the district court in so construing them. The decision of that question depends upon the construction given to sections 6, 7, and 8 of article 18 of the state constitution, which sections are as follows:

"Sec. 6. The legislature, by general and uniform laws, shall provide for the election biennially, in each of the several counties of the state, of county commissioners; a sheriff; county treasurer, who is ex officio public administrator; probate judge, who is ex officio county superintendent of public instruction; county assessor, who is ex officio tax collector; a coroner; and a surveyor. The clerk of the district court shall be ex officio auditor and recorder. No other county officers shall be established, but the legislature, by general and uniform laws, shall provide for the election of such township, precinct, and municipal officers as public convenience may require, and shall prescribe their duties, and fix their terms of office. The legislature shall provide for the strict accountability of county, township, precinct, and municipal officers for all fees which may be collected by them, and for all public and municipal moneys which may be paid to them or officially come into their possession. The county commissioners may employ counsel when necessary. The sheriff, auditor and recorder and clerk of the district court shall be empowered by the county commissioners to appoint such deputies and clerical assistance as the business of their offices may require; said deputies and clerical assistance to receive such compensation as may be fixed by the county commissioners. No sheriff or county assessor shall be qualified to hold the term of office immediately succeeding the term for which he was elected.

"Sec. 7. The officers provided by section 6 of this article shall receive annually, as compensation for their services, as follows: Sheriff, not more than four thousand dollars and not less than one thousand dollars, together with such mileage as may be prescribed by law; clerk of the district court, who is ex officio auditor and recorder, not more than three thousand dollars and not less than five hundred dollars; probate judge, who is ex officio county superintendent of public instruction, not more than two thousand dollars and not less than five hundred dollars; county assessor, who is ex officio tax collector, not more than three thousand dollars and not less than five hundred dollars; county treasurer, who is ex officio public administrator, not more than one thousand dollars and not less than three hundred dollars; coroner not more than five hundred dollars; county surveyor not more than one thousand dollars; county commissioners, such per diem and mileage as may be pre-

scribed by law; and justices of the peace and constables such fees as may be prescribed by law.

"Sec. 8. The compensation provided in section seven (7) for the officers therein mentioned shall be paid by fees or commissions or both, as prescribed by law. All fees and commissions received by such officers in excess of the maximum compensation per annum provided for each in section seven (7) of this article shall be paid to the county treasurer for the use and benefit of the county. In case the fees received in any one year by any one of such officers shall not amount to the minimum compensation per annum therein provided, he shall be paid by the county a sum sufficient to make his aggregate annual compensation equal to such minimum compensation."

Said section 7 has been amended, but the amendment in no wise affects this suit, as it went into effect after this alleged cause of action arose, and the above quotation gives that section as it was before amendment. By a provision of said section 6 the sheriff, auditor, recorder, and clerk of the district court may employ such deputies and clerical assistants as the business of their offices may require, whenever empowered to do so by the county commissioners; and it is further provided that such deputies and clerical assistants shall receive such compensation as may be fixed by the board of county commissioners. Said section 7, among other things, fixes the minimum and maximum compensation which said county officers may receive per annum; while section 8, *inter alia*, provides that such compensation shall be paid by fees or commissions, or both, as prescribed by law, and further provides that all fees and commissions received by such officers in excess of the maximum compensation shall be paid into the county treasury for the use and benefit of the county. While this court has held that the evident intent of the framers of the constitution was that the county offices referred to should be self-sustaining, except when the fees and commissions did not amount to the minimum, we think that the framers also considered that exigencies might arise when those offices would not and could not be self-sustaining, as that is clearly indicated by the wording of said sections. And after careful investigation and consideration of this matter, we conclude that it was intended, when the sheriff, auditor, recorder, or clerk required a deputy, and on proper application to the board of county commissioners it is found that the business of the office required a deputy and empowered the officer to employ one and fix his salary, the salary so fixed is a charge against the county. The board, in empowering the employment of a deputy, should have had in mind that the intention of the framers of the constitution was to make such offices self-sustaining as nearly as possible, and the income of the office was a good index of the necessity of a deputy,

and should have been carefully considered by the board on said application. Where the income of the office was less than the minimum, or even slightly above, no deputy should have been allowed, except at the expense of the officer, unless some very cogent reason was shown therefor. With the liberal fees allowed by law, if the income of the office does not amount to the minimum, the officer certainly has not been overworked. The necessity of each case must rest on its own facts, and the board of county commissioners should be ever mindful of the interest of the taxpayer, as well as that of the officer, in passing upon the necessity for the employment of a deputy.

The board of county commissioners in passing upon the claim involved in this case evidently concluded that the deputy's salary was not a county charge unless the officer turned fees sufficient into the county treasury to pay such salary over and above his maximum. It is shown by the record that the earning of said sheriff's office for the fiscal year of 1897 amounted to but \$1,336.78. Considering the fees allowed, it would seem that the sheriff was not overburdened with business, and in no urgent need of a deputy. However, be that as it may, some urgent necessity may have been shown for the appointment of a deputy, and this appeal is from the judgment of dismissal rendered on sustaining a general demurrer to the complaint, and we are of the opinion that the sustaining of the demurrer was error, and the judgment must be set aside.

Recurring to the appointment of deputies, section 1815, Rev. St., provides that every county officer, except probate judge, commissioner, school superintendent, and coroner may appoint as many deputies as may be necessary for the faithful and prompt discharge of the duties of his office; and by an act amendatory of said section the school superintendent is authorized to appoint a deputy. Laws 1889, p. 9. Section 1816, Rev. St., requires any county officer, who may be granted a leave of absence to appoint a deputy to act during his absence. Sections 1817, 1818, 1819, and 1820 pertain to the appointment of deputies. And the general rule is that all ministerial duties which the principal has the authority to perform may be performed by a deputy. 9 Am. & Eng. Enc. Law (2d Ed.) 370. Under the statutes the payment of salaries of deputies became a grievous burden to the taxpayer, and relief was demanded and was granted by that provision of said section 6 of the constitution which provides that only the sheriff, auditor, recorder, and clerk may be empowered to employ deputies, whose salaries shall be a charge against the county, and then only upon due application to the board of county commissioners, and the board is authorized to fix the salaries of all deputies so appointed. It is part of the history of the county government of the state that the county officers not

included among those who may be empowered by the board to employ a deputy needs one at some time during his term of office, on account of his sickness or being by force of circumstances obliged to leave his office for a time. Take, for instance, the assessor and tax collector. His duties take him from his office several weeks in the year, and in our large counties almost daily some citizen and taxpayer wishes to do business with the office, and the framers of the constitution fully understood those facts and conditions, and we do not think that they intended that said provision of section 6, art. 18, should operate as a repeal of said section 1815, and the act amendatory thereof, any further than to relieve the county from the payment of all deputies' salaries except of those appointed by the sheriff, auditor, recorder, and clerk when duly empowered by the board, and the salaries of such deputies fixed by the board as provided in said section 6 of the constitution. The judgment is reversed, and the cause remanded, with instructions to overrule the demurrer, and for further proceedings in accordance with the views expressed in this opinion.

HUSTON, C. J., and QUARLES, J., concur.

PRATT v. RATLIFF, Sheriff.

(Supreme Court of Oklahoma. June 8, 1900.)

RES JUDICATA.

1. A judgment is a bar if the cause of action be the same, though the form be different. The cause is the same when the same evidence will support both actions; or, rather, the judgment in the former action will be a bar provided the evidence necessary to sustain the judgment for the plaintiff in the present action would have authorized a judgment for him in the former.

2. When a matter has once passed to final judgment without fraud or collusion, in a court of competent jurisdiction, it has become res judicata, and the same matter, between the same parties, cannot be reopened or subsequently considered.

(Syllabus by the Court.)

Error from district court, Kingfisher county; before Justice John C. Tarsney.

This is an action of replevin, brought by plaintiff in error, W. S. Pratt, before Thomas Menzies, a justice of the peace in and for Kingfisher county, Okl. T., against the defendant in error, John A. Ratliff, to recover possession of personal property levied upon and taken by the defendant, as the sheriff of said county, under an execution issued in a suit in which one D. W. Doty recovered a judgment against the plaintiff in error in June, 1893, before one W. D. Hilton, who was then pretending to act as justice of the peace in and for said county, and which last-mentioned judgment was taken on transcript to, and filed in the district court of, said county, and the execution in the hands of the defendant, as sheriff, upon which he

acted in taking the property, was issued by the clerk of the district court on said transcript. The plaintiff in error, in his affidavit of replevin filed in this case, sets out that the judgment on which the execution issued is void, for the reason that at the time said judgment was rendered the said Hilton who rendered said judgment was not a justice of the peace *de facto* nor *de jure*, and had no authority whatever to render said judgment. To plaintiff's affidavit in replevin defendant filed a demurrer in the justice court, which was sustained by that court, and judgment rendered against the plaintiff. Plaintiff then appealed to the district court, and in the district court the case again came on for hearing on a motion of the defendant to dismiss the appeal, for the reason that the affidavit in replevin was not sufficient, which motion was by the court overruled. Defendant was then allowed to and did file a general denial, and the trial of the case proceeded upon an agreed statement of facts. By agreement of counsel it was stipulated that the statement and evidence contained in a certain case-made in case No. 760, wherein this plaintiff was plaintiff, and B. W. Burchett, as sheriff, and one Doty, were defendants, should be taken as a statement of facts in this case. This case No. 760 was brought in the district court of said county by this plaintiff to enjoin the sheriff of said county and said Doty from enforcing collection of the same judgment which is claimed in this case to be void. And the plaintiff in that case, who is the plaintiff in this, obtained a temporary restraining order restraining the sheriff from collecting said judgment. It is agreed and stipulated by counsel that the evidence in that case was practically the same as the evidence in this case, and that the only difference between the two cases is that this one is an action of replevin, and that was an action for injunction or restraining order. On hearing, the district court refused to grant a permanent restraining order in that suit, the judgment of the court in that case being as follows: "And now, on this 27th day of November, 1897, the same being a regular judicial day of said court, this cause came regularly on for decision, having theretofore been tried, argument of counsel made, and having been taken under advisement by the court until this date; the plaintiff being present in court by D. K. Cunningham, his attorney, and defendants being present by W. A. Taylor, their attorney, and the court, having been thoroughly advised in the premises, finds that the temporary writ of injunction heretofore issued be quashed, and that any further or permanent injunctive writ be refused therein, and generally finds for the defendants. The costs taxed to the plaintiff." This plaintiff took an appeal from this order and judgment to the supreme court, and the same was dismissed in that court on motion (43 Pac. 1063), for the rea-

son that plaintiff did not file his brief in time. After a full hearing of the cause, the court, on the 2d day of November, 1898, sitting in the district court in and for Kingfisher county, Okl. T., rendered a judgment in favor of the defendant, and against the plaintiff, for the recovery of certain personal property, or the value thereof, in the sum of \$79.47, and costs of suit. Motion for a new trial was made by the plaintiff, overruled by the court, and the plaintiff brings the cause here for review, alleging the action of the court in so rendering judgment, and overruling his motion for a new trial, as error. Affirmed.

D. K. Cunningham, for plaintiff in error.
M. J. Kaue, for defendant in error.

IRWIN, J. (after stating the facts as above). It is apparent from an examination of the record and the stipulation of the parties that the issues joined and the evidence in case No. 760, referred to in the stipulation, are identical with the case at bar. The parties are practically the same. In that case it was this plaintiff in error as plaintiff, and the sheriff of Kingfisher county and the execution creditor as defendants. The question there involved was the validity of the judgment on which the execution in this case was issued. The questions to be tried in that case were identical with the questions put in issue by the pleadings in this case. The plaintiff could not recover, nor the defendant defeat the action, except by an adjudication, one way or the other, of the validity or invalidity of that judgment, as the issues are identical, and the evidence the same, and between the same parties. We think the judgment in that case, being a final judgment, is conclusive and binding upon the parties to this case, and that the district court was correct in so finding by the judgment. We take the proposition of law to be well settled that when a matter has once passed to final judgment, without fraud or collusion, in a court of competent jurisdiction, it becomes res judicata, and the same matter, between the same parties, cannot be reopened or subsequently considered. 21 Am. & Eng. Enc. Law, p. 128. In the *Duchess of Kingston's Case*, 20 State Tr. 355, 2 Smith, Lead. Cas. (6th Am. Ed.) 963, it is said: "The judgment of a court of concurrent jurisdiction directly upon a point is, as a plea, a bar; or, as evidence, conclusive between the same parties, upon the same matter directly in question, in another court."

It is urged by the plaintiff in error that the decision in case No. 760, referred to in the stipulation, is not a bar to this action, and the decision there is not final or binding in this case, as the decision there was the refusal of an injunction, and the granting of an injunction is a matter resting largely in the discretion of the court, and the court

may have refused the injunction on the grounds that the plaintiff had an adequate remedy at law, and may not have based his refusal upon the merits of that case. But an examination of the record will show that this is not the fact. It is true the court might have based his decision upon the grounds alone that the plaintiff had an adequate remedy at law, but an examination of that case and the decision of the court will show that such refusal was not upon that ground, as the court found after a full examination of the case and hearing the arguments of the counsel. The finding is generally in favor of the defendant, and in that case the application for an injunction was not resisted upon the grounds that there was an adequate remedy at law, but upon the grounds that the judgment was a valid and legal judgment; and this was the only question at issue in that case, as shown by the stipulation, and the only question upon which the court passed. The court having found in that case in favor of the validity of that judgment, that decision, being a final decision between the same parties and decisive of the subject-matter in this case, is conclusive and binding upon the parties. While it is true that in that case the court did not, in express terms, say in his judgment that the judgment rendered by Hilton as a justice of the peace was a legal and valid judgment, the court did by that judgment find generally for the defendant. And the rule is well settled that where a bill in equity is dismissed upon a full hearing on the merits it is an effectual bar to a subsequent suit for the same cause of action. 21 Am. & Eng. Enc. Law, p. 227. The fact that the former suit was a suit in equity, and this a suit at law, does not change the rule. *Williamsburgh Sav. Bank v. Town of Solon* (N. Y. App.) 32 N. E. 1058. We think that the principles or doctrine laid down by the New York court of appeals in that case will apply with equal force to this case. They there say: "In an action in equity by a town against the bondholders to cancel certain bonds alleged to be invalid on certain grounds, a judgment declaring the bonds to be valid is *res judicata* of the questions involved, and estops the town to plead their invalidity on the same grounds in a subsequent action on the bonds by the holders."

Applying that doctrine to this case, we find that the identical question involved in this case was adjudicated in case No. 760, referred to. The same judgment and existent facts are pleaded to furnish the vital grounds of controversy in that case as in this case. In that case the plaintiff could not succeed without proving that that judgment was void, and while the defendant might have defended upon other grounds, as, for instance, the fact that plaintiff had an adequate remedy at law, they did not so defend, and put it solely upon the question of the validity of that judgment; and the court there decid-

ed in favor of the validity of that judgment, and that judgment is the identical judgment in question in this case. As the United States supreme court, in the case of *Aurora City v. West*, 7 Wall. 82, 19 L. Ed. 42, has well said: "The doctrine of estoppel by a former judgment between the same parties is one of the most beneficial principles of our jurisprudence, and has been less affected by legislation than almost any other." The supreme court of Vermont, in the case of *Gray v. Pingry*, 17 Vt. 419, say: "There must be some end to litigation, and much more injustice might be done in reviewing forgotten issues than in limiting the right to prosecute." In the case of *Van Rensselaer v. Kearney*, 11 How. 326, 13 L. Ed. 715, the United States supreme court say: "The doctrine of *res judicata* is conducive of peace, repose, and morality, and that without working any injustice." In the supreme court of New Hampshire, in the case of *Holister v. Abbott*, 31 N. H. 448, 64 Am. Dec. 342, the court, through Judge Eastman, said: "It is a well-established principle that the judgment of a court of record having jurisdiction of the case and of the parties is binding and conclusive upon the parties and privies in every other court until it is regularly reversed by some court having jurisdiction for that purpose. Notwithstanding the proceeding may be erroneous, yet, as between the parties, the judgment must stand until regularly vacated or reversed. Where the court has jurisdiction it has the right to decide every question which arises in the case; and, whether its decisions be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. In no collateral way can the parties question the correctness of a judgment which has been rendered between them in a court having jurisdiction of them and of the subject-matter. The only way for them to investigate such a judgment is by a rehearing of that case, either by writ of error or some other legal and direct mode; for to the extent to which the judgment goes their rights have been considered and decided, and they have submitted to that decision, either from the force of law, after a final hearing, by a court of last resort, or from a disinclination to pursue the matter further when other courses of proceeding for rehearing were open before them, and might have been had if they had so elected."

Now, it seems to us, applying that doctrine to this case, that it must conclusively appear that the judgment rendered in No. 760 is a bar to the action brought in this case, and the judgment of the district court could not have been other or different than it was; that the court could not have found other than for the defendant. This entire matter was brought up by the application for an injunction, and was passed upon by the court, and the case at bar was simply an attempt on the part of the plaintiff to retry that case

by an action of replevin. The former case, involving the same issues, based upon the same evidence, was tried before the district court, and decided by it, and an appeal was regularly taken; and, while no decision of the supreme court was had, this failure to obtain a decision was entirely through the fault of the plaintiff in error, and it seems to us that he could not be heard to complain of the result of his own negligence in not filing his brief as required by the rule of the supreme court. That decision of the district court of Kingfisher county was in full force and effect between the parties, and was conclusive of their rights in this case, and the district court was justified in rendering a judgment in this case in favor of the defendants. Therefore the decision of the district court will be affirmed. All the justices concurring.

423 Utah 196)

LIPPINCOTT et al. v. RICH et al.

(Supreme Court of Utah. June 6, 1900.)

PROMISSORY NOTE—STIPULATION FOR ATTORNEY'S FEE—NEGOTIABILITY—CONDITIONAL SALE—PURCHASE-PRICE NOTES—TITLE REMAINING IN VENDOR—TENDER OF UNPAID NOTES—REPLEVIN.

1. Under sections 1553, 1559, Rev. St. 1898, a promissory note containing a stipulation to pay a reasonable attorney's fee in case the note is placed in the hands of an attorney for collection, after maturity, is uncertain in amount, because not binding the makers to pay a definite or certain sum, and therefore non-negotiable.¹

2. A conditional sale, reserving the title to the property in the seller until payment of the purchase price, evidenced by notes which are not negotiable, with a right to take possession of the property in case of failure to perform the conditions, is valid in this state, not only between the parties, but also as against third persons; and it is not a condition precedent to an action in replevin by the vendor in such case that he return the nonnegotiable notes, given by the vendee as a part of the purchase price, before action brought, unless it is especially so agreed in the contract.²

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by Charles Lippincott & Co., against E. E. Rich and the Wasatch Drug Company. Judgment for defendants, and plaintiffs appeal. Reversed.

C. S. Patterson and Geo. W. Moyer, for appellants. Bennett, Harkness, Howat, Sutherland & Van Cott, for respondents.

MINER, J. This action was before this court on a former appeal, and the decision thereon is reported in 19 Utah, 140, 56 Pac. 806. In 1890, F. O. and Jennie Horn were doing business under the firm name of the Wasatch Drug Company. On that day they purchased from the plaintiffs, Charles Lippincott & Co., a soda fountain, the property in

question here, by a contract of conditional sale, giving a large number of notes in connection with the contract, all providing that the title to the soda fountain should not pass to the Wasatch Drug Company until all of said notes were paid, and that until then the title thereto should remain in Lippincott & Co., who had the right, in case of nonpayment at maturity of either of said notes, without process of law to enter and take immediate possession of said property, wherever it may be, and remove the same. It was further provided in said notes that in case they, or either of them, were placed in the hands of an attorney for collection after maturity, by suit or otherwise, that the makers should pay a reasonable attorney's fee and costs of collection. The notes falling due January 1, February 1, and March 1, 1897, were unpaid at the time this action was commenced. Prior to March 20, 1897, Horn and wife, trading as the Wasatch Drug Company, made an assignment of all their property, including the soda fountain, to John B. Forbes, who went into possession thereof. Thereafter, on the 20th day of March, 1897, plaintiffs served on Forbes a written notice disaffirming the sale, demanded back the possession of the property on account of the nonpayment of the notes, and tendered to Forbes the unpaid notes. Forbes refused to comply, but tendered the attorney for the plaintiffs, who held the notes and made the demand, \$30.00, that being the face value of the notes due, but did not include \$1.00, interest due on said notes to that date. This tender was refused because the amount tendered was not sufficient. Immediately thereafter Forbes assigned and sold the property to the Wasatch Drug Company, who claimed the property at the time this action was brought. On April 7, 1897, this action was brought in replevin to recover the property and damages for the unlawful detention of the same. At the conclusion of plaintiffs' testimony, the defendants moved for a nonsuit on the ground that the unpaid notes had not been tendered back to the makers, F. O. and Jennie Horn. The nonsuit was granted, and the action was dismissed. From this judgment of dismissal, the plaintiffs appeal.

One of the questions involved in this appeal is whether the plaintiffs were bound to tender back the unpaid notes to Horn and wife before bringing this action in replevin, and another question is whether the notes were negotiable.

The notes in question were past due, and in the hands of the payee, when the action was brought. One condition of the notes was that a reasonable attorney's fee should be paid in case the notes should be placed in the hands of an attorney for collection after maturity. The amount of the attorney's fee was not definitely fixed, and was uncertain in amount, and did not bind the makers to pay a definite or certain sum, and therefore the notes were not negotiable. *Donaldson v.*

¹ *Donaldson v. Grant*, 49 Pac. 779, 15 Utah, 231; also *Salisbury v. Stewart*, 49 Pac. 777, 15 Utah, 308.

² *Lippincott v. Rich*, 56 Pac. 806, 19 Utah, 140.

Grant, 15 Utah, 231, 49 Pac. 779; sections 1553, 1559, Rev. St. 1898. See, also, Salisbury v. Stewart, 15 Utah, 308, 49 Pac. 777. The transfer of the soda fountain by assignment, while good between the parties, was fraudulent as to creditors, and conveyed no title therein to the defendants. Under the contract of conditional sale, the plaintiffs were entitled to take possession of the property on conditions broken, as held in Lippincott v. Rich, 19 Utah, 140, 56 Pac. 806. Burrill, Assignm., § 323. The title to the property, as shown by the contract of conditional sale contained in the notes, did not pass to the grantee until all the notes were paid. Until then the title remained in the plaintiffs, with the absolute right, in case of nonpayment of the notes at maturity, without process of law to take immediate possession thereof and remove the same. There was no provision or agreement in the notes that in case of their nonpayment, or forfeiture of the contract for nonpayment, the unpaid notes should be surrendered to the makers.

As we have seen, the notes were past due, and not negotiable. Their transfer before or after maturity would not injure the makers. At the time of the demand these notes were tendered to Forbes, the assignee of Horn and wife, the makers. As between the two, Forbes represented the makers in that transaction. Whatever right Horn and wife possessed in the property was transferred to Forbes by the assignment. As to those parties the assignment was valid. Burrill, Assignm., § 223.

The possession of the property had been transferred to Forbes by Horn and wife, and he took possession and assumed the responsibility of the notes in so far as to offer to pay them, but not the interest. Upon the payment of the notes depended the title of the assignee. If, under such circumstances, a tender of the notes was necessary at all, it was sufficient as made to the assignee. The assignment operated as a quitclaim of all the assignors' interest in the property, conveyed in the same plight and condition as they held it themselves. The assignment would not defeat a pre-existing lien, nor lessen the obligation created by it. Burrill, Assignm., § 271.

But under the contract it was competent for the plaintiffs to disaffirm the sale, and demand possession of the property, without tendering back the nonnegotiable notes to the makers. The title to the property never vested in the vendee, nor in the defendants. It remained in the plaintiffs. The contract, on failure of a payment of the notes, authorized the plaintiffs to take possession of the property wherever it may be without tendering back the notes. Under such circumstances the plaintiffs were entitled to demand and recover the property without any tender of the notes being made to the makers. Kirby v. Tompkins, 48 Ark. 273, 3 S. W. 363; Fleck v. Warner, 25 Kan. 342; McRea v. Merrifield, 48 Ark. 160, 2 S. W. 780; Bauendahl v. Horr,

7 Blatchf. 548, Fed. Cas. No. 1,113; Tufts v. D'Arcambal, 85 Mich. 185, 48 N. W. 497, 12 L. R. A. 446; Lippincott v. Rich, 19 Utah, 140, 56 Pac. 806.

A conditional sale, reserving the title to the property in the seller until payment of the purchase price, evidenced by notes which are not negotiable, with the right to take possession of the same in case of failure to perform the conditions, is valid in this state, not only between the parties, but also as against third parties; and it is not a condition precedent to an action in replevin by a vendor of a conditional sale in such a case that he return the nonnegotiable notes given by the vendee as a part of the conditional purchase price before action brought, unless it is especially so agreed in the contract. Fleck v. Warner, 25 Kan. 342. The case of Segrist v. Crabtree, 131 U. S. 287, 9 Sup. Ct. 687, 33 L. Ed. 125, cited by the respondents, arose out of a suit in trover for the conversion of cattle transferred by absolute bill of sale, and for negotiable notes given in payment without any condition thereto, and without written authority to take possession in case of default in payment. The case is based upon an entirely different state of facts and a different cause of action from the one under consideration. We are of the opinion that the court erred in granting the nonsuit, and in holding that the notes should have been tendered back to the makers before suit. The judgment of the district court is reversed. The cause is remanded to said court, with directions to grant a new trial. Plaintiffs are entitled to costs.

BARTCH, C. J., and BASKIN, J., concur.

STATE v. MORGAN.

(Supreme Court of Utah. June 4, 1900.)

COMMISSION OF FELONY—SHERIFF'S POSSE—ARREST BY PRIVATE CITIZENS—MURDER—EVIDENCE—APPEAL—RECORD.

1. When facts showing the commission of a felony under section 4175, Rev. St. 1898, are related to the members of a sheriff's posse, section 4638, Rev. St. 1898, subds. 2, 3, are sufficient warrant for the members of such posse, although private citizens and nonresidents of the county, to follow and capture the persons who committed the crime; using sufficient force to accomplish such capture.

2. Any kind of willful, deliberate, malicious, and premeditated killing is sufficient to constitute murder in the first degree, under section 4161, Rev. St. 1898; and the willful, deliberate, and malicious intent may be formed the instant the criminal act is done.¹

3. Where the evidence shows that the defendant and another were associated together to rob and resist arrest, even to the killing of other persons, and in resistance one of the persons attempting arrest was killed, the killing, by whomsoever done, was the act of each and both of the conspirators; and defendant is chargeable therewith, whether he or his companion fired the fatal shot.¹

4. An affidavit not embraced in the bill of

¹ People v. Coughlin, 44 Pac. 94, 13 Utah, 68.

exceptions or transcript, and not presented to the trial judge on motion for a new trial, but which is brought to the attention of this court for the first time on the argument on appeal, and without notice to the other side, can form no part of the record in the appellate court, and is without legal merit.

5. On the trial for murder for the killing of a person attempting to arrest defendant and another for the commission of a robbery, evidence of the commission of such felony by defendant and his confederate is competent, as tending to show motive for resisting arrest, and that, in connection with their criminal intent, they were confederated together for the felonious purpose of robbery and resistance to the civil power of the state, and that the act of either was the act of both.¹

6. Evidence tending to show an attempted escape of defendant may be given in evidence against him.

(Syllabus by the Court.)

Appeal from district court, First district; C. H. Hart, Judge.

James Morgan was convicted of murder in the first degree, and appeals. Affirmed.

R. H. Jones, for appellant. A. C. Bishop, Atty. Gen., and W. A. Lee, Dep. Atty. Gen., for the State.

MINER, J. The defendant in this case was charged with, and convicted of, murder in the first degree. The record shows that shortly after 9 o'clock on the evening of the 29th of April, 1890, Fred Hanson started from Brigham City, Box Elder county, to return to his home, located about one mile distant. It was a dark night. At the outskirts of the city Hanson was met by two men, afterwards known as the defendant, James Morgan, and his brother, who was called Archie Majors. These two men drew their revolvers on Hanson, and ordered him to throw up his hands and say nothing, or they would kill him. He did so, and was ordered to come with them; their revolvers being placed at his head. Hanson was compelled to go with the hold-ups for about 75 yards, into an unfrequented spot, and there he was compelled to kneel down. The hold-ups then tied his hands behind his back, rifled his pockets, and took from him a silverware sample outfit, a pocketbook, a purse, a pocketknife, cuff and collar buttons, a watch, two quarts of milk, and other property, and also took his shoes and stockings off his feet. They then tied his feet, drank the milk, and laughed over it. Hanson's necktie was then taken off and stuffed into his mouth, and his handkerchief tied around his mouth, and he was told that if he uttered an outcry they would come back and kill him. The hold-ups then left him on the ground, bound hand and foot. Some time afterwards Hanson succeeded in releasing himself from his bonds, and notified Sheriff Cordon and Deputy Sheriff Thompson of the outrage. These parties, with Constable Wells, started in pursuit of the offenders. The hold-ups were

discovered near Hot Springs, and were ordered to halt; but they refused to halt, and told the officers to go back, and then went into the mountains. The officers fired some shots over the heads of the pursued men, to stop them, but the fire was returned by the two men; and 25 shots were then exchanged between the fugitives and officers, and the firing continued until the cartridges of the latter were exhausted. The officers then telephoned to officers at Ogden to come to their assistance. Sheriff Layne, of Weber county, and his deputies, Joseph Belknap and Joseph Bailey, and also Capt. William Brown, of the Ogden police force, at once responded, and arrived at the scene by daylight next morning. Sheriff Cordon, of Box Elder county, at once advised the Weber county officers and Brown, in detail, of the robbery, and of their encounter with the robbers. All these parties then separated into groups of two and three, and started in pursuit of the robbers. About 2 p. m. of April 30th, Sheriff Cordon, Belknap, and Brown encountered defendant, Morgan, and Majors on the mountain side, and commanded them to halt. The command was refused. The officers gave pursuit, and when within 75 yards of the fugitives three shots were fired over the heads of the fugitives, and they were again commanded to halt. The fugitives returned the fire upon the officers. The officers then shot at the fugitives, and Majors was killed. Almost immediately after Majors was shot, the defendant, Morgan, shot and killed Capt. Brown. The testimony shows that, after Majors was shot and killed, the defendant took deliberate aim, and shot and killed Brown. The defendant then dropped behind a rock, and, upon being commanded, held up his hands and was captured. Deputy Sheriff Belknap, of Weber county, testified to what transpired. He says, in substance: That, after following the robbers for some time with Brown and Cordon, he discovered them 200 yards away, and hallooed at them and said: "Stop, boys. Come back and give up,"—but that they did not stop. That he hallooed two or three times, loud enough to be heard. That they kept on running. That they ran after them for about a half a mile. That he saw each robber have a revolver. That he hallooed at them again to stop; that they did not want to hurt them; that it was "nothing but a hold-up; to stop and come back and give up." That at this time they were 80 yards away. That "the robbers then started to whirl around towards us, with their guns in their hands." That all three of the pursuers then shot at the fugitives. That defendant, Morgan, pointed his pistol at Brown, who was 15 feet to one side of the other officers, and fired. That he fired as he turned around, facing the officers. That the defendant then took deliberate aim at Brown and shot. That the shot struck Brown and killed him. That this shot was fired a second or two

¹ People v. Coughlin, 44 Pac. 94, 13 Utah, 53.

after Majors was shot. That it all happened in about five seconds. Sheriff Cordon gave testimony to the same effect. After his arrest the defendant stated to Sheriff Cordon that he heard them call to stop before they shot, but says, "We thought we could get into the brush or behind the rocks, where we could hold our own and stand you off." The property stolen from Hanson on the evening before was mostly found in possession of the defendant and Majors at the time, and the balance was found soon after, where the first encounter took place. The shoes taken off Hanson's feet the night before were found on the feet of the defendant at the time of his capture. The information charged the defendant with the murder of William Brown, and he was found guilty of murder in the first degree. Upon his election, he was sentenced to be shot. A motion for a new trial was made and denied. From the judgment of conviction, this appeal is taken.

The appellant contends that under the facts, as shown, no motive or malice is proved on the part of the defendant; that the act was committed under great provocation, and in the heat of passion, when pursued by the officers, and after they had fired the first shot; that the crime committed did not exceed manslaughter or justifiable homicide; or, at most, murder in the second degree; that the verdict of guilty in the first degree was erroneous and not warranted by the evidence; that William Brown was not a resident of Box Elder county, where the crime was committed, and was a private person, not authorized to make an arrest.

Section 4638, Rev. St. 1898, provides that a private person may arrest another "(2) when the person arrested has committed a felony, although not in his presence; (3) when a felony has been committed and he has reasonable cause to believe the person arrested to have committed it. The testimony clearly shows that on the night previous to the murder the defendant committed a felony, by robbing Hanson of his property, and gagging and tying him hand and foot. These facts were communicated to all the officers, including Brown, by Hanson and Sheriff Cordon, and they were all requested to assist in the capture of the bandits. It is clear that a felony had been committed, under section 4175, Rev. St. 1898, and that Brown and the officers from Weber county and the sheriff's posse had reasonable cause to believe that the persons they were attempting to arrest had just committed it, and were fleeing to escape arrest. It follows that Brown and the officers with him, composing the sheriff's posse, even though acting as private citizens and nonresidents of the county, had a right, under the circumstances shown, to follow and capture the defendant; using sufficient force to accomplish such arrest. *People v. Coughlin*, 13 Utah, 53, 44 Pac. 94; 1 Bish. New Cr. Proc. § 168; *People v. Pool*, 27 Cal. 573; section 4642, Rev. St. 1898.

Whether the defendant was properly convicted of murder in the first degree depends upon the statute and the testimony. Section 4161, Rev. St. 1898, reads as follows: "Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed; or perpetrated by an act greatly dangerous to the lives of others and evidencing a depraved mind, regardless of human life,—is murder in the first degree. Any other homicide committed under such circumstances as would have constituted murder at common law, is murder in the second degree." The defendant and his companion had committed a felony, and Brown and the sheriff and others were lawfully in hot pursuit. The officers had commanded the fleeing parties to halt. They had refused, and notified the posse not to follow them. Soon after, a second command was given to the offenders to surrender, and the command was disobeyed. Shots were then fired, and returned by the bandits. Many of these return shots struck and raised the dust near the officers. Finally the defendant took deliberate aim, and shot and killed Brown. The killing was not perpetrated by poison or lying in wait, but this is not necessary in order to constitute murder in the first degree. Any other kind of willful, deliberate, malicious, and premeditated killing is sufficient to constitute the higher grade of crime, under the statute. To fall within the first degree, the murder must have been premeditated, willful, deliberate, and malicious. A willful, malicious intent may be formed the instant the criminal act is done. A man may do a thing willfully, intentionally, maliciously, and deliberately from a moment's reflection as well as after pondering over it a month. He may think and premeditate before doing the act, and do it the same instant he conceives the criminal purpose, as well as if he had premeditated over it for a long time. The statute fixes no time when the deliberation and purpose to kill shall have been formed before the act of killing shall take place. The distinction between murder in the first degree and in the second degree is that in the former, unless it is committed in perpetrating or attempting to perpetrate arson, rape, burglary, or robbery, the killing must be deliberate and premeditated, while in the latter the killing is not premeditated or deliberate. In the one case there is a deliberate, premeditated, preconceived design and intent to kill, though it may have been formed in the mind immediately before the mortal wound is given. The premeditated design to kill may precede the fatal blow.

In the other case there is no deliberation, premeditation, or preconceived design to kill. To constitute murder in the first degree, the unlawful, malicious killing must be accompanied with a clear intent to take life. This is the great distinguishing feature between murder in the first and murder in the second degree. In both cases the killing must have been unlawful and accompanied with malice. "In cases where the killing was done in perpetration of the felonies, or the attempt to perpetrate the felonies, mentioned in the statute, murder in the first degree may be committed, although no intent existed to kill at the time of the fatal blow, as if the criminal shot at the deceased for the purpose of disabling him, or the like." *People v. Bealoba*, 17 Cal. 390. So the act of homicide by poison or lying in wait carries with it conclusive evidence of premeditation; and a jury have no option but to find the prisoner guilty in the first degree, upon proof of the crime. Many elements are wanting that are necessary to classify the crime herein as falling within the rule of either justifiable or excusable homicide or of manslaughter, and all the elements are shown by which defendant could properly be found guilty of murder in the first degree. The case of *People v. Coughlin*, 13 Utah, 58, 44 Pac. 94, arose from a similar state of facts, and is directly in point upon the main question presented in this case. In that case the issues raised are decided adversely to the contention of the appellant herein. *People v. Bealoba*, 17 Cal. 390; *Com. v. Green*, 1 Ashm. 290; *Com. v. Murray*, 2 Ashm. 43; *People v. Long*, 30 Cal. 694; *People v. Welch*, 49 Cal. 174; *People v. Hunt*, 59 Cal. 430; *People v. Pool*, 27 Cal. 573. The testimony clearly shows that the defendant, to prevent his arrest and capture for a felony, deliberately shot and killed Brown. But even if the killing was not directly traced to the defendant, still the record shows that, in connection with their criminal acts, these two men were acting in concert to rob and resist arrest, even to the killing of other persons; and, being so associated and confederated together in their felonious purposes of robbery and resistance to the civil power of the state, the killing of the deceased, by whomsoever it was done, was the act of each and both of the conspirators, and thereby the defendant is chargeable therewith, whether he or his companion fired the fatal shot. *People v. Coughlin*, 13 Utah, 58, 44 Pac. 94; *People v. Pool*, 27 Cal. 573; 3 Greenl. Ev. § 94; *State v. Mowry* (Kan. Sup.) 15 Pac. 282. If one who has committed a felony kills another, whom he knows is in fresh pursuit of him for such felony, under the circumstances shown here, he is guilty of murder in the first degree. *People v. Pool*, 27 Cal. 573; 3 Greenl. Ev. § 94; 3 Whart. Cr. Ev. § 2924; *People v. Coughlin*, 13 Utah, 58, 44 Pac. 94; *State v. Mowry* (Kan. Sup.) 15 Pac. 282.

Appellant also contends that he was tried

15 days after the alleged crime was committed, and before public excitement attending the crime had subsided, and that therefore he did not have a fair trial. Upon the trial of this case the defendant was represented by three practicing attorneys residing in Box Elder county, and the record does not disclose that any request was made for a postponement of the trial. Indeed, it was admitted by counsel upon the argument here that no such request was made. It does not appear that the defendant was injured or prejudiced by proceeding with the trial at the time the case was set; nor are we able to find any request, motion, objection, or exception in this regard.

Counsel for appellant also urge that the court erred in not granting a new trial on the affidavit of Verne Phillips to the effect that one of the jurors upon the panel had expressed an opinion unfavorable to the defendant before he was sworn as a juror. This alleged affidavit is not embraced in the bill of exceptions or transcript. No such affidavit was before the trial judge before or at the time when the motion for a new trial was made or overruled. It is brought to the attention of this court for the first time on the argument of the appeal, without any notice to the other side, and can form no part of the record of this court in this case, and is wholly without any legal merit.

Appellant also alleges error in the admission of the testimony of Hanson to the effect that he was held up, gagged, and robbed by the alleged bandits on the night previous to the murder. This testimony was clearly proper, as tending to justify the officers in calling for assistance in making the pursuit of the robbers after the robbery, and in justification of the parties so called in assisting to make the arrest. It was also admitted as tending to show that the defendant was engaged in the commission of the robbery, and that he and his confederate had a motive, beyond their own protection as men innocent of crime, in killing the deceased while in pursuit of them, and to show that, in connection with their criminal purpose, they had agreed to resist being arrested, even to the death, and that, being confederated together for the felonious purpose of robbery and resistance to the civil power of the state, the killing of the deceased, by whichever of them actually done, was the act of each and all of the conspirators. *People v. Coughlin*, 13 Utah, 58, 44 Pac. 94; *People v. Pool*, 27 Cal. 573.

Counsel for the appellant except to the refusal of the court to give instructions to the jury as requested by appellant. This exception was not insisted upon or argued at the hearing, and we are unable to find any such requests that were not given. The charge, as a whole, seems to be fair, and covers all the material issues in the case.

The appellant also alleges error in the ad-

mission of the testimony of Sheriff Cordon, to the effect that during the trial the pistols used at the shooting, with cartridges, were in the court room, and that after an adjournment the defendant made a quick move sideways, a step or two, in the direction of the pistols, which he was looking at over his shoulder, and that Mr. Allison put his hands in front of the prisoner and stopped him. Considering the desperate character of the man, as shown, we are of the opinion that the testimony was proper for the purpose offered, as tending to show the attempted escape. A prisoner's attempt to escape may be given in evidence. *Burris v. State*, 38 Ark. 221; *People v. Sheldon*, 68 Cal. 434, 9 Pac. 457; *Whart. Cr. Ev.* (9th Ed.) §§ 750, 752.

We have examined all the alleged assignments of error in the record, so far as we have been able to discover them from an imperfect record, and, from such an examination, are convinced that the testimony clearly justifies the verdict of the jury and the judgment of the court. From his first introduction, the defendant appears to have been an outlaw, having no regard for the rights of life, liberty, or property of others; and in defense of his own criminal acts he deliberately took the life of the brave and fearless Capt. Brown, and it was no fault of either him or his companion that the lives of Sheriff Cordon and Belknap, and the other vallant men composing the pursuing party, were not also taken. It is a source of gratification to all law-abiding people that the state contains within its borders such courageous, fearless, and high-spirited men, who are willing to endanger and lay down their lives in enforcing the law, and in protecting the lives and property of the people of the state. We find no reversible error in the record. The judgment and sentence of the district court are affirmed, and the cause remanded to said court, with directions to execute the judgment and sentence in accordance with law.

BARTCH, C. J., and BASKIN, J., concur.

PARKHURST et al. v. SHARP.

(Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.)

REPLEVIN—EVIDENCE—MORTGAGE—NOTE—TRIAL—INSTRUCTIONS—DIRECTION OF VERDICT—SUFFICIENCY OF EVIDENCE.

1. Where a petition in error appears to be in compliance with the statute, a motion to dismiss because the case is not certified according to law cannot be sustained if the deficiency is not pointed out in the brief or argument.

2. In replevin against one claiming the property by virtue of a chattel mortgage filed in a county other than that in which plaintiff lives, a certified copy of the mortgage is admissible in evidence without showing that it had been recorded in the county in which it had been filed, where the defendant also relied for his right of possession on another mortgage, recorded in the county of plaintiff's residence.

3. Where a petition in replevin is sufficiently broad to admit proof of a wrongful taking by defendant in the first instance, which was the sole contention in plaintiff's opening statement, it was not error to overrule defendant's objection to the introduction of evidence on the ground that the petition did not state a cause of action.

4. In replevin by a lessor against a creditor of the lessee for property which plaintiff claims by virtue of the lease, which gave him an agister's lien, securing the payment of rent, the lease and the note for rent are admissible in evidence, notwithstanding plaintiff had recovered judgment against the lessee for the rent.

5. Where, in replevin, there was no evidence as to the value of the property, nor as to the value of plaintiff's special interest in it, his claim being based on an agister's lien under a lease, nor that a judgment for rent, which was the basis of plaintiff's claim, had not been satisfied from other property liable to be sold therefor, and the evidence shows that defendant had a first mortgage on the property at the commencement of the suit, and was given possession by the mortgagor, the court should have granted defendant's motion for a peremptory instruction.

Error from district court, Riley county; W. S. Glass, Judge.

Action by Henry Sharp against Ed. Parkhurst and another. Judgment for plaintiff, and defendants bring error. Reversed.

Davis & Melly, for plaintiffs in error. Irish & Brock, for defendant in error.

PER CURIAM. Defendant in error moves to dismiss the petition in error in the case upon two grounds: First, that the certificate of the judge to the case-made is insufficient; second, that the case-made does not present any question for review, because it is not certified as required by law. What this deficiency in the certificate is, is not pointed out in the brief, nor was it referred to in the argument. Upon an examination of the certificate we find no defects. It seems to be in full compliance with the statute. The motion to dismiss must therefore be denied.

This was an action of replevin by the defendant in error against the plaintiffs in error to recover the possession of 50 head of cattle. He claimed a special ownership in the cattle, by way of a mortgage, for feed furnished the cattle, and for rent of pasture and land on which the feed was grown, under a contract of lease and mortgage combined between himself and one F. G. Wells. In his petition he further alleges that, as to Wells, his lien has been adjudicated by the district court of Pottawatomie county in a suit wherein he was plaintiff and Wells was defendant. He alleges that the defendants wrongfully detained the possession of the cattle from him at the time of the commencement of this suit. It was, however, claimed upon the trial, in the statement of counsel to the jury in opening the case, that the plaintiff had possession under his alleged lien, and that the defendants had wrongfully taken the cattle from him. The facts disclosed by the undisputed evidence are that Wells leased from Sharp several tracts of land, including farm and pasture land, for the term of three years, and

went into the possession and enjoyment thereof. Sharp reserved the use of a room or two in the house, some stable room, and the fruit from certain specific trees upon the premises, and the right of ingress and egress to the house, and the right to enter upon the farm for the purpose of inspection, to see that the tenant was performing the conditions of the contract upon his part. Wells agreed to pay a certain cash rental per annum for the land, and agreed to execute a chattel mortgage upon the crops grown thereon on the 1st of June in each year, and that Sharp should have "an agister's lien upon all the cattle of Wells brought upon the premises, to secure said rent." This lease was made January 1, 1898, to begin March 1, 1898, at which latter date Wells entered into the possession of the premises thereunder, and continued to occupy the premises until the 1st of January, 1899. In May, 1898, Wells took about 365 head of cattle from B. T. Parkhurst to pasture. At that time the plaintiff in error the Drovers' Live-Stock Commission Company held a mortgage upon the cattle to secure an indebtedness of B. T. Parkhurst to them of something more than \$9,000. These cattle were taken to the leased premises by Wells, and kept there by him until the 8th day of December, 1898, when the defendant Ed. Parkhurst, son of B. T. Parkhurst, took possession of the entire lot of cattle in the interest of his father, B. T. Parkhurst, and the Drovers' Live-Stock Commission Company. About the middle of October, 1898, B. T. Parkhurst sold these cattle to Wells for \$11,000, and took his note therefor and a chattel mortgage upon these cattle, including the cattle in controversy, to secure the payment of the purchase money, which was recorded in Pottawatomie county, the place of Wells' residence, and the place where the land was situated where the cattle were kept, as well. This note and mortgage was turned over to the Drovers' Live-Stock Commission Company as collateral security for Parkhurst's indebtedness to them. At the time of the sale, the mortgage given by Parkhurst to the Drovers' Live-Stock Commission Company was filed in Jackson county, where-in Parkhurst lived. There is a discrepancy between the descriptions of the cattle in the replevin suit and the description of the cattle in this last-named mortgage; but there is no contention that the mortgage given by Wells to Parkhurst did not cover the identical cattle in controversy. This mortgage was not introduced in evidence, but the proof respecting the same was introduced without objection, and it appeared from the evidence of Sharp that, at about the time of the sale, he saw the mortgage in the recorder's office at Westmoreland, and read it two or three times. The judgment, the transcript of which is attached to the petition in this case, confirming the lien of Sharp upon the cattle as against Wells, was rendered December 13, 1898. It was stipulated in the lease that the cattle upon which Sharp had an agister's lien should not be removed from the premises until his

rent was paid. On the 15th of December, Ed. Parkhurst, one of the defendants, acting in the interest of his father and the Drovers' Live-Stock Commission Company, removed the cattle from Sharp's farm, and took them to Manhattan, in Riley county. For the purpose of effecting this removal without a conflict with Sharp, Parkhurst indulged in some equivocation. In removing the cattle he was obeying the instructions of the Drovers' Live-Stock Commission Company. It is not claimed in the evidence of the plaintiff, Sharp, directly or indirectly, that he had ever asserted a right of possession of the property, or had in any manner actually or constructively acquired the possession from Wells or anybody else, prior to their removal. The possession of Parkhurst and the Drovers' Live-Stock Commission Company was by consent and the direction of Wells. The evidence shows that neither the claim of Sharp for his rent, nor the indebtedness of Parkhurst to the Drovers' Live-Stock Commission Company or of Wells for the purchase money for the cattle, had been paid prior to the beginning of this suit. The plaintiffs in error gave a forthcoming bond at the time of the levy of the writ in this case, and retained possession of the cattle. The answer in the case was a general denial. The issues of fact were tried to a jury, who found for the plaintiff against the defendants, that the plaintiff had a special ownership in the cattle in the sum of \$515.62, and that he was entitled to the possession of the property. Upon this, judgment was entered that the plaintiff have a return of the property, and that, in case return could not be had, he have a judgment against the defendants for \$515.62 and costs.

Plaintiffs in error objected to the introduction of any evidence under the petition, upon the ground that it did not state facts sufficient to constitute a cause of action against them. At the conclusion of the evidence they interposed a demurrer thereto for the same reason. The objection and demurrer were overruled. At the conclusion of all the evidence in the case, plaintiffs in error asked the court to instruct the jury to find for the defendants for the following reasons: (1) That there was no evidence offered by the plaintiff as to the value of the property, nor the value of the plaintiff's special ownership therein. (2) That there was no evidence that the indebtedness represented by the judgment had not been paid from the other property, cattle, and crops mortgaged, and decreed to be sold thereby. (3) Because by the undisputed evidence in the case it appeared that the Drovers' Live-Stock Commission Company had a first lien upon the cattle at the commencement of the suit, and was entitled to the possession thereof. This instruction was refused.

There are eight specifications of error: The first based upon the court's refusing to give the instruction to find for the defendants, alluded to above. Second, in overrul-

ing the objection to the introduction of evidence. Third, in permitting the plaintiff to introduce in evidence the lease above referred to, and the note given for the rent thereunder for the first year. Fourth, in refusing to allow the defendants to introduce and read in evidence a certified copy of the mortgage given by Parkhurst to the Drovers' Live-Stock Commission Company. Fifth, in overruling the demurrer to the plaintiff's evidence. The sixth is a repetition of the first. The seventh assignment is that the verdict of the jury and the judgment of the court are not sustained by the evidence and are contrary to law. Eighth, in denying the motion of the defendants for a new trial.

As to the first, fifth, sixth, seventh, and eighth specifications, we are clearly of the opinion that they are well founded and should be sustained. We will notice the argument of counsel for the defendant in error in opposition thereto. It is first contended that the legal effect of the contract of lease was a chattel mortgage upon the property of Wells, the lessee. We will assume that it is a chattel mortgage; that as between Sharp and Wells it was a mortgage not only upon all the property that Wells at the time owned and could pledge, but as well any property he might acquire thereafter that would come within its terms; and yet the verdict and judgment cannot be sustained, for the reason that the evidence is undisputed that the Drovers' Live-Stock Commission Company had a prior mortgage upon these cattle; that at the time Wells acquired any interest in the cattle they were incumbered with a lien, made by him to Parkhurst by Wells' chattel mortgage thereon, which must be prior to any right which Sharp could claim to such after-acquired property. Counsel say in their brief: "The testimony in this case shows that, at the time the cattle were taken by the plaintiffs in error, Sharp was in possession of said cattle, and exercising the rights of possession over them." "That the cattle were upon Sharp's farm, where he resided, and in his testimony he detailed several conversations with Ed. Parkhurst wherein his lien is recognized." In the first part of this statement, counsel are mistaken. There is no evidence that can be construed into a claim of possession or of the exercising of the right of possession. The testimony does show that the cattle were on Sharp's farm; that is, a farm to which he had a legal title, but which at the time in controversy, under the terms of the lease, was Wells' farm, except the small reservation in the house and stable. There is nothing in the evidence that would amount to an estoppel against B. T. Parkhurst or the Drovers' Live-Stock Commission Company. As we said previously, they may have resorted to some prevarication and artifice to avoid a collision with Sharp. But there is nothing therein that would either create a lien in Sharp's favor, or operate to deprive the Drovers'

Live-Stock Commission Company of a prior lien by way of estoppel or otherwise, admitting that the conversations were had just as claimed by the plaintiff (defendant in error). Upon this statement it is contended that replevin lies in favor of a lienholder, where the property upon which he has a lien has been taken from him against his will; and, again, that the pledgee has the right to the possession of the property pledged, and may maintain replevin therefor against one who wrongfully and unlawfully takes it and retains it from him. It is said in the brief: "This disposes of the objection of the plaintiffs in error that Sharp cannot maintain replevin," etc.

It is further contended that plaintiffs in error rely entirely upon the chattel mortgage given by Parkhurst to the Drovers' Live-Stock Commission Company, and that these cattle in controversy are not described in that mortgage. But let us assume that this is all true. The cattle had been turned over to the Drovers' Live-Stock Commission Company under this mortgage as well as the other before the replevin was brought,—before Sharp asserted any right to the possession. Even though there was a mistake in the description, or the cattle were not included therein, they were pledged for this debt before Sharp acquired any lien thereon, and before he attempted to assert any lien, except in his suit to foreclose his mortgage. However, counsel are mistaken in the assumption that the plaintiff in error the Drovers' Live-Stock Commission Company relied or relies upon the mortgage given by Parkhurst to it. It appears clearly that it relied upon both the mortgages, and it is not contended but that the cattle in controversy were clearly included in the last mortgage. Upon this assumption it is said that practically the only question submitted to the jury under the instruction of the court was as to whether the mortgage given by Parkhurst covered the cattle repleved, and the jury found the negative; that the verdict settled every disputed fact, and should stand. We cannot ignore the existence of this subsequent mortgage, or the rights of the plaintiffs in error thereunder, as disclosed by the evidence in this case, which is uncontradicted and unimpeached in any manner.

We are of the opinion that the court erred in refusing to admit in evidence the certified copy of the Parkhurst mortgage, relied upon under the fourth assignment of error, but it was immaterial, under the other facts of the case, to show that the mortgage had been recorded in Jackson county, and had remained on file there.

We do not think the court erred in overruling the objection of the defendants to the introduction of evidence under the petition, as explained by statement of counsel to the jury in the opening of the case. The allegations of the petition were sufficiently broad to admit proof of a wrongful taking

by the defendants in the first instance, which was counsel's contention in his opening statement.

We are of the opinion that the court did not err in permitting the introduction of the farm lease, and note for rent thereunder. The judgment gave the plaintiff no lien as against anybody but Wells. It was not a contract that would affect anybody but Sharp and Wells, and it occurred after the rights of the parties adversary had accrued in the premises. It was necessary for the plaintiff to rely upon the original contract of lease for his lien and rights thereunder to be asserted in this replevin suit. Under all of the evidence the court should have instructed the jury to find for the defendants, inasmuch as it was not possible to sustain a verdict thereunder for the plaintiff. The court should have sustained the demurrer to the evidence of the plaintiff, as it disclosed that the defendants were entitled to the possession of the property at the commencement of the suit; that the defendant the Drovers' Live-Stock Commission Company had the prior right. The verdict and judgment are not sustained by the evidence, but are contrary thereto, and contrary to law. The motion for a new trial should have been sustained. The judgment of the trial court is reversed, with directions to award a new trial.

(22 Utah 55)

MILES v. WELLS et al.

(Supreme Court of Utah. May 7, 1900.)

STATUTORY CONSTRUCTION—LEGISLATIVE INTENT—STATE BOARD OF LAND COMMISSIONERS—DUTIES—APPLICATION FOR LANDS—VESTED RIGHT—MANDAMUS—JURISDICTION OF DISTRICT COURT—LAND BOARD'S DISCRETIONARY POWERS.

1. When the language of a particular provision of a statute is ambiguous, construction may be resorted to in order, if possible, to ascertain the true intention of the legislature; but, where there is no ambiguity, the language must be taken as the expression of the legislature's intention, unless other provisions of the statute clearly show that the language was used in a sense different from its natural and ordinary meaning.

2. A court will not construe a particular provision of a statute so as to neutralize or modify other provisions, if any other construction of the particular provision is at all tenable.

3. There are no provisions in chapter 64 of the Sessions Laws of 1899 which indicate that the word "may," occurring in the sentence, "The board may select and contract to sell," etc., in section 16 of said act, was used in any other than its ordinary sense; to have used it otherwise would have neutralized the plain provisions of some, and materially modified others, of the sections of the act.

4. Section 16, c. 64, Sess. Laws 1899, does not make it the duty of the state board of land commissioners to select and contract land applied for, nor to fix a uniform price for all lands selected.

5. Under chapter 64, Sess. Laws 1899, after an application for lands is made, until the selection is made, and the price to be paid, and the time in which the deferred payments shall be made, are fixed by the board, and assented to by the applicant, and a contract of

sale containing the stipulation agreed upon is executed, the applicant has no vested rights whatever.

6. A court has no jurisdiction to direct, by mandamus, how the discretionary power vested in the state board of land commissioners by chapter 64, Sess. Laws 1899, shall be exercised. (Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. G. Norrell, Judge.

Application by Orson Miles for a writ of mandate to Heber M. Wells and others, members of the state board of land commissioners. Judgment for defendants, and plaintiff appeals. Affirmed.

King, Burton & King, for appellant. A. C. Bishop, Atty. Gen., and W. A. Lee, Dep. Atty. Gen., for respondents.

BASKIN, J. The plaintiff, by petition, applied to the court below to issue a writ of mandate, directed to the defendants, and each of them, commanding them "to refrain from selecting certain lands for the purposes of public sale or lease, and to receive the application made by the petitioner for the selection of said lands; and also to select the same pursuant to the petitioner's application, and to contract to sell the same at private sale to the petitioner for the sum of \$1.50 per acre, and to receive the sum of 25 cents per acre tendered by the petitioner; and also commanding them, and each of them, to make no selection of said lands, or any part thereof, except pursuant to the application of the petitioner, and for the purpose of selling them to the petitioner at private sale pursuant to his said application; and also commanding them to show cause before this court, at the court room thereof in the city of Salt Lake, and in the state aforesaid, on the 7th day of October, 1899, at 10 o'clock a. m., and to show cause, if any they have, why they have not done so. Your petitioner prays for general relief." An alternative writ of mandate was granted, and served upon defendants. A demurrer was interposed to the petition by the defendants on the ground that the same did not state facts sufficient to constitute a cause of action, and that the court had no jurisdiction of the subject-matter.

Without setting out in detail the allegations of the petition, it is sufficient to state that it is, in substance, alleged that the plaintiff, a citizen of the United States, and a resident of Cache county, in this state, on the 2d day of October, 1899, in due form, made a written application to the state board of land commissioners, of which the defendants were the members, as follows: "For the selection by the said board of the following described tracts of land, to wit: [Then follows description by metes and bounds of various tracts of lands, aggregating 2,400 acres:] which said lands were and still are public and unoccupied public domain of the United States, and subject to selection by defendants for said state, in satisfac-

tion of the grants made as aforesaid." And in said application the plaintiff requested and demanded said board to select said lands, and to contract and sell the same to him at private sale at \$1.50 per acre, that being the price fixed by the board to be paid by persons applying for lands to be selected by the board in satisfaction of the grants of public lands made by congress to the state of Utah. That the plaintiff tendered to the board 25 cents per acre for said lands, to be applied on the first payment, and "demanded a contract with said defendants by which the balance of said purchase price should be paid in ten equal yearly payments," and that the board refused to receive the money so tendered, and refused, and still refuses, to select said lands, and contract and sell the same to the plaintiff at private sale, or at all.

Prior to the argument of the demurrer, the following minutes of said board, by agreement of the parties to the action, were added to, and made a part of, the petition: "Commissioner Hammond moved that the secretary be directed to notify each person upon whose application land had been selected that the board is now prepared to enter into a contract to sell the land so selected to the applicants at \$1.50 per acre in all cases, except where the applicants have agreed to pay more than that price, and in such cases the price to be that stated in the application, and that the applicants have thirty days after the receipt of such notice within which to enter into the contract and make a deposit. Carried. Adopted May 4, 1899. Commissioner MacFarland moved that the executive committee be authorized to enter into private contracts with the citizens to sell to them lands which have been selected on their application, when the board is not in session. Commissioner Harris moved that all of the applications for the selection of lands by the state be denied where the price offered by the applicants is less than \$1.50 per acre or the land applied for is surveyed. Carried. By order of the state board of land commissioners of July 6, 1899."

Section 1, art. 20, Const., provides that "all lands of the state that have been or may hereafter be granted to the state by congress * * * shall be held in trust for the people, to be disposed of as may be provided by law."

The legislature passed an act (chapter 64, Laws 1899, p. 85), among the sections of which are the following, which have a bearing upon the questions involved:

"Sec. 5. The board of land commissioners shall have the discretion, management, and control of all lands heretofore, or which may hereafter, be granted to this state by the United States government, or otherwise, for any purpose whatever, except lands used or set apart for public purposes or occupied by public buildings, and shall have the power to sell or lease the same for the best interests of the state and in accordance with the

provisions of this act and the constitution of the state."

"Sec. 7. The board shall cause all the public lands now owned by the state, or lands the title to which may hereafter be vested in the state, to be selected and registered, and thereafter sold or leased."

"Sec. 9. The board shall cause the state lands and the improvements thereon to be appraised or reappraised at such times as it may deem for the best interests of the state."

"Sec. 14. In all counties where the public lands or any portion thereof, have been appraised, the board shall, when deemed conducive to the best interest of the state, attend in person or by agent, at such time as the board shall direct, and offer at public auction at the court house of the county, and sell to the highest bidder, all or any of the appraised and unsold and unleased lands situated in the county where such public auction is held."

"Sec. 18. Whenever any citizen of the United States or person who has declared his intention to become such, shall make application in writing for the selection by the state of any tract of land in satisfaction of any grant to the state, the board may select and contract to sell to the same at private sale to the person requesting the selection thereof at a price to be fixed by the board, not less than one dollar per acre, provided that at the time of making such contract twenty-five cents per acre shall be deposited with the board to be applied as the first payment on such land after the same is patented to the state, and the remainder of the purchase price shall be paid in not to exceed ten equal yearly payments. All lands heretofore selected by the board upon the application of citizens may be sold to the applicants under the provisions of this section."

"Sec. 18. The board may sell the timber on the unsold and unleased lands of the state, except as provided in section 38 of this act, in the same way as it may sell state lands, but payment for such timber must be made as provided in sec. 21 of this act."

"Sec. 21. No timber or lands on which timber forms an appreciable part of the value of such lands shall be sold except for cash, unless the purchaser shall secure the state the payment of the full purchase price by giving, at the time of purchase, an execution of notes for purchase, a good and sufficient bond running to the state for double the value of the timber on said lands; said bond to be in such form as the board may direct and subject to its approval."

"Sec. 36. Any portion of the public lands of this state, excepting such lands as are occupied by bona fide settlers who have a preference right of purchase, as hereinbefore provided, may be subdivided into lots, and sold as provided in this act, the board being satisfied that by a subdivision of any

tract into lots, the sale of the same could be made for a greater amount than if sold in legal subdivisions as designated by United States surveys."

"Sec. 38. The board shall set apart and reserve from sale such tracts of timber lands and the timber thereon, as may, in the opinion of the board, be required to preserve the forests of the state, prevent the diminution of the flow of rivers and aid in the irrigation of the arid lands."

The appellant predicates his alleged rights in the premises upon the provisions of section 16, and claims, by virtue of its provisions, that when he made application for the selection of said lands, and tendered to the board, as the first payment for the same, 25 cents per acre, he acquired the absolute right to have selected and to purchase said lands at the price of \$1.50 per acre, and to pay the balance of the purchase money in 10 equal yearly payments, and that it became and was the mandatory duty of the board to make a selection of said lands, and enter into a contract of sale to him of said lands, at the price and on the terms mentioned. When the language of a particular provision of a statute is ambiguous, construction may be resorted to, in order, if possible, to ascertain the true intention of the legislature; but where there is no ambiguity the language must be taken as the expression of the legislature's intention, unless other provisions of the statute clearly show that the language was used in a sense different from its natural and ordinary meaning. In *Minor v. Bank*, 1 Pet. 64, 7 L. Ed. 47, Justice Story in the opinion said: "The ordinary meaning of the language [of a statute] must be presumed to be intended, unless it would manifestly defeat the object of the provisions." The court will not construe a particular provision of a statute so as to neutralize or modify other provisions, if any other construction of the particular provisions is at all tenable. It is stated in *Suth. St. Const.* § 460, that "where statutes are couched in words of permission, or declare that it shall be lawful to do certain things, or provide that they may be done, their literal signification is that the persons, official or otherwise, to whom they are addressed, are at liberty or have the option to do those things, or refrain, at their discretion." The language of section 16 in this regard is "the board may select and contract to sell," etc. Therefore, unless the term "may" is clearly shown by context of said section or by other provisions of the act to have been used in the sense of "must," or if by giving to it that meaning other provisions of the statute would be neutralized, then the natural and ordinary meaning of that word must control, and said board may, at their option, select and contract to sell the lands donated to the state and applied for by a citizen, or refrain from doing so. There are no provisions of

the statute which indicate that that term was used in any other than its ordinary sense. To have done so would have neutralized the plain provisions of some, and materially modified others, of the sections of the statute hereinbefore cited.

Under the construction contended for by appellant, the board could not exercise the power expressly conferred upon them by sections 5, 7, 9, and 14, to lease or to sell at public auction all or any of the appraised, unsold, and unleased lands, when deemed by the board to be conducive to the best interests of the state to do so. If an application should be made for lands the timber on which forms an appreciable part of its value, in that case such a construction would entirely neutralize the provisions quoted from sections 18, 21, and 38. It would prevent the subdivision into lots, as provided in section 36. In short, it would in many instances prevent the board from resorting to the methods which, of those explicitly authorized by the legislature, would, in the judgment of the board, best subserve the interests of the state. That it is not made the duty of the board to make selection and contract the land applied for under section 16 is apparent from other provisions of that section. The sale of the land applied for in each instance is to be made at a price to be fixed by the board. Unless the parties to this transaction were under mutual obligations, none existed. If the board, as contended by appellant, becomes bound, whenever an application and tender are made, to make selection and contract for sale of the lands applied for, then the applicant is also bound to pay the price fixed by the board.

It is, however, claimed by the appellant that the price for the land applied for in this case was fixed at \$1.50 per acre by the action of the board, in the minutes, added by agreement to the petition. The price fixed by these minutes in express terms was confined to all selections which had already been made, except in those cases where the applicants had agreed to pay more than that price. The statute does not require the board to fix a uniform price for all lands selected, but as the respective applications are frequently for lands of greatly different values, by reason of their different locations, quality of soil, irrigating facility, and the difference in the quality, quantity, and value of the timber on each tract, it is evident, not only from section 16, but from other sections of the statute, that it was the intention of the legislature to vest the board with authority to fix the price to be paid by each applicant for the lands selected for him, so that the state might receive the benefit of the full value of the lands so sold. No price has been fixed by the board for the lands in question, but the appellant insists that he is entitled to have the same contracted to him at a price fixed in some other case. This claim is clearly untenable. It is provided in

section 16 that "the remainder of the purchase price [after the first payment] shall be paid in not to exceed ten equal yearly payments." Under this provision, the time in which the deferred payments shall be made is discretionary with the board. The petition does not allege that any time for the payment of the remainder of the purchase price was ever fixed, yet the appellant demanded of the board a contract by which the balance of the alleged purchase price should be paid in 10 equal yearly payments. The minds of the parties have never met, either on the question of price or the time of the deferred payments. Under the statute, after an application for lands is made, until the selection is made, and the price to be paid, and the time in which the deferred payments shall be made are fixed by the board, and assented to by the applicant, and a contract of sale containing the stipulation agreed upon is executed, the applicant has no vested rights whatever. The petition fails to state a cause of action.

The court has no jurisdiction to direct, by mandamus, how the discretionary power in the premises, vested in the board by the statute, shall be exercised. It is ordered that the judgment of the court below be affirmed, and that the appellant pay the costs.

BARTCH, C. J., and MINER, J., concur.

(21 Utah 448)

THUM v. WOLSTENHOLME.

(Supreme Court of Utah. April 30, 1900.)

INSURANCE—DELIVERY OF POLICY—EXECUTION OF PREMIUM NOTE—PAYMENT—LIFE INSURANCE POLICY—CONDITION PRECEDENT—ANNUITY-NEGOTIABLE NOTE-PAYMENT OF PREMIUM—ESTOPPEL—LEGAL TITLE TO INSURANCE POLICY VESTED—EQUITABLE LIEN—TRUST FUNDS INVESTED IN PREMIUMS—MISAPPROPRIATION OF TRUST FUNDS.

1. Where it appears that upon the issuance and delivery of a life insurance policy a note is executed and delivered by the assured to the general agent of the insurance company for practically all the first premium, and that the note bears the same date as the policy, and the policy was among the effects of the assured at the time of his death, the presumption is that the policy was delivered at the time it bears date, and that the difference between the face of the note and the amount of the premium was paid in cash or arranged by the assured; and the giving and delivery of the note and the receiving of the policy must be held to operate as a payment of the first annual premium.

2. A life insurance policy which stipulates for the payment of an annual premium by the assured, with a condition to be void in case of nonpayment, is not an insurance from year to year, but the premium constitutes an annuity, the whole of which is the consideration for the entire assurance for life; the condition is a condition subsequent, making the policy void by nonperformance, and the acceptance of a note for the annual premium is a waiver of the payment of the premium, and brings into operation the conditions in the policy referring to the note.

3. The giving and acceptance of a negotiable promissory note for the first annual premium on an insurance policy at the time of delivery of the policy, and its subsequent sale

and indorsement before maturity, operate as a payment of the premium for the first year, even if the note was never paid, and, as between the maker and the insurance company, as a collection of the note; and the company is thereafter estopped from claiming a forfeiture of the policy because of the nonpayment of the note.

4. Where the first annual premium on a policy of insurance is paid by giving and accepting a note and delivering the policy, the legal title to the policy and its proceeds vests in the assured, and the subsequent payment of premiums maturing thereafter out of funds belonging to a bank in which the assured is a large stockholder, and of which he is manager, cannot create a trust in favor of such bank.

5. After an assured has obtained title to a policy of insurance, if he uses funds of a bank, of which he is manager, in paying subsequent premiums, and such funds can be traced "into the policy," a court of equity will give a lien for such sums and interest on the proceeds of the policy.

6. Where a fund sought to be impressed with a trust is grossly disproportionate to the amount of the trust funds alleged to have been used in the creation of such fund, courts of equity will not decree the entire fund as a trust fund, but will allow a lien for the trust funds used.

7. While Bunting was owner and manager of the Bunting Bank, a corporation, which was insolvent, although it paid its debts, he insured his life with the New York Life Insurance Company for \$50,000, payable to his heirs, and gave his negotiable note, due in six months, to Fritter, the general agent of the company, for \$1,500, and other considerations, for the payment of the first premium. The policy was delivered to Bunting in exchange for the note. Fritter thereafter, and before maturity, transferred the note to the Pocatello Bank for value, which bank forwarded the same to the Bunting Bank for collection and the amount was credited to the Pocatello Bank, which bank was then owing the Bunting Bank. Two other notes were given the insurance company for other premiums on the policy, which were afterwards paid by Bunting's bank. Bunting died after the third note was paid, and the \$50,000 was paid on the policy to defendant. In a proceeding by the receiver of the Bunting Bank to impress all the insurance fund of \$50,000 with a trust for the \$5,110 paid by the bank, *held*, that the note given in payment of the first premium, having been sold and transferred by the insurance company before due, vested the title to the policy in Bunting on its delivery, and that the sale of the note by the insurance company operated, as between the company and Bunting, as a collection of the note.

8. By giving the \$1,500 note to Fritter, and paying the balance of the first premium, and receiving the policy, Bunting acquired the legal title to the policy and its proceeds, and no subsequent payments of premium maturing thereafter out of the funds of the bank would create a trust in favor of the bank. The trust, if any, must arise or result from the transaction whereby the trustee acquired the legal title or right to the property in which the trust is claimed, and it must arise at the time the legal title is obtained by the trustee, and not afterwards.

9. While the fund was not impressed with a trust such as would absorb the fund, yet it was subject to an equitable lien in the nature of a resulting trust to the amount of the bank's funds used in paying the second and third premiums, with interest.

(Syllabus by the Court.)

1. Where a policy of insurance is paid for entirely out of corporate funds wrongfully and illegally taken by the insured out of assets belonging primarily to the creditors of an insolvent corporation, the policy and the proceeds become impressed with a trust by implication of law,

and the insured in his lifetime held the policy as a trustee for the benefit of the creditors, and could not shake off the fiduciary character by assignment. In such case the law fastens a constructive trust in invitum upon the conscience of the offending party.¹

2. Although one person owns a majority of the stock, or all of it, or all but two shares, he does not, in consequence thereof, acquire the right to act for the corporation, or as the corporation, independently of the directors. One person may own all the stock, and yet the existence, relations, and business methods of the corporation continue.

3. If insurance be procured with assets of an insolvent corporation which ought to be used in payment of the corporate debts, the creditors have the right to follow the assets into the new investment, and appropriate the proceeds in the hands of those having full knowledge of the equities.

4. Where a trustee or other person standing in a fiduciary relation makes a profit out of any transaction within the scope of his agency or authority, that profit will belong to his cestui que trust, and the rule extends to all persons standing in a fiduciary relation.

Per Bartch, C. J., dissenting.

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by C. E. Thum, receiver of C. Bunting & Co., Bankers, against Daniel Wolstenholme. Judgment for plaintiff, and defendant appeals. Reversed.

Dickson, Ellis & Ellis, for appellant. Brown & Henderson, for respondent.

MINER, J. This equitable action was brought to recover a fund amounting to \$50,000 alleged to be held by the defendant, and to have been acquired by him as trustee of C. Bunting & Co., Bankers, a corporation organized under the laws of Utah. It is claimed in the complaint that this fund was derived from the proceeds of a life insurance policy issued on the life of Charles Bunting, deceased, for the sum of \$50,000, on November 29, 1894, payable on the death of Bunting to his estate. The testimony shows that in case of loss the policy was payable to his heirs, executors, or assigns. Therefore this action was brought to recover this fund upon the ground that the sum of \$5,110 of the money of C. Bunting & Co., Bankers, of which the plaintiff is the receiver, was used by Bunting from the funds of C. Bunting & Co., Bankers, in the payment of three premiums on the life policy prior to his death, and that a trust resulted in favor of the bank and its receivers to the extent of the entire sum of \$50,000 derived from the policy. It is also alleged, and not denied, that in 1896 the policy was assigned to the defendant. The testimony shows that it was assigned in August, 1896, and that the insurance company then sent the usual notice for payment of the premium to the defendant. It is also alleged that the assignment was made without any consideration. This allegation is admitted. In May, 1897, after proof of Bunt-

ing's death, the insurance company paid to the defendant the full amount of the policy. C. Bunting & Co., Bankers, was organized December 9, 1892, and Bunting, up to the time of his death, which was on May 16, 1897, was its general manager, and since October 14, 1893, had owned all the stock of the bank. It is also alleged that to pay the first premium on July 1, 1895, Bunting executed his note, which he caused to be discounted at his bank; that the second premium, due November 22, 1895, was paid by draft on the bank, and the third premium, due November 9, 1896, was paid by charging the same to his own account. It is further alleged in the complaint "that in his lifetime the said Charles Bunting procured his life to be insured on or about the 20th day of November, 1894, by a life insurance policy, executed by the New York Life Insurance Company, in the sum of \$50,000, payable to his estate in the event of death; that a policy was duly issued to him therefor as aforesaid by said life insurance company; that at the time of such payments Bunting had no credit or funds in the bank with which to pay the same; that said sums taken from the bank for such purposes amounted to \$5,110; that such money was the property of the bank; that such bank was in truth insolvent during a large portion of the said three years prior to the appointment of the receiver on February 21, 1898, if an accounting had been had of its debts and assets." Prior to October 14, 1893, Mr. Wallace owned an interest in the bank, and then sold his interest therein to Bunting. Up to that time Bunting had had credit at the bank, and his overdrafts, when made, were paid by permission of the board of directors. Upon the hearing in the court below it was ordered and decreed that the fund so received by the defendant was impressed with a trust, and the defendant was ordered to turn over to the plaintiff the entire fund of \$50,000. From this decree the defendant appealed to this court.

The testimony shows that on November 29, 1894, for the purpose of insuring his life in the New York Life Insurance Company for \$50,000, Bunting gave his note for \$1,500, payable to his own order on July 1, 1895, and that he delivered the same indorsed to W. C. Fritter, who was then the general agent for the state of Idaho, for said insurance company. The policy was delivered to Bunting at the same time. The complaint alleges the delivery of the policy to Bunting, and it bears the same date as the note. It was found among Bunting's private papers after his death, and in the absence of proof to the contrary the general presumption is that the policy of insurance was delivered to Bunting at the time it bears date. Devl. Deeds, § 265; Treadwell v. Reynolds, 47 Cal. 171.

The amount of the annual premium on the policy was \$1,805. The note given was for \$1,500. Whether the agent discounted

¹ Wyeth Hardware & Mfg. Co. v. James-Spencer-Bateman Co., 47 Pac. 604, 35 Utah, 110; Mercantile Co. v. Mt. Pleasant Equitable Co-operative Inst., 42 Pac. 869, 12 Utah, 212.

\$305 from his commission, or whether Bunting paid the difference between the note and the full premium in cash, does not appear from the testimony given in the case, but it does appear that \$1,805 was the full yearly premium on the policy which the company required to be paid. This sum must have been arranged or paid by some one. The policy was in the possession of Bunting. The presumption follows that it was rightfully there, and that he paid the insurance company the premium, amounting to \$1,805, or the sum of \$305 over and above the note for the first premium. But whether this \$305 was actually paid to the agent, or whether the agent discounted that much from his commission, or made Bunting a present of it, would not change the result or effect of giving the note for the first premium. Bunting delivered the note to Fritter, and Fritter thereafter, before maturity, and for value, indorsed and transferred said note to the First National Bank of Pocatello. Thereafter, on July 6, 1895, the said last-mentioned bank forwarded said note for collection to C. Bunting & Co., Bankers, and the amount of the note was paid by it by charging to Bunting's account, and credited to the First National Bank of Pocatello. At this time Bunting's bank had a credit at the Pocatello bank. No money was actually paid by the Bunting bank, except as stated. Thum testified that Bunting told him the note was given over to Fritter, the insurance agent. The question arises whether the giving and delivery of the note and the receiving of the policy operated as a payment of the first year's premium. The note in question was a negotiable one, indorsed, delivered, and accepted by the insurance company as payment of the premium, and thereafter by it sold and transferred before maturity for value. In *Iron Works v. Hall*, 64 Mich. 165, 31 N. W. 152, it is held that a draft or note is regarded as a payment whenever it appears that such was the intention of the parties, which may be shown by the acts and conduct of the parties as well as by proof of the express contract or agreement, and the surrender of the evidence of the debt or liability strongly indicates such payment. So, in *Farnum v. Insurance Co.*, 83 Cal. 247, 23 Pac. 869, it is held that, in case the policy had contained an express provision that the company should not be liable on the policy until the premium was paid (which is not shown), such provision is waived by the unconditional delivery of the policy to the insured as a complete and executed contract, under an express or implied agreement that a credit shall be given for the premium by note or otherwise, and in such a case the company is liable for a loss which may occur during the period of the credit. To the same effect are 2 Pars. Cont. 624; *Thacher v. Dinsmore*, 5 Mass. 299; *Reed v. Insurance Co.*, 21 Utah. — 61 Pac. 21; 2 Greenl. Ev. § 52, 519; *Insurance Co. v. McCrea*, 8 Lea, 520, 41 Am. St. Rep. 617; *Tennant v.*

Insurance Co. (C. C.) 31 Fed. 322; 2 Beach, Ins. § 460, 770, 773; 1 Joyce, Ins. § 76. In the case of *Insurance Co. v. Bowes*, 42 Mich. 19, 51 N. W. 902, the court, speaking through Judge Cooley, on page 22, 42 Mich., and page 963, 51 N. W., in discussing a similar question, where notes were given for a premium, said: "The company may have sold them [the notes], and this, as between the company and Mrs. Bowes [the assured], would have been equivalent to collection." A life policy which stipulates for the payment of an annual premium by the assured, with a condition to be void in case of nonpayment, is not an insurance from year to year; but the premium constitutes an annuity, the whole of which is the consideration for the entire assurance for life. The condition is a condition subsequent, making the policy void by nonperformance of the condition. *Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789; *Insurance Co. v. Pruett*, 74 Ala. 497. So, if the note is given for the annual premium, the acceptance of the note is a waiver of the payment of the premium, and brings into operation such conditions in the policy referring to the note. In this case the policy was not placed in evidence, no condition of invalidity is shown, and no violation of its provisions can be presumed.

The testimony clearly shows, and I find, that at the time of obtaining the policy Bunting gave his negotiable promissory note, and indorsed it over to Fritter, together with the \$305, previously referred to as arranged. In payment of the first year's premium on the policy. The policy for \$50,000 was then delivered to Bunting. Fritter thereafter sold and indorsed the note to the First National Bank of Pocatello, without recourse. This constituted an absolute, completed transaction between the parties, and operated as a full payment of the premium for the first year, even if the note was never paid. The sale of the note to the bank by Fritter operates, as between Bunting and the insurance company, as a collection of the note. The insurance company would thereafter be estopped from claiming a forfeiture of the policy because of the nonpayment of the note. So the insurance company would be estopped after it had collected subsequent premiums on the policy. The fact that Bunting afterwards directed the cashier of the Bunting bank to pay the note at maturity does not change the character of the transaction, nor create nor stamp the fund or the policy with a trust. It necessarily follows that the note and the \$305 previously paid make up the first year's premium on the policy, amounting to \$1,805. This did not constitute a trust fund, and never was a part of the assets of the bank. The funds of the bank were not used in making the first payment, or any part of it, at the time Bunting obtained the actual ownership of the policy. So far, Bunting must be held to have paid the full premium, and to be the owner of the policy, unaf-

affected by any trust liability. It also appears from the record that Bunting owned all the stock of the bank, was its president and manager, and, without hindrance or question from the directors, managed and controlled its business. Since its organization, in 1892, up to the time the receiver was appointed, in 1897, it had done business as a bank, and was considered solvent during the years 1894, 1895, and 1896, so far as being able to pay, and in paying, its obligations as they matured. The acts of Bunting were open, and not secretive. The fraud, if any, consisted in overdrawing his account at the bank which he owned, and in procuring and depositing as assets of the bank to his own credit \$107,000 or more of securities which were by him, as manager, hypothecated in part to secure other obligations growing out of the bank's indebtedness. Bunting was evidently endeavoring to keep up the credit of the bank and to pay its obligations during a period when strong men were driven into despair by a whirlwind of financial adversity, few of whom were able to withstand the gale. The securities he deposited shrunk in value, and many losses followed; but no intentional, criminal dishonesty appears on the part of Mr. Bunting in his management of the bank, or in his endeavor to save it from financial ruin.

The record shows that on the 16th day of July, 1895, the \$1,500 note was forwarded by the Pocatello bank to the Bunting bank, and it was paid by crediting the same to the former bank, and charging the same to Bunting's account. It also appears that, at the time of the payment of said note, Bunting had a balance to his credit of about \$20,000 on the books of the bank. At the time the note was given, in 1894, it does not appear that Bunting was indebted to the bank. The second premium, of \$1,805, was paid by the bank November 24, 1895, on Bunting's check. At this time Bunting's account was overdrawn about \$10,000. The third premium was paid on Bunting's check November 27, 1896. At this time Bunting's account shows a balance to his credit of over \$9,000 on the books of the bank. So far as I am able to judge from the testimony with reference to Bunting's account at the bank, it appears that, while he had a credit on the books of the bank, yet, as a matter of fact, he had deposited to his credit stock and shares of Bunting & Co., Merchants, amounting to \$107,000, besides other securities, that were in part fictitious, as some of them were held as security for other debts, and were not paid for in full, so that, considering these credits as made, his account was overdrawn after the 31st day of December, 1894. For these reasons, respondent seeks to charge the fund derived from the insurance policy with a constructive trust because the sum of \$5,110 of the funds of the bank was paid in premiums on the policy, and asks that not only the amount paid, but the whole \$50,000, be turned over to the bank, as im-

pressed with a trust. In section 124, 1 Perry, Trusts, defining resulting trusts, the author says: "There is another class of trusts, which result in law from the acts of parties, whether they are intended to create a trust or not, and they are aptly designated as 'resulting trusts.'" In section 125 the author says: "In this chapter resulting trusts will be examined under five heads: (1) When the purchaser of an estate pays the purchase money and takes the title in the name of a third person; (2) where a person standing in a fiduciary relation uses fiduciary funds to purchase property, and takes the title in his own name. * * *" It will be remembered that the policy in question was payable to the heirs, executors, administrators, and assigns of Charles Bunting. By giving the \$1,500 note to Fritter, who sold the same, and paying the balance of the first premium and receiving the policy, Bunting acquired the legal title to the policy and its proceeds; and no subsequent payments of premiums maturing thereafter, by him, out of the funds of C. Bunting & Co., Bankers, could create a trust in favor of said bank or its receiver. The trust, if any, must arise or result from the transaction whereby the trustee acquired the legal title or right to the property in which the trust is claimed, and it must arise at the time the legal title is obtained by the trustee, and not afterwards. This doctrine is sustained by the great weight of authority, and the principle applies to transactions of this character as well as to cases growing out of real-estate transactions. In section 133, 1 Perry, Trusts, it is said: "The trust must result, if at all, at the instant the deed is taken, and the legal title vests in the grantee. No oral agreements and no payments, before or after the title is taken, will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction itself." In *Re Wood* (D. C.) 5 Fed. 443, it is said: "To raise such a trust where the purchase money is paid by one, and the title taken by another, the entire purchase money must have been paid by such party; or, if a part only be paid, such part must be paid for some aliquot part of the property, as a fourth, a third, or a moiety, and there must be no uncertainty as to the proportion of the property to which the trust extends. *Olcott v. Bynum*, 17 Wall. 44, 21 L. Ed. 570. And, again, such a trust must arise at the time of the purchase. It cannot arise by after advances." In *Bosworth v. Hopkins*, 85 Wis. 50, 62, 55 N. W. 424, it is said: "Whether any trust is to be implied in favor of the firm from the alleged secret or fraudulent use of its funds in making the purchase depends entirely upon the facts as they existed November 29, 1875, when the purchase was made; and the subsequent withdrawal of funds of the firm, and use of the same in payment of part of the purchase money and interest remaining unpaid, and the pay-

ment of taxes or improvements on the land, cannot be regarded as material to the rightfulness of the purchase. * * * And subsequent wrongful payments on the purchase price from the partnership funds pursuant to a land contract, and subsequent and prior to the deed, will not be ground for an implied trust, though the firm might, if necessary, have a lien against the land for sums so paid. *Conner v. Lewis*, 16 Me. 274." *Fulton v. Jansen*, 99 Cal. 587, 34 Pac. 331; *French v. Shepler*, 83 Ind. 266; *Buck v. Swazey*, 35 Me. 41; *Pinnock v. Clough*, 16 Vt. 500; *Case v. Coddling*, 38 Cal. 191; *Munro v. Collins*, 95 Mo. 33, 7 S. W. 461; *Botsford v. Burr*, 2 Johns. Ch. 405; *Pom. Eq. Jur.* § 1037; *White v. Carpenter*, 2 Paige, Ch. 237; *Barnard v. Jewett*, 97 Mass. 87; *Tilford v. Torrey*, 53 Ala. 120; *Coles v. Allen*, 64 Ala. 98; *Somers v. Overhulser* (Cal.) 7 Pac. 645. Under the facts shown, the money derived from the policy is not made subject to, or impressed with, a trust in favor of the bank.

But it appears that the sum of \$3,610 of the moneys of the bank was, after Bunting had obtained ownership and title to the insurance policy, used by him in making payments of premiums upon the policy as they matured. This sum is traced into the policy, and, as we understand, counsel for the appellant, upon the argument, consented that this sum, with interest, could be allowed the bank, and made a lien upon the fund. In section 842, 2 Perry, Trusts, it is said: "Where the trust fund constitutes a part only of the purchase money of an estate, the court usually gives a lien on the land only for the amount of the trust fund invested and interest; but, where the entire land is the fruit of the trust fund, the cestui que trust has an election to take the land, or the trust fund and interest." In section 123, 1 Perry, Trusts, it is said: "If, however, a trustee purchase an estate with trust funds, and adds funds of his own to the purchase money, a trust will result to the cestui que trust, and the burden will be on the trustee to show the amount of his own funds in the purchase; otherwise, the cestui que trust will take the whole. If the purchase is partly with trust funds and partly not, the cestui has a lien on the whole property for the amount of the fund misapplied." In *Munro v. Collins*, 95 Mo. 33, 7 S. W. 461, it is held that, where a trustee purchases an estate partly with his own funds and partly with the trust money, the cestui que trust, on establishing the fact, will have a lien on the whole estate for the whole amount of the trust fund thus misapplied. See, also, *Bosworth v. Hopkins*, 85 Wis. 50, 55 N. W. 424; *Botsford v. Burr*, 2 Johns. Ch. 404; *Case v. Coddling*, 38 Cal. 191.

The respondent insists that the \$50,000 derived from the insurance policy, which was payable to Bunting's heirs, representatives, and assigns, should be impressed with a trust because \$5,110 of the funds of the bank were used to pay the premiums. He de-

mands that a court of equity shall allow the bank a return of the money invested and \$44,890 as a just equivalent for the use of \$5,110 for the time named. If the trust created were a constructive trust, and the payments were made of trust money at the time Bunting acquired the policy, this contention would seem more in accordance with the holding of many courts. But in this case, where the fund sought to be impressed with a trust is so grossly disproportionate to the amount of the trust funds alleged to have been used, the application of the rule is inequitable, and courts of equity are not required to do injustice; nor should such a doctrine be invoked under a state of facts like those under consideration in this case. The case of *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, which is relied upon by respondent, differs materially from the case at bar. In that case Gilman embezzled \$200,000 from the cestui que trust, and afterwards insured his life, for the benefit of his wife, for \$50,000, from the funds so embezzled. The court declared a trust upon the fund, but on page 385, 138 N. Y., page 209, 34 N. E., and page 573, 20 L. R. A., recognized the existence of the equitable rule here contended for, without deciding the question, because it was not before the court. The court said: "If the proceeds of these policies had been greater than the whole amount of the indebtedness of the husband to the cestui que trust arising out of the husband's breach of trust, we do not decide what in equity might be the different rights of the wife and the cestui que trust in the balance, or whether any different rule could be logically applied. The husband in this case converted \$200,000 of what stood in the nature of a trust fund, and the plaintiff recovers only a little over one-fourth thereof in case the judgment of the referee's report be affirmed. We simply decided the case before us." Here the insurance was payable to Bunting's heirs, administrators, and assigns, —in effect, to his creditors; and \$5,110 is the only sum charged in the complaint as having been in any manner misappropriated from the funds of the bank by Bunting. This is the only allegation in the complaint, or claim on that subject, while \$50,000 is sought to be applied to reimburse the trust fund thus alleged to have been depleted. In the *Gilman Case*, at the time the policy was obtained all of the first premium was paid out of the trust moneys. In this case the first premium was paid by the note of Bunting, for which full credit was given by the company, which vested in him the legal title to the policy at the time of its delivery, relieved from any trust obligation. In the *Gilman Case* the policy was payable to his wife. Upon his death the policy and the proceeds thereof became her separate, individual property. In this case the policy was payable to Bunting's heirs, and thereby became a part of his estate, so that his creditors holding his prom-

ise to pay, and to whom he was indebted, could recover therefrom the amount due them. In the one case there was an intent shown to defraud creditors; in the other, an intent and disposition are shown to pay creditors. In the case at bar neither the insurance policy nor the proceeds thereof were ever impressed with a constructive trust. When Bunting paid or arranged for the payment of \$305, and gave his note for \$1,500 to Fritter, the agent of the insurance company, in payment of the first year's premium, and it was accepted as such, and the policy delivered, the title to the policy and the proceeds thereof became vested in Bunting. For all that appears, if Bunting had died during that year the company would have been liable on that policy for its full amount, even if the note had never been paid. As it now stands, the policy having been made payable to Bunting's heirs, the fund necessarily belongs to the estate, and becomes liable for the payment of Bunting's debts, and all his creditors will share ratably in the fund according to the amount of their respective claims. But, if the fund is impressed with a trust, then only the creditors of the Bunting bank, to the exclusion of other creditors, would obtain the sum of \$44,800 over and above the amount invested by Bunting from trust funds, as a reward for his misappropriation of the funds of the bank. To permit such a disposition of the fund in this case would, to my mind, not only be an injustice to the heirs and creditors of Bunting, but would be an example against which the conscience of a court of equity would revolt. By giving its sanction to such a disposition of the fund, a court of justice would indeed become an engine of oppression and injustice, while by returning the fund misappropriated, with interest, the injured parties are restored to their original standing, and the financial loss complained of is recompensed. By insuring his life for the benefit of his estate, Bunting's creditors were, as it seems, placed in a better position than they otherwise would have been; and this was, possibly, his intention in obtaining the insurance. If he afterwards entertained the intention of assigning the policy to the appellant, he did not effectuate that purpose by delivering the assignment of the policy. It still belongs to the estate of Bunting. The respondent is restored to what belongs to it, and the heirs and creditors receive upward of \$44,000 that they would not have received but for the alleged fraudulent acts of Bunting.

I am of the opinion that the plaintiff has an equitable lien, in the nature of a resulting trust, upon the fund in question, for the amount of money of the bank used in paying the second and third premiums, amounting to \$3,610, with interest; but I cannot allow the \$1,500 advanced by the bank in payment of the note given by Bunting. That payment was of no legal benefit to him, and no equita-

ble lien or trust can arise from this payment. As to Bunting and the insurance company, the premium for the first year was paid. The record shows that the appellant obtained the policy, with the assignment thereof attached thereto, after Bunting's death; that he paid no consideration therefor, and claims no interest therein except as trustee for the heirs of Bunting's estate. Under such circumstances, the money collected upon the policy belongs to the heirs of Charles Bunting, deceased, and should be paid to the administrator of Charles Bunting, deceased, after the payment by him of the sum of \$3,610 to the respondent, with interest as stated herein. It is therefore ordered that, out of the \$50,000 fund in the hands of the appellant, he pay to the respondent the sum of \$1,805, with interest thereon from November 27, 1895, and the sum of \$1,805, with interest thereon from November 27, 1896, and that the interest be computed at the rate of 8 per cent. per annum. It is further ordered that the findings and conclusions of the court below be set aside and vacated, and that the judgment and decree be reversed, and that findings and decree be entered in accordance with this opinion. The costs of this case to be equally divided.

BASKIN, J. (concurring). It is alleged in the complaint "that in his lifetime the said Charles Bunting procured his life to be insured, on or about the 29th day of November, 1894, by a life insurance policy executed by the New York Life Insurance Company, in the sum of \$50,000, payable to his estate in the event of death; that a policy was duly issued to him therefor as aforesaid by said life insurance company; that in payment of the first premium the said Bunting executed his note, due in July, 1895." These allegations were fully sustained by the evidence, and are not disputed by the appellant. It further appears from the evidence that the note so given in payment of the first premium was for \$1,500, payable to Bunting's own order, on July 1, 1895; that Bunting indorsed and delivered the same to W. C. Fritter, who was the general agent of the insurance company, and represented it in the transaction; that said note and the policy are of the same date; that the agent afterwards, for value, indorsed and delivered the same, without recourse, to the First National Bank of Pocatello; that upon the maturity of the note the same was presented to C. Bunting & Co., Bankers, of which Bunting was the manager and one of the directors, and was paid by the latter bank by crediting, under the direction of Bunting, on its bank books, the First National Bank of Pocatello with the amount of said note; that, under the direction of Bunting, his account with C. Bunting & Co. was charged with the amount of said note; that afterwards two other premiums, of \$1,805 each, were paid out of

the funds of C. Bunting & Co., on checks for the same drawn on said bank by Bunting. There is some conflict in the evidence as to whether Bunting had any money to his credit in C. Bunting & Co.'s bank when said note and the two other premiums were paid, but I think that the evidence shows that he had none. The complaint does not allege that Bunting was insolvent either at the date of the policy or when such payments were made, and the only charge of fraud made against him in the complaint is that while he was the manager of C. Bunting & Co. he caused the note to be paid, and drew checks on the bank, which were honored, when he had no money of his own deposited in said bank, and had no credit there upon which he was entitled to draw, or which he was authorized to use in the payment of his own obligations. Before Bunting's death he assigned, without consideration, the insurance policy to the appellant. After the death of Bunting the appellant was paid \$50,000 on the policy. The respondent claims that from these facts there arose a constructive trust in favor of C. Bunting & Co., by virtue of which it became the equitable owner of said policy. It is evident from the facts that, upon the execution of the policy and the note given in payment of the first premium, the assured became the absolute owner of the policy, and that such was the intention of the insurance company when it issued the policy and received said note, and that the only consideration of said policy was said note, unless Bunting paid \$305, the difference between the principal of said note and the amount of the other premiums. No funds of C. Bunting & Co., Bankers, constituted any part of the consideration for the policy. The bank was not connected in any way with the transaction in which Bunting acquired the legal title to the policy, nor was it in any way injured thereby. Therefore the title which Bunting thus acquired was an absolute one. That Bunting became the absolute owner, and was such owner at the time the note was paid, are conclusively shown by the patent fact that, if he had died before the payment of the note, the policy would not have been thereby vitiated, but upon his death could have been enforced against the insurance company. As the bank had no connection whatever with the matter until the note was paid, the alleged trust has no other basis than the payment of said note and the two subsequent premiums. It follows that, unless these payments divested Bunting of all or a portion of his legal title, no resulting or constructive trust arose in favor of the bank. From the nature of such trusts, no such anomalous result as that is possible. No such doctrine has ever been laid down by any of the text writers or held by any court. Any one who holds the legal title to either real or personal property cannot be divested of all or any portion of his title in any such way; nor can

any equitable interest in such property be acquired, as against the absolute title, in that way. Neither a resulting nor a constructive trust in either real or personal property can arise from anything which the owner of the legal title may do in regard to such property after the legal title has been acquired. Equitable liens, however, may be created in favor of other persons by the subsequent acts of such owner. The only difference between a resulting and a constructive trust is well stated in respondent's brief as follows: "Resulting trusts arise from an implied agreement. It is enforced as an agreement, yet it arises by operation of law; it is implied. For instance, property is bought and paid for out of the funds of one person, and is deeded to another. A trust is implied in favor of the party who furnished the means. * * * Constructive trusts are wholly different from implied trusts, in this: They arise out of some actual or constructive fraud. They are not upon the theory of an agreement or contract, but they arise out of the violation of some duty, amounting to a fraud, and are in invitum, and are enforced upon the party regardless of what his intention is." From the very nature of these trusts, they can only be created by acts done in the acquisition of the legal title, and must vest in the cestui que trust the equitable title at the same time that the legal title vests in the trustee; and in cases of constructive trusts the actual or constructive fraud upon which they arise must have been committed in the acquisition of the property to which the trust attached. In 1 Beach, Trusts, § 180, p. 377, it is stated that "whenever it is shown that a fraud, either actual or constructive, has been committed in the acquisition of property, equity will raise a constructive trust in favor of the person defrauded." See, also, the numerous cases cited in note 1 on said page.

In all cases of resulting or constructive trusts there are two titles. One is legal, and the other equitable. The latter is the beneficial title, but when the legal title to property is an absolute one there is no room for a trust. It is conceded by counsel for the respondent that Bunting acquired an absolute legal title to the policy. In their brief they say: "Of course, the title to this insurance policy vested in Bunting. That is the very cause of the complaint. As long as he carried it without paying for it out of the bank funds, he had the right to it; but, the moment he paid for it out of the funds belonging to the bank, equity thrusts upon it a trust by construction of law." It is admitted by this statement, and such was the fact, that up to the time the note was paid the title of Bunting was as absolute as his title to any other property which he may have owned; and if it be conceded that by its payment he committed an actual fraud, and not an implied one, such payment does not raise a resulting trust in favor of C.

Bunting & Co., because it was neither alleged in the complaint nor shown by the evidence that any fraud was committed in the acquisition of Bunting's absolute title to the policy. The admission in the brief of respondent's counsel that, "as long as he [Bunting] carried it [the policy] without paying for it out of the bank's funds, he had a right to it," shows that it is not claimed that fraud was committed in the acquisition of the title, but that the only fraud complained of and relied on was the payment of the note and premiums after the absolute title of Bunting had been acquired. The note was paid six months after, and the premiums, respectively, in one and two years after, the title to the policy had been acquired. The execution and delivery of the note was the sole consideration which induced the agent of the insurance company to issue the policy, and it would have continued to be in force if the note had never been paid. Neither did the payment of the note enhance the value of the policy or benefit it in any way. Therefore C. Bunting & Co. acquired no rights in the policy by virtue thereof. But the payment of the second and third premiums increased the value of the policy and kept it alive, and, notwithstanding these payments did not raise a resulting trust in favor of C. Bunting & Co., an equitable lien, in the nature of a resulting trust, was created in its favor on said policy and its proceeds for the amount of each of the last premiums, with legal interest. In 2 Story, Eq. Jur. (13th Ed.) p. 558, § 1217, it is stated that: "There are liens recognized in equity whose existence is not known or obligation enforced at law, and in respect to which courts of equity exercise a very large and salutary jurisdiction. In regard to these liens, it may be generally stated that they arise from constructive trusts. They are therefore wholly independent of possession of the thing to which they attach as a charge or incumbrance, and they can only be enforced in courts of equity." Pomeroy, in his work on Equity Jurisprudence (section 166), asserts that it is more accurate to describe these liens as analogous to trusts. In Jones, Liens, § 28, it is stated that: "Equitable liens do not depend upon possession, as do liens at law. Possession by the creditor is not essential to his acquiring and enforcing a lien." In the case of Ferris v. Van Vechten, 9 Hun, 12, it appears that an executor of an estate had in his hands money of the estate sufficient to pay the creditors of the same, but instead of doing so he applied these funds in the payment of taxes and of repairs, and in removing a lien upon real estate devised by said will in trust for certain beneficiaries named therein. It was held that the funds so applied were held in trust by the executor for the benefit of the creditors, and, as the devisees had the benefit of the misappropriation of the fund, it became a charge upon the devised property. The real estate

was accordingly sold to satisfy the lien thereby created. The foregoing case, and the case of Haddow v. Lundy, 59 N. Y. 320, are in point upon the question under consideration. The facts in the latter case are as follows: The defendant, Margaret Lundy, procured letters of administration on the estate of Robert Haddow, deceased, on the false and fraudulent representation that she was the widow of the deceased. Mary Haddow, the widow of the deceased, and his children, instituted a suit to revoke the letters granted to the defendant, and to have letters granted to Mary Haddow, and to have certain funds of the estate, which the complaint alleged had been used by the defendant in improving certain real estate belonging to her, decreed a lien upon such real estate. The letters granted to the defendant were set aside, and Mary Haddow was appointed administratrix; and the amount of the money of the estate which the defendant had expended in buildings on her real estate was adjudged to be a lien on said real estate, and the same was ordered to be sold to satisfy the lien. The appellate court, in its opinion, said: "A portion of the money belonging to the estate was clearly traced into the building erected by the defendant upon her own land. Although she had also invested money of her own in the same building, the trust fund could, on familiar principles of equity, be followed as an equitable lien, and therefore adjudged and enforced by any appropriate remedy." The judgment of the lower court was affirmed. The case at bar only differs from this case in this: The trust fund, instead of being expended by the trustee in improving real estate which belonged to him, was used in enhancing the value and prolonging the life of an insurance policy of which he was the owner. In 2 Lewin, Trusts, p. 897, § 10, it is said that "wherever a trust fund is traceable into land, and the fund constitutes a part only of the money laid out in the purchase, the court has usually given a lien merely on the land for the trust money and interest." The same practice is stated in section 843, 1 Perry, Trusts. The principle underlying this practice is applicable to the case at bar, and when the money which belonged to C. Bunting & Co., that was expended for the benefit of the policy, is repaid to it, with interest, out of the funds realized on the policy by the appellant, the requirements of equity will have been fully met.

As the assignment of the policy to Wolstenholme, the appellant, was made without consideration, he took and held the same subject to the equitable lien of C. Bunting & Co.; and the receiver of said company is entitled to have paid to him, out of the funds in appellant's hands, realized on the policy, the amount of the premiums paid on said policy, with interest thereon at the legal rate from the time each premium was paid; and for the additional reason that, as al-

leged in the complaint, the insurance was payable to Bunting's estate in the event of his death, and the appellant not having paid any consideration for the assignment, or having paid any premiums on the policy, he held the same merely as trustee, and, as the money paid on said premiums is traceable into said fund, he holds said policy subject to said lien, and in trust for the creditors of Bunting's estate and for his heirs. This view of the case is supported both by the principles of equity and the authorities herein quoted. I concur in the conclusion and judgment announced in the opinion of Mr. Justice MINER.

BARTCH, C. J. I am unable to agree with my Brethren in the disposition they have made of this case. The action is a suit in equity, brought by the plaintiff, as receiver of C. Bunting & Co., a corporation organized under the laws of Utah, but which carried on a banking business in the state of Idaho, to recover a fund of \$50,000, the proceeds of a life insurance policy issued upon the life of Charles Bunting, now deceased; the fund having come into the possession of the defendant because of an assignment of the policy to him. It is alleged in the complaint that the corporation was organized about December 9, 1892, for the purpose of doing a general banking business at Blackfoot, Idaho; that it carried on such business at that place until February 15, 1897, when, having become insolvent, it closed its doors, and in a suit of a creditor against the bank in his own behalf and in behalf of all other creditors, brought in a district court of the state of Idaho, this plaintiff was appointed general receiver of the corporation, and thereafter, in another creditors' suit brought against the bank in a district court of Utah, this plaintiff was appointed receiver for all the assets and matters pertaining to the corporation existing and to be found in Utah; that the plaintiff qualified and is acting as receiver of the bank and its assets; that Charles Bunting, during the entire existence of the bank, was its acting general manager, directed its affairs, and held the office of vice president; that about November 29, 1894, said Bunting procured his life to be insured, and had issued to him a life insurance policy, in the sum of \$50,000, payable, in the event of his death, to his estate; that in payment of the first premium the insured executed his note, due in July, 1895, and caused it to be discounted by his own bank; that at the time of the transaction he had no money of his own on deposit in the bank, and no credit upon which he was entitled to draw, or which he was authorized to use in payment of his own obligations; that all the premiums on the policy, aggregating \$5,110, were taken by the insured from the funds of the bank and used in the purchase of the insurance; that the money thus used was the

property of the bank; that the bank was in truth insolvent during a large portion of the three years prior to the appointment of the receiver; that in 1896, and before the payment of the last premium, the insured assigned the policy to the defendant, who paid no consideration whatever therefor; that after the assignment the insured retained possession of the policy, and continued to treat it as his own, and paid the last premium from the funds of the bank; that the insured died on May 16, 1897; that after the death of said Bunting the defendant procured possession of the policy from among the papers of the deceased, and thereafter received from the insurance company \$50,000, the amount of the policy, and now holds the same in his possession; that in equity and good conscience the insurance money so collected belongs to and is the property of the corporation, and should be paid to this plaintiff as receiver; that the amount of the available assets to be distributed among the creditors was reduced by the amounts paid for premiums on the policy; and that, upon demand made, payment of the fund to the receiver was refused by the defendant. The answer admits the corporate existence of C. Bunting & Co., Bankers, the amount of the life insurance by Charles Bunting, the assignment of the policy to defendant, and the receipt of the sum of \$50,000 as the proceeds of the insurance, which sum the defendant now holds in his possession. The other material allegations of the complaint appear to be denied.

From the testimony introduced at the trial the court, among other things, found that the banking corporation was duly organized under the laws of Utah December 9, 1892, and thereafter did a general banking business at Blackfoot, Idaho, until February 15, 1897, when it ceased to do business, and has transacted no business since as a banking institution; that on the day last named the plaintiff, in a suit brought in Idaho by a creditor in his own behalf and in behalf of all other creditors, was appointed general receiver of the institution and of all its property and effects; that thereafter, on February 21, 1898, in a similar suit brought in Utah, the plaintiff was appointed receiver of all the assets, causes of action, and other things pertaining to the corporation, existing or to be found in Utah; that he at once qualified, became, and still is, such receiver; that during all the time the banking business was conducted Charles Bunting had the exclusive management, control, and direction thereof, without the intervention of the board of directors or other officers, and was vice president of the corporation; that from the time of its organization, and during all the time it transacted banking business, the corporation was actually insolvent, and was known to be so by said Bunting, but its solvency was not known to the

general public until the institution closed its doors; that about November 29, 1894, a policy of insurance was issued to Charles Bunting upon his life, payable to his estate after his death, and thereafter delivered to him; that said Bunting paid for the policy, and each and every premium thereon, amounting to \$5,110, with the money of the corporation taken by him wrongfully, unlawfully, and fraudulently,—the last premium, amounting to \$1,805, being so paid by him about November 28, 1896; that in August, 1896, said Bunting executed an assignment of the policy to the defendant, and notified the insurance company thereof, but the assignment and policy were retained in the possession of the insured until his death, which occurred May 16, 1897, when they were found among his papers and effects, and delivered to the defendant, who never paid any consideration or parted with anything of value for the assignment of the policy, and never paid any part of the premiums; that the defendant has received the sum of \$50,000 on the policy, and has the same now in his possession at Salt Lake City, Utah; that after November 1, 1894, Charles Bunting had no money on deposit with the corporation or in the bank, and had no credit there upon which he was entitled to draw, or which he was authorized to use in payment of his own obligations, but during all the time his account was largely overdrawn, and at the time of his death, for money taken without authority and abstracted from the assets of the corporation, he was indebted to it in a sum largely in excess of \$150,000, no part of which has ever been paid; and that when the corporation ceased doing a banking business it was indebted to various persons in the sum of \$251,635.42, and the value of the assets did not exceed the sum of \$100,000. Such, in substance, are the material findings of fact. The evidence is quite voluminous, and appears to be amply sufficient to support the findings. The court, upon the facts found, made a decree directing the defendant to pay over to the plaintiff the \$50,000 now in his hands, and which he received on the policy of insurance, with interest thereon from February 25, 1896, that being the date of the commencement of this suit, and to pay the costs of suit. Judgment was entered accordingly.

It is contended by the appellant, in the first instance, that when, on November 29, 1894, the policy in question was delivered to Bunting, the insured, he thereby acquired the legal title to it, and all rights thereunder, and that, having thus the title or right of possession and the possession, and right of assignment, he had the right to dispose of it, or the proceeds thereof, either with or without consideration, regardless of any person, except his then-existing creditors, and even as against them, provided he was then solvent and able to pay his then

existing debts. This contention, in the absence of any fiduciary relations connected with the procurement of the policy, might be regarded as of considerable force; but the respondent maintains that the policy of insurance and the premiums were paid for entirely out of corporate funds wrongfully and illegally taken by the insured, out of assets belonging primarily to the creditors of the banking corporation, which, it is insisted, was at that time insolvent. If this be true, then not only the policy but its proceeds became impressed with a trust by implication of law, and the insured in his lifetime held the policy as a trustee for the benefit of the cestuis que trustent, the creditors, and could not shake off the fiduciary character by assignment. The assignee, as to the policy and the proceeds thereof, stands exactly in the same relation as to the corporate creditors as did his assignor. If the bank was insolvent, and the insured purchased the insurance, and paid the premiums out of the corporate assets, the creditors, or the receiver for their benefit, is entitled to the proceeds of the investment, so long as they have not passed into the hands of innocent third parties who have had no notice of the facts in relation thereto. This is true, regardless of the method by which such assets were obtained for the purchase. Where a corporation is insolvent, the assets constitute, in a certain sense, a trust fund for the payment, in the first instance, of the corporate debts, and the person in charge of the fund is the trustee, and the creditors are cestuis que trustent. If the trustee in such case purchases property with the assets, the transaction is looked upon as a purchase paid for by the cestuis que trustent. "A purchase with trust funds is virtually a purchase for the cestui." 1 Perry, Trusts, § 127. In 2 Pom. Eq. Jur. § 1040, it is said: "Whenever a trustee or other person in a fiduciary capacity, acting apparently within the scope of his powers,—that is, having authority to do what he does,—purchases property with trust funds, and takes the title thereto in his own name, without any declaration of trust, a trust arises with respect to such property in favor of the cestui que trust or other beneficiary. Equity regards such a purchase as made in trust for the person beneficially interested, independently of any imputation of fraud, and without requiring any proof of an intention to violate the existing fiduciary obligation, because it assumes that the purchaser intended to act in pursuance of his fiduciary duty, and not in violation of it." 1 Perry, Trusts, §§ 128, 430; 2 Perry, Trusts, § 838; Bank v. Russell, 50 Neb. 277, 60 N. W. 763.

Bunting could not invest the corporate assets of an insolvent concern, and then claim the benefits or profits of the investment, as against the creditors. While the assets of a corporation cannot be and are

not burdened with a specific lien or direct trust, in the absence of a valid judgment or recorded lien created by the parties, still, insolvency appearing, the creditors have a right to payment out of them before they can be appropriated for any other purpose. Such assets constitute a trust fund in the sense that the proceeds must in the first instance be applied to the payment of the corporate debts, and if, anterior to such payment, any portion of the fund be invested in other property, the cestui que trustant have a right to follow the fund into such investment, so long as the purchase can be identified as made with such proceeds and with knowledge of the facts. This court, in *Wyeth Hardware & Manufacturing Co. v. James-Spencer-Bateman Co.*, 15 Utah, 110, 47 Pac. 604, said: "Doubtless, the assets of a corporation constitute, in a certain sense, a trust fund for the payment of its debts, in the sense that they cannot be appropriated for any purpose foreign to its legitimate business, or distributed among its officers or stockholders, until all its debts are paid. This implies that creditors have an equitable right, which may be enforced, when the assets have been taken into possession by a court of equity in a proper proceeding, at the instance of a proper party." 2 Story, Eq. Jur. §§ 1258, 1259; 2 Perry, Trusts, §§ 823, 835-838; 2 Pom. Eq. Jur. § 1049; *Mercantile Co. v. Mt. Pleasant Equitable Co-operative Inst.*, 12 Utah, 213, 42 Pac. 869. The trust arising under such circumstances as are claimed to exist in this case is a constructive trust in invitum, it not having been in contemplation of the parties at the time of making the contract. Such a trust is fastened upon the conscience of the offending party by mere operation of law, and without his consent. It results from an abuse of fiduciary relations, misrepresentations, concealment, or other fraudulent practices, and a court of equity will convert him who has acquired property by any such method into a trustee, to execute the trust in such manner as to do justice between the parties. The right to pursue and claim property impressed with such a trust falls only when the means of ascertainment fail. This is upon the ground of the fraud connected with the transaction, creating, in foro conscientiae, a trust in favor of the parties defrauded. "A constructive trust is one that arises when a person clothed with some fiduciary character, by fraud or otherwise, gains some advantage to himself. Courts construe this to be an advantage for the cestui que trust, or a constructive trust." 1 Perry, Trusts, § 27. The same author, in section 166, *Id.*, says: "If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of the confidential relation and influence under such circumstances that he ought not, according to the rules of equity and

good conscience as administered in chancery, to hold and enjoy the beneficial interest of the property, courts of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances or relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it or execute the trust in such manner as to protect the rights of the defrauded party and promote the safety and interests of society. Such trusts are called 'constructive trusts.'" So, in 2 Pom. Eq. Jur. § 1051, it is said: "A constructive trust arises whenever another's property has been wrongfully appropriated and converted into a different form. If one person, having money or any kind of property belonging to another in his hands, wrongfully uses it for the purchase of lands, taking the title in his own name; or if a trustee or other fiduciary person wrongfully converts the trust fund into another species of property, taking to himself the title; or if an agent or bailee wrongfully disposes of his principal's securities, and with the proceeds purchases other securities in his own name,—in these and all similar cases equity impresses a constructive trust upon the new form or species of property, not only while it is in the hands of the original wrongdoer, but as long as it can be followed and identified in whosoever hands it may come, except into those of a bona fide purchaser for value and without notice; and the court will enforce the constructive trust for the benefit of the beneficial owner or original cestui que trust who has thus been defrauded." 1 Perry, Trusts, §§ 167-169; 2 Story, Eq. Jur. §§ 1265, 1254, 1261; 2 Pom. Eq. Jur. §§ 1044, 1053, 1058; *Long v. King*, 117 Ala. 423, 23 South. 534; *Thompson's Appeal*, 22 Pa. St. 16; *Wells Fargo & Co. v. Robinson*, 13 Cal. 134; *Gale v. Harby*, 20 Fla. 171; *Bent v. Priest*, 86 Mo. 475; *Preston v. McMillan*, 53 Ala. 84; *Weaver v. Fisher*, 110 Ill. 146; *Hendrix v. Nunn*, 46 Tex. 141; *Kayser v. Maugham*, 8 Colo. 232, 6 Pac. 803; *Hollinshead v. Simms*, 51 Cal. 158.

The principles above referred to apply with equal force where, as claimed in this case, the capital stock of the corporation is owned by one person. In such case the corporation still remains a distinct entity, and does not necessarily lose its individuality or identity as a business concern, nor the character or attributes of a corporation. Nor does the sole owner of the stock acquire the right to act for it, or transact its business, independently of its agents and officers, or become the owner of its corporate property individually as a natural person. During the existence of the corporation he is a mere stockholder, and the corporate affairs must be managed by the board of directors, the same as where there is a plurality of stockholders. If, therefore, such stockholder in-

vests the corporate assets for his individual benefit and advantage, or disposes of them without the sanction of the proper officers, his action in so doing is illegal and wrongful, and the creditors of the corporation, in case of its insolvency, may follow the assets so invested or disposed of in the same manner as in the case of any other incorporation. The conveyance of all the capital stock to a purchaser gives him no right to carry on the business, or dispose of or invest the assets, as an individual. It simply gives him an equitable interest in the corporate property to carry on the business in the corporate name under the act of incorporation, and the legal title to the property or assets still remains in the corporation. Hence, if such a purchaser, when the corporation is insolvent, uses the corporate assets or trust fund to purchase property for himself as an individual, such purchase is an abuse of a trust, which can confer no rights upon him, or on those claiming under him, as against the *cestui que trustent*. In 2 Cook, Stock & Stockh. § 709, the author says: "Although one person owns a majority of the stock, or all of it, or all but two shares, he does not, in consequence thereof, acquire the right to act for the corporation, or as the corporation. Independently of the directors. One person may own all the stock, and yet the existence, relations, and business methods of the corporation continue." So, in *Button v. Hoffman*, 61 Wis. 20, 20 N. W. 667, after the stating of principles applicable to corporations, it was said: "These general principles sufficiently establish the doctrine that the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit, without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and at the same time it would belong to the corporation. The stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do." 2 Story, Eq. Jur. § 1258; *Harrington v. Connor*, 51 Neb. 214, 70 N. W. 911; *England v. Dearborn*, 141 Mass. 590, 6 N. E. 837; *Winona & St. P. R. Co. v. St. Paul & S. C. R. Co.*, 23 Minn. 359; *Parker v. Hotel Co.*, 96 Tenn. 252, 34 S. W. 209, 31 L. R. A. 706; *Wilde v. Jenkins*, 4 Paige. 481.

The foregoing principles apply as well where the trust funds have been invested in

an insurance policy as where the purchase consists of other property. This is so even where the policy is made payable to the estate or the heirs of the insured. It is true, where the insurance is procured with funds belonging to the insured, and in the absence of any violation of a trust, the beneficiary has a vested interest in the policy after it is delivered; but where the policy and premiums are paid for by the insured with funds impressed with a trust, and in violation of his obligations to the *cestui que trustent*, the beneficiary under the policy can only claim the insurance subject to the means with which it was procured and existing equities, and must adopt the methods employed in procuring it. If, therefore, insurance be procured with assets of an insolvent corporation which ought to be used in payment of the corporate debts, the creditors have the right to follow the assets into the new investment, and appropriate the proceeds in the hands of those having full knowledge of the equities. These principles were similarly applied by a unanimous court in *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 506, a case from which Mr. Justice Miner quotes, and which he claims recognized the rule contended for and applied by him. The case will be more fully considered hereinafter. So, the court of errors and appeals of New Jersey, in *Shaler v. Trowbridge*, 28 N. J. Eq. 595, a case where the husband misappropriated funds of a partnership, and out of such funds paid the premiums on policies of insurance upon his life which were made payable to his wife, held by unanimous decision that thereby a constructive trust was created in favor of the partnership, and that the husband held the policies as a trustee, and after his death the wife held the proceeds as trustee for the firm, and she was not permitted to derive any benefit out of the insurance. Mr. Justice Syckel, delivering the opinion, after stating that it was "not a case of resulting trust," but one of "constructive trust," said: "If a person occupying a fiduciary capacity purchases property with fiduciary funds in his hands, and takes the title in his own name, he will, by construction, be charged as a trustee for the person entitled to the beneficial interest in the fund with which such purchase was made. * * * Nor does it make any difference that the investment turns out to be a profitable one; for, whatever the profit may be, it must belong to the *cestui que trust*. It is a constructive fraud upon the latter to use his property unlawfully, and to retain the profit of the misapplication; it being a fundamental principle in regard to a trustee that he shall derive no gain to himself from the employment of the trust fund." Again he said: "It is urged that a life policy should be exempt from the equitable rule which applies to other transactions, because it differs in its character from ordinary investments, and is

a beneficent provision for the family, which should be favored. Public policy clearly forbids the adoption of this suggestion. It would invite the commission of wrong by assuring the wrongdoer that there is one mode in which he could secure profit by his turpitude in securing a provision for his family. The policy is the thing which the partnership money purchased, and it stands in the place of what was corruptly abstracted. Whether the policy would be productive, when terminated by death, of more or less than the premiums paid upon it, would depend upon the length of the life insured. The fact that it has a contingent value does not distinguish it in principle from an investment in the purchase of stock, or of an annuity, and can give no support to the claim of the widow that nothing should be exacted of her beyond the amount of premiums paid upon it out of the firm funds. If this suit had been prosecuted in the lifetime of the husband, and the policy had been disposed of to the company for its surrender value, it would hardly have been insisted that he could claim, in a court of conscience, a right to any excess of the proceeds after refunding to his firm the amount of the premiums." 1 Story, Eq. Jur. § 322; 2 Story, Eq. Jur. § 1261; 2 Pom. Eq. Jur. § 1048.

Viewing the case at bar as presented in the record in the light of the principles hereinbefore stated, is the contention of the respondent that at the time of the purchase of the insurance the banking corporation was insolvent, and that the policy was procured and the premiums thereon paid for by the insured with corporate assets wrongfully and unlawfully taken by him, correct? Upon careful examination of the evidence presented in this voluminous record, and upon due consideration of the able arguments of counsel on both sides, the conclusion that respondent's position is well taken seems irresistible. On the question of the insolvency of the corporation, the court found that from the time of its organization, and during all the time that it transacted banking business, it was actually insolvent, and that its insolvency was known to Charles Bunting, the insured. It is shown by the proof that Charles Bunting and two others, under the firm name of C. Bunting & Co., commenced doing business about 1879 as co-partners, and conducted a general banking and merchandise business until about December 9, 1892, when the banking corporation was formed, and the banking business and assets turned over to it. Whether the court was warranted in finding that then, at the time of its organization, the corporation was insolvent, is not material, because there is ample evidence to show that from the beginning of 1894, which was prior to the procuring of the insurance policy, the banking institution was in fact insolvent, and remained so until it closed its doors

in February, 1897. This is apparent from the testimony of the witness Thum, who was Bunting's confidential man, was at times the bookkeeper and occasionally the cashier, and was familiar with the books and affairs of the institution, and knew what its assets and liabilities were, and finally, when it failed, was appointed receiver. Early in 1894 he learned that the "bank was unable to pay its debts," and was insolvent. That the institution was insolvent, even prior to 1894, as found by the court, and since, also appears from the admissions of Bunting himself, which, as testified to by the witness Vogeler, are as follows: "Mr. Bunting said that the failure was nothing more than he expected, or had expected for the last seven years, since 1890. He said that in 1890 he wanted to go into voluntary liquidation, and his partners, Mr. Lyman and Wallace, prevailed on him not to. In 1893, they wanted—they requested—him to talk over the matter, and asked if he had not better go into voluntary liquidation, and he said, 'No; not at that time.' Values had depreciated so that it would be impossible for them to do anything to realize on any of their assets. He said it finally went on until it came on itself. That was the result." The witness Thum also testified that during the fall of 1894 and winter following he had several conversations with Bunting on the subject of insolvency, and that Bunting said he could make no money at banking, and that "he must find some other means of making money in order to carry him through." The books of the concern likewise show insolvency. From this and other evidence in the record it is clear, not only that the bank and Bunting, who was its sole owner, were insolvent for a long time anterior to the purchasing of the insurance policy in November, 1894, and all the time since, until the final collapse of the institution, but that Bunting all the time was fully cognizant of the fact. At the same time the depositors and confiding public were misled, and were unaware of the hazardous condition of the institution, until the crisis finally came, and the doors were closed. Under the circumstances disclosed by the testimony, the assets, according to the equitable principles already considered, and which in my judgment ought to be applied to such a case, were so impressed with a trust for the benefit of the creditors that they could not rightfully be appropriated for any purpose foreign to the legitimate business of the corporation; and the remaining vital question, therefore, is, were the policy and premiums paid for out of the trust fund? If they were, the proceeds thereof should be regarded as a part of the fund, notwithstanding the assignment, which was made to one who is not an innocent purchaser for value, having paid nothing for it, and who, it seems, has no personal interest in it.

In behalf of the appellant it is insisted that the insured used no trust money at all in the purchase of the insurance, but used his own money, and that in payment of the first premium he gave his own note, and thus used his own credit. By the judgment which they announce, my Brethren both admit that the second and third premiums were paid for out of the corporate assets. Mr. Justice BASKIN says: "There is some conflict in the evidence as to whether Bunting had any money to his credit in C. Bunting & Co.'s bank when said note and the two other premiums were paid, but I think that the evidence shows that he had none." This, since Bunting's note and the checks for the premiums were honored by the bank, is a clear admission that they were paid out of its assets. Mr. Justice MINER, however, because the note was for \$1,500, while the premium was \$1,805, and because the policy was in the possession of Bunting, says: "The presumption follows that it was rightfully there, and that he paid the insurance company the premium, amounting to \$1,805, or the sum of \$305 over and above the note for the first premium." In this connection my Brother admits that "whether the agent discounted \$305 from his commission, or whether Bunting paid" the sum in cash, "does not appear from the testimony," and relies upon a presumption of payment in cash; but later on he seems to discard the presumption when he says: "The testimony clearly shows, and I find, that at the time of obtaining the policy Bunting gave his negotiable promissory note, and indorsed it over to Fritter, together with the \$305, previously referred to, in payment of the first year's premium on the policy." It must be admitted that the actual payment by the insured of a part of the first premium with his own money would have been an important fact in this case; but, with all due respect to the views of my Brother as to what the testimony shows, I have searched the record in vain to find evidence which, in my judgment, warrants either a presumption or a finding that the \$305 was ever paid by the insured or any one else. In fact, to my mind the record and evidence indicate exactly the contrary. The witness Thum testified that, shortly after the purchase of the insurance, Bunting said to him "that he had taken out an insurance policy, and had given his note for the first premium," and told him to pay it when it came in. The witness was then conducting the business of the bank under Bunting's directions, and it will be noticed that Bunting did not say he had given the note for a part of the first premium, but for the first premium; and I find not even a hint in the evidence that he ever claimed to have paid the \$305. Again, the appellant, in support of his motion for a new trial, filed an affidavit from Fritter, the agent of the insurance company through whom Bunting obtained the insurance and

to whom he gave the note; but in that affidavit, from a man who knew absolutely what the fact was, there is not to be found a word about the payment of the \$305, nor any reference thereto. Is it reasonable to suppose that, if such payment had been made, the able counsel who conducted the defense would not only not have shown it during the trial, but would also have failed to have the fact of payment stated in the affidavit in support of their motion, when the burden was upon them to show the existence of such facts as would warrant the court in granting a new trial? The real fact doubtless is that the \$305 were never paid, but simply deducted from the commission.

Respecting the payment of the premiums and the ability of Bunting to pay, the finding of the court, who heard all the testimony and observed the witnesses, in substance is that the insured paid for the "insurance policy, and each and every premium thereon, with the money of C. Bunting & Co., Bankers," and that the money so paid was taken by him from the assets of the corporation, wrongfully, illegally, and fraudulently. The court further found that, after November 1, 1894, the insured had no money on deposit in the bank, nor any credit there, upon which he was entitled to draw, or which he was authorized to use in payment of his own obligations; that all the time his account was largely overdrawn; and that at the time of his death he was indebted to the corporation, "for moneys illegally and without authority taken and abstracted from the assets," in a sum in excess of \$150,000. After examination of the evidence with care, I am of the opinion that the court was warranted and justified in finding these facts. As shown by the transcript, Bunting's personal account, on November 1, 1894, was overdrawn \$1,478.50, and on the 29th of November, when the insurance was purchased, the account was overdrawn more than \$5,000, and continued so until the 31st of December, 1894, on which day Bunting, without action or consent of any board of directors, directed his bookkeeper to open a warrant and stock account, and to charge that account with 215 shares of the capital stock of the First National Bank of Pocatello, at \$150 per share, amounting to \$32,250, and with 750 shares of the stock of C. Bunting & Co., Merchants, at \$100 per share, amounting to \$75,000. At the same time Bunting directed his personal account to be credited with the same items, amounting to \$107,250. None of the stock was delivered to the bank. The witness Thum testified that at that time the real value of the Pocatello Bank stock was \$125, and of the Merchants Company stock \$25 per share. At the very time of taking this credit 500 shares of the Merchants Company stock had been pledged to McCornick & Co., of Salt Lake City, as collateral security for notes amount-

ing to \$71,000, and was never received either by the corporation or the receiver; and 55 shares only of the Pocatello Bank stock came into the hands of the receiver. The balance of that stock, also, had been disposed of. Except for the credit so directed to be given, Bunting's personal account, on January 1, 1895, a month after the note in question was given, would have shown overdrafts amounting to over \$51,000. If to this there were added the Bunting and Wheeler note, amounting to \$4,500, on which he was obligated to the bank, and his Triumph Mine account of \$14,730.87, and the Bunting and Wheeler overdraft of \$1,000, which account and overdraft, Bunting, on December 31st, ordered charged to the profit and loss account, his debt to the bank on January 1, 1896, would aggregate over \$71,000. Notwithstanding this fictitious credit so obtained by manipulation of the books, Bunting, at the time the note in question was paid, had a balance in his favor on his personal account of but about \$20,000, and when the second and third premiums were paid his account was again largely overdrawn. After December 31, 1894, Bunting continued in mining speculations. In addition to the Triumph Mine, in which others were interested with him, he also developed the Viola Mine. The expenses for developing were also paid out of the assets of the bank, but not charged to Bunting. None of Bunting's mining transactions and speculations, so far as shown by the record, proved profitable. The evidence shows numerous reckless attempts to keep up credit. I will refer to but one more, which is the transaction with John D. Riter, who, as appears, sent \$8,060 in certificates of deposit from another bank to Bunting, or his bank, for safe-keeping. Bunting drew the money on the certificates, the same being credited to his account, and the bank paid \$322 interest thereon. How can a court of equity countenance such transactions as are revealed by this record? How can such a court recognize a credit thus obtained, and defeat therewith the bona fide claims of creditors,—depositors, many of whom, lulled into security by appearances, doubtless handed to the insolvent institution their small earnings and accumulations of years, only to have them abstracted and wasted in private and profitless speculations, foreign to the objects of the corporation, without the sanction of a board of directors? The credit obtained by the insured, who was the sole owner and manager of the bank, by directing his book-keeper to open the warrant and stock account, and charge such account with the stock referred to, and then directing that he be credited on his personal account with those same items, when the same stock, or at least by far the greater portion of it, had already been pledged as security for a large debt owed by the insured, and when none of the stock was produced or transfer-

red to the bank, did not add to the financial standing of the insured, nor to his actual credit at the bank. It was a mere fictitious credit, and ought not avail the appellant in this case. The transaction was not authorized or ratified by the board of directors, but merely ordered by the insured. It was therefore unlawful, and served simply to conceal from the public the true financial condition of him who received the fictitious credit. Likewise, and for similar reasons, respecting the accounts with the several mining companies. It is true the insured gave his note for the first premium, but that he intended the note should be paid out of the assets of the corporation clearly appears from the circumstances in evidence and his acts and conduct thereafter. The note was made payable at his bank, and shortly afterwards he asked his agent, in charge of the bank, if it had come in, and, upon being informed that it had not, instructed him to pay it upon presentation. It appears the note was finally forwarded by another bank, a correspondent of Bunting's Bank, for collection, and received by the latter bank as a check upon Bunting's account, and the amount thereof credited on the exchange account of the bank that forwarded it. The note thus simply amounted to a check drawn upon the bank payable at a future day.

As has been shown, without the fictitious credits, the account of the insured at his bank was, at the time of payment, as well as the time of the making, of the note, largely overdrawn. Hence receiving the note as a check upon Bunting's account, and crediting it upon the exchange account, depleted the assets of the bank to the extent of such credit. The evidence likewise shows that the assets were depleted in a sum equal to the amount of the other premiums paid on the policy. So that the trust fund was reduced at least in such sums, to the disadvantage and injury of the creditors, and in equity and good conscience they ought to be permitted to lay hold of the proceeds, so long as they have not passed into the hands of an innocent third person for value without knowledge of the facts. The use of the trust funds, in the manner disclosed by the record, was wrongful, unlawful, and fraudulent as to corporate creditors. The proceeds should therefore be impressed with a trust, no matter how circuitous or ingenious the method employed in securing the money to pay for the insurance; it clearly appearing that such money constituted a part of the assets of the insolvent institution. "The specific instances," says Mr. Pomeroy, in his treatise on Equity Jurisprudence (section 1045), "in which equity impresses a constructive trust are numberless,—as numberless as the modes by which property may be obtained through bad faith and unconscientious acts." In 2 Story, Eq. Jur. § 1261, the eminent author says: "Upon similar

grounds, where a trustee or other person standing in a fiduciary relation makes a profit out of any transactions within the scope of his agency or authority, that profit will belong to his cestui que trust; for it is a constructive fraud upon the latter to employ that property contrary to the trust and to retain the profit of such misapplication, and by operation of equity the profit is immediately converted into a constructive trust in favor of the party entitled to the benefit. For the like reason a trustee, becoming a purchaser of the estate of his cestui que trust, is deemed incapable of holding it to his own use, and it may be set aside by the cestui que trust. Nor is the doctrine confined to trustees strictly so called. It extends to all other persons standing in a fiduciary relation to the party, whatever that relation may be."

Mr. Justice MINER, however, says: "In a case like this, where the fund sought to be impressed with a trust is so grossly disproportionate to the amount of the trust funds alleged to have been used, the application of the rule is inequitable, and courts of equity are not required to do injustice; nor should such a doctrine be invoked under a state of facts like those under consideration in this case,"—and quotes *Holmes v. Gilman*, 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566, hereinbefore referred to, as recognizing the rule, contended for by him, that in such a case the cestui que trust has but a lien on the profits or proceeds to the extent of the trust funds misappropriated. It is difficult to see how that case recognizes the application of legal principles which my Brethren have made in this. The case is very like the one at bar. There *Gilman*, a partner, misappropriated funds of a partnership, and invested some of them in certain policies of insurance upon his life in favor of his wife and children; here *Bunting* misappropriated funds of a corporation, and invested some of them in a policy of insurance upon his life in favor of his estate. There the amount of insurance sued for was \$56,000; here, \$50,000. There the premiums aggregated \$4,000; here, \$5,110. There one policy of \$5,000 was purchased, and the premiums to a certain date paid for, with *Gilman's* own money; here all were ultimately paid for out of the assets of the bank. There *Gilman* was the manager of the partnership; here *Bunting* was the manager of the corporation. There about the time of *Gilman's* death the partnership was discovered to be insolvent; here shortly before *Bunting's* death the corporation was discovered to be insolvent, and the proof shows that it was in fact insolvent for a number of years previously. There, through *Gilman's* management, the partnership was short over \$200,000; here, through *Bunting's* management, the corporation is short over \$150,000. There a court of equity decreed to the cestui que trust over \$50,000, proceeds of

the insurance; here a court of equity decrees to the cestui que trust \$3,610, and divides the costs equally between the parties. Except as to the ultimate outcome, it will be seen, upon examination and comparison, that there is great resemblance between the main facts of the two cases. So it may be observed, upon examination, that the principal legal questions presented in that case to the court of last resort were quite similar to those presented herein. Counsel for the beneficiaries under the policies in the *New York Case* contended that the policies were contracts with the wife, and by the statute were her property, free from any claims against her husband; that, assuming it to be true that in equity the cestui que trust may follow the trust funds used in "payment of the premiums on the policies, and impress the proceeds with a trust in his favor, he could not under any principles of equity obtain a lien for more than the gross amount of the moneys so applied, with interest"; that "*Gilman* being a partner in the firm, and being rightfully entitled as such to draw and use for his own benefit a part of the partnership funds, there was no appropriation by him of funds which can be followed in equity"; that "the funds appropriated by *Gilman* were taken in the form of money, and as such used in a transaction in the ordinary course of business upon a consideration valid as between himself and wife"; and that the evidence was insufficient to warrant a finding that he had wrongfully appropriated funds of the partnership. Notwithstanding these contentions, however, the court held that the cestui que trust had the right to follow the trust fund into the new investment, and appropriate the proceeds thereof. Mr. Justice Peckham, now a justice of the supreme court of the United States, delivering the opinion of the court, said: "The claim of the plaintiff to recover the moneys arising from the payments of these policies is based upon the principle which allows a cestui que trust to follow trust funds and to appropriate to himself the property into which such funds have been changed, together with the increased value of such property, provided the trust fund can be clearly ascertained, traced, and identified, and provided the rights of bona fide purchasers for value without notice do not intervene. The right has its basis in the right of property, and the court proceeds on the principle that the title has not been affected by the change made of the trust funds, and the cestui que trust has his option to claim the property and its increased value as representing his original fund. The right to follow and appropriate ceases only when the means of ascertainment fail." Then, in answer to the claim of the defendant that the payment of the premiums were mingled with the property right of the wife, and therefore the plaintiff could "have only a lien on the policies, or the moneys arising

from their payment, to the amount of the premiums paid with the firm funds and the interest thereon," which claim was characterized as presenting "really the chief question in the case," the eminent jurist said: "I am not at all prepared to admit that under no circumstances is the cestui que trust entitled to recover back anything more than the amount of his property and interest, where there has been a mingling of funds. In case the trustee took \$1,000 of trust funds and \$500 of his own, and purchased property which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs to the trustee, and that only the original sum wrongfully taken and interest can be given to the cestui que trust, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value. If in such case the cestui que trust were not allowed to at least participate proportionately in this increased value, it would appear to be a violation of the principle that the trustee cannot ever be permitted to make a profit out of the use of trust funds. It seems to me to be a case for the application of the doctrine that the parties became co-owners of the property, at the option of the cestui que trust, in the proportion which their various contributions bore to the sum total invested." And again, speaking to the point that, when the insurance was procured for the wife's benefit, the husband was acting as her agent, and that she had a vested interest in the policies the moment they were delivered, he said: "This is doubtless true in the case of the husband procuring the insurance with funds which belong to him or to his wife, but where the premiums are paid with moneys which in truth do not belong to him, and which the husband misapplies in so paying, and by which he violates his obligation to the true owner of the moneys thus used, the wife in such case must claim the policy subject to the means by which the husband procured it, and she must adopt all his methods. The moneys in the hands of the company could not be recovered back by the cestui que trust if received by the company in good faith, because it would stand in the position of a bona fide purchaser, yet the policy itself would stand as the representative of these trust moneys, and the right of the wife would be to that extent subordinate." Thus it will be seen that the court of appeals of New York did not hesitate to apply to a case similar to the one at bar the principles herein contended for, nor to lay hold of the proceeds and impress them with a trust in favor of the cestui que trust, notwithstanding the fact that such proceeds were "grossly disproportionate" to the trust funds misappropriated.

Mr. Justice MINER finally assumes the position that, under the disposition made of this case, all of Bunting's "creditors will

share ratably in the fund," and that, "if the fund is impressed with a trust, then only the creditors of the Bunting Bank, to the exclusion of other creditors, would obtain the sum of \$44,890 * * * as a reward for his misappropriation of the funds of the bank," and says: "To permit such a disposition of the fund would, to my mind, not only be an injustice to the heirs and creditors of Bunting, but would be an example against which a court of equity would revolt." Whether or not Bunting had any private creditors does not appear in this case. There is no claim that such creditors exist set up in the answer, nor does the evidence show their existence. Bunting was the sole owner of the corporation, and, so far as the record shows, conducted his business through his bank. However it may be as to the existence of such creditors in point of fact, it is difficult to see how the corporate creditors, whose funds purchased the insurance, can share ratably with the private creditors of Bunting in the proceeds under this decision. Bunting, though the sole owner of the stock, was still but a shareholder in the institution, which, it is admitted, was a valid corporation, and its articles of incorporation provide, agreeably to the statute then in force, that "the private property of the stockholders shall not be liable for the debts or liabilities of the corporation." How, then, can the creditors of the corporation share in his private estate? Whether he had any private property is not shown by the record, except as to the \$35,000 of other insurance, which, it seems, has already gone to the heirs. That there are many corporate creditors is apparent from the fact that, when the institution closed its doors, it was short over \$150,000. Is it, then, revolting to a court of equity to return to those creditors, whose money made it possible to procure the proceeds of insurance, about one-third of their trust funds which had been misappropriated and wasted? Is it not inequitable and unjust to take property from the creditors whose money purchased it, and give it to others who contributed not one dollar to the purchase? In my judgment this opens the door to fraud, and sets aside the well-established principle that a trustee cannot secure a profit or advantage to himself in the management of the affairs of his cestui que trust. It seems that hereafter the way is open for a trustee to obtain insurance for himself or family, or even other property, with trust funds by simply manipulating the purchase with a note, instead of cash, and thus profit by his own wrong. That Bunting all the while thoroughly understood the insolvent condition of his bank, and his lack of funds and credit there upon which to draw to meet his personal obligations, is manifest from the evidence; yet he may not have had it in his mind to perpetrate an absolute fraud upon his creditors. He may have intended

the insurance for the benefit of his creditors. This seems to be indicated by the evidence of the witness Vogeler, who testified that the insured said that the people might criticize him for taking out so large a life insurance policy, but that "he believed he owed it to his creditors to do it." Again, it may be that, foreseeing the inevitable, and actuated by the desire to save something for the future maintenance of his family out of the impending wreck, he lost sight of the effect which his action would have upon the rights of his creditors. However this may be, he violated his duty as trustee, and his action was fraudulent as to his cestui que trustent. While it is a laudable purpose in any man during his lifetime to make provision for his family after his death, yet a court of equity ought not permit him to make such provision in disregard of his duty to, and at the expense of, those to whom he stands in the relation of a trustee. In this case, however, if the proceeds in controversy were turned over to the creditors, the family of the deceased, considering his financial ability in his lifetime, would remain provided for with much liberality; for, aside from the \$50,000 in question herein, the record shows other policies of the insured, aggregating \$35,000, in which it appears the children and the family of the deceased are the beneficiaries. That the proceeds in dispute should be distributed among the creditors of the insolvent corporation is thus not only in accord with legal principles, but also with justice and fair dealing. "A trustee," says Judge Story, "will not be permitted to obtain any profit or advantage to himself in managing the concerns of the cestui que trust. In short, it may be laid down as a general rule that a trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, or which has a tendency to interfere with his duty in discharging it. And this doctrine applies, not only to trustees strictly so called, but to other persons standing in like situation." Story, Eq. Jur. (12th Ed.) § 322. Since, however, the defendant holds the proceeds merely as a trustee, pending the litigation to determine to whom they belong, and, in the absence of evidence showing that during such time he made use of the money, or received any interest or profit because thereof, I am of the opinion that the decree of the lower court is erroneous, in so far as it adjudges the payment of interest on the proceeds by the defendant pending the litigation. In all other respects that decree, in my judgment, ought to be affirmed. I have thus expressed my views at considerable length, owing to the importance of the principles involved. For the foregoing reasons I dissent.

On Rehearing.

(May 23, 1900.)

PER CURIAM. Petition for rehearing overruled.

BARTCH, C. J. (dissenting from the order of the majority of the court overruling the petition for a rehearing). I think the petition for a rehearing ought to be granted. An examination of the opinions filed in this case shows that whether the payment of the \$305 was actually made by Bunting, in addition to the giving of the note of \$1,500 for the first premium, was regarded as a material question of fact. In the opinion of Mr. Justice MINER, which is the authoritative opinion herein, it is assumed, as appears, that the \$305 were actually paid by the insured. It is now shown by the affidavit of Mr. Fritter, filed in support of the petition, the affiant being the agent through whom the insurance was purchased, that the \$305 were never paid at all,—a fact which to my mind seemed clear from the evidence in the case. Among other things, there is a statement in the affidavit as follows: "Affiant further says that, for the purpose of inducing the said Bunting to take out a policy of insurance with the said company to the amount of fifty thousand dollars, affiant agreed with the said Bunting that he would accept as full payment of the first premium said Bunting's note for the sum of fifteen hundred dollars (\$1,500) on condition that the said Bunting would arrange with the Pocatello Bank to have the said note cashed, which the said Bunting did, and the said note was cashed at the said bank; that said Bunting paid no more as the first premium than the said note, and the same was accepted by this affiant in full payment of the first premium. This arrangement was a private arrangement between this affiant and the said Bunting, with which the said insurance company had nothing to do, and the deduction from the regular premium, which was eighteen hundred and five dollars (\$1,805),—said deduction amounting to three hundred and five dollars (\$305),—came out of this affiant's commission as agent. The full amount of the proceeds of said premium required by said insurance company, less commission, was received by the said insurance company in satisfaction of the first premium, and a receipt issued by said company therefor in form." There is now no longer any room for doubt that the note was the only consideration for the first premium, and that it was ultimately paid out of the assets of the insolvent bank. The affiant all the time during this controversy was a nonresident, and was not a witness at the trial. Considering the circumstances surrounding this case; the large amount involved; the important legal and equitable principles which have been invoked, concerning the application of which all the members of the court so widely differ; the effect which this decision will have upon rights of property, and upon trust relations and the use of trust funds; and its grave importance respecting the rights of

cestulae que trustent in this state in the future,—it seems to me that this is eminently a case which ought to be re-examined, and that, if the findings of the trial court are to be set aside, the case ought to be sent back for a new trial. For these reasons I dissent from the order overruling the petition.

(22 Utah 191)

SWENSON v. SNELL.

(Supreme Court of Utah. June 6, 1900.)

EQUITABLE ACTION—APPEAL—REVIEW OF EVIDENCE—NEW TRIAL—ACTION TO QUIET TITLE—CLAIM FOR DAMAGES—COSTS.

1. On appeal of an equitable action, the appellate court cannot consider the testimony for the purpose of ascertaining whether the findings of fact are supported by the evidence, unless a motion for a new trial has been interposed and ruled on in the court below.

2. In an action to quiet title to real estate, and for damages for the removal of a division fence, a finding that the fence in dispute was built by plaintiff and defendant's grantor in 1884 or 1885, and ever since was "maintained as the agreed, established, and undisputed division fence and line, until October 11, 1898, when it was torn down by defendant without consent of plaintiff and against his will, and that thereby the plaintiff's otherwise inclosed premises were left open, exposed, and unprotected against trespassing animals," clearly shows that the plaintiff was entitled to some damages, and to costs under section 3339, Rev. St. 1898; and a decree which, after quieting plaintiff's title, dismisses his claim for damages, and divides the costs between plaintiff and defendant, will be set aside as to such dismissal and division of costs.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Suit by Andrew J. Swenson against J. Snell. Decree granting plaintiff a portion of the relief demanded, and he appeals. Reversed.

N. J. Sheckell, for appellant. F. H. Clark, for respondent.

BARTCH, C. J. This is an action to quiet title to real estate, and for damages for the removal of a division fence. It is alleged in the complaint, substantially, that the plaintiff is the owner of certain premises adjoining certain other premises owned by the defendant; that his premises were separated from those of the defendant by a fence, which was erected and maintained as the established and undisputed division fence and line between them, and as such was acquiesced in and consented to by the defendant and his grantors for a period of about 15 years prior to October 11, 1898; that the fence belonged to the plaintiff and the defendant; that on October 11, 1898, the defendant wrongfully and forcibly, without plaintiff's consent and against his will, tore it down and destroyed it for a distance of six rods, leaving plaintiff's premises open, exposed, and unprotected, to his damage in the sum of \$500; and that the defendant claims some estate or interest in plain-

tiff's premises along the fence and line, but has no right, title, or interest therein whatever. The prayer is for \$500 damages; that the defendant be required to set forth his claim; and that the title be quieted in plaintiff, and the defendant enjoined from asserting any claim to any part of the premises on plaintiff's side of the division fence and line. The material allegations of the complaint were denied in the answer.

At the trial, among other things, the court found as follows: "Second. That said fence was built by the plaintiff and defendant's grantor in 1884 or 1885, and was maintained as the agreed, established, and undisputed division fence and line between the said premises belonging to plaintiff and premises belonging to defendant, on the south side of said division fence and line, from the time said fence was built, and until the same was torn down by defendant, on the 11th day of October, 1898. Third. That said division fence was removed by defendant without plaintiff's consent and against his will, leaving plaintiff's otherwise inclosed premises open, exposed, and unprotected against trespassing animals belonging to tenants living on defendant's premises, next to and on the south side of plaintiff's said premises. Fourth. That all the allegations and averments of the plaintiff's complaint, except as to damages, are true, and all the denials and allegations of the defendant's answer are untrue." Thereupon, by decree, the plaintiff's title was quieted in accordance with the prayer of the complaint, his claim for damages dismissed, and the costs of suit divided between the plaintiff and defendant.

The appellant, on this appeal, contends that the decree is erroneous respecting the question of damages and costs. We are of the opinion that this contention is correct. As will be noticed, the court found that the fence in dispute was built by the plaintiff and the defendant's grantor in 1884 or 1885; that ever since it "was maintained as the agreed, established, and undisputed division fence and line" until October 11, 1898, when it was torn down by the defendant without the consent of the plaintiff and against his will; and that thereby the "plaintiff's otherwise inclosed premises" were left "open, exposed, and unprotected against trespassing animals." The court also found generally that all the allegations of the complaint, except as to damages, are true, and that all the denials in the answer are untrue. There having been no motion for a new trial interposed or ruled upon, we cannot consider the testimony, and hence have no means of ascertaining whether the findings of fact are supported by the proof. Under the findings, however, we are of the opinion that the appellant was entitled to some damages. The tearing down of the division fence, in the manner found by the court, was wrongful, and, by so doing, the respondent rendered himself liable for what-

ever damages were occasioned thereby to the appellant. We are also of the opinion that the appellant was entitled to costs, under section 3330, Rev. St. The case must therefore be reversed, with costs, and the cause remanded, with directions to the court below to set aside its judgment as to costs, and of dismissal as to damages, and proceed in accordance herewith. It is so ordered.

MINER and BASKIN, JJ., concur.

(22 Utah 117)

DAVIDSON v. HUNTER.

(Supreme Court of Utah. May 15, 1900.)

TERRITORIES—ORGANIZATION OF STATE—TRANSFER OF CAUSES—ENABLING ACT—JURISDICTION—ACTION TO REVIVE—EVIDENCE—SUFFICIENCY—ACTION TO REVIVE JUDGMENT—JURISDICTION OF DISTRICT COURTS—SUBJECT-MATTER.

1. Under the provisions of section 17 of the enabling act, section 7, art. 24, of the constitution, and section 1, c. 20, Sess. Laws 1896, approved February 18, 1896, a case in which judgment was rendered in the First district court of the territory of Utah, in and for the county of Utah, was removed to the "Fourth judicial district for the county of Utah"; and an order of said Fourth district court made March 3, 1896, transferring said cause to the Seventh judicial district court for Sanpete county, was unauthorized, and did not deprive said Fourth district court of its jurisdiction over said case, and an action to revive said judgment is properly brought in said Fourth district court for Utah county.

2. In an action to revive a judgment, evidence that defendant was personally served in the former proceeding; that default of defendant was entered in open court; that, upon application of plaintiff, judgment was ordered by the court for a certain amount; that thereafter judgment was duly docketed as ordered; that said judgment bore interest at 8 per cent. per annum, and that there is now a certain amount due thereon,—is sufficient to support a judgment for plaintiff for the amount found due.

3. Under the provisions of the constitution, district courts have original jurisdiction in all matters, civil and criminal, not excepted in the constitution or prohibited by law; and the jurisdiction of the trial court in this case not falling within any exception, and not being prohibited by law, the court had jurisdiction of the subject-matter.

(Syllabus by the Court.)

Appeal from district court, Fourth district; W. N. Dusenberry, Judge.

Action by Daniel Davidson against James D. Hunter. Judgment for plaintiff. Defendant appeals. Affirmed.

Klug, Burton & King and Grant C. Bagley, for appellant. Marshall, Royle & Hempstead and J. W. N. Whitecotton, for respondent.

BASKIN, J. This action was instituted on the 3d day of September, 1899, in the Fourth judicial district court, in and for Utah county, for the purpose, under the provisions of section 3237, Rev. St., of reviving a judgment for \$4,926.24 and costs alleged to have been duly given and made in favor of the plaintiff against the defendant on the 8th day

of November, 1898, in the district court of the First judicial district, in and for Utah county, in the then territory of Utah, and now state of Utah. The answer denied each and every allegation of the complaint, and alleged "that the supposed cause of action accrued to said plaintiff, if at all, out of the jurisdiction of this court [the said Fourth district court]; that is to say, at the county of Sanpete, and not at the county of Utah." Counsel for appellant made but two objections: (1) That the trial court had no jurisdiction; (2) that the evidence was not sufficient to justify the findings and judgment.

Section 17 of the enabling act provides "that the convention herein provided for shall have the power to provide, by ordinance, for the transfer of actions, cases, proceedings, and matters pending in the supreme or district courts of the territory of Utah at the time of the admission of the said state into the Union, to such courts as shall be established under the constitution to be thus formed, or to the circuit or district court of the United States for the district of Utah: * * * and the circuit, district, and state courts herein named shall, respectively, be the successors of the supreme court of the territory as to all such cases arising within the limits embraced within the jurisdiction of such courts, respectively, with full power to proceed with the same, and award mesne and final process therein." Section 7, art. 24, of the constitution, provides that "all actions, cases, proceedings and matters, pending in the supreme and district courts of the territory of Utah, at the time the state shall be admitted into the Union, and all files, records and indictments relating thereto, except as otherwise provided herein, shall be appropriately transferred to the supreme and district courts of the state respectively; and thereafter all such actions, matters and cases, shall be proceeded with in the proper courts." Section 1, c. 20, p. 95, Laws 1896, provides that "all actions, cases, matters and proceedings which were at said date [the date the state was admitted] pending in the district courts of the territory are hereby transferred to the district courts of the Second judicial district for the county of Weber, the district court of the Third judicial district for the county of Salt Lake, the district court of the Fourth judicial district for the county of Utah and the district court of the Fifth judicial district for the county of Beaver, according as said actions, cases, proceedings and matters were pending in the Fourth, Third, First or Second territorial judicial district courts respectively: provided, that all such actions, cases, matters or proceedings which prior to the passage of this act by order of the court have been removed substantially in accordance with the terms of this act to any other state district court shall be deemed and held to be pending in the district and county to which the same may have been transferred." The act containing

this provision was approved and went into effect on February 18, 1896. As the judgment sought to be reviewed was rendered in the First district court of the territory of Utah, in and for the county of Utah, the case in which it was rendered, by the express terms of said section, was removed to the "Fourth judicial district for the county of Utah." On the 3d day of March, 1896, said Fourth district court, on its own motion, ordered said cause, with others, transferred to the Seventh judicial district court, of Sanpete. As this order was made subsequent to the approval of said act, and after it had gone into effect, said order was unauthorized, and did not deprive the Fourth district court, in and for Utah county, of its jurisdiction over said case. The present suit was therefore properly brought in that court.

At the trial of the case, plaintiff offered in evidence the summons in the former case, and the marshal's return showing service of the same on the defendant, Hunter, the complaint, and the following from the minute entries of the court, to wit: "First District Court Minutes. Utah, May Term, 1893. Wednesday, the 8th day of November, 1893. Daniel Davidson v. James B. Hunter. In this cause, default of defendant having been taken in open court, the court, upon application of plaintiff's counsel,—it appearing that plaintiff is entitled to the relief prayed for,—ordered that judgment be entered herein in favor of the plaintiff and against the defendant for the sum of \$4,926.24, and \$39.35 costs of suit. W. H. Smith, Judge." Also, offered the following entry in the judgment docket of said court: "No. 2,873. Judgment debtors, James B. Hunter; judgment creditors, Daniel Davidson. Judgment and costs. Judgment, \$4,926.24; costs, \$39.35. Interest at eight per cent. per annum. Time of entry: Month, Nov.; day, 8; year, 1893. Entered in Judgment Book No. MB., page 340." J. W. N. Whitecotton testified in behalf of plaintiff that there was due plaintiff the sum of \$7,160.92, and thereupon the plaintiff rested. The only objection and exception taken by defendant to the admission of this testimony was that the court had no jurisdiction of the subject-matter of the action. The district courts of this state, under the provisions of the constitution, have original jurisdiction in all matters, civil and criminal, not excepted in the constitution, and not prohibited by law. The jurisdiction of said court in the case is not within any exception, and is not prohibited by law. Therefore there is no doubt but that the court had jurisdiction of the subject-matter of the action, and that the suit was brought in the proper county.

The court made the following findings: "That on the 8th day of November, 1893, in the district court of the First judicial district of the territory of Utah, sitting at Provo City, in Utah county, then territory, now state, of Utah, a judgment was duly given,

made, and entered by said court in favor of this plaintiff, Daniel Davidson, and against the defendant herein, James B. Hunter, in an action in said court pending, wherein this plaintiff, the said Daniel Davidson, was plaintiff, and the defendant herein, James B. Hunter, was defendant, for the sum of \$4,926.24, and \$39.35 costs of suit, which judgment bears interest since the entry thereof at the rate of eight per cent. per annum. (2) That the defendant has not paid said judgment, or any part thereof." The defendant excepted to the findings and judgment on the ground that the same are not justified by the evidence. We think that the findings and judgment were correct. It is ordered that the judgment of the court below be affirmed, and that the appellant pay the costs.

BARTCH, C. J., and McCARTY, District Judge, concur.

STATE v. IMLAY. (22 Utah 156)

(Supreme Court of Utah. June 1, 1900.)

INFORMATION—TRIAL BY JURY OF EIGHT—OFFENSE LESS THAN MURDER—ASSAULT WITH INTENT TO RAPE—DECLARATIONS OF PROSECUTRIX—RES GESTÆ.

1. Prosecution by information instead of by indictment and trial of a felony, less than murder, by a jury of eight men, if otherwise properly conducted, is legal under the constitution and laws of this state.¹

2. The rule that, in a case of rape, the declarations of the injured female, made immediately or soon after the injury was inflicted, are competent testimony as part of the *res gestæ*, not to prove the commission of the offense, but in corroboration of the evidence of the prosecutrix, applies with equal force to a prosecution for assault with intent to rape.²

(Syllabus by the Court.)

Appeal from district court, Sixth district; W. M. McCarty, Judge.

Thomas Imlay was convicted of assault with intent to rape, and appeals. Affirmed.

W. F. Knox, for appellant. A. C. Bishop, Atty. Gen., and W. A. Lee, Dep. Atty. Gen., for the State.

BARTCH, C. J. The defendant was prosecuted for and convicted of the crime of assault with intent to commit rape. Upon being sentenced to imprisonment in the state prison for a term of 18 months, he appealed to this court, and has assigned numerous errors, alleged to have been committed during the trial of the cause. The accused was charged with having perpetrated the offense on the 1st day of July, 1899, upon the person of Kate Judd, a girl 15 years of age. From the proof, however, it appears that the crime was committed on the 8th day of June, 1899.

The appellant, in the first instance, challenges the legality of the trial on the ground

¹ In re McKee, 57 Pac. 23, 19 Utah, 231; In re Maxwell, 57 Pac. 412, 19 Utah, 495; Maxwell v. Dow, 20 Sup. Ct. 448, Adv. S. U. S. 448, 44 L. Ed. —.

² Compare State v. Halford, 54 Pac. 819, 18 Utah, 3; State v. Neal (Utah) 60 Pac. 510.

that the state proceeded against him by information instead of by indictment, and tried him before a jury of only eight men. That such a trial, in a case of this class, if otherwise properly conducted, is legal, is no longer an open question in this state. In *re McKee* (Utah) 57 Pac. 23; In *re Maxwell*, Id. 412; *Maxwell v. Dow*, 20 Sup. Ct. 448, Adv. S. U. S. 448, 44 L. Ed. —.

At the trial the prosecutrix, during her examination in chief, testified that, after the assault had been committed, she started home, and that she met one Taylor Norton, and told him that the defendant had thrown her down. Taylor Norton, called as a witness, also testified that the prosecutrix told him the defendant "had her down." Counsel for the appellant insists that the court erred in admitting this testimony, but, under the circumstances disclosed, the objection to its admission is not well taken. It appears in evidence that the complaint and statement respecting the assault were made to the witness Norton only about 2½ minutes after the perpetration of the offense; that, while the assault was being committed, the prosecutrix saw Norton approaching, and told her assailant that she would tell him of it; that thereupon the perpetrator desisted, jumped on his horse, and rode off; and that his intended victim arose, crying, started for home, and, meeting Norton, made the disclosure to him. Under such circumstances, the complaint having been made almost at the very time and place of the commission of the outrage, not only evidence of the complaint, but also of the particulars thereof, was admissible, because the disclosure was a part of the *res gestæ*. Such evidence is generally received for the purpose of corroborating the evidence of the prosecutrix, but not as substantive testimony, to prove the commission of the offense. It must be conceded that there is some diversity of opinion upon the general subject of the admissibility of such evidence, but, when the complaint and the particulars thereof can be fairly considered part of the *res gestæ*, the rule seems to be well settled that they are admissible. This court, in *State v. Neel* (Utah) 60 Pac. 510, after stating the rule that, in a prosecution for rape, the prosecutrix, upon her examination in chief, may testify to the fact that she made complaint of the outrage recently after its perpetration, and may state to whom, when, and where such complaint was made, but not the particulars thereof, said: "Where the complaint is so recent and of such a character as to be a part of the *res gestæ*, the particulars or details thereof are also admissible." In *People v. Gage*, 62 Mich. 271, 28 N. W. 835, Mr. Justice Champlin, speaking for the court, said: "Some courts hold that the evidence that complaint was made is not received merely as corroborative of the statement of the prosecutrix, but as a part of the *res gestæ*, where they are made immediately after the outrage complained of; and this is the holding of our own court. If the complaint made immediately after the

occurrence constitutes part of the *res gestæ*, it would seem that not only the fact that complaint was made, but the complaint made, should be admitted. Besides, the reason upon which the rule of exclusion is based, namely, the difficulty of disproving the accusation, no longer exists in this state, where the accused is permitted to testify in his own behalf. We think in this case there was no error in admitting the testimony of the mother of the child." So, in *Phillips v. State*, 9 Humph. 246, Green, J., delivering the opinion of the court, said: "All of the authorities concur that, where the injured party is examined as a witness, her complaint of the injury in general terms, if made recently after the commission of the offense, is admissible, and may be proved by the persons to whom such complaint was made, as confirmatory of her credibility. But it would seem, according to some authorities, that her statement of the circumstances, or particulars of the complaint, should be excluded from the jury, while others lay it down that such evidence is admissible. We think the latter is the correct rule, both upon principle and weight of authority. And upon a careful examination it will, perhaps, be found that the conflict of authority is apparent, rather than real." So, in *Johnson v. State*, 17 Ohio, 593, Mr. Justice Hitchcock said: "There can be no doubt that, in a case of rape, the declarations of the injured female, made immediately or soon after the injury inflicted, are competent testimony, provided the female herself has first been examined,—competent, not for the purpose of proving the commission of the offense, but as corroborative of, or contradictory to, her statements made in court." 1 McClain, Cr. Law, § 455; 2 Starkie, Ev. (6th Am. Ed.) pp. 699, 700; 3 Rice, Ev. § 524; 1 Greenl. Ev. § 102, and note d; 1 Whart. Cr. Law, §§ 566, 567; *People v. Brown*, 53 Mich. 531, 19 N. W. 172; *Phillips v. State*, 9 Humph. 246; *Laughlin v. State*, 18 Ohio, 99; *McMath v. State*, 55 Ga. 203; *State v. Shettleworth*, 18 Minn. 208 (Gil. 191); *People v. Flynn*, 96 Mich. 276, 55 N. W. 834; *Johnson v. State*, 17 Ohio, 593; *State v. De Wolf*, 8 Conn. 93; *Same v. Kinney*, 44 Conn. 153; *State v. Halford*, 18 Utah, 3, 54 Pac. 819; *State v. Byrne*, 47 Conn. 465; *People v. Glover*, 71 Mich. 303, 38 N. W. 874.

We perceive no sound reason why a different rule should be applied where the offense is assault with intent to commit rape. The indignity to the female and the violation of her feelings exist as a result of either offense. So, either offense is an outrage upon humanity, and is shocking to the community, although the injury to the victim and the degree of atrocity are greater where the nefarious design of the perpetrator is consummated, than where its full consummation is frustrated. Neither the severity of the injury nor the degree of atrocity, however, affects the application of the rules of evidence as to such offenses. Whether, therefore, the charge be that of rape, or of assault with intent to com-

omit rape, the same rules respecting the admission of such evidence apply. In *People v. Barney*, 114 Cal. 554, 47 Pac. 41, where the charge was an attempt to commit rape, the supreme court of California said: "In cases of this kind the prosecution is always permitted to prove that the injured party made complaint of the injury while it was recent." The supreme court of Oregon, in *State v. Sargent*, 32 Or. 110, 49 Pac. 889, held, as appears from the syllabus, that, "in proof of an assault with intent to rape, the mother of the prosecutrix may testify as to her manner and appearance, and the condition of her person, shortly after the alleged assault, and to the fact that she made a disclosure." 3 Rice, Ev. § 524; *Thompson v. State*, 38 Ind. 39; *Pefferling v. State*, 40 Tex. 487; *Reddick v. Same* (Tex. Cr. App.) 34 S. W. 274; *Territory v. Maldonado* (N. M.) 58 Pac. 350; *Stephen v. State*, 11 Ga. 225; *State v. De Wolf*, 8 Conn. 93.

For similar reasons and upon similar grounds the witnesses Sarah Lewis and Hannah Judd were properly permitted to testify that the prosecutrix made complaint to them recently after the commission of the assault. The testimony relating to the age of the prosecuting witness was also properly admitted. Nor did the court err in admitting evidence of the conversation between the witness Richard Judd and the defendant, relative to the charge against the latter.

The appellant also complains of certain instructions of the court to the jury, but, upon examining and considering the whole charge, we find no reversible error therein. Nor do we find any error, prejudicial to the rights of the appellant, in the record. The judgment is affirmed.

MINER and BASKIN, JJ., concur.

(22 Utah 134)

PEOPLE'S BUILDING, LOAN & SAVINGS ASS'N v. KROEGER et al.

(Supreme Court of Utah. June 1, 1900.)

BUILDING AND LOAN ASSOCIATIONS—BOND AND MORTGAGE—PARTIAL PAYMENTS—INTEREST.

Where a bond and mortgage given by defendant K. to plaintiff at the time of procuring a loan both provided for the payment of a stipulated sum per month as interest on the loan, K. and his successors in interest were entitled to credit against the principal only for payments of dues and premiums, and not to deductions for interest paid on the loan. The rule of partial payments does not apply in such case. See *Association v. Fowble*, 53 Pac. 500, 17 Utah, 122; *Sawtelle v. Building Co.*, 48 Pac. 211, 14 Utah, 443.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by the People's Building, Loan & Savings Association against Gustave Kroeger and others. Judgment for defendants, and plaintiff appeals. Reversed.

Stephens & Smith, for appellant. J. M. Bowman, for respondents.

BARTCH, C. J. It is shown by the record that the defendant Kroeger was a stockholder in the plaintiff association, and that on July 7, 1891, he executed a bond whereby he undertook to pay to the association the sum of \$1,000 in five years from date thereof, and \$4.17 contribution of interest and \$4.17 contribution of premium each and every month thereafter, commencing July 25, 1891, and to be continued and made on or before the last Saturday of each month, until the full sum secured would be paid. As security for the payment of this obligation, the obligor executed a mortgage upon certain property situate in Salt Lake City, wherein the terms of the bond were set forth. It was also provided in the mortgage that the mortgagor should keep the buildings upon the premises insured, and pay all taxes and assessments which might be levied against the property, and, if he failed to do so, that the association could effect the insurance and pay the taxes, in which event such expenditures should become a part of the mortgage debt. The property was afterwards conveyed to S. W. Morrison, who assumed and agreed to pay the mortgage indebtedness, and he thereafter conveyed the premises to the defendants Morrison, Merrill & Co. Kroeger and the vendees continued to pay the interest, premium, and fines until April 1, 1896, when they ceased to make further payments, and also to procure insurance and pay the taxes as provided in the contract. Thereafter the plaintiff, claiming a balance still due it, brought this suit to recover such balance. The defendants alleged that the payments were made in full compliance with the terms of the contract, and prayed that the same be declared fully satisfied and discharged. At the trial the court entered judgment in favor of the defendants in the sum of \$38.55 for money paid over and above the amount due the association on the bond and mortgage, and for costs, and declared the premises discharged from the mortgage lien. From that judgment this appeal was prosecuted.

The decisive question is whether the court erred in applying the rule of partial payments to this case. It appears that the court permitted the defendants to make a computation of the amount due under the contract, upon the basis of partial payments made each month, by computing interest upon the principal at the rate of 5 per cent. per annum, and deducting interest upon interest at the same rate. The appellant contends that this was contrary to the terms of the contract. We are of the opinion that such contention is well founded. Both the bond and mortgage provided for the payment to the association of \$4.17 per month as interest on the loan. The parties thus, instead of providing for the payment of interest at a certain rate per annum, stipulated for the payment of a definite and fixed sum per

month; and, under the circumstances disclosed by the record, they must be held bound by the terms of their contract. The defendants were entitled to credit against the principal sum for all monthly payments of dues and premiums on the stock, but not to deductions for interest paid for the loan. This court, in *Association v. Fowble*, 17 Utah, 122, 53 Pac. 990, following the case of *Sawtelle v. Building Co.*, 14 Utah, 443, 48 Pac. 211, said: "Where, as in this case, the association has undertaken, by foreclosure proceedings, to determine the relations existing between it and the grantee of the mortgaged premises, who has assumed and agreed to pay the debt, such grantee has a right to have the stock payment, whether paid as dues or premium, credited on the loan." The respondent relies upon these cases, but upon examination it will be seen that in neither of them was there any question considered or decided relating to the application of the rule of partial payments, or to the deduction of interest, in determining the amount due under the contracts. Under the terms of the contract in this case, the association was entitled to retain absolutely the monthly payments of interest, and the court erred in applying the rule of partial payments and permitting deductions of interest. The case must therefore be reversed, with costs, and the cause remanded, with directions to the court below to set aside its judgment and proceed in accordance with this opinion. It is so ordered.

MINER and BASKIN, JJ., concur.

(31 Utah 324)

COMMERCIAL NAT. BANK v. CHAMBERS, County Treasurer.

(Supreme Court of Utah. April 10, 1900.)

ASSESSMENT FOR TAXES—NATIONAL BANK STOCK—DEDUCTIONS ALLOWED—DISCRIMINATION—PROPERTY OF NATIONAL BANK—SUBJECT TO STATE TAXATION—POWER OF TAXATION—PROPERTY WITHIN JURISDICTION—SITUS OF STOCK—HOW FIXED FOR TAXATION—VALUE—"STOCKS"—"CREDITS"—REVENUE ACT—DEBTS OF INDIVIDUAL SHAREHOLDERS—DEDUCTIONS FROM STOCK—"MONEYED CAPITAL."

1. Under sections 2, 3, art. 13, Const., and subdivisions 6, 7, § 2505, and sections 2503-2508, Rev. St. 1898, the only deductions authorized in the assessment for taxes of the shares of any national bank or other corporation, organized and doing business in this state, are deductions from the value of the shares of the value of the real estate which is represented by the stock, and which has been assessed, and deductions of bona fide debts from credits, and there is no unfriendly discrimination therein in favor of state corporations and against national banks.

2. Although a national bank is organized under the banking act of the United States, if it is located in this state, and conducting its business here, all its property, not exempt, situate, or held, owned, and used, within this jurisdiction, is within the taxing power of this state, under the provisions of section 5219, Rev. St. U. S., and such power extends to every species of property which exists within the limits of the state by its authority, or which is

introduced by permission of the state, unless such power be excluded expressly or by necessary implication.

3. Under the power of taxation, property must be treated as it exists within the jurisdiction of such taxing power, and without reference to the powers of another state over which there is no jurisdiction whatever.

4. A state has the right to fix the particular situs of the stock of a corporation doing business within its limits, for the purposes of taxation, and its value for such purposes cannot be diminished by deducting therefrom the value of property not situated or taxable within the state, and over which the state can exercise no control.

5. "Stocks" are not "credits," and "credits" are not "stocks," within the meaning of the revenue act of this state, and the law does not authorize the deduction of the debts of the individual shareholder in a bank from his shares of stock.

6. The term "moneyed capital," employed in section 5219, Rev. St. U. S., does not require that where, under a system of taxation such as ours, debts may be deducted from credits, the individual debts of a shareholder in a national bank must be deducted from the value of his stock; neither does the term include money which does not come into competition with the business of the bank. Debts disconnected from such business cannot be deducted from the amount of the capital, and the shares of stock cannot be treated as credits.

(Syllabus by the Court.)

Appeal from district court, Weber county; H. H. Rolapp, Judge.

Action by the Commercial National Bank against Alma D. Chambers, treasurer of Weber county. Judgment for plaintiff. Defendant appeals. Reversed.

George Halverson, for appellant. Heywood & Tait, for respondent.

BARTCH, C. J. This suit was brought by the plaintiff against the treasurer of Weber county to have declared void all taxes assessed against the bank for the year 1898 in excess of \$612.99, and to have the treasurer enjoined from collecting such excess, and from enforcing the collection by sale of the property assessed or otherwise. The findings of fact show that the plaintiff bank is a corporation organized and existing by virtue of the banking act of the United States, and has been, and now is, conducting a general banking business, as a national bank, in Ogden City, Weber county, Utah. For the purposes of taxation, the bank's capital stock, in 1898, was valued at \$80,000, its real estate situate in Utah was valued at \$27,535, and its real estate situate outside of this state at \$19,500. In levying the tax the value of the real estate situate within the state was deducted from the value of the stock, but a deduction of the value of the real estate situate without the state was refused. Likewise the bona fide debts of resident shareholders were deducted from the value of the stock, and deduction refused of such debts of nonresident shareholders. The total amount of tax levied against the stock, and claimed by the defendant, for that year is \$1,471.73. The amount offered to be paid by the plaintiff is \$612.99. At the trial the court entered a decree in fa-

vor of the plaintiff, and this appeal is from that decree.

The material question is, was the respondent entitled to deductions from the stock assessment for the value of the real estate situate without the limits of this state, and to have the bona fide debts of nonresident shareholders deducted from the value of their stock? The appellant insists that the court erred in allowing such deductions. Whether or not this insistence is sound must be determined by reference to the constitutional and statutory provisions relating to the subject. In section 2, art. 13, Const., it is provided: "All property in the state, not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises and all other matters and things (real, personal and mixed) capable of private ownership; but this shall not be so construed as to authorize the taxation of the stocks of any company or corporation, when the property of such company or corporation represented by such stocks, has been taxed." Under this provision, all property in this state must be "taxed in proportion to its value," except such as is exempt under the provisions of the constitution, or by virtue of the constitution of the United States. It will be observed that "credits" and "stocks" are included within the meaning of the word "property," as used in reference to the subjects of taxation, and these two classes are separately and distinctly mentioned as being included. All kinds of credits and stocks are therefore susceptible of being taxed, except as may be otherwise provided by the fundamental law. In the same section, as will be noticed, it is provided that stocks of any company or corporation are not taxable "when the property of such company or corporation represented by such stocks has been taxed." The word "stocks" is in the plural form, and, as here used, evidently means property consisting of shares in joint-stock companies, whether of banking institutions or other corporations. It is referred to as a distinct species of property. The word "credits" is also in the plural form, and, as here used, evidently means all debts due and owing, from whatever source, to the party whose property is to be taxed. The word, as employed in this provision, clearly refers to a species of property entirely distinct and different from that of stocks. Thus, under section 2, art. 13, of the constitution, all "credits" would be subject to taxation were it not for the limitation contained in section 3 of the same enactment, which reads: "The legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe by general law such regulations as shall secure a just valuation for taxation of all property; so that every person and corporation shall pay a tax in pro-

portion to the value of his, her or its property: provided, that a deduction of debts from credits may be authorized." Here is a provision that "debts" may be deducted from "credits" in the taxation of property. To the extent, therefore, that the debts owing by any person whose property is being taxed offset the credits or debts owing to him, the credits cannot be taxed, and to that extent this provision is a limitation upon section 2. Stocks, however, are not included in the limitation, they not being included within the proviso, and here we apprehend the maxim, "*Expressio unius est exclusio alterius*," applies. The framers of the constitution having thus referred to "credits" and "stocks" as separate species of property for the purposes of taxation, and, having provided different limitations as to each, they must, for such purposes, be treated separately and distinctly. It may further be observed that, according to the terms of section 3, every species of property in the state, except, of course, such as is exempt, must be taxed "according to its value in money," by a "uniform and equal rate of assessment" and a "just valuation," which must be provided for by the legislature, and the injunction for this is, "so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." In *Judge v. Spencer*, 15 Utah, 242, 48 Pac. 1097, where the question was whether mortgages were taxable, this court, after considering section 2, and referring to section 3, said: "This provision made it incumbent upon the legislature to provide a uniform system by which every species of property within the state, not exempt by the organic law, should equally and ratably bear its due proportion of the public burden, and the legislature had no power to exempt property not exempt under the constitution. The intention manifest from the several provisions of that instrument, respecting revenue and taxation, is not only that previous territorial legislation as to such exemptions should be repealed, but also that no power should exist in the state government to grant exemptions other than those mentioned in the constitution."

It will also be seen upon examination that in neither of the constitutional provisions is there any direct reference, with respect to taxation, to corporate property situate without the limits of the state, nor is there any provision for the deduction of debts from stocks; and as in the organic law "credits" and "stocks" of corporations are treated as separate species of property, and the legislature is commanded to provide by law uniform and equal rates of assessment, and for just valuation, of every kind of taxable property within the state, it becomes important to ascertain what the statute law respecting the matters under consideration is.

Section 2506, Rev. St., requires all property to be "assessed at its full value," agreeably to section 2 of the constitution.

Section 2507, Id., reads: "The stockholders in every bank or banking association or-

ganized under the authority of this state or of the United States, must be assessed and taxed on the value of their shares of stock therein, in the county, town, city, or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such place or not. To aid the assessor in determining the value of such shares of stock, the cashier or other accounting officer of every such bank must furnish a verified statement to the assessor showing the amount and number of shares of the capital stock of each bank, the amount of its surplus or reserve fund or undivided profits, the amount of investments in real estate, which real estate must be assessed to said bank and taxed as other real estate, and the names and places of residence of its stockholders, together with the number of shares held by each." In this case there is no contention that the tax was not assessed, nor that no statement was furnished the assessor as provided.

Section 2508, Id., reads: "In the assessment of the shares of stock mentioned in the next preceding section, each stockholder must be allowed all the deductions and exemptions allowed by law in assessing the value of other taxable personal property owned by individual citizens of this state, and the assessment and taxation must not be at a greater rate than is made or assessed upon other moneyed capital in the hands of individual citizens of this state." Under this provision every stockholder of a bank, whether a resident or nonresident of this state, is entitled to and must be allowed all the deductions and exemptions in the assessment of his shares as are allowed in the taxation of other taxable personal property owned by a resident citizen, and the rate must not be greater than is assessed upon other moneyed capital in the hands of such a citizen. There is, however, nothing in this provision authorizing the deduction of debts from the value of stocks in the hands either of a resident or nonresident individual. The only deductions authorized are debts from credits. "The term 'credit' means those solvent debts, secured or unsecured, owing to a person." Subdivision 6, § 2505, Id. "The term 'debts' means those secured or unsecured liabilities owing by a person." Subdivision 7, § 2505, Id. Nor can the words, "moneyed capital," employed in section 2508, have the effect to enlarge the meaning of the term "credits," as used in the constitution and statute, so as to include bank stocks, and then permit the deduction of debts from the value of shares in national banks. Nor can those words have such an effect as to any other corporation. As we have seen, stocks are not "credits," within the meaning of the constitution. Stock is not an indebtedness due the owner, but simply an interest in the assets or property of the corporation. *Niles v. Shaw*, 50 Ohio St. 370, 34 N. E. 162; *Bridgman v. City of Keokuk*, 72 Iowa, 42, 33 N. W. 355.

Section 2509, Rev. St., provides: "In making such assessment, there must also be deducted from the value of such shares, such sum as is in the same proportion to such value as the assessed value of the real estate of such bank or banking association in which such shares are held, bears to the whole amount of the capital stock, surplus, reserve, and undivided profits of such bank or banking association." Here is a provision which permits a deduction from the value of the shares in banking institutions of the value of the real estate, where such real estate, held by the bank and represented by such shares, has been taxed. Real estate so held is assessed to the bank and taxed the same as real property held by an individual is taxed to him, and therefore its value is deducted from the value of the shares so as to avoid double assessment. This is in harmony with section 2, art. 13, of the constitution, above considered.

The remaining section of the Revised Statutes material in this case is 2518, which, among other things, provides that, "in making up the amount of credits which any person is required to list, he will be entitled to deduct from the gross amount of such credits the amount of all bona fide debts owing by him." This accords with section 3, art. 13, of the constitution, which authorizes a deduction of debts from credits.

Thus, from an examination of the several constitutional and statutory provisions respecting the subject of taxation, it is evident that the only deductions which are authorized in the assessment of the shares of stock of any national bank or other corporation organized and doing business in this state are deductions from the value of the shares of the value of the real estate which is represented by the stock, and which has been assessed, and deductions of bona fide debts from credits. It is also clear that moneyed capital invested in national banks is placed precisely upon the same basis as moneyed capital invested in other banks, and that there is no unfriendly discrimination in favor of state corporations.

In the case at bar deductions were made from the value of the stock of the value of all real estate owned by the bank which is situate within the limits of the state, but deductions for its real estate situate without the state were refused by the assessor and board of equalization, but the court below ordered that the value of the real estate situate in other states should also be deducted from the value of the stock. In this we think the court erred. It is true the bank is a corporation organized under the banking act of the United States, but it is located in this state, and is conducting its business here. All of its property, therefore, not exempt, situate, or held, owned, and used, within this jurisdiction, is within the taxing power of this state. The power of taxation extends to every species of property which exists within the limits of the state

by its authority, or which is introduced by permission of the state, unless such power be excluded expressly or by necessary implication. A national bank, although a United States institution and subject to its control, is taxable in the state where located, by consent of congress, as will hereinafter be seen.

The property of the respondent bank being thus within the taxing power of the state, it must be taxed as provided by our laws, the same as other property, and, as we have seen, our constitution and statutes provide that all taxable property shall be taxed according to its value in money, which has been construed to be at its full cash value, and banking corporations are to be taxed on the value of the stock at the place where the corporation is located, and not elsewhere. Now, if the value of its real estate situate in other states, where this state has no jurisdiction, is to be deducted from the value of the stock, how can the stock of the bank be taxed at its cash value? Yet stock is "property," within the meaning of the constitution and statute. When its real property situate within the state is taxed, then its value should be deducted from the value of the stock which represents such real property; for otherwise there would be a double assessment, in that the same property would be taxed as other real estate and also as represented by the stock. In such case all the property is still taxed at its full cash value, but this is not so as to real estate situate in another state which cannot be taxed here. Under the power of taxation property must be treated as it exists here, without reference to that of another state, where we have no jurisdiction whatever. Stock of a bank or corporation located in this state, being property within the meaning of our revenue laws, must be treated as such.

Suppose, for instance, three-fourths of the property in value of the bank were situate in another state, and its stock here was worth 100 cents on the dollar, and for the purpose of taxation the value of such property were deducted from the value of the stock; could it be said that the stock was assessed at its cash value? The shares of stock of such a corporation are subject to state control in respect to the right of taxation, and therefore every person who takes them must take them subject to such control, and it matters not whether he be a resident or nonresident. The state has a right to fix a particular situs as to such stock for the purposes of taxation, and its value for such purposes cannot be diminished by deducting therefrom the value of property not situated or taxable within the state, and over which the state can exercise no control. The bank, therefore, had no right to have the value of its real estate situate without the state deducted from the value of the stock. "The true criterion, as fixed by the statute, is the true value of the

stock, without reference to the question where, or in what manner or nature of property or security, the capital stock may be invested. Whether that be invested in real estate or other property beyond the jurisdiction of this state, the latter having control over the shares and their true value, the peculiar nature and value of the investment of the capital stock of the corporation beyond the limits of the state can form no proper subject for specific deduction or abatement from the true value of the shares of stock when presented to be assessed for purposes of taxation. It is exclusively with the shares of stock, and their true value, as representing the entire corporate assets, that the tax commissioner has to deal, and not with the nature and locality of the investment of the capital stock of the corporation, except as to the real estate of the company situate within this state." *American Coal Co. v. County Com'rs of Allegany Co.*, 59 Md. 185; *Dwight v. Mayor*, etc., 12 Allen, 316; *Bank v. Sedgwick*, 104 U. S. 111, 20 L. Ed. 703; *Kelley v. Rhoads* (Wyo.) 51 Pac. 593.

The question remains whether the individual stockholders were entitled to have their debts deducted from the value of their stock, or, rather, whether the bank was entitled to have such deductions made from the valuation of the capital stock. It appears that individual debts owed by resident shareholders were deducted from the value of their shares, but such deductions were refused nonresident shareholders by the assessing officers. The court, however, allowed the deductions also to be made as to nonresidents. Certainly, if shareholders who are residing in this state are entitled to deduct their debts from the value of their shares, those who are residing in another state are likewise entitled. The law permits no discrimination between the two classes of shareholders in national banks, and the distinction attempted to be made by the assessing officers would be a clear and unjust discrimination in favor of resident owners of stock, and it would be difficult to assign any good reason therefor, for the nonresident, the same as the resident, stockholder, may have debts which he owes in this state, and the capital of both alike is invested in the bank. No such discrimination is tolerated by the laws of this state or of the United States. Aside from the fact, however, that no such unfriendly discrimination can be permitted, by what authority can any such deduction be made, whether the stock be held by a resident or nonresident? In vain have we searched the constitution and statutory provisions of this state relating to the subject of taxation for the existence of such a power, and none has been pointed out by counsel on either side. The constitution provides for the deduction of "debts" from "credits," but, as we have seen, that provision does not authorize a deduction of "debts" from "stocks." Stocks

are not credits any more than credits are stocks, within the definition of the statute respecting the term "credit." As has already been observed, "credits" and "stocks," under our system of taxation, are separate and distinct species of property. Neither one includes the other, and, as the framers of our constitution have seen fit to single out and mention "credits" as the kind of property from which "debts" might be deducted, they have expressed an intention to prohibit the deduction of debts from any other species of property. The expression of the one excludes every other kind. No doubt the banking corporation in its capacity as an artificial person—as a distinct entity—has the right to have its debts contracted by it in the conduct of its banking business deducted from its credits or the moneyed capital employed, for that is necessary to determine the real value of the stock, which value amounts simply to what can be realized from the property of the corporation after its obligations are paid. This will reduce the value of the credits or capital in the amount of the debts, and, as the value of the credits or capital enters into the value of the shares, the value of the shares will be proportionately reduced for the purpose of the assessment. In this way the individual shareholder receives the benefit of the deduction of debts from credits, and such is the only way in which he is entitled to any deduction from the value of his stock. But the law does not authorize the bank to deduct debts disconnected from the banking business, nor the bank or shareholder to have his individual debts deducted from the value of his shares of stock. The debts incurred in the conduct of the corporate business are deducted from the credits or moneyed capital, so that the actual value of the capital employed may be determined, and the taxes levied thereon.

Under the system of taxation prescribed by the constitution and statutes of this state, a banking corporation, state or national, has the same immunity from excessive taxation, and the same right to deductions of debts from credits, as any other corporation or any private person has; but "to place the holder of national bank shares into the class of bankers, and treat his shares as stocks until the net value is fixed, and then change his stock into a credit, and take him out of the class of bankers, and place him into the class of private individuals, so as to enable him still further to reduce his stock thus changed into a credit, by deducting therefrom his legal bona fide debts, would be discriminating in favor of such national bank shareholder, and would be giving him two chances to escape taxation, while other bankers and private individuals have but one." *Chapman v. Bank*, 56 Ohio St. 310, 47 N. E. 54; *Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 609; *Dutton v. Bank*, 53 Kan. 440, 36 Pac. 719; *Bressler v. Wayne Co.*, 32 Neb. 834, 47

N. W. 787, 13 L. R. A. 614; *People v. Dolan*, 36 N. Y. 59; *National Bank of Commerce of Seattle v. City of Seattle*, 9 Wash. 608, 38 Pac. 219; *First Nat. Bank of St. Joseph v. St. Joseph*, 46 Mich. 526, 9 N. W. 838; *First Nat. Bank of Aberdeen v. Chehalis Co.*, 6 Wash. 64, 32 Pac. 1015; *Williams v. Weaver*, 75 N. Y. 30; *McVeagh v. City of Chicago*, 49 Ill. 318.

Nor are the provisions of our constitution and statutes respecting taxation in conflict with section 5219 of the Revised Statutes of the United States, which reads as follows: "Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by nonresidents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed." In this section the legislature of every state is given express power to include within the subjects of taxation the "shares of national banking associations located within the state," subject, however, to the restrictions that such shares shall not be taxed at a greater rate than "other moneyed capital in the hands of individual citizens of the state," and that those owned by nonresidents "shall be taxed in the city or town where the bank is located, and not elsewhere." Examination and comparison will show that the several sections of the constitution and Revised Statutes of this state, hereinbefore construed, are entirely in harmony with the federal statute. No purpose to discriminate against shareholders in national banks is manifest. The taxation of the shares and property of the two classes of banks, state and national, is precisely the same, and such shares and property are taxed at no higher rate than is the property of other corporations and of individuals. The assessment of all taxable property, whether of corporations or individuals, must be at its full cash value. Nor is it shown that the system of taxation pursued in this state discriminates in any way material in its practical operation against the holder of shares in national banks.

Under our laws such shares, the same as shares in state banks or other corporations, are known as stocks, or investments in stock,

and are not credits from which debts can be deducted. Such stocks are not to be assessed at a different rate in one institution than in another. Stocks in national banks, in incorporated state banks, and in unincorporated banks are all subject to the same system of taxation, and we perceive no discrimination in favor of either class, nor as against either of those classes in favor of private taxable property. By enacting the federal statute, congress doubtless intended to establish a national banking system, so as to obtain a secure and uniform currency for the people, and facilitate the operations of the treasury of the United States. The banks under this system were to be furnished with private capital. The capital, so far as it was security for their circulating notes, was to be invested in United States bonds for the protection of the government and the people. Neither these bonds, nor the shares of stock held by individuals, nor the capital, however invested, nor the banks, were taxable by the states in which the banks were located, without the consent of congress. Such consent was granted, and power to tax them conferred upon the states by congress in the statute referred to, subject to the restrictions or limitations therein contained. Those limitations were doubtless necessary to prohibit discrimination in favor of state banks and individuals doing similar business, and the imposition of burdens which would prevent private capital from seeking investment in the institutions which it was the object of the enactment to establish and promote. "The main purpose," says Mr. Justice Matthews in *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826, 30 L. Ed. 895, "of congress in fixing limits to state taxation on investments in the shares of national banks, was to render it impossible for the state, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a similar business, and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy." There is nothing in the federal statute which prohibits the deduction of debts from credits when such deductions do not constitute an unfriendly discrimination against national banks. Nor does the term "moneyed capital," employed in that statute, require that where, as under our system of taxation, debts may be deducted from credits, the individual debts of a shareholder in a national bank must be deducted from the value of the stock. The term "moneyed capital" as there used does not include money which does not come into competition with the business of the bank, and debts disconnected from such business cannot be deducted from the amount of the capital. Nor can the shares of stock of such a bank be treated as credits. Therefore the refusal by the assessing officers, on application of the bank, to deduct the individual debts of nonresident shareholders from the value of the stock, is not an illegal dis-

crimination against a national bank, and hence no such deduction can be enforced by the bank. *Bank v. Ayers*, 160 U. S. 600, 16 Sup. Ct. 412, 40 L. Ed. 573; *Bank v. Chapman*, 173 U. S. 205, 19 Sup. Ct. 407, 43 L. Ed. 669; *First Nat. Bank of Aberdeen v. Chehalls Co.*, 166 U. S. 440, 17 Sup. Ct. 629, 41 L. Ed. 1069; *Bank of Commerce v. City of Seattle*, 166 U. S. 463, 17 Sup. Ct. 996, 41 L. Ed. 1079; *Mercantile Nat. Bank of City of New York v. Mayor, etc., of City of New York (C. C.)* 28 Fed. 776; *Richards v. Incorporated Town of Rock Rapids (C. C.)* 31 Fed. 505. We are of the opinion that the court erred in rendering a decree in favor of the plaintiff. Judgment ought to have been entered in favor of the defendant for costs. The case must therefore be reversed, with costs, and remanded, with instructions to the court below to set aside its decree, and enter judgment in accordance herewith. It is so ordered.

MINER and BASKIN, JJ., concur.

(22 Utah, 179)

SILCOCK v. RIO GRANDE W. RY. CO.

(Supreme Court of Utah. June 6, 1900.)

ACCIDENT AT CROSSING — DAMAGES — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — NONSUIT—QUESTION FOR JURY.

1. In a suit for damages on account of plaintiff's horses having been run over and killed by defendant's train, where it appeared that plaintiff had been at the place of the accident on a previous occasion when the same train passed; that plaintiff knew it was a fast train and did not stop there; that he knew about the usual time for the train to pass, and that he had not seen or heard it pass on his way to the depot; that plaintiff drove his horses to within "twenty or thirty feet" of the track, and left them standing there without tying, and went to a point about 60 feet on the other side of the track,—want of ordinary care and contributory negligence on the part of plaintiff are sufficiently shown, and a nonsuit was properly granted.

2. Where a person permits a team to stand upon a public highway in close proximity to a railroad track, or is about to cross such track, he is bound to look and listen, in order to avoid an approaching train, and the happening of an accident. *Bunnell v. Railway Co.*, 44 Pac. 927, 13 Utah, 314.

3. The principle which requires that a man shall use his ears and eyes in crossing a railroad track, so far as he has opportunity to do so, equally demands that he shall employ his faculties in managing his team, and thus keep out of danger. *Clark v. Railroad Co. (Utah)* 59 Pac. 92.

4. Even though it be admitted that respondent was negligent in some things, still if the evidence introduced by appellant in attempting to prove his case shows that his own negligence contributed to, and was the proximate cause of, the injury, the question of negligence becomes one of law for the court. *Lowe v. Salt Lake City*, 44 Pac. 1050, 13 Utah, 91.

5. Where the plaintiff in a suit to recover damages for injuries shows by his own evidence that he was guilty of contributory negligence which was the proximate cause of such injuries, the defense is relieved from the burden of proving such negligence, and the plain-

tiff cannot recover. *Clark v. Railroad Co.* (Utah) 59 Pac. 92.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by Alma D. Silcock against the Rio Grande Western Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

D. Harrington and G. M. Sullivan, for appellant. Bennett, Harkness, Howat, Sutherland & Van Cott, for respondent.

BARTCH, C. J. This action was brought to recover damages for injury to personal property and for personal injuries claimed to have been occasioned through the negligence of the defendant. It was, among other things, alleged in the complaint that the defendant, in disregard of its duty, failed to announce the arrival of its train, and carelessly, unlawfully, and negligently ran and managed a locomotive and train belonging to it, on its track, crossing a public highway, and "that the same ran against and partially over said property," killing a span of mares, and injuring other personal property and the plaintiff. The defendant, in its answer, denied negligence on its part, and charged that the plaintiff was guilty of negligence which caused the injuries of which he complains. From the testimony of the plaintiff, it appears that on January 29, 1898, he went with his team to defendant's railway station to purchase coal. When he arrived there he stopped his team at a point on the public road "twenty to thirty feet" from the railway track, facing the same. He then applied the brake, and tied the lines to his wagon, and went to the depot, on the north side of the highway, to arrange with the agent for the coal. The agent not being there, he stepped west across the track, about 60 feet, to the coal bins, to ascertain if there was any coal to be had. While there he heard the rumbling of an incoming train, which was then close to the station, and hastened back to his team, and got into the wagon and hold of the lines, when his horses became frightened and unmanageable and collided with the train. The injuries resulted from the collision. The whistle on the engine was not blown, nor the bell rung, until immediately at the crossing. It was the north-bound passenger train, called the "Flyer," running at a rate of 50 to 60 miles an hour. That train, according to plaintiff's testimony, generally passed there somewhere "about a quarter to twelve," but on this occasion it arrived about "half past twelve or a quarter to one." The plaintiff had not noticed it come, but supposed that it had gone. He testified that this particular train generally went through there rapidly, —rapidly enough to probably frighten his team. He also testified that on a previous occasion, with a load of beets, he stopped at the same place while the train was passing, sat in the wagon, and held the team. Such are, substantially, the material facts shown

by the plaintiff's testimony. After he rested his case the defendant made a motion for a nonsuit upon the grounds that no negligence on the part of the defendant was shown, and that the evidence shows that the plaintiff was guilty of negligence which contributed proximately to the injury. The motion was sustained, and the plaintiff appealed.

The decisive question presented is, was the appellant guilty of such contributory negligence as prevents his recovery? That is, assuming that the respondent was negligent in not sounding the whistle or ringing the bell at a proper distance from the public crossing, was the appellant guilty, as shown by his own evidence, of negligence which contributed proximately and materially to the accident, so that, as matter of law, he cannot be permitted to recover? Due consideration of the facts and circumstances appearing in evidence impels the conclusion that this question must be answered in the affirmative. The proof leaves no room for doubt that if the appellant had proceeded with ordinary care about the railway station, he could have averted the accident. He was there on a previous occasion with his team when the same train passed at a rapid rate of speed, and knew that it was a fast train, and would probably frighten his horses in passing them. He knew about the usual time when it passed the crossing, and that it did not stop there; and, although the regular time for its arrival had passed, still he had not seen nor heard it pass, on his way to the depot. Aware of these things, he had no right to assume that it had passed. He was chargeable with knowledge of the fact that the train might be late, and that it or any other train might pass there at any time; the track on which the train was running being the main line of the respondent's system. Under such circumstances, for the appellant to drive his horses to within "twenty or thirty feet" of the track, and then leave them standing there on the highway alone, without being tied, and without, so far as appears from the evidence, looking or listening for a train, and go to the depot, thence to the coal shed, 60 feet across the track,—the team remaining all the while so untied,—is, to say the least, culpable negligence. Suppose by the striking of the team the train had been derailed and some person killed; would not the act of thus carelessly leaving the team within 20 or 30 feet of the track, unattended, have been characterized as gross negligence? Yet the more serious consequence would not have changed the character of the act. The appellant was bound to exercise ordinary care, and that, according to the facts disclosed, demanded that the team should be left at a greater distance from the track, or at least securely tied. Such care also required him to look and listen for an approaching train before and after leaving his team. No rule of law authorizes a person to thus recklessly leave his team upon the highway,

within a few feet of a railway track, unattended, and not even tied. In *Bunnell v. Railway Co.*, 13 Utah, 314, 44 Pac. 927, where the plaintiff had turned his cattle upon the highway in the vicinity of a railway track, unattended, and one of them was killed by a passing train, this court said: "A proper regard for the safety of humanity and of property forbids that a person should turn his beasts, which can neither reason nor appreciate danger, out upon the highway, without a keeper, in the vicinity of a railway crossing; and especially is this true where such person knows that they must cross the track to get to the pasture where their instinct leads them. The sacredness of human life, and common sense, alike dictate this rule."

Although he thus left his team upon the public highway, there is nothing in the testimony to show that the appellant either looked or listened for this or any train, either before or after arriving at the depot, until he heard the rumbling noise as the train approached; and yet it appears that there was nothing to obscure his vision, and that one could see a quarter of a mile or more down the track. If, therefore, the appellant, even after he had so left his team, had used his senses, as the law required him to do, he could, in all probability, have averted the accident. Having left his team in such a reckless manner, and having failed, as indicated by the record, to look and listen or use his senses, he is in no position to complain that the whistle was not sounded, nor the bell struck, nor of any failure of the respondent to give notice of the arrival of trains, because his own carelessness contributed so far to the accident that he has no right to complain of others. Negligence of the respondent in these particulars, if there was any, was no excuse for negligence on his part. Where a person permits a team to stand upon a public highway in close proximity to a railroad track, or is about to cross such track, he is bound to look and listen, in order to avoid an approaching train, and the happening of an accident. Ordinary care, under such circumstances as are disclosed in this case, requires this. In *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, where a lady was killed by an approaching train, Mr. Justice Field, delivering the opinion of the court, said: "She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others." The appellant having been familiar with the locality of the crossing, and knowing that a train was liable to pass there at any time, and that the train in question was usually run at a high rate of speed without

stopping at that place, it was negligence on his part to place himself and team in such a position that he could not control it when the train passed them. "The principle which requires that a man shall use his ears and eyes in crossing a railroad track, so far as he has opportunity to do so, equally demands that he shall employ his faculties in managing his team, and thus keep out of danger." *Salter v. Railroad Co.*, 75 N. Y. 273; *Schaefer v. Railway Co.*, 62 Iowa, 624, 17 N. W. 893; *Railroad Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Brady v. Railway Co.* (Neb.) 80 N. W. 809; *Railway Co. v. Howard* (Ind. Sup.) 24 N. E. 892; *Stahl v. Railroad Co.*, 117 Mich. 273, 75 N. W. 629.

Nor did the fact that this particular train was behind time relieve the appellant from his duty of exercising ordinary care at and about the railroad crossing, to avoid accident. Railroad corporations have the right to run their trains at any and all times, and travelers upon a highway, at a railway crossing, are entitled to no exemption from care and vigilance because trains are not run at regular schedule time. In *Clark v. Railroad Co.*, 59 Pac. 92, this court, speaking through Mr. Justice Baskin, said: "A railroad has as much right to use special trains as to use regular trains. As to how many or at what time a railroad company shall run trains over its track, is not restricted by law. It is a matter of common knowledge that the necessities of railroad transportation require the frequent use of special trains, and that such trains are liable to pass along the track at any time."

Nor can the fact that the train in question was run at a high rate of speed avail the appellant. The accident happened at a highway crossing in the country,—outside, so far as shown by the testimony, of the limits of any village or city,—where the railroad company was not limited to any particular rate of speed. The company was therefore entitled not only to run its trains at any and all times to suit the business demands of the people, but also at such rate of speed as the condition of its roadbed would permit, so as to afford rapid transit to the public; and there is nothing to show that the train in question was run more rapidly than the condition of the roadbed warranted. In *Bunnell v. Railway Co.*, supra, this court said: "Unless the condition of its road demands it, a railroad company is not required to run its trains at a low rate of speed through a sparsely-settled country, or to check the same at ordinary highway crossings, outside of cities and villages, and to do so would greatly interfere with its usefulness as a common carrier."

If it be admitted that the respondent was negligent as to some of the matters referred to, still the evidence introduced by the appellant in attempting to prove his case shows clearly that his own negligence contributed to, and was the proximate cause of,

the injury. The irresistible conclusion from an examination of all the testimony is that the proof is of such a character that, if taken with every legitimate inference which a jury could justifiably draw from it, it is insufficient to support a verdict. In such case the question of negligence is one of law, for the court. The nonsuit was therefore properly granted. *Lowe v. Salt Lake City*, 13 Utah, 91, 44 Pac. 1050. Where the plaintiff, in a suit to recover damages for injuries, shows by his own evidence that he was guilty of contributory negligence which was the proximate cause of such injuries, the defense is relieved from the burden of proving such negligence, and the plaintiff cannot recover. This court, in *Bunnell v. Railway Co.*, supra, as to the question of contributory negligence, said: "Generally contributory negligence is a matter of defense, and must be alleged and proven by the defendant; but where the testimony on the part of the plaintiff, who seeks to recover damages for injuries resulting from negligence, shows conclusively that his own negligence or want of ordinary care was the proximate cause of the injury, he will not be permitted to recover, even though the answer contains no averment of contributory negligence." *Clark v. Railway Co.* (Utah) 59 Pac. 92; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; *Pepper v. Southern Pac. Co.*, 105 Cal. 389, 38 Pac. 974; *Salter v. Railway Co.*, 75 N. Y. 273; *Railroad Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542; *Railroad Co. v. Talbot*, 48 Neb. 627, 67 N. W. 599; *Brady v. Railway Co.* (Neb.) 80 N. W. 809.

We discover no reversible error in the record. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

(22 Utah, 128)

WHITE et al. v. RIO GRANDE W. RY. CO.

(Supreme Court of Utah. June 4, 1900.)

MOTION FOR NONSUIT—SUFFICIENCY.

1. A party moving for a nonsuit must, in his motion, specify particularly the points relied on for such nonsuit, and thereby call the attention of the court and the opposite party to the points of his objections.¹

2. A motion for a nonsuit on the ground that "there is no evidence to show negligence towards deceased for which an action will lie against defendant in favor of plaintiffs, or either of them," does not advise the plaintiffs of the exact defects in the proof relied on by defendant, and should have been overruled.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by John E. White and Ann White against the Rio Grande Western Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed.

¹ *Lewis v. Mining Co.* (Utah) 61 Pac. 860; *Frank v. Mining Co.*, 19 Utah, 36, 56 Pac. 419; *McIntyre v. Mining Co.* (Utah) 60 Pac. 554.

Patterson & Moyer, for appellant. Bennett, Harkness, Howat, Sutherland & Van Cott, for respondents.

BASKIN, J. This is an action in which the plaintiffs seek to recover damages for the death of their son, Thomas F. White, alleged to have been caused by the negligence of the defendant company. At the close of the testimony offered by plaintiffs, on motion of defendant, a nonsuit was granted. The following is the only ground stated in the motion, to wit: "There is no evidence to show negligence towards Thomas F. White, deceased, for which an action will lie against defendant in favor of plaintiffs, or either of them." Among the assignments of error by the appellants is the following: "The court erred in sustaining defendant's motion for nonsuit in this: That said motion was made in general terms, and the particular grounds on which the motion was made were not sufficiently called to the attention of the trial judge and of the plaintiffs at the time the motion was made, and was insufficient to raise any question on which the court could properly pass at that time."

This court, at the February term, in the case of *Lewis v. Mining Co.*, 61 Pac. 860, held that "the party moving for a nonsuit should, in the motion, lay his finger on the exact point of his objection, * * * and thereby call the court's attention and that of the opposite party to the point on which he relies." See, also, *Frank v. Mining Co.* (Utah) 56 Pac. 419, and *McIntyre v. Mining Co.* (Utah) 60 Pac. 554. Counsel for the respondent contend "that the rule that the motion for a nonsuit does not specifically state the grounds of the objection can only be raised on appeal when the motion is denied, and the party making the motion complains that it should have been granted, or, when granted, by the plaintiff only when he shows that the defect could have been remedied by him if it had been called to his attention"; and in support of this contention state that "in other cases than those we do not know of a single case where the appellate court has held that the granting of a nonsuit or the sustaining of an objection was erroneous because the particular ground upon which the motion for a nonsuit was asked or objection made was not pointed out in the motion or in the objection." They do not, however, cite any case making any such distinction. In each of the cases hereinbefore cited, and which were decided by this court, the motion for a nonsuit was granted. In the case of *Sanchez v. Neary*, 41 Cal. 487, the grounds of the motion were: "First, that the plaintiff had failed to show the title to the demanded premises to be in himself; second, that he had failed to show that said premises are included in any of the deeds offered in evidence, or in the grant or patent to Sutter." The motion was granted by the lower court,

and in the appellate court the respondent claimed that a certain deed introduced by appellant did not include the premises in controversy. The court, in its opinion, said: "If the defendants [respondents] intended to rely, in their motion for a nonsuit, on the ground that the deed from Sutter, Jr., to Brannan does not include the locus in quo, they should have distinctly so stated at the time." In the case of *Flynn v. Dougherty*, 91 Cal. 669, 27 Pac. 1080, 14 L. R. A. 230, a motion for a nonsuit was granted, and the appellate court, in reversing the judgment and order, said: "The only grounds stated by the defendant in his motion for a nonsuit were that the contract was one for the sale of goods and chattels, 'and that there was no note or memorandum thereof signed by the defendants, nor any acceptance or receipt of the goods or any part thereof, nor any payment of purchase money or any part thereof, as required by the provisions of section 1624, subd. 4, of the Civil Code; and on the further ground that plaintiff has failed to show that he has sustained any damage in any sum whatever.' The rule is well settled that a nonsuit cannot stand unless the ground upon which it is supported was called to the attention of the court and the plaintiffs at the time the motion was made." In the case of *Weber v. Insurance Co. (Sup.)* 44 N. Y. Supp. 978, a motion for a nonsuit had been granted, and the appellate court, in reversing the case, said: "From the record before us it does not appear that the specific point was made upon the trial in the motion for a nonsuit that the proof disclosed that the insured had not title to a portion of the property insured. The point made was that the plaintiff had failed to show facts sufficient to constitute a cause of action, and was too general to call the attention of the court to this specific point. *Pratt v. Insurance Co.*, 130 N. Y. 220, 29 N. E. 117; *Isham v. Davidson*, 52 N. Y. 237; *Adams v. Insurance Co.*, 70 N. Y. 166. Had the attention of the court been called to this matter, an opportunity might have been given the plaintiff to give further proof upon the subject of notice which would have been conclusive." In the case of *Perrin v. Insurance Co. (City Ct. N. Y.)* 61 N. Y. Supp. 249, it was held that "a motion for nonsuit on the ground that the proof fails to sustain the allegations of the complaint must specify the omissions relied on, so that they can be supplied, if possible." In this case the motion was granted by the lower court. In *Kafka v. Levensohn (Sup.)* 41 N. Y. Supp. 368, the court said: "The second ground assigned for dismissal—that the plaintiff has failed to prove the cause of action alleged—is too general to be available. It fails to point out any specific defect in the proofs." When the motion fails to specifically state the grounds relied upon, the record on ap-

peal fails to inform the appellate court what the grounds were, or upon what grounds the motion was granted or refused. Whether or not the appellant could or would have corrected the defects if any had been specifically pointed out in the motion, this court cannot determine from the record. It is enough that the appellant was deprived of the right of being advised of the exact defects in the proof relied upon. We are of the opinion that the motion in the case at bar should have stated the particulars wherein the evidence failed to show negligence. The judgment of the court below is reversed, at respondent's costs, and the case remanded for a new trial.

BARTCH, C. J., and MINER, J., concur.

(23 Utah 174)

MILLER v. LIVINGSTON et al.

(Supreme Court of Utah. June 4, 1900.)

APPEAL IN EQUITY—REVIEW—CONSIDERATION
— RECITAL IN DEED — PRIMA
FACIE EVIDENCE.

1. On appeal of an equitable action the appellate court will not disturb the findings and decree of the trial court, which had the opportunity of observing the manner and bearing of the witnesses while testifying, in the absence of apparent oversight or mistake.

2. While the recital of consideration in a deed is prima facie evidence of the amount thereof, it is not conclusive, and a different consideration or amount may be shown by extraneous evidence.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by Thomas Miller against Elizabeth Livingston, Sr., and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Rawlins, Thurman, Hurd & Wedgwood, for appellants. Zane & Rogers, for respondent.

BARTCH, C. J. It appears from the record that on June 16, 1893, the defendants, Elizabeth Livingston, Sr., Archibald Livingston, John Livingston, and Elizabeth Livingston, Jr., executed and delivered to the plaintiff a promissory note in the sum of \$700, payable on or before two years after date thereof, and secured the same by mortgage upon certain real property situate in Salt Lake City. On August 31, 1898, plaintiff, claiming the note and mortgage to be still due and unpaid, brought this action to foreclose the mortgage and recover the amount due on the note, a certain sum alleged to have been paid by him for taxes assessed against the property, and a certain sum as attorney's fee. Thereafter the defendants filed an answer denying the indebtedness, and set up a counterclaim for a balance of \$1,333.30, claimed by them to be due on the purchase price of certain real estate conveyed to plaintiff by Elizabeth Livingston, Sr.,

and Jane L. Winsness, the consideration mentioned in the deed being \$4,000. In his answer to the counterclaim the plaintiff denied any balance unpaid, and alleged that the true consideration was but \$3,000, and that it was paid at the time of the purchase. At the trial the main controversy between the parties was as to whether the consideration for the real estate conveyed to the plaintiff was in fact \$4,000 or \$3,000. The court found the issues in favor of the plaintiff, and entered a decree of foreclosure. Thereupon the defendants appealed to this court.

The appellants contend that the court erred in sustaining respondent's objection to the question asked the witness Elizabeth Livingston, Sr., in rebuttal, as follows: "What was the agreement as to the consideration for this property?" And also to the one asked another witness, as follows: "What was said in relation to the consideration?" These questions, it appears, related to a verbal agreement respecting the consideration for the property purchased by the respondent, claimed to have been made between the vendors and a person who, it is contended, represented the vendee, at a time anterior to the execution and delivery of the deed, in the absence of the vendee. It was shown, however, by a clear preponderance of the evidence, and the court so found, that at the very time of the making, execution, and delivery of the deed,—at the final consummation of the transaction,—it was understood between all the parties that the real consideration was \$3,000, and that the \$4,000 consideration was inserted in the instrument of conveyance simply "to make it appear better." It was also shown that, at the same time, the \$3,000 was paid in full by the vendee. Under the facts and circumstances disclosed by the record, the evidence thus sought to be introduced could not avail the appellants, and it was therefore properly excluded. It is true, the testimony concerning what occurred between the parties, as to the consideration, at the time of the execution of the deed, is not all harmonious, but, the trial court having had an opportunity to observe the manner and bearing of the witnesses while testifying, and having decided in favor of the respondent, this court will not, in the absence of any apparent oversight or mistake, disturb its findings or decree.

While the recital of the consideration in a deed is *prima facie* evidence of the amount thereof, still a different consideration or amount may be shown by extraneous evidence. Such recital is not conclusive of the fact. 6 Am. & Eng. Enc. Law (2d Ed.) 778-780.

We do not deem it important to discuss any other question presented. There appears to be no reversible error in the record. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

FOGARTY v. FOGARTY. (Sac. 685.)

(Supreme Court of California. June 25, 1900.)

WATERS AND WATER COURSES—USE—CONTRACTS—APPROPRIATION—EVIDENCE—FINDINGS.

1. Defendant's grantors of the T. lot agreed with plaintiff's grantors of the D. lot that the owner of the D. lot should lay a larger pipe to run water from a spring on a ranch into a tank on the T. lot, and also a pipe from the tank to the D. lot. The latter pipe connected with the tank about six inches from the surface, and plaintiff's grantors were to have the water flowing through this pipe. Under this arrangement the water flowing through such pipe was continuously used by the owners of the D. lot until 1899, when the tank rotted out, and the pipe to the D. lot was connected to the pipe leading to the tank, with the consent of defendant's grantor, and all the water was used continuously on the D. lot until 1898. *Held*, that the evidence did not sustain a finding that the water had been appropriated by defendant's grantors, and that they were the owners of such water, since plaintiff's grantors, under the agreement, became owners of the right to the water flowing from the tank, after five years' user.

2. Where plaintiff claimed water diverted by defendants by adverse user for six years, a finding that neither plaintiff nor his grantors have had open, notorious, adverse use of the water does not negative plaintiff's claim of adverse user, since all that is necessary to make a use adverse is a claim of right and knowledge of the claim in the adverse party; it may be adverse without being open and notorious.

3. Where plaintiff and his grantors had acquired the right to use, and did use, all the water that flowed through a pipe from a tank on certain premises, by an agreement with the owner of such premises, plaintiff's right was good against all the world except successors in title to the owner who made such agreement, and defendant must show himself such a successor in order to maintain his right to divert the same.

Commissioners' decision. Department 2. Appeal from superior court, Nevada county.

Suit by J. P. Fogarty against John Fogarty to enjoin the diversion of water flowing in a pipe to the land of plaintiff, and to quiet plaintiff's title to the same. Judgment for defendant, and from an order denying a new trial plaintiff appeals. Reversed.

Thos. S. Ford, for appellant. J. M. Walling, for respondent.

SMITH, C. The suit was brought to enjoin the defendant from diverting water flowing in a pipe to the land of the plaintiff, and to quiet plaintiff's title to the same. The judgment was for the defendant, and the appeal is from an order denying a new trial.

The plaintiff is the owner of a piece of ground known as the "Doyle Place," which for many years has been supplied with water by means of an iron pipe conveying water thereto from a spring on a place known as the "Thomas Rancho," which is the water in controversy; and one of the allegations of the complaint is "that the plaintiff and his predecessors in title are, and have been for six years and over last past continuously, the owners of * * * the said stream of

water." This allegation is denied in the answer. There is no direct finding on the issue thus raised, but it is found that the water was appropriated many years ago by the then owners of the lot now owned by the defendant, and known as the "Thompson Lot,"—"the predecessors in interest of defendant" therein,—and "that, ever since the appropriation of said water, defendant and his grantors have been the owners * * * thereof." But this finding, which may be regarded as inferentially finding against the plaintiff on the issue raised by his allegation of ownership, cannot be sustained, for it appears from the evidence that the plaintiff has a clearly defined legal interest in the water right in controversy, which, to the extent of the right, entitled him to a finding in his favor. The evidence on this point is contained in the deposition of Thompson,—read in evidence by defendant,—who, prior to the year 1869, was the owner of the Thompson lot. The water in question had, prior to his coming, been diverted from the Thomas place to the Thompson lot by means of a half-inch lead pipe, and was then, and for many years afterwards, collected in a tank on the lot. Under these circumstances Thompson entered into an agreement with one Quinn,—the then owner of the Doyle place, and predecessor in title of plaintiff,—under and in accordance with which Quinn replaced the half-inch pipe leading from the Thomas ranch to the tank on the Thompson lot with a one-inch pipe, and laid the half-inch pipe from the tank to his house on the Doyle place. The pipe was connected with the tank about six inches from the surface, and it was agreed that Quinn was to have the surplus water from the tank. Under this arrangement the water flowing through the Quinn pipe was continuously used by him and the succeeding owners of the Doyle place until 1890. In that year the tank had become rotten and decayed, and one Allen, the grantor of the defendant, who claimed to be the owner of the Thompson lot, was applied to by Doyle, the then owner of the Doyle place, to pay half the expense of rebuilding the tank, but declined to do so, having no use for the water at that time. Thereupon Doyle, with the consent of Allen, connected his pipe directly with the pipe leading from the spring to the Thompson lot, and he and his successors in title continued to use all the water on the Doyle place until March, 1898, when the water was diverted by the defendant, to whom Allen had conveyed February 4, 1898.

Under the agreement between Thompson and Quinn it cannot be doubted that the latter acquired an equitable right to the use of the water to the extent agreed upon; that is, to the surplus water not used by Thompson, or—what is the same—to all the water flowing through the orifice in the tank about six inches from the surface. The agreement was indeed merely oral, but it was for a valuable consideration, and was

in fact carried into execution. It was therefore a valid agreement, conveying to Quinn a complete equitable title to the easement for his pipe and to the use of the water as agreed, which could at any time have been enforced by an action for specific performance, and which, pending such enforcement, was equivalent, for all purposes of defense, to the legal title. *Love v. Watkins*, 40 Cal. 547; *Luco v. De Toro*, 91 Cal. 405, 27 Pac. 1082. So, also, in the absence of evidence to the contrary, it must be conclusively presumed that the subsequent user of the right agreed upon was under the agreement, and therefore "adverse, or as of right" (*Washb. Easem.* p. 152 [86]); and thus, at the end of five years Quinn or his successor acquired the legal title to the easement, and became, to the extent of the interest agreed upon, the owner of the right. (*Jones, Easem.* §§ 179, 182; *Washb. Easem.* p. 154 [88-9]). The finding negatives this right, and hence cannot be sustained.

There are other points in the case, but these it will be necessary to consider only in so far as they may affect the further proceedings. The real controversy intended between the parties relates, not to the use of the surplus water, under the agreement between Thompson and Quinn, prior to the rotting away of the tank in 1890, but to the claim of the plaintiff that since then he has acquired, by adverse user, a right to all the water. The allegations of the complaint on this point are that "during that period [i. e. "for six years and over last past"] plaintiff and his grantors have had the continuous, exclusive, uninterrupted, peaceable, notorious, and adverse use, enjoyment, and possession of the said water against defendant and all others, with the knowledge of all, by appropriation, use, and under claim of right, and [that] during all of said time the said plaintiff appropriated said waters to a useful purpose." These allegations are denied in the answer substantially in the language of the complaint, and conjunctively only; and on familiar principles we would have to regard these denials, if not cured by failure to object to their sufficiency, as insufficient to raise an issue. *Deering's Code Civ. Proc.* § 437, note p. 181; 3 *Deering's Cal. Dig.*, "Pleading and Practice," p. 2246, par. 250 et seq. But as no objection was made on this account, and the parties went to trial as though the proper issues had been made, the objection to the sufficiency of the answer may, perhaps, be regarded as waived.

But the finding on this point is also open to a similar objection. It is that neither the plaintiff nor his grantors "have had the open, notorious, adverse use of said water for the period of five years as against the defendant or his grantors." But as all that is necessary to make a use adverse is a claim of right in the party using it, and knowledge of the claim in the adverse party, the use of the water might be adverse without being open or notorious. The finding, therefore,

does not negative the plaintiff's claim of adverse use. But as the appeal is from the order denying a new trial, on the sole ground of insufficiency of evidence, this objection to the sufficiency of the finding cannot be used as ground of reversal. It is alluded to merely for the purpose of directing the court and parties in the further proceedings in the case.

With the same view, a further observation must be made. The plaintiff's right to the use of all the water flowing in the pipe is good against all the world except as against the successors in interest of Thompson. Hence, unless the defendant is shown to be such successor, the plaintiff must recover. On this point there is no evidence appearing in the bill of exceptions to connect Allen, the defendant's grantor, with Thompson. In the findings, indeed, the original appropriators of the water are spoken of as the "predecessors in interest of the defendant," and Thompson himself as "one of defendant's grantors,"—meaning predecessors in title; and this, in the absence of any specification directed at these findings, may perhaps be regarded as a sufficient finding of the acquisition of Thompson's title to the water by the defendant; or, at all events, the sufficiency of the findings in this respect cannot be considered on this appeal. But on a new trial the question will become of importance.

We therefore advise that the order denying a new trial be reversed, and the cause remanded for further proceedings.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is reversed, and the cause remanded for further proceedings.

(129 Cal. 38)

DOUGLASS v. WILLARD. (L. A. 634.)
(Supreme Court of California. June 25, 1900.)
TRIAL—EVIDENCE—ADDITIONAL EVIDENCE
AFTER RESTING—DISCRETION OF
COURT—FINDINGS.

1. In an action to quiet title, plaintiff proved a conveyance under a sale on execution, and rested. Defendant showed a deed of the same premises, executed before, but not filed until after, the certificate of sale to plaintiff was filed. *Held*, that plaintiff thereafter might be allowed to show that he was a purchaser in good faith, without notice, and for a valuable consideration, in the discretion of the court, and, unless such discretion was abused, the order allowing such evidence will not be interfered with.

2. A finding that plaintiff purchased premises for the sum of \$200, and paid that amount therefor, is a finding that plaintiff was a purchaser for a valuable consideration.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by B. M. Douglass against B. E. Willard to quiet title. From a judgment for plaintiff, and from an order denying a new trial, defendant appeals. Affirmed.

E. W. Sargent, for appellant. William Fitzgerald, for respondent.

HAYNES, C. Action to quiet title. Findings and judgment were for the plaintiff, and the defendant appeals from the judgment, and from an order denying a new trial.

The complaint was in the usual form, alleging that the plaintiff is the owner in fee simple of the described lot, that defendant claims an interest therein adverse to the plaintiff, and that her claim is without right, etc. The answer denied these allegations, and alleged that defendant was the owner in fee simple. Neither referred in any manner to the source of title under which they respectively claimed. The plaintiff gave evidence showing a valid sale by a constable of the lot in question, under a judgment rendered by a justice of the peace against J. H. Melvill, the plaintiff being the purchaser; that the certificate of sale was duly recorded on October 23, 1896; the execution of a deed to the plaintiff; and that the deed was recorded April 23, 1897. It was stipulated that the title to the lot in question was vested in said Melvill on February 26, 1890; and the plaintiff then rested. The defendant introduced a deed executed by said Melvill to her on May 1, 1894, and recorded April 17, 1897, after the certificate of sale to the plaintiff was recorded, and six days before his deed was recorded; and the defendant then rested. The plaintiff immediately moved the court to reopen the case and permit him to show that plaintiff was a purchaser for a valuable consideration, and without notice that the defendant or any person other than said Melvill had any interest in said lot. This motion was granted, over defendant's objection, and an exception was taken. The plaintiff thereupon introduced evidence tending to show that he was a bona fide purchaser in good faith and without notice, and for a valuable consideration. If it be conceded that plaintiff could not have introduced this evidence otherwise than by motion and leave of the court, it was clearly within the discretion of the court to grant it. After the defendant had introduced her deed, prior in date to that of plaintiff, the burden was then shifted to plaintiff to show that his purchase was for value, without notice, and prior to the recording of the defendant's deed. *Long v. Dollarhide*, 24 Cal. 218. It is only in cases of abuse of discretion that this court will interfere with an order of the lower court allowing additional evidence to be introduced by a party after he has once rested.

It is contended that there is no finding that the plaintiff was a purchaser for a valuable consideration. It is found by the court that plaintiff purchased the premises for the sum of \$200, and paid the said amount therefor, and at the time "had no notice, actual or constructive, that said J. H. Melvill had sold or conveyed said prem-

ises to the defendant B. E. Willard or to any person." This certainly is a finding that plaintiff was a purchaser, and \$200 is certainly a valuable consideration. See *Forman v. Wallace*, 75 Cal. 552, 17 Pac. 680.

This disposes of the only points urged in defendant's brief. We advise that the judgment and order be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

129 Cal. 40

SCHWIND v. SHORTRIDGE et al. (L. A. 696.)

(Supreme Court of California. June 25, 1900.)

APPEAL—HARMLESS ERROR—FAILURE TO PLEAD DEFENSE.

A complaint in an action on a note alleged that it was made payable on or before two years after its date, and that 27 days after its date the payee assigned it to plaintiff by indorsement and delivery; that certain interest had been paid and indorsed on the note; that a certain sum, the principal sum in said note with certain interest, still remained due and unpaid from the said defendant to plaintiff. Defendant demurred to the complaint, claiming it did not sufficiently allege nonpayment, in that it did not appear therefrom that it had not been paid by defendant to the payee before transfer, or by the payee after it became due, and he is liable as an indorser. His demurrer was overruled, and he answered, but did not plead payment. *Held*, that since the allegation of indorsement and delivery raised a prima facie presumption that it was not paid at the time of its indorsement, and the possession of the indorsee was prima facie evidence of nonpayment, defendant's failure to plead payment raised a presumption that he had no such defense, and on appeal he could not urge the refusal of the trial court to sustain his demurrer as error.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by Adaline Schwind against Charles M. Shortridge and others to recover on a promissory note. From a judgment in favor of plaintiff, defendant Shortridge appeals. Affirmed.

John E. Richards and S. M. Shortridge, for appellant. C. W. Cobb and Graves & Graves, for respondent.

GRAY, C. This is an action on a promissory note and to foreclose a mortgage executed by the appellant Shortridge to the defendant Herbert S. Hall, who indorsed and delivered said note and assigned said mortgage to plaintiff. The defendants, other than Shortridge, made default. Shortridge demurred to the complaint for want of facts, and on the ground that it was uncertain in its allegations as to nonpayment. On his demurrer being overruled, he answered, and on a trial plaintiff obtained judgment against him, from

Cal. Rep. 60-62 P.—23

which he appeals, and in support thereof relies solely on the insufficiency of the complaint. The complaint shows that the note was drawn payable "on or before two years after date," and that some 27 days after its execution the defendant Hall "assigned said note by indorsing the same on the back thereof, and delivering the same to this plaintiff." The allegation of nonpayment of the note is as follows: "That interest was paid thereon to the 27th day of March, 1896; which said payments have been indorsed on the said promissory note, and the sum of forty-five hundred dollars United States gold coin, the principal sum in said promissory note and mortgage, together with interest thereon at the rate of eight per cent. per annum, compounded as in said note provided, from the 27th day of March, 1896, still remains due and unpaid from the said defendant Charles M. Shortridge to this plaintiff." Appellant's contention is that the complaint fails to show that the note was not paid (1) by the appellant to Hall while he was the payee and holder thereof; (2) by Hall to the plaintiff herein during the time that he was liable thereon as an indorser, and after said note became due. The allegation of delivery of the note by Hall to plaintiff at the time it was indorsed, and that plaintiff was subsequently the owner and holder of it, shows prima facie that the note had not been paid prior to such indorsement and delivery, for the possession of the note in the payee or indorsee is prima facie evidence that it has not been paid. *Turner v. Turner*, 79 Cal. 565, 21 Pac. 959. If the note had been paid by any person it would have operated as a discharge of it, and also of the mortgage, and appellant might have pleaded such payment as a defense to the action. He did nothing of the kind, though he further defended the action. Therefore it is not unreasonable to presume that he had no such defense, and that he was in no way misled or otherwise injured by the action of the court in overruling his demurrer. This case should be distinguished from such cases as *Ryan v. Holliday*, 110 Cal. 335, 42 Pac. 891, and other cases cited by appellant, in which there was an entire absence of any allegation in the complaint as to nonpayment. The most that can be said against the complaint herein is that it is not as clear and certain as it should have been in its allegations showing a breach of the contract sued on. It contains, however, in addition to other allegations tending to show nonpayment of the note, a clear statement that the principal and part of the interest on the note is unpaid to the plaintiff by the one from whom it is primarily due. We think the complaint sufficient to support the judgment against this appellant, and if the court erred in overruling the demurrer such error should be disregarded because it did not mislead defendant, was merely technical in its character, and was in no way prejudicial to any substantial right of defendant. *Gassen v. Bower*, 72 Cal. 555, 14 Pac. 206; *Holland v. McDade*, 125 Cal. 353, 58

Pac. 9. We advise that the judgment be affirmed.

We concur: COOPER, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

129 Cal. 45

WISE v. BALLOU. (L. A. 667.)

(Supreme Court of California. June 25, 1900.)

APPEAL—TIME—SUFFICIENCY OF EVIDENCE—REVIEW.

Under Code Civ. Proc. § 939, subd. 1, providing that an exception to a decision, that it is not supported by the evidence, cannot be reviewed on an appeal, unless it is taken within 60 days from the judgment, or (subdivision 3) within 60 days from an order denying a new trial, the question of the sufficiency of evidence will not be reviewed on an appeal taken 61 days after an order denying a new trial has been entered.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county.

Action by John H. Wise against S. D. Ballou. From a judgment for defendant, and from an order denying a motion for new trial, plaintiff appeals. Affirmed.

Graves & Graves, for appellant. F. A. Dorn, for respondent.

HAYNES, C. Claim and delivery to recover possession of 500 sacks of wheat or their value. The defendant had judgment, and the plaintiff appeals therefrom, and from an order denying his motion for a new trial.

The only point made by appellant, and upon which he rests his case, is that the evidence is insufficient to justify the decision. Respondent makes the point that the sufficiency of the evidence to justify the findings and decision cannot be considered, because the appeal was taken more than 60 days after the entry of the judgment, and more than 60 days after the order denying a new trial. The judgment was entered February 11, 1898, the order denying a new trial was made July 2, 1898, and the notice of appeal was filed and served September 1, 1898,—61 days after the order was entered. As there is a bill of exceptions in the record, errors of law occurring upon the trial or appearing upon the judgment roll might be considered upon this appeal, but it is conceded there are none; and, the appeal not having been taken within 60 days after the motion for new trial was denied, the question as to the insufficiency of the evidence cannot be considered. Code Civ. Proc. § 939, subs. 1, 3. The appeal from the order should therefore be dismissed, and the judgment affirmed.

We concur: GRAY, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the order is dismissed, and the judgment affirmed.

129 Cal. 33

PEOPLE v. ROACH. (Cr. 608.)

(Supreme Court of California. June 23, 1900.)

RAPE—AGE OF CONSENT—FORCE—CONSENT—EVIDENCE—ADMISSIBILITY.

1. Where one is prosecuted for assault with intent to commit rape on a girl under the age of consent, evidence that he did not intend to use force, or to accomplish the act without her consent, is immaterial, as legally she cannot consent, and the law resists for her.

2. On an issue whether defendant went into the bedroom of a girl under the age of consent, who was sleeping in a house of ill repute run by her mother and himself, and there assaulted her with intent to commit rape, evidence that defendant told the girl's mother when the girl returned to her room, immediately after escaping from him, to get her clothing, that the latter was a fool, and, if she had any sense, would stay in the house and make lots of money, was admissible as tending to show defendant's object in going to the room.

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county.

D. E. Roach was convicted of an assault with intent to commit rape, and he appeals. Affirmed.

J. B. Curtin, for appellant. Atty. Gen. Ford, for the People.

CHIPMAN, C. Information for assault with intent to commit rape. The jury returned a verdict of guilty as charged in the information, and judgment was entered thereon that defendant be imprisoned at Folsom for the term of eight years. The appeal is from the judgment, and from the order denying defendant's motion for a new trial.

1. It is contended that the verdict was contrary to the evidence. It appears that the alleged assault was upon a girl under the age of 14 years, and hence under the age of consent. A full statement of the facts and circumstances cannot be set forth in an opinion, with due regard for the ordinary laws of propriety and common decency. Defendant claims that the evidence fails to bring the case within the rule laid down in *People v. Fleming*, 94 Cal. 311, 29 Pac. 647, where it was said: "The assault must have been made with intent to commit rape notwithstanding all possible resistance that could be made. The intent must have been to perpetrate the crime at all events, regardless of what the prosecutrix might or could do to prevent it." In that case the female was of the age of 24 years, and force was a necessary element of the crime, and so, also, was consent a question necessarily involved. In the present case neither the element of force, nor the question of consent, has any application. The prosecutrix could not consent, and the law resists for her. *People v. Verdegren*, 106 Cal. 211, 39 Pac. 607. We must judge of defendant's intent by his conduct, and not by that of his victim. She had gone to bed with her mother, who, with defendant, was running a disreputable saloon and house, called "Dawson Saloon," at Cherokee, in Tuolumne

county. The girl usually lodged with a neighbor, Mrs. Scanavino, and took her meals at her mother's place. On the night of May 24, 1899, however, she slept with her mother at the Dawson Saloon. The next morning she was aroused from sleep by the manipulations of defendant, and found him undressed and in bed with her, and her mother not there. In her testimony the girl states how she struggled to free herself from defendant, and his efforts to detain her; that he got on top of her and tried to raise her gown; that she screamed and held her gown down, and he let her go; that he got out of the bed and went to the door through which she ran to escape, and held it to prevent her from getting away, when she again screamed, and he let her go out into an adjoining room. She had undressed in her mother's room, and went back to get her clothing, when he tried again to catch her, and her mother, appearing, told him to let her alone. She dressed and went immediately to Mrs. Scanavino's house, and told her of defendant's conduct. There were certain unmentionable acts on his part which clearly showed his intent to have sexual intercourse with the girl, and, from all the facts and circumstances, we think it sufficiently appeared that his intent was to have carnal intercourse with the girl. If he had succeeded, it would have been rape, with or without force, and with or without her consent; and it must follow that, as his intent was to violate the person of the girl, it constituted an assault with intent to commit rape. In *People v. Courier*, 79 Mich. 366, 44 N. W. 571, the court said: "In cases of this kind it is not necessary that it should be shown, as in rape, that the accused intended to gratify his passion at all events. If he intended to have sexual intercourse with the child, and took steps looking toward such intercourse, and laid hands upon her for that purpose, although he did not mean to use any force, or to complete his attempt if it caused the child pain, and desisted from his attempt as soon as it hurt, he yet would be guilty of an assault with intent to commit the crime charged in the information." In *State v. Sherman*, 106 Iowa, 684, 77 N. W. 461, an instruction was held good that charged that if the defendant asked or caused the child to lie down upon the ground, and disarranged her clothing, for the purpose of having intercourse with her, it would constitute an assault, and if, in addition, the jury should find that it was defendant's intention in so doing to carnally know her, and she was then under the age of consent, and nothing further be shown, the defendant would be guilty of assault with intent to commit rape.

2. It is claimed that the court erred in overruling defendant's objection to the following question, and in refusing to strike out the answer thereto: "Q. What did you hear the defendant say, if anything?" The question related to what defendant said when she returned to the room for her cloth-

ing, and just after she returned to her own room and was dressing. The answer was: "Well, he said I was a fool; if I had any sense I would stay there and make lots of money, because I was young, and people would naturally take me because I was young." This remark was made to her mother, who, it seems, was a disreputable character, and had shown a disposition to help defendant in the accomplishment of his purpose in the early stage of his efforts; for she came into the bedroom while her daughter was struggling with defendant, and told her to be quiet; that he would not hurt her,—and went out without giving her any assistance. The remark of defendant, now objected to, tended to cast some light on his intent in going to the room, and manifestly had reference to the encounter he had just experienced with the girl, and was clearly admissible. It is advised that the judgment and order be affirmed.

We concur: COOPER, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

129 Cal. 39

MORAN v. McINERNEY et al. (S. F. 1,374.)¹

(Supreme Court of California. June 22, 1900.)

PARTNERSHIP—DISSOLUTION—DECREE—REAL PROPERTY—TRIAL—FINDINGS.

1. In decreeing the dissolution of a co-partnership it was error to enter a decree that plaintiff have an undivided half of the partnership real property, but leaving the title in defendant, without the consent of the parties, as the parties were entitled to a severance of interests.

2. A decree in the dissolution of a partnership, which distributed the real property subject to liens for certain debts and for costs, was defective, as such property should have been treated as personality, and sold, and all proper charges paid from the proceeds.

3. Where a debtor made an assignment for the benefit of his creditors, but the assignee never filed an inventory, or qualified as such, and the assignor subsequently settled with his creditors, the assignee had no lien on the property for a debt due him, as his title ceased when the trust failed.

4. Where the plaintiff, in a suit for the dissolution of a partnership, brought in a third party, alleging that he had acquired an interest in the property, a finding, on such issue, that the third party had succeeded to the interests of the purchasers at an execution sale under a judgment against the defending partner, and had no interest except in the share of such partner, but not defining the interest, was erroneous.

5. In a suit for the dissolution of a partnership, brought against a partner and his creditors who claimed an interest, a decree giving the plaintiff an undivided half, and declaring that, if any money remained of the respective halves, it should be paid to the parties respectively, but not stating the portion of defendants, was erroneous.

¹ For opinion on petition for rehearing, see 61 Pac. 948.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Thomas Moran against Thomas McInerney and others. From a decree in favor of plaintiff, defendants appeal. Reversed.

M. C. Hassett, for appellants. T. Z. Blake-man, for respondent.

TEMPLE, J. The action was brought against defendant McInerney to dissolve a co-partnership, and for an accounting. Plaintiff also asked that certain property be declared to be partnership property, and be distributed between plaintiff and defendant as partners. McInerney answered, and denied the existence of the partnership, and all allegations made by plaintiff in respect thereto. In this state of the pleadings a trial was had, and an interlocutory decree was entered. No findings were made, but it was decreed that plaintiff and defendant did, prior to May, 1870, enter into and form a co-partnership for the purpose of buying and selling real estate, and subsequently did buy and sell real estate in pursuance of the partnership agreement, and that plaintiff was entitled to have said partnership dissolved, and a referee was appointed to state an account. This decree bears date May 2, 1880. Subsequently, January 9, 1891, plaintiff filed a supplemental complaint, bringing in and making defendants George W. Burnett, the Humboldt Savings & Loan Society, and Patrick Cahill. In this supplemental complaint it is alleged, *inter alia*, that in 1884 McInerney conveyed to Burnett certain property, alleged to have been the property of the co-partnership, to secure payment to Burnett of the sum of \$2,756.00, to redeem the land from foreclosure sales upon mortgages existing on the land when the same were purchased for the co-partnership; and also that defendant McInerney, in 1884, after the commencement of this action, assigned and conveyed to said Cahill, for the benefit of the creditors of McInerney, all the real and personal property of McInerney; that Cahill never filed an inventory or qualified as such assignee, and subsequently McInerney settled with his creditors. Burnett answered, admitting the conveyance, but denied that it was intended as a mortgage. Cahill also answered, admitting the conveyance to him, but alleging that McInerney was indebted to him, and demanded payment out of the interest of McInerney. Later, other supplemental complaints were filed, charging that McInerney had conveyed, since the commencement of the action, other interests in the land, and, among others, that M. C. Hassett had acquired an interest by conveyance from McInerney, and that Hassett acquired such interest with full notice of the rights of plaintiff in respect to the land. Answers were interposed to these supplemental complaints, a trial had, findings made, and a decree was entered.

The first objection to the judgment is that the court erred in decreeing that plaintiff have and recover from Thomas McInerney and the other defendants an undivided one-half of the property (describing it). Supposing McInerney to be merely the trustee of plaintiff, this certainly was a very unusual form for a decree. The title was left in McInerney, but, by the judgment, plaintiff would be let into joint possession with the defendants. This is a proper form of a judgment in ejectment, but not in an action by a cestui que trust to get the title from his trustee. But the action was for a dissolution of a co-partnership. In such case the real estate should be treated as personal property, and sold to pay debts, if there are any, and the residue distributed. *Coward v. Clanton*, 79 Cal. 23, 21 Pac. 359; *Bates v. Babcock*, 95 Cal. 479, 30 Pac. 605, 16 L. R. A. 745. In this case the property was distributed subject to several liens to secure partnership debts, and even subject to liens to secure the individual debts of each of the partners. Unless the parties consent to such a decree, it should not be entered. To have their interests severed is itself a relief to which each partner is entitled. But the court has no power to declare that certain debts, and especially costs, shall constitute liens upon the partnership property. If the costs or indebtedness was properly payable out of the partnership assets, the court could and should have caused a sale to be made of the assets, and could have ordered such claims paid from the proceeds; but a lien cannot be created by the court upon the partnership property, or upon the portions assigned to the parties.

Cahill filed no cross complaint. He asked for affirmative relief in his answer; but this was not served on McInerney, nor did McInerney answer it as a cross complaint. No issue was made between Cahill and McInerney, and no judgment could have been rendered establishing, as against McInerney, a money demand.

Hassett, having been made a defendant by a supplemental complaint, answered, admitting that he had acquired an interest in the property described in the complaint since the commencement of the action, but denied that plaintiff had any title to or interest in the property, as partner or otherwise. In the findings the court finds that several judgments were rendered against McInerney, under which execution sales were made; that Hassett succeeded to the interests of the purchasers; and that sheriffs' deeds, in pursuance of the sales, were made to Hassett or his grantors. It does not find what interest Hassett has in the property, or whether he has any, but that he has none except "in the share or portion thereof belonging to the defendant McInerney." Supposing this to be intelligible language, it is yet a failure to define either the interest of Hassett or McInerney. In the decree, as stated, nothing is ad-

judged to either McInerney or Hassett. The plaintiff merely recovers from them and the other defendants an undivided one-half of the property. In the conclusion of the decree, however, it is provided, referring to a possible sale of the property and the payment of certain demands: "If any money remains of the respective halves of the plaintiff and defendants, the same shall be paid to them or their attorneys, respectively." To what defendants, or in what proportions, is not stated. In short, the findings and decree are formed on the idea that the plaintiff is suing to recover specific property from the defendants, and not to obtain the dissolution of a partnership, the liquidation of its debts, and the distribution of its assets.

The judgment in favor of Burnett is also erroneous, as it is not supported by the findings.

The judgment is reversed, and the cause remanded for a new trial.

We concur: HENSHAW, J.; McFARLAND, J.

129 Cal. 36

McBRIDE v. NEWLIN, County Clerk, et al.
(L. A. 694).

(Supreme Court of California. June 23, 1900.)
COUNTIES — OFFICERS — SUPERVISORS — ALLOWANCE OF CLAIMS — INJUNCTION — PLEADING.

1. The county board of supervisors, being authorized to pass on claims against the county, in doing so acts in a judicial capacity, and injunction will not lie at the instance of a taxpayer to prevent the allowance of a claim, or its payment when allowed.

2. A petition to enjoin a board of county supervisors from allowing, and the treasurer from paying, a certain claim, was fatally defective, where it did not allege that such bill had been made out or filed, or that it would be presented.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Bill by R. Y. McBride against T. E. Newlin, county clerk, and others. From a judgment sustaining a demurrer to the bill, plaintiff appeals. Affirmed.

Hester & Ladd, for appellant. J. A. Donnell and Flint & Barker, for respondents.

COOPER, C. The court sustained a demurrer to the complaint, and judgment was entered for defendants. This appeal is from the judgment and for the purpose of reviewing the order sustaining the demurrer.

The action was brought by plaintiff, as a taxpayer, for the purpose of enjoining the board of supervisors of Los Angeles county from allowing or ordering a warrant drawn, the auditor of the county from drawing the same, and the treasurer from paying any such warrant, for a claim of defendants Fridham & Faulkner for printing a supplemental register of the county, which claim

61 P.—37

for printing is alleged to be illegal for certain reasons not necessary to be discussed in this opinion. The demurrer was properly sustained. The case is clearly within the rule laid down in *Linden v. Case*, 46 Cal. 171, and *Merriam v. Supervisors*, 72 Cal. 519, 14 Pac. 137. The board of supervisors, in passing upon a claim, act in a quasi judicial capacity. *Colusa Co. v. De Jarnett*, 55 Cal. 375; *McFarland v. McCowen*, 98 Cal. 331, 33 Pac. 113. In the latter case the plaintiff presented an itemized bill against the county for services alleged to have been performed as constable, and the board of supervisors allowed the claim and ordered the warrant drawn. The defendant, as auditor, refused to pay the warrant, and attempted to show that plaintiff never in fact performed any services for the county. This court held the adjudication of the board of supervisors, as to the fact of whether or not the services had been performed, final and conclusive. In the opinion it is said: "The claim of respondent for fees in payment of services as constable was one which the board of supervisors had jurisdiction to hear and determine." The board of supervisors, being the body clothed with quasi judicial functions, is the appropriate tribunal to pass upon the claim which it is alleged will be allowed. We must presume that the board will do its duty, and if the claim is illegal that it will be rejected. In order for the court to have issued an injunction in this case, it would have to determine that a tribunal possessing judicial powers was intending to and would violate the law. If an injunction would lie in such case, on the same principle it would lie against the superior court in case it were alleged that such court intended to decide some case contrary to law.

The complaint is fatally defective in other respects. It is not alleged that any claim for said printing has been made out or filed with the board of supervisors, or that any such claim will be presented. The cases cited by appellant are not in conflict with what has here been said. In *Winn v. Shaw*, 87 Cal. 632, 25 Pac. 368, the action was for the purpose of restraining the auditor from drawing his warrant for the purchase price of land which the board of supervisors had no power to purchase without publishing notice as required. In *Bradford v. City & County of San Francisco*, 112 Cal. 537, 44 Pac. 912, the action was for the purpose, among other things, of enjoining the board of supervisors from incurring an indebtedness and levying a tax in violation of the county government act, and in excess of the revenue provided for the fiscal year. We advise that the judgment be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

6 Cal. Unrep. 448

DIAMOND COAL CO. v. COOK et al.
(L. A. 645.)

(Supreme Court of California. June 23, 1900.)

CORPORATION — PLEADING — WAIVER — SUFFICIENCY — EVIDENCE — PRESUMPTIONS — OBJECTIONS — STATUTE OF FRAUDS — DEBT OF ANOTHER — EQUITY — TRIAL.

1. Where defendant demurred to the complaint, but the record did not show that the demurrer was passed on, or that any ruling thereon was called for, but defendant afterwards answered, the demurrer must be deemed to have been waived on appeal.

2. In action against two, a complaint alleging that plaintiff and defendant, on a certain date, entered into a written agreement, and setting out the agreement, was sufficient as an averment that a certain one of the defendants entered into such agreement.

3. Where a plaintiff owned a certificate of purchase of state school lands, and the court found that plaintiff was a corporation, but there was no other proof, such certificate is admissible in evidence, as it will be presumed that the corporation had power to purchase and hold lands.

4. In an action to cancel a sale of land to one, and to enjoin another from removing wood therefrom, on which wood the second defendant claimed a lien by virtue of a promise by plaintiff and the other defendant to pay for cutting it, such second defendant cannot object to the validity of the contract of sale between plaintiff and the first defendant, when offered to prove the issues between them.

5. Where plaintiff objected to testimony, and the court reserved decision, and, on re-examination in chief, the evidence was given without objection, it was within the discretion of the court to allow a motion to strike out the evidence without a restatement of the grounds of objection; it being regarded as a renewal of the first objection.

6. Where defendant had cut wood on plaintiff's property at the instance of a third person, and claimed a payment from plaintiff by virtue of a promise to pay, made after the cutting, but defendant had stated that he would hold the wood until he received payment, and that he did not care whether plaintiff or the third party paid, such promise was within Civ. Code, § 1624, subd. 2, declaring contracts to answer for the debt of another invalid unless in writing; and such promise is not valid under section 2794, subd. 3, providing that such promise is good where the party receiving it cancels the antecedent obligation, and accepts the new promise as a substitute.

7. Where an action was brought to cancel a contract for the sale of land to one defendant, and to enjoin another from removing wood from the land, and the defendant to the injunction claimed a lien on the wood for cutting it, and asked for foreclosure thereof, the plaintiff's action being equitable, as were also the predominant features of the defense, it was not error for the court to set aside the jury's answers to interrogatories, and substitute findings of its own, though they were contrary to the findings of the jury.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Bill by the Diamond Coal Company against R. L. Cook and H. D. Welch. From a judgment in plaintiff's favor, and from an order denying a new trial, defendant H. D. Welch appeals. Affirmed.

George B. Cole, for appellant. Bledsoe & Bledsoe, for respondent.

CHIPMAN, G. Action to cancel a contract of sale and purchase of land, and for an injunction to prohibit the removal of wood from said land. Certain special issues were submitted to and answered by a jury, but the court set these aside, and made findings of its own, and gave judgment for plaintiff, as prayed for in the complaint. Defendant Welch appeals from the judgment, and from an order denying his motion for a new trial.

1. The defendants appeared by demurrer, alleging that the complaint does not state facts sufficient to constitute a cause of action. There is also an attempt to demur for ambiguity, but the statements are not such as to raise an issue of law on this ground. Defendant Cook did not answer and does not appeal. Defendant Welch answered, and the trial seems to have proceeded as though both defendants were in court. So far as appears by the record, the demurrer to the complaint was not passed upon, and it is not shown that defendants called for any ruling upon it, or called the attention of the court to it in any way. Appellant now claims that "the complaint does not state facts." We presume he means to have us add, "sufficient to constitute a cause of action." The particular wherein it is now claimed that the complaint was lacking in its facts is that there is no distinct averment that defendant Cook entered into the agreement set out in the complaint. The allegation is: "That on the [giving date] plaintiff and defendant entered into a written agreement, * * * which agreement is in the words and figures following, to wit." Then follows the agreement in *hæc verba*. This was sufficient. Appellant does not suggest any other defect in the complaint, or other reason why it is insufficient, and we do not feel called upon to look for others. The demurrer must be deemed to have been waived. *Silcox v. Lang*, 78 Cal. 118, 20 Pac. 297.

Defendant Welch answered, denying ownership of the land by plaintiff; denying the allegations as to Cook's entering into the agreement pleaded, or that Cook failed to perform; denying that Cook fraudulently procured defendant Welch to cut wood from the premises, and denying his own insolvency; alleging that prior to December 19, 1895, the date of the contract, he cut about 700 cords of wood on the premises, and delivered at Hesperia about 550 cords, and that he had about 150 cords on the premises not yet hauled, all of which was with plaintiff's knowledge and consent; that, after this wood was cut, plaintiff agreed to pay defendant Welch for it, and told him that he might look to plaintiff for his pay, and that plaintiff agreed to pay him certain stated prices per cord; admitting that he has threatened to sell the wood, and would have sold it if he had not been restrained. He prays for a dissolution of the injunction, for judgment for \$655, and for general relief.

In a cross complaint defendant Welch sets forth the facts as to cutting the wood, as above stated, at plaintiff's instance and request, and alleges the promise of plaintiff to pay him the prices as previously stated in the answer. The cross complaint further sets forth that he has been in possession of the 150 cords of wood not yet delivered, and still is in possession, and that he has a lien thereon for work done and service performed. He prays judgment of foreclosure of his said lien; that said wood—presumably the 150 cords—be sold to pay his claim, and, "if there should be an over-plus, that it be applied in payment of said two hundred cords of wood delivered," etc.; "and if the court should find that cross complainant is not entitled to have said lien foreclosed, that then cross complainant have judgment against plaintiff for the cutting of said wood," and that "he have such other and further relief and judgment as are just and equitable in the premises." Plaintiff demurred to the answer and cross complaint for insufficiency of facts, and on the ground of ambiguity. The demurrer was not passed upon by the court, and need not be further noticed. Plaintiff answered the cross complaint, denying its allegations, and averred that defendant Welch was employed by defendant Cook, and that Cook, and not plaintiff, agreed to pay him. The jury returned answers to certain special issues, which the court followed, except in one particular, in its findings of fact. In a running commentary upon the case, appellant makes numerous points in addition to the one already noticed, which will be examined in the order as they appear in his brief.

2. Plaintiff's certificate of purchase, when offered in evidence, was objected to by defendant for several reasons. The only one now urged is that there was no proof that plaintiff corporation was empowered, by charter or otherwise, to hold or own state school lands, or a certificate of purchase of the same. The court found that plaintiff is a corporation, but there was nothing in the case to show the purpose for which the corporation was organized, nor to show the nature of its business. It must be presumed that it had power to purchase and hold land. *Bank v. Staples*, 98 Cal. 189, 32 Pac. 993.

3. The agreement was objected to, when offered in evidence by plaintiff, on the ground that there was no evidence showing that it was executed by authority or resolution of the directors entered on the records of the corporation. The agreement was entered into between defendant Cook and plaintiff. Defendant Welch was not a party to it. The offer was to prove the issues in the case affecting Cook, and not affecting Welch. The only relief sought against Welch was to restrain him from taking wood from plaintiff's land. The invalidity of the contract was immaterial so far as it concerned Welch. He claimed under a sep-

arate and distinct contract. Conceding error, it was harmless.

4. Defendant Welch, as a witness in his own behalf, testified that about March 20, 1896, one Kellam, secretary of the plaintiff corporation, came to witness' house, and told him that Cook had forfeited his contract, and no longer had anything to do with the wood, and that he (witness) could look to plaintiff for his pay for the wood. He testified that he had cut the wood with the knowledge of Kellam, but under orders from Cook, and was to receive \$1.30 per cord for wood not delivered, and \$2.30 per cord for wood delivered at the railroad. After he had testified to the promise made by Kellam, it appeared on cross-examination that it was not in writing, whereupon plaintiff objected to the evidence, and moved to strike it out on the ground, among others, that it was incompetent as the promise to answer the default or miscarriage of Cook. The court reserved its ruling, and the trial proceeded. On re-examination in chief the same facts were brought out without objection, and two other witnesses,—Welch's wife and his son,—who claimed that they were present when Kellam made the promise, testified to the facts without objection. Kellam was recalled in rebuttal, and denied making the promise, whereupon plaintiff moved to strike from the record all evidence concerning the promise of Kellam to Welch, including the testimony of Mrs. Welch and her son, that had been received without objection. The court granted the motion, and defendant excepted. The motion was doubtless regarded as a renewal of the objection made to the testimony of Welch, and to that of his wife and son to the same effect, and in that view it was not necessary to restate the grounds of the motion. It was within the discretion of the court to grant the motion, although the evidence went in without objection. The cases cited by appellant are instances where the court refused to strike out evidence that had not been objected to, which presents a different question from that now here. There was evidence tending to show that Welch was employed by Cook, and was to be paid by Cook. It was after the wood was cut, and some had been disposed of, and plaintiff found that Cook was not keeping his contract, that Welch claims Kellam came to him, and made the promise testified to by Welch and his wife and son. It was clearly a promise to answer for the debt or default of Cook, and was invalid because there was no note or memorandum thereof in writing, subscribed by the party to be charged or by his agent (subdivision 2, § 1624, Civ. Code); and we do not think the evidence brings the case within the exception mentioned in subdivision 3 of section 2794 of the same Code, as claimed by appellant. There was no evidence that Welch canceled the antecedent obligation of Cook, and accepted the new promise as a substitute therefor; nor does it appear that there

was any consideration beneficial to plaintiff, moving from either party to the antecedent obligation. Welch was asked what he said in reply to Kellam, and answered: "I told him, all right; if Mr. Cook didn't have anything to do with the wood, if he would pay me for it, all right; that I didn't care; and he said that Mr. Cook didn't have anything to do with the wood whatever, and that I could look to the Diamond Coal Company for my pay. Q. And did you? A. Yes, sir; and I have ever since. Q. Have you looked to Mr. Cook since that time for pay? A. No, sir. I didn't consider that he owed me anything. This was the first time I ever saw Mr. Kellam out at my place, and that was the only conversation that I had with him that he promised to pay me anything. Before that time I looked to Mr. Cook for my pay." He further testified that he continued to hold possession of the wood, and claimed a lien on it for his pay. Mrs. Welch testified that her husband said the wood should not be removed until he had his money for it. She testified: "Mr. Welch said that he held his lien on that wood, and that it should not be removed till he got his money. He didn't care who paid it,—Mr. Cook or Mr. Kellam." We find no evidence that Welch in any way released Cook or canceled Cook's obligation to him, and, so far as the evidence shows, that obligation still exists. Nor can we discover from the evidence that any consideration moved to the promisor, plaintiff, or that Welch suffered any detriment, or forebore or lost any alleged right to or lien upon the wood. He still retained his claim of lien, and is now asserting it. There had been no previous contract relations between Welch and plaintiff to which we can look in aid of the promise now being urged. There may be hardship, and there generally is in this class of cases, in enforcing the rule; but the duty of the court is none the less imperative to administer the law as it finds it.

5. It is urged that the court erred in setting aside the verdict. The jury returned answers to the special issues submitted to it on November 29th, and some days after the trial had closed, to wit, on December 13th following, the court "set aside the verdict of the jury, and decided said cause in favor of the plaintiff, and ordered that plaintiff have judgment as prayed for, and directed plaintiff's attorneys to draw judgment and findings." Defendant contends that this is an action at law, and that defendant was entitled to have the answers of the jury stand. The action was to foreclose Cook's interest in the contract of purchase. Welch was made a party for the purpose of enjoining him from removing the wood and timber on the land in question. Thus far the action was clearly equitable. Welch admitted his intention to remove the wood unless restrained. He claimed a lien on 150 cords of wood, and asked to have the lien foreclosed, and the wood sold to pay his claim for these 150

cords, and he also asked to have any surplus of money arising from the sale applied to pay his claim for the 200 cords of wood delivered at the railroad. The predominant features of Welch's defense are equitable, while the plaintiff's action is purely equitable. Furthermore, defendant made no claim at the trial, as he now does, that his cross complaint presented grounds for relief at law. The record shows that certain special issues were "settled and allowed as the only special issues to be submitted to the jury." These special issues did not embrace all the issues presented by the pleadings. The verdict was merely advisory to the court, and, unless adopted by the court, could be disregarded, and the court could make findings of fact. *Warring v. Freear*, 61 Cal. 54, 28 Pac. 115.

6. For like reason it was not error for the court to find an issue of fact contrary to the verdict of the answer given by the jury to that issue; and also for like reason it was not error for the court to refuse to instruct the jury as requested by defendant. The findings support the judgment, and it is advised that the judgment and order be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

120 Cal. 51

FONTANA et al. v. PACIFIC CAN CO.
(S. F. 1,431.)

(Supreme Court of California. June 25, 1900.)
CORPORATIONS—CONTRACT—VALIDITY — CONSTRUCTION—NONSUIT—GROUNDS—SPECIFIC STATEMENT.

1. One claiming under a contract of a corporation, executed without its corporate seal by its president and secretary, must show that they were clothed with general or special authority to make it, or had powers from which such authority might be inferred, or that their act was ratified by the board of directors.

2. That the grounds stated on a motion for a nonsuit were not sufficiently specific was harmless, where the defects in the case could not have been cured if attention had been specifically called to them.

3. Defendant corporation agreed that plaintiff should receive all dividends on certain shares of its capital stock on which he held an option, during the period the option was to run, and that it would make good any deficiencies in said dividends below 4 per cent. per annum; but there was no guaranty that the dividends should be paid annually or at any stated period. The dividend paid for the first year exceeded 4 per cent. for the whole period, but no dividend was declared thereafter. *Held*, that defendant's liability was discharged by the payment of the first dividend declared.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

Action by M. J. Fontana and others against the Pacific Can Company. From a judgment for plaintiffs, defendant appeals. Reversed.

Olney & Olney, for appellant. Naphtaly, Freidenrich & Ackerman, for respondents.

CHIPMAN, C. Plaintiff sued to recover a balance due upon the following contract, alleged to have been entered into by plaintiffs and defendant on the day of its date: "Agreement between the Pacific Can Company and Fontana & Company, both of the city and county of San Francisco: That the former shall sell to the latter two hundred and fifty (250) shares of the capital stock of the Pacific Can Company, at two hundred (200.00) dollars per share. Payment to be made by the latter's note for fifty thousand (50,000) dollars, one day after date, with interest at six per cent. per annum. Both stock and note to be placed in escrow at the Anglo-California Bank, subject to the following conditions: Said Fontana & Company may take up said note, with accrued interest, and receive said stock in satisfaction thereof, at any date prior to February 1, 1896, or they may require that said note be returned to them, provided said stock be returned to the Pacific Can Company at any date before February 1, 1896; interest on said note being paid to the date of said return. Said Pacific Can Company agree that all dividends declared on said stock up to either of the above dates shall be paid to said Fontana & Company, and that said Pacific Can Company will make good to Fontana & Company any deficiencies in said dividends below ten (10) per cent. per annum. Should there be no dividends paid, then the Pacific Can Company agree to pay Fontana & Company ten per cent. interest on the amount of the note from the time of the purchase of the stock until the cancellation of the note and the return of the shares. Said stock shall be returned to said Pacific Can Company, and said note to Fontana & Company, on February 1, 1896, under the above conditions as to interest and dividends, if the latter should not previously assume ownership in either way above provided. Signed in triplicate. San Francisco, April 25, 1894. Pacific Can Company, by John Lee, President, A. D. Cutler, Secretary. Fontana & Co." Defendant denied specifically the allegations of the verified complaint, and set up a cause of action for damages against plaintiffs on account of an alleged agreement on their part to purchase cans for the year 1895 from defendant. Plaintiffs purchased no cans from defendant for that year. The court found against defendant on this issue, and, as the evidence was conflicting, defendant does not urge the claim here. The court found that the contract of April 25, 1894, "was executed on behalf of defendant by its president and secretary, and the execution of said contract by said officers was not without authority of its board of directors, and was not without authority of law. Said contract was duly made and executed by said corporation." This finding is attacked as unsupported by the evidence; the defendant claiming in its

answer and at the trial that the contract was unauthorized and void. Plaintiffs had judgment for \$2,458.35, with interest at 7 per cent. per annum from February 1, 1896. Defendant appeals from the judgment, and brings the evidence up by bill of exceptions.

Plaintiff offered in evidence the contract sued upon, which is set out supra. The record reads as follows: "Said document [the contract] was not under the seal of the corporation. The witness testified that there were three originals of said document, and that the one shown here was one of the originals. Thereupon the counsel for the plaintiff offered it in evidence." Defendant objected on the following grounds: That the corporation had no authority to execute any such contract; that upon its face it appears to be ultra vires; that it is contrary to public policy and void; that it does not purport to be executed by the corporation, in this: that it is not under the seal of the corporation, and there is no proof yet that the signatures of the officers are their genuine signatures, nor that they were authorized to make the contract. The objections were overruled, and the contract was admitted in evidence; defendant reserving an exception. Plaintiffs cite in support of the ruling *Pixley v. Railroad Co.*, 33 Cal. 183, and *Crowley v. Mining Co.*, 55 Cal. 273. Plaintiffs do not claim that there was any evidence (and there was none) showing that the directors of the corporation had, by resolution or by any other action, official or otherwise, authorized the president and secretary to make the contract. There is no evidence that either of these officers was clothed with general or special powers to make such a contract, or had any powers from which it might be inferred that they, or either of them, could make such a contract. There was no corporate seal attached. There is no evidence or claim of subsequent ratification by the directors of the corporation. The *Pixley* Case is not authority for the broad proposition that the partial execution of a contract by a corporation raises the presumption of authority to make it. The presumption in that case arose from the established acts of the directors of the corporation, as well as from the part execution of the contract. In the case here there is no evidence that the directors ever knew of the contract, much less authorized it by their conduct or acts. Nor does it follow, as is claimed, that the contract was under seal because it was executed, and because the certificate of the shares issued under the contract was under seal. It is affirmatively shown that the contract bears no seal of the corporation, and its absence is not accounted for in any way. The seal on the certificate of shares is not the slightest evidence that a seal was attached to the contract. Besides, whatever presumption arose that the seal was attached was overcome by the admission that in fact no seal was attached. The principle decided in the *Crowley* Case has since been approved, and is not now questioned.

But in that case it was admitted that the president of the corporation, who made the contract, was also superintendent and general managing agent of the mining corporation; and it was held that authority may be inferred from the admitted relations of the agent to the corporation, or from its course of business. No such facts appear here. We do not think the finding is supported by the evidence. *Barney v. Pforr*, 117 Cal. 56, 48 Pac. 987; *Pauly v. Pauly*, 107 Cal. 8, 40 Pac. 29; *Blood v. Water Co.*, 113 Cal. 221, 41 Pac. 1017, 45 Pac. 252.

At the close of plaintiffs' case, defendant made a motion for nonsuit on grounds which, in our opinion, would not ordinarily have been sufficiently specific to bring it within the well-established rule as stated in *Daley v. Russ*, 86 Cal. 114, 24 Pac. 867, and cases there cited. See, also, *Palmer v. Publishing Co.*, 90 Cal. 168, 27 Pac. 21. The rule, however, does not apply if the case is one that cannot be cured, although attention be specifically called to the defects. *Daley v. Russ*, *supra*. Aside from the failure to make the proof of authority, we think the contract on which plaintiffs relied gave them no cause of action, and for this reason the motion for nonsuit should have been granted.

The court found that defendant paid plaintiffs a dividend of \$25 per share on 250 shares November 1, 1894, amounting to \$6,250. Plaintiffs' contention is (and the trial court so construed the contract) that defendant agreed to guaranty a dividend of not less than 10 per cent. per annum, and to pay all dividends in excess of that amount; that the first dividend was paid during the first year, and plaintiffs were entitled to all of it, less 6 per cent. interest to be paid defendant on the note; that, there being no dividend declared the second year, the guaranty was to pay 10 per cent. for that year, regardless of the dividend already paid, and up to February 1, 1896, less interest on the note. We cannot so construe the contract. There was no guaranty that dividends should be declared once a year, or at any stated periods. The agreement was that "all dividends * * * shall be paid to said Fontana & Company, and that said Pacific Can Company will make good to Fontana & Company any deficiencies in said dividends [i. e. in such dividends as should be declared] below ten per cent. per annum." This meant that, for the period the contract was to run, the dividends should amount to 10 per cent. per annum. This construction, it seems to us, is strengthened by what follows, to wit: "Should there be no dividends paid, then the Pacific Can Company agree to pay Fontana & Company ten per cent. interest on the amount of the note from the time of the purchase of the stock until the cancellation of the note and the return of the shares." Simply stated,

defendant agreed that in any event plaintiffs should receive all dividends, no matter how large, and, if no dividend was declared, plaintiffs should receive the equivalent of 10 per cent. per annum on the amount of the note, less 6 per cent., or 4 per cent. net. It is altogether probable that defendant understood the contract as to the purchase of cans to be that plaintiffs were to buy cans from defendant for the year 1895 as well as for 1894; otherwise, there would seem to have been no reason for making the contract run to February 1, 1896, and there was evidence tending to show this to be the contract. There was evidence to the contrary, however, which the trial court adopted, and the finding as to this fact cannot be questioned here. But this view of the evidence taken by the court did not warrant it in finding the contract now before us to mean something different from its obvious import. To illustrate, suppose no dividends whatever had been declared; what would have been the measure of plaintiffs' right to recover? Clearly, 10 per cent. per annum, less 6 per cent. per annum to be paid defendant for the period of the contract. Suppose the dividend declared had occurred at the end of the period, instead of November 1, 1894; what would have been the rule of adjustment? Plaintiffs would have been entitled to the dividend, much or little, and if, in the aggregate, it was less than 10 per cent., after deducting 6 per cent. defendant would have been obliged to make good the deficiency; if more, plaintiffs would be entitled to retain all of it, and the obligations of the parties would stand discharged, so far as concerned dividends and interest. It will be observed that defendant's liability to make good any deficiencies in dividends did not accrue until the termination of the contract, for the deficiencies could not sooner be ascertained. The fundamental error of plaintiffs' contention lies in the assumption that the contract contemplated and provided for annual dividends, and that each year must be treated separately. Plaintiffs terminated the contract by notice January 23, 1896,—one year and nine months (lacking two days) from its date. The guaranty of 10 per cent. for this period amounted to \$8,750, and the interest at 6 per cent. amounted to \$5,250, leaving a deficiency of \$3,500. The dividend paid was \$6,250, so that plaintiffs received \$2,750 more than the stipulated deficiency. The court found that plaintiffs were entitled to judgment for \$2,796.66. We can discover no warrant for the finding or the judgment. The judgment should be reversed.

We concur: COOPER, C.; GRAY, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed.

CARMICHAEL v. PIERCE et al.

(Supreme Court of Oklahoma. June 6, 1900.)
JUDGMENTS OF PROBATE COURT—FORCE AND
EFFECT—REVIEW ON APPEAL.

1. Under the statutes of this territory, proceedings in the probate court, when exercising jurisdiction concurrent with the district court, are considered in the same manner and with like intentment as the proceedings of courts of general jurisdiction; and its records, orders, judgments, and decrees are accorded like force, effect, and legal presumption as the records, orders, judgments, and decrees of the district court.

2. Where the matters involved in a decision in the district court are purely questions of fact, and a jury is waived, and the cause submitted to the court, the decision will not be disturbed by this court, if the evidence reasonably tends to support the judgment of the court.

(Syllabus by the Court.)

Appeal from district court, Kay county; before Justice Bayard T. Hainer.

Action by Elmer E. Carmichael against W. F. Pierce and A. O. Lund. Judgment for defendants, and plaintiff appeals. Affirmed.

This case is brought to this court to review a certain judgment and proceedings had in the district court of Kay county in an action in which the plaintiff in error was plaintiff and the defendants in error were defendants. The action in the court below was replevin, to recover the possession of a certain quantity of wheat which the plaintiff claims he was the owner of, and of which he was entitled to the possession, and that said possession was unlawfully and wrongfully detained from him by the defendants. The case was heard and tried by the court, trial by jury having been waived by the parties. The court rendered a decision in favor of the defendants, and made an order for the return of the property, or the value thereof. Plaintiff filed a motion for a new trial, which was overruled, to which overruling of the motion for a new trial and to the judgment of the court the plaintiff excepted, and brings the cause here on appeal.

Chas. J. Peckham and Ed. L. Peckham, for plaintiff in error. Fuller & Hargis and W. C. Tetrick, for defendants in error.

IRWIN, J. (after stating the facts). The first assignment of error is that the court rejected material and competent evidence offered on the part of the plaintiff. We have examined the brief of counsel for plaintiff in error in this particular, and do not think that this contention can be maintained, for the reason that an examination of the record will show that while the testimony complained of as having been excluded was excluded as to one witness, to wit, the plaintiff in error, E. E. Carmichael, whom the court refused to allow to testify to a conversation had with his mother when she came from Oklahoma to Chautauqua county, Kan., as the agent of his father, from whom he claimed to have leased the premises, the court sub-

sequently permitted this same identical conversation to be given in evidence by the witness Mary A. Carmichael, the mother of the plaintiff in error, and also permitted W. P. Carmichael, the father of the plaintiff in error, and from whom he claimed to have leased the premises, to testify to the word sent to his son in Chautauqua county, Kan.; and we think an examination of the entire record will show that this objection and assignment of error, and the second assignment of error, to wit, that incompetent and irrelevant testimony was admitted by the court, on the part of the defendants, cannot be sustained, as, from a full examination of the record, we are fully satisfied with the holdings of the court in this regard.

Another assignment of error is urged as a part of the second assignment of error,—that the execution under and by virtue of which the defendant Lund, as deputy sheriff, levied upon the wheat in question, was upon a judgment rendered in the probate court, and the only record introduced to sustain this judgment in the trial court was the journal entry of the judgment, for the sum of \$523.96 and costs, and the execution based thereon. After a careful examination of the statute, we are satisfied that this is all that the law required, and we think that the admissions contained in the reply brief of counsel for plaintiff in error fully sustain this position. This cause depends entirely for a decision upon the good faith of the transaction between the plaintiff in error, E. E. Carmichael, and his father, W. P. Carmichael, in the contract or leasing of the premises on which the wheat in question was raised. If the said leasing was honest and in good faith, then the wheat was the property of the plaintiff in error, and he was entitled to the possession thereof, and should recover in this suit. On the other hand, if the transaction was fraudulent, and not in good faith, and was done for the purpose of covering up the property of W. P. Carmichael, to hinder and delay the collection of this judgment, then the decision of the lower court was right. On this question an examination of the record will show that there was a contrariety of evidence. The trial court had the witnesses before him, had a chance to see their manner and demeanor on the stand, and had many ways of determining the truth or falsity of their statements, which this court, from viewing this case as put on paper, does not have, and, after a full and careful examination of the entire record, we are not prepared to say that the evidence does not reasonably sustain the finding of that court; and the rule laid down by this court in a number of cases is that, in questions of fact, the verdict of a jury will not be disturbed if the evidence reasonably tends to support the verdict, and we can see no reason why the same rule should not be applied to a trial by the court where a jury is waived. An examination of the record does not disclose that any

injustice has been done, and we fail to find any error in the rulings of the court. For these reasons, the judgment of the lower court will be affirmed. All of the justices concurring, except HAINER, J., who, having presided in the court below, took no part in this case.

RICHARDSON et al. v. PENNY.¹

(Supreme Court of Oklahoma. Feb. 8, 1900.)

APPEAL—BONDS—RECITALS—EFFECT—ESTOPPEL—COUNTERCLAIM—SET-OFF—USE AND OCCUPATION—GRANT—EVIDENCE—LIMITATIONS—PLEADING—DEMURRER—SHERIFFS—WRIT OF RESTITUTION—RETURN—CONTRA-DICTION.

1. An action to recover for breach of a bond given to stay a judgment of the district court pending an appeal to the supreme court is an action on contract, and the obligors are bound by the terms and conditions of the bond.

2. The obligors upon an appeal or supersedeas bond are bound by the recitals in the bond, and where the bond recites that a certain action was pending in the district court between certain parties, and that a judgment was rendered in said cause, the obligors in such bond, in a suit thereon, are estopped from saying that no such suit was pending, or that no valid judgment was rendered therein.

3. A counterclaim is a cause of action existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action.

4. A set-off is a cause of action arising upon contract or ascertained by the decision of a court, and can only be pleaded in an action founded on contract. It must be independent of, and not connected with, the contract made the foundation of the cause of action in the petition, and can only be pleaded where there is mutuality of parties. The cause of action sought to be pleaded as a set-off must exist in favor of all the defendants against the plaintiff.

5. Where a party has obligated himself to pay another the value of the use and occupation of certain real property during a particular period, it is not reversible error to permit the plaintiff to show what the property actually rented for during such period. Such proof is not controlling as to the rental value, but is proper to be considered by the jury, under proper instructions by the court, in determining the reasonable value of the use and occupation of the property.

6. A cause of action barred by the statute of limitations cannot be pleaded as a set-off.

7. It is not error to overrule a demurrer to a petition in an action on a supersedeas bond, where the petition contains the necessary averments as to the execution of the bond, the pendency of the action, the taking of the appeal, the affirmance of the judgment by the supreme court, the recitals in the bond, and which then alleges the breach of the conditions of the bond, and the damages sustained.

8. While proof may not be admissible for the purpose of contradicting a sheriff's return on a writ of restitution, it is not error to admit evidence as to the manner in which the writ was executed, and to show that, while the sheriff did technically give possession to the plaintiff, the defendants in fact retained actual possession and kept the plaintiff out after sheriff had made his return.

(Syllabus by the Court.)

Error from district court, Noble county; before Justice Bayard T. Hainer.

An action of forcible entry and detainer by Elisha Penny against F. A. Richardson and others was brought before a justice of the peace, in which judgment was rendered for plaintiff, which was affirmed by the district court. Plaintiff brought two suits on the appeal and supersedeas bonds, which were consolidated, and from a judgment in his favor defendants bring error. Affirmed.

H. B. Martin and J. B. Diggs, for plaintiffs in error. H. R. Thurston, for defendant in error.

BURFORD, C. J. The defendant in error, Penny, brought an action in forcible entry and detainer, before a justice of the peace, against plaintiffs in error Richardson, Monroe, and Murray, to recover possession of 80 feet off the east end of lot numbered 1 in block numbered 28 in the city of Perry, in Noble county, Okl. Penny recovered judgment before the justice, and Richardson et al. appealed the case to the district court, where the case was again tried, and judgment rendered in favor of Penny. Richardson, Monroe, and Murray appealed to the supreme court, and gave a supersedeas bond to stay judgment, with the other plaintiffs in error as sureties on the bond. The judgment of the district court was affirmed. Richardson v. Penny, 50 Pac. 231, 6 Okl. 328. Penny then brought two suits in the district court of Noble county,—one on the appeal bond given by Richardson et al. when they appealed from the judgment of the justice of the peace in the forcible entry and detainer case, and the other on the supersedeas bond given to stay the judgment of the district court pending the appeal in the supreme court. Each suit was against Richardson, Monroe, and Murray, as principals, and the sureties on the bond, as defendants. The issues were joined in each of the causes, and both were called for trial. On motion of the defendants below, the causes were consolidated, as the purpose of the action on each bond was to recover for the use and occupation of the part of the lot in question during the period covered by the bonds. On the trial of the cause the district court sustained an objection to the introduction of any evidence in support of the cause of action based on the bond given to perfect the appeal from the justice to the district court, and confirmed the proof to the other cause of action. To this ruling no objection is made by Penny, and that question is not involved in this appeal. On the trial of the cause before a jury, a verdict was returned for the sum of \$985, and judgment was rendered in accordance with the verdict. Motion for new trial was filed by the defendants below and overruled, and proper exceptions saved. The defendants below appeal. A number of alleged errors are assigned,

¹ Rehearing denied June 6, 1900.

some of which it will not be necessary to review.

It is first contended that the trial court erred in overruling the demurrer to the amended petition. The petition avers that the defendants Richardson, Monroe, and Murray, as principals, and Martin, Mullinix, and Higdon, as sureties, executed an undertaking to the plaintiff, Penny, by the conditions of which undertaking the defendants bound themselves, in the sum of \$1,000, that during the possession of 80 feet off the east end of lot 1 in block 28 in the city of Perry by the plaintiffs in error F. A. Richardson, W. C. Monroe, and Joseph Murray they would neither commit nor suffer to be committed any waste thereon, and that, if the judgment of the district court should be affirmed, they would pay the value of the use and occupation of the property from the 5th day of February, 1896, until the delivery of the possession of said premises pursuant to the judgment, and pay all costs; that said undertaking was duly executed in an action pending in the district court of Noble county, wherein Elisha Penny was plaintiff, and F. A. Richardson, W. C. Monroe, and Joseph Murray were defendants; that said judgment of the district court was by the supreme court duly affirmed; and that said defendants had been in continual possession and occupancy of said real estate, and had wholly failed and refused to deliver possession thereof to the plaintiff, or to pay any part of the value of the use and occupation thereof, or to pay the costs of said action. A copy of said bond was filed with the petition, and made part thereof. There was a demand for judgment for the sum of \$1,000. It is true, this petition is, in a measure, defective, and is not as specific and certain as good pleading would require; but, upon the whole, we think it states a cause of action, and there was no material error in overruling the demurrer.

The defendants answered by setting up a general denial, and four other defenses, some of which were in the nature of set-offs. The second defense pleaded attempted to raise the question of jurisdiction of the district court in the forcible entry case on appeal from the justice's court. It alleged that the bond given to effect the appeal failed to contain the condition that the defendants would surrender possession of the premises, should judgment be rendered against them, and further averred that the bond was not approved as required by statute. The trial court sustained a demurrer to this defense. If these questions had been presented to the district court when the forcible entry case was before that court, they might have been material, and possibly might have resulted in a dismissal of the appeal. But after judgment in the district court, and the giving of a supersedeas bond, and judgment in the supreme court, it is too late to raise such objections in a suit on the

supersedeas bond. The bond sued on recites that Penny obtained a judgment in the district court of Noble county against the defendants Richardson, Monroe, and Murray for the restitution of the lot heretofore described, and for costs of action; that the defendants have taken said cause to the supreme court by writ of error, in order to have the proceedings in said cause reviewed. These recitals in the bond are conclusive on the defendants, and they are now estopped from saying that no cause was pending in the district court. In the case of Trimble v. State, 4 Blackf. 435, the supreme court of Indiana, at an early day, said: "When a party makes an admission in an instrument under his hand and seal, he is estopped from disputing the facts which he recites. If a condition be to perform the covenants in an indenture, the party cannot say there is no such indenture. * * * If a condition in a bond recite that a particular suit is depending in the court of king's bench, for example, the obligor is estopped from saying there is no such suit there." In Stow v. Wyse, 7 Conn. 214, Judge Doggett said: "Without multiplying authorities upon a point rendered clear by numerous cases, it is sufficient to state that, where a party has solemnly admitted a fact by deed under his hand and seal, he is estopped not only from disputing the deed itself, but every fact which it recites." And this principle is based upon sound reason. It would be manifestly unfair and unjust to permit the defendants to keep silent upon a material question, which it was their duty to bring to the knowledge of the trial court, and after getting the benefit of a trial and hearing on the issues presented, and after giving a bond which in effect stayed the judgment of the lower court, and enabled them to still enjoy the use and profits of the property the court had adjudged they were not entitled to, and after getting the cause reviewed in the supreme court, and all had been decided adverse to them, still hold on to the property, and, when suit is brought on the bond, allow them to say, "We were only trifling with the rights of the adverse party and with the courts. No cause was ever pending in the courts." Having executed their solemn obligation to pay to the plaintiff the value of the use and occupation of the real estate in controversy, and recited in this obligation that a suit was pending between the adverse parties in the district court, and that judgment was rendered against them, the law says they shall not be permitted to contradict such recital, but shall be bound thereby.

The third defense set up in the answer undertook to plead a superior title in the defendant Richardson, acquired after the judgment was rendered against him in the forcible entry and detainer case. He alleged, among other things, that he became the owner of the title to said lot by conveyance from one Case, who obtained title

from the United States through town-site trustees, and that the deed from Case to him was executed on the 9th day of January, 1895. The judgment in the forcible entry case was rendered in the district court of Noble county in November, 1895, and the bond sued on in this case was executed on the 5th day of February, 1896; and one of the express stipulations in the bond was that, if the judgment of the district court should be affirmed, they would pay the value of the use and occupation of the property from the date of the undertaking until the delivery of the possession pursuant to the judgment. It was no defense to this agreement that Richardson was the owner of the property. Plaintiff was seeking to recover on the bond, and the defendants were bound by the terms of the bond. The question of title or right to possession was not involved, and could in no way be made a proper defense to the action on the bond. It had been declared by the judgment of the court that the defendants forcibly entered the plaintiff's possession, and restitution had been ordered. Before they could comply with the judgment, or relieve themselves of the burdens of their bond, or even place themselves in a position to assert any right to the use, occupation, or rents of the property, they were bound to openly surrender their wrongfully obtained possession, and give the plaintiff that which they had forcibly wrested from him. They failed to aver that they had done this, and hence the third defense was not sufficient to warrant the court in admitting any proof under it, and no error was committed in rejecting it.

The fourth defense is attempted to be pleaded as a counterclaim or set-off. The court refused to receive any proof in support of its allegations. This paragraph of the answer sets up that one Case was the owner of the west 70 feet of lot 1, block 28, in the city of Perry, and entitled to the use and occupation of same from the 16th day of September, 1893, to the 9th day of January, 1895; that the rental value of same was \$75 per month; that the plaintiff, Penny, used and occupied all of said lot during said time; that Penny was indebted to Case, for rent of said 70 feet, in the sum of \$1,200; that on January 9, 1895, Case sold and assigned said claim to defendant Richardson. And he asked that this amount be set off against the amount found due Penny on the bond. There was no error in rejecting the proof to establish the allegations of this defense or set-off. The claim sued on was barred by the statute of limitations. If it was an action upon an implied contract, it was barred within three years. If it was for trespass upon real estate, it was barred in two years. The set-off pleaded must be treated the same as the commencement of an action. The answer was filed May 24, 1898,—more than three years after the last

item of charge for rent on the claim sued on as a set-off.

The fifth defense was also denominated a "counterclaim" or "set-off," and the court sustained the objection to the introduction of any evidence in support of its allegations. This paragraph averred that on the 9th day of January, 1895, the defendant Richardson became entitled to the use, occupation, and rents of the west 70 feet of the lot in controversy; that the reasonable rental value of said west 70 feet was \$15 per month; that the said Penny from said 9th day of January, 1895, to the — day of March, 1898, used, occupied, and enjoyed said west 70 feet, and thereby became indebted to said Richardson in the sum of \$585, which was due and unpaid. And he asked for judgment against Penny for said sum. This pleading is somewhat informal, and is improperly designated. It contains none of the essential elements of a counterclaim. It relates to a wholly independent subject-matter and transaction. A counterclaim must be one existing in favor of a defendant, and against a plaintiff, between whom a several judgment might be had in the action, arising out of the contract or transaction set forth in the petition as the foundation of plaintiff's claim, or connected with the subject of the action. The claim for rent for the west 70 feet of the lot does not arise out of the contract set forth in the petition, nor is it connected with the subject of the action. A set-off is a cause of action in favor of the defendant, and against the plaintiff, arising upon contract, or ascertained by the decision of a court. The fifth defense sets up a claim for rent on account of the use of the west 70 feet of lot 1, block 28, which is an action arising upon implied contract. The plea shows that this is an individual claim of the defendant Richardson against the plaintiff, Penny. It does not appear that either of the other defendants has any interest in this claim for rent; nor are any facts pleaded which tend to show any valid reason why one defendant should be allowed to set off an individual claim against the plaintiff's demand on the contract. If this claim could be classed as a counterclaim, then, under our statute relating to counterclaims, it might be pleaded by Richardson, in his own right, to reduce any several judgment that might be rendered against him. But we find no similar provision in the statute in reference to a set-off. The claim for a set-off is pleaded by all the defendants as a joint demand against Penny, but the facts pleaded show that it is not joint, but the separate claim of only one of the joint defendants. Hence it does not show a cause of action in favor of all the defendants against the plaintiff. But, had it been pleaded as the individual demand or claim of Richardson alone, it could not be allowed. It was held in the case of *Murphy v. Colton*, 4 Okl. 181, 44

Pac. 208, that, "except where the Code has otherwise provided, mutuality is essential to set-off." It is true, in that case the court had under consideration the provisions of the Code of 1890, but the same rule is applicable under the present Code, as the Code of 1893 contains no provision changing or modifying the rule as to mutuality of parties. A demand, to be available as a set-off, must be a demand of all the defendants against the plaintiff. No error was committed in sustaining the objection to introduction of testimony under the fifth defense.

It is next contended that the court committed error in permitting the plaintiff below to introduce in evidence the mandate of the supreme court in the forcible entry case of *Richardson v. Penny*. It seems that the mandate had the entire opinion attached to it, and it was all permitted to go to the jury. This, we think, was error. The opinion of the court was the law of that case. It was not necessary to prove the law, but we are unable to see how this could prejudice the defendants, and we do not think it did.

The plaintiff was permitted to introduce in evidence the judgment, record, and files in the case of *Penny against Richardson* in the district court. While the recitals in the bond were conclusive on the defendants that such a case had been pending in the district court, and that a judgment was rendered therein in favor of *Penny* and against the defendants, and such facts needed no further proof, yet the evidence admitted only tended to prove an established fact, and such evidence could not prejudice the rights of the defendants.

In order to prove the value of the use and occupation of the premises in question, the plaintiff introduced the testimony of witnesses who were familiar with the property, and of rental values generally, in the immediate locality of this lot, and they gave their judgment as to the monthly rental value of the property. In addition to this testimony, the court permitted the plaintiff to prove the monthly rentals collected by *Richardson* from the tenants who had occupied the property under him during the period covered by the bond. This latter evidence was objected to, and exceptions saved. While the reasonable rental value of the property was the fact to be determined by the jury, we think there was no prejudicial error in permitting this evidence to go to the jury. The actual rents paid for the property for ordinary purposes during the period for which plaintiff was entitled to recover was a fact, among others, which the jury might well consider in determining the reasonable rental value of the property. There was not such error committed in admitting this testimony to go to the jury as will warrant a reversal of the case.

It is next contended that the court should have confined the evidence of the plaintiff to proof of the rental value of the lot, exclusive of the improvements. We cannot con-

cur in this contention. The action was one to recover on the bond,—on a contract in writing,—the terms of which were that the defendants would "pay the value of the use and occupation of the property." The property referred to was described in the recitals of the bond as "eighty feet off the east end of lot 1 in block 28 in the city of Perry." There was nothing in the pleadings or in the bond to rebut or even question the legal presumption that the lot embraced all the improvements thereon. If the defendants had intended to limit their liability to the rental value of the naked lot, they should have so specified in the bond; and, having given the bond to cover the "property," which included lot and improvements, they could not afterwards limit such liability by confining the proof to a portion of the property. Nor was there any error in excluding the evidence offered by the defendants for the purpose of showing that *Penny* was not the owner of the building. *Campbell v. Coonradt*, 26 Kan. 67; *Coonradt v. Campbell*, 29 Kan. 391.

It was contended by plaintiffs in error that *Penny* had been put in possession of the property in controversy on the 7th day of November, 1897, and that the court should have limited his right of recovery to a period prior to that date. It was shown that a writ of restitution issued, and was delivered to the sheriff, and he made a return on the writ to the effect that he executed the writ, by giving to *Elisha Penny* possession of the premises described, on the 7th day of October, 1897; and it is now contended that this return is conclusive. The court permitted evidence to be introduced, not to contradict the return, but to show the manner in which the officer put *Penny* in possession. It appeared that the officer went with *Penny* to the tenant occupying the property, and told the tenant he must pay the rent to *Penny*, or he would put him out. The tenant then paid some rent to *Penny*, and before the officer could serve the writ on the defendants he was enjoined by an order of court from further proceedings, and the defendants continued in possession of the property. The question as to whether the defendants had committed a breach of the bond was one for the jury. They had obligated themselves, by the terms of the bond, to pay rent from date of the bond until the delivery of the possession by them. The technical possession given by the officer in the manner shown would not satisfy the conditions of their bond, if they still remained in the actual control and occupancy of the lot. The court submitted the question of fact to the jury, as it was proper he should do, and the jury found that the only delivery of possession to *Penny* was that of the tenant, at the time the sheriff went to the premises with *Penny*. The defendants, in view of the fact that they never at any time surrendered possession, either in obe-

dience to the judgment of the court, or in compliance with the terms of the bond, are in no position to claim exemption from the penalties of the bond by reason of the technical possession shown by the sheriff's return. If the plaintiff actually obtained any possession, it was of such short and fleeting duration and character that it never availed him anything, or interfered with the defendants. There is no error in the rulings of the court in this matter that warrants a new trial of the cause.

The instructions requested by the defendants and refused by the court, none of them, singly or as a whole, state the law as applicable to the issues and facts in this case, and there was no error in refusing them. We have examined the instructions given by the court, and think they present the law of the case clearly, fairly, and fully, and that no tenable objection can be made to them. There was no error committed in giving or refusing instructions.

It is further contended that the court should have rendered judgment for the defendants on defendants' motion for judgment on the special findings of fact. This motion is as follows: "Come now the defendants in the above-entitled cause, and move the court to enter judgment for the defendants, on special findings of facts of the jury in said cause, for the sum of four hundred and eighty-five dollars, the same being the amount of damages found by the jury as the value of the premises described in the pleadings in this cause accruing after October 7, 1897, for the reason that said special findings establish the fact that the plaintiff herein entered on said premises and took possession thereof on the 7th day of October, 1897." It requires no reasoning or argument to show that no error could be committed in overruling this motion. There were neither pleadings, proof, nor findings that would warrant the court in rendering a judgment for defendants.

The motion for new trial involves the questions already reviewed. We have examined the whole record, and are of the opinion the judgment should be affirmed. The judgment of the district court of Noble county is affirmed, at costs of plaintiffs in error. All the justices concur, except HAINER, J., who presided in the trial below, not sitting.

STATE v. YEE WEE.

(Supreme Court of Idaho. June 7, 1900.)

HOMICIDE—EVIDENCE—DYING DECLARATIONS—APPELLATE JURISDICTION.

1. The evidence examined, and held to be sufficient to justify verdict of murder in first degree.

2. An ante mortem statement as to the cause of death, made by the deceased soon after receiving an injury from which he died, made when death was apparently imminent, and while the deceased believed that he was about to

die, is admissible in evidence as against the defendant on the charge of murdering the deceased, although deceased had not been informed by a physician that he was about to die.

3. Upon appeal in a criminal case the jurisdiction of the appellate court is confined to a review of the case made in the trial court.

(Syllabus by the Court.)

Appeal from district court, Blaine county; C. O. Stockslager, Judge.

Yee Wee was convicted of murder, and appeals. Affirmed.

Lyttleton Price, W. T. Reeves, P. M. Bruner, and Hawley, Puckett & Hawley, for appellant. S. H. Hays, Atty. Gen., for the State.

QUARLES, J. The appellant was tried upon information charging him with the murder of one Wee Waugh, alleged to have been committed in Blaine county in May, 1899, was tried and convicted, and sentenced to death. The appellant moved for a new trial, which was denied, and has appealed from the order denying him a new trial and from the judgment of conviction. Several witnesses, all Chinese, testified that on the night of May 3, 1899, at about 9 o'clock, they were at the store of Sam Waugh, in the quarter known as "Chinese Town," in Hailley, the deceased, Wee Waugh, being among the number, when appellant came into said store; that appellant had a paper sack on his hand; that soon thereafter a shot was fired, when the deceased, Wee Waugh, exclaimed, "Wee shoot me! Wee shoot me!" A number of witnesses testified that at the time of the shooting the deceased was standing at the inside or back of the table, and that the accused approached the table on the other side from the deceased, leaned his arm on the table, and slightly raised his hand, whereupon the report of a firearm was heard, when the deceased exclaimed: "Wee shoot me! Wee shoot me!" Thereupon nearly all of the parties, including the accused and the deceased, ran out of the house. Immediately after the shooting a paper bag, similar in appearance to the one held in the hand of the accused, was found by the door of the store building, picked up and carried in the house by one of the witnesses, and there kept until morning, when it and a candle were turned over to the county attorney. It was shown that the candle was burning on the table between the deceased and the accused at the time the shot was fired, and that the candle then went out; that a piece was cut out of the candle, making a notch therein; that this notch was not in the candle before the shot. Said paper bag and candle were introduced as evidence before the jury. The appellant objected to the introduction of the paper bag, but did not object to the introduction of the candle. The introduction of both the candle and the paper bag in evidence is now assigned as error, on the ground that they

were not sufficiently identified. We have carefully considered the evidence, and think that it was sufficient to identify the candle. Was it sufficient as to the paper bag? Wee Gwing testified that accused came in with a yellow bag, like the one exhibited, in his hand; that he saw the paper bag introduced in evidence, after the shot, out by the door. Chin Shu testified that the accused had a paper bag in his hand; that he pointed paper bag at deceased, but thought the paper bag held by accused was not as large as the one introduced in evidence. Gul Waugh testified: "I saw the paper bag before the shot went off. * * * Wee had it on his hand when the shot went off. He raised up the bag high enough for Wee Waugh. * * * I have seen a paper bag like this, but did not see this one before. I saw this bag right after the shot outside the door in front of Sam Waugh's store. I picked it up, and brought it in the house. It stayed in the house that night." The witness then stated that the paper bag remained in the house until the next morning, when the sheriff and county attorney went and took it and the candle away. This witness also testified: "Wee Waugh was hurt there that night, Wee Waugh hollow out, 'Wee shoot me!'" * * * Wee Waugh died May 19th."

After a careful consideration of all the evidence, we are of the opinion that the paper sack was properly introduced in evidence. The finding of this paper bag just outside the door out of which accused fled after the shooting, and its similarity to the one held over the head of the accused, were circumstances tending to identify it. The candle and the paper bag are not before us. Their appearance doubtless would show whether they were in close proximity to a firearm which had been discharged, and without an inspection of such exhibits, under all of the evidence, we are unable to conclude that the admission of either of these exhibits was error.

There is only one other error assigned, and that is the introduction of the evidence of the ante mortem statement of the deceased, to the effect that the accused shot the deceased, testified to by J. D. Jones, a dentist, and William Rember, the sheriff, and the action of the court in refusing to strike out such evidence. This alleged error is predicated upon the idea that before such statement could be introduced it must be shown that the attending physician informed deceased that he was going to die. We cannot agree with this contention. To make such statement admissible, it must be shown that it was made by deceased while under the belief that death was impending, the imminence of death being apparent at the time. It makes no difference what influence induces the deceased, whose death is apparently imminent, to believe that he is about to die,—whether from his own condition and feelings, or the advice of a physi-

cian,—his statement as to the cause which brings about his death, made under such circumstances, is admissible. The evidence shows that said ante mortem statement was made about three hours after the shooting, and while deceased believed that he was about to die, and while his death was apparently imminent. He lived 18 days after the injury, but Dr. Brown, his physician, testified that he (the physician) expected the death of deceased to occur at any time. It might well be argued that the admission of the evidence showing this dying declaration was unnecessary, as there was sufficient evidence to convict the accused without it, but we do not think that the admission of such evidence was error.

Appellant contends that the evidence was insufficient to justify the verdict, because it was not proven that appellant had any firearm at the time of the shooting, and because the evidence does not show premeditation. We cannot agree with this contention. The evidence showing that accused walked into the presence of deceased with a paper bag over his hand; that accused rested his arm on the table, and pointed his hand, covered by such paper bag, towards deceased; that thereon there was a flash seen and a report heard; that deceased then exclaimed that the accused shot him; and that the accused immediately ran away,—was sufficient to show that accused was not only armed, but that he deliberately, and with malice aforethought, shot deceased with the intent to kill him. The evidence further shows that appellant immediately after the shooting was making inquiries of different persons as to who did the shooting and who was shot; thus feigning ignorance of his own act. Such acts on the part of the defendant tended to prove his guilt. The evidence was amply sufficient, and would be if all of the evidence complained of was out of the record.

It is also contended by the learned counsel for appellant that the evidence of the Chinese witness who interpreted a paper written by the accused was untrue, and said witness prejudiced against the appellant. Taking the testimony of the appellant, and ignoring the other testimony touching this point, we would have to agree with this contention. But the evidence, taken as a whole, does not show that this contention is well founded. The paper alluded to was written in the Chinese language, and was given by the appellant to the sheriff to be posted by the latter in the Chinese quarters, in Hailey. Said paper was interpreted by Charlie Shung at the trial to read as follows: "Any particular friend for Yee Wee; any relation of Yee Wee: This trial comes off Monday. I wish all to come to court; explain this case. Nobody force he to shoot Wee Waugh. He done it for himself, right on this paper. If you don't believe it, send down to Frisco. Here it is, Yee Wee done;

here it is, you say no man force you. You done it yourself, right here. You send it down to San Francisco, and find out." Another interpretation of this paper was made at the trial by Wang Fung, substantially the same as the above. The defendant gave a different interpretation. It was for the jury to say which interpretation was correct, and also to determine the weight and effect of the evidence. We are now asked to consider an interpretation of said paper which has been made since the trial, and which is certified by the secretary (interpreter) of the Chinese legation at Washington, D. C., to be correct. But this interpretation and certificate are not, and would not have been, competent evidence at the trial, and could not there have been received. But, if it was competent evidence, we could not receive it or consider it on the hearing of this appeal, as the doing so would be assuming to a certain extent original jurisdiction not vested in this court by the constitution; our jurisdiction being limited to a review of the case tried by the lower court. It is proper to suggest that jurisdiction to review this case on the ground of evidence that has been discovered since the bringing of this appeal is vested, under the constitution, in another tribunal, to wit, the board of pardons. Finding no error in the record which would justify a reversal, and the evidence being sufficient to sustain and justify the verdict, the order denying a new trial and the judgment are both affirmed.

HUSTON, C. J., and SULLIVAN, J., concur.

NETHERLANDS AMERICAN MORTG. BANK v. CONNAWAY et al.

(Supreme Court of Idaho. May 15, 1900.)
TRUSTS—EVIDENCE TO ESTABLISH—LIABILITY
OF BANK.

B., the president of a national bank, made a loan for his personal use, to be invested, as the lender understood, in a purely personal transaction of B. *Held*, that the fact that the money so borrowed by B. was or might have been mingled with the money of the bank created no liability on the part of the bank as trustee.

(Syllabus by the Court.)

Appeal from district court, Latah county; Edgar C. Steele, Judge.

Action by the Netherlands American Mortgage Bank against W. P. Connaway, as receiver of the Moscow National Bank of Moscow, and S. Barghoorn. Judgment for defendants, and plaintiff appeals. Affirmed.

C. J. Orland, for appellant. R. T. Morgan and J. T. Morgan, for respondent Connaway.

HUSTON, C. J. The facts in this case, briefly stated, are as follows: The appellant is a foreign corporation, having an agent at Moscow, Idaho. The business of the said

corporation is the loaning of money upon first mortgages on real estate, and to this, it would seem, their agent was limited, so far as loans were concerned. The agent of the appellant, one Barghoorn, held the position of assistant, or quasi assistant, cashier of the Moscow Bank. One R. S. Browne was at the time the president of the Moscow National Bank. In fact, the inference from the evidence is that Browne was the National Bank of Moscow, if not *de jure*, at least *de facto*. The appellant had money on deposit with the Exchange National Bank of Spokane, Wash., against which their said agent, Barghoorn, was authorized to draw for loans upon real estate. It appears from the record that Browne was fully advised of the nature and extent of Barghoorn's authority in relation to the funds of appellant against which he was authorized to draw. On or about the 15th of January, 1897, it seems a payment was about to be made by the United States government to the Nez Perce Indians at Lapawal, Nez Perces county, and, as these payments were to be made in treasury drafts, there was a visible profit to be made in the purchase of the same from the Indians. Of course, such a transaction was outside of, and prohibited by the law governing, the operations of a national bank. But the astute and ubiquitous Browne saw a margin of profit, at least for Browne, in the transaction; but there were not sufficient funds in the bank available for the project. He therefore approaches Barghoorn with the request that he (Barghoorn) should loan him (Browne) the sum of \$2,000 of the funds of the appellant, which Browne at the time well knew Barghoorn could not do without being guilty of a breach of trust. But the hypnotic influence of Browne overcame any scruples of Barghoorn, and upon the understanding that he (Barghoorn) was to be repaid in a few days, either in money or "Indian drafts," Barghoorn wires to the Spokane bank for the sum of \$2,000, and on its receipt turns it over to Browne. There is considerable evidence as to what disposition was made of the money after its receipt by Browne, but we do not think it cuts any figure in the case. The money was loaned by Barghoorn to Browne individually, and not to the Moscow National Bank. It was loaned for a purpose well known to Barghoorn at the time, and which he, as an officer of the bank, was presumed to know was without the legitimate and authorized business of the bank. Because the money was placed by Browne in any particular receptacle of the bank, or because the book-keeper in making up the cash of the bank included this sum in the aggregate of the funds of the bank, cannot alter the legal status of the parties. It is sought by this action to charge the Moscow National Bank, or its receiver, with this sum of money as a trust fund.

We are unable from the record to find

anything in this transaction which tends to impress the loan from Barghoorn to Browne with the character of a trust in the bank. It was a simple loan from an individual to an individual; nothing more. That Browne knew that Barghoorn was violating his trust in making the loan is no predicate for a charge against the bank; for Browne did not make the loan by or on behalf of the bank, but for his own personal profit. Had the money been loaned to Browne as president of the bank, for the use of the bank, or had it been deposited by Barghoorn as the agent of the appellant, under his known authority as such agent, a different case would be presented; but no such conclusion can be reached from the evidence. The mere fact that Browne put the money, which he had borrowed as an individual, in the safe of the bank, and presumably drew therefrom its equivalent in gold, to be used in a personal transaction of his own, could not make the bank responsible as a trustee. If the bank were to be held responsible for all the illegitimate, not to say unlawful, transactions of its officers, clearly outside of, and disconnected with, their official duties or responsibilities, the business of banking would be handicapped with most fearful responsibilities. The bank in this case derived no benefit from the loan from Barghoorn to Browne. It was no party to the loan. It could no more be held liable to Barghoorn, according to the evidence in the record, than if Browne had picked his (Barghoorn's) pocket of this amount.

We have examined the authorities cited by the appellant, but we find no case where the conditions were at all similar to the case at bar. The trouble with appellant's position and argument is that it assumes the existence of a state of facts not disclosed by the record, and ignores the primary and controlling fact in the case, to wit, that the loan from Barghoorn to Browne was purely a personal transaction, with which the bank had nothing to do, to which it was not privy, and for which it could no more be held responsible than it could for a larceny or any other criminality of Browne, and this condition could not be changed by any of the acts of the employees of the bank. We think the findings of the district court are fully sustained by the evidence. The judgment of the district court is affirmed, with costs to respondents.

SULLIVAN, J., concurs. QUARLES, J., did not sit at the hearing of this case, and took no part in the decision thereof.

On Rehearing.

(June 28, 1900.)

PER CURIAM. The facts in this case are undisputed. They were succinctly set forth in the opinion filed herein. To repeat them would be an act of supererogation. Simply

stated, the facts as they appear in the record are these: One R. S. Browne, being at the time president of the Moscow National Bank, entered into an agreement with Barghoorn, who was the agent of the appellant, by which they were together to realize a profit out of a speculation in Indian drafts; that is, drafts paid by the government to the Nez Perce Indians upon a purchase of Indian lands. This was, as set forth in appellant's findings of fact No. 9, submitted to the court, and by the court refused, and which is as follows: "(9) That Barghoorn and R. S. Browne had agreed together to use the said money of the plaintiff for the purpose of purchasing Indian drafts, which they had no authority to do, and did misapply the funds of the plaintiff to further their own business, or profit, and were wrongfully diverting said money from the purposes for which it was intrusted to said Barghoorn by the appellant." Accepting this statement of fact as fully supported by the evidence, which we think it is, upon what principle can the appellant claim a right of recovery from the bank? While it is clear from the evidence that the actual money received by Browne from Barghoorn was, by mistake of the clerk or bookkeeper, placed in the general funds of the bank, it is equally clear that its equivalent was drawn from the funds of the bank by Browne, and used by him in the joint speculation of himself and Barghoorn, and the bank received no consideration whatever therefor or therefrom. That Browne and Barghoorn, by their unlawful and unauthorized act (to use a very mild term to designate their actions), can impose a trust upon the bank is a proposition we are unable to recognize. Petition for rehearing denied.

HAYS, Atty. Gen., v. STEWART, Judge.

(Supreme Court of Idaho. June 20, 1900.)

ESCAPE—TRIAL—MANDAMUS.

1. A prisoner who escapes while serving a term in the state prison may, before the expiration of his term, be tried for such escape, under the provisions of section 6452, Rev. St. Idaho.

2. Writ of mandate will issue to require a district court to proceed with a criminal case in such court which is triable, when such court refuses to proceed at all with said case.

(Syllabus by the Court.)

Application by Samuel H. Hays, attorney general, for a writ of mandate to George H. Stewart, judge of the Third district court, to compel the court to proceed with a criminal case pending before it. Writ granted.

S. H. Hays, Atty. Gen., in pro. per. Silas W. Moody, for defendant.

QUARLES, J. One James Guy, while serving a term in the state prison, and before the expiration of such term, made his escape from said prison. He was retaken, where-

upon an information charging him with such escape was filed by the county attorney of Ada county in the district court of the Third judicial district in and for said Ada county, Hon. George H. Stewart, judge. Thereafter, and on March 2, 1900, said county attorney filed in said district court his affidavit showing such facts, and moved that the defendant be brought before the court to plead, and that the case be proceeded with. Said district court denied said motion, refused to order said defendant brought before it, and refused to proceed with the case. To compel the said district court to proceed, plaintiff has commenced this proceeding, and demands the writ of mandate of this court requiring the said district court to take the plea of said defendant, James Guy, to said information, at the next term of said court, and proceed to try said defendant. Annexed to the petition as exhibits are copies of said information, motion, and affidavit. To the petition the defendant files a general demurrer. The only question before us is, can the defendant be tried for such escape before the expiration of his original sentence?

Section 6452, Rev. St., is as follows: "Every territorial prisoner confined in the territorial prison for a term less than for life, who escapes therefrom, is punishable by imprisonment in the territorial prison for a term equal in length to the term he was serving at the time of such escape; said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison." Construing this statute by the usual rules of construction, it is palpable that it was the manifest intention of the legislature that a prisoner who escapes from the state prison should be speedily tried for such escape, with out awaiting the termination of his original term of imprisonment. This intent is evident from the language, "said second term of imprisonment to commence from the time he would otherwise have been discharged from said prison." The action of the district court, if affirmed, would nullify this statute, which was evidently enacted in behalf of the good government of the state prison, to deter prisoners from escaping, and in order to have a speedy trial, while the witnesses, both for the state and the defendant, are accessible. The defendant has no just cause to complain, inasmuch as he is relieved from having to wait, in the county jail, the convening of the district court after his discharge at the end of his first term. We think the provisions of this statute are wise, and in the interest of good government. The trial of the defendant on the charge of such escape in no way interferes with the judgment of conviction under which he is imprisoned. The district court should have ordered the warden of the penitentiary to bring said defendant before it, received the defendant's plea, and proceeded with the case in all respects as if the defendant was in the county jail and in the custody of the sheriff, instead of being in

the state penitentiary and in the custody of the warden of the penitentiary. During the trial the defendant should remain in the custody of the warden, the same as he would in the custody of the sheriff if he was confined in the county jail. The writ demanded should be granted and issued, and it is so ordered; no costs to be taxed against either party.

HUSTON, C. J., and SULLIVAN, J., concur.

PEOPLE ex rel. GREEN v. COURT OF APPEALS OF COLORADO.

(Supreme Court of Colorado. June 4, 1900.)

CERTIORARI—JURISDICTION OF COURT OF APPEALS—DECISIONS REVIEWABLE—MIS-TAKE OF LAW—HABEAS CORPUS.

1. Under Const. art. 6, § 2, giving the supreme court control over all inferior courts, certiorari will not lie to review a decision of the court of appeals on the ground of application of a wrong legal doctrine in reversing a judgment of the district court in a habeas corpus proceeding, and awarding the custody of a child, for its benefit, to relatives of its deceased mother, instead of the father, who was not shown to be disqualified, as there has been no decision of the supreme court announcing a contrary doctrine.

2. Where a court has appellate jurisdiction over a cause, its jurisdiction is not defeated by a mistake in the law controlling the decision thereof.

3. The court of appeals has jurisdiction of an appeal from the district court of a habeas corpus proceeding brought to determine the right to the custody of a child as between its father and relatives of its deceased mother, as it is a civil suit, and certiorari will not lie to review its decision thereon.

Certiorari to court of appeals.

Certiorari by the people of the state of Colorado, on relation of Frederick I. Green, against the court of appeals of Colorado. Dismissed.

Henry T. Sale and Morgan Edgar, for petitioner. Patterson, Richardson & Hawkins, for respondent.

PER CURIAM. This is a petition for a writ of certiorari to review a judgment of the court of appeals in the case of Eliza J. McKercher and others vs. Frederick I. Green, brought to that court on a writ of error to a judgment of the district court of Arapahoe county. A proceeding in habeas corpus was instituted in the district court to determine the right to the custody of an infant child, as between the father and the immediate family of the deceased mother. The district court awarded the custody of the child to the father. The court of appeals reversed this judgment, and remanded the case to the district court, with instructions that a decree be entered dismissing the writ, and awarding the custody of the child to respondents, upon the ground that the best interests of the child would be thereby subserved. McKercher v. Green, 13 Colo. App. 270, 58 Pac. 406.

The grounds upon which the right to the

writ is predicated are—First, that the court of appeals had no jurisdiction to review the judgment of the district court; second, that, if it should be held that it had jurisdiction to review the judgment, it exceeded its jurisdiction, and greatly abused its discretion, in rendering the particular judgment it did render.

It is conceded that no appeal to, or writ of error from, this court would lie to review the judgment rendered by the district court in the first instance, and that, if reviewable at all on appeal or error, it was within the exclusive and final jurisdiction of the court of appeals, and the review now asked can only be had in the exercise of our "general superintending control over all inferior courts," lodged in the supreme court by section 2, art. 6, of the constitution, which reads as follows: "The supreme court, except as otherwise provided in this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the state, and shall have a general superintending control over all inferior courts, under such regulations and limitations as may be prescribed by law."

We are directly called upon, in this and three other cases now pending, to lay down the rule which should govern us in the exercise of the power of "superintending control" conferred upon us by the foregoing provision, in reference to the action and decisions of the court of appeals. It is strenuously insisted by some of the petitioners in these cases that it should be exercised in all cases where the court of appeals ignores or misconceives any well-settled rule of law upon any given subject, or fails to regularly pursue the authority conferred upon it. We do not think that this is the intentment of this provision. As was said in *People v. Richmond*, 16 Colo. 278, 26 Pac. 933: "It was not designed to secure the review of judgments in connection with ordinary appellate jurisdiction," but "it was, rather, intended that the power thus lodged in the supreme court should be exercised only in special or extreme cases, whose peculiar circumstances as to the facts, or the law governing the same, justify, in the opinion of this court, a resort to it." In *re Ingersoll*, 50 La. Ann. 748, 23 South. 889. Without attempting to specify the reasons that may be sufficient to justify us in exercising the power in other cases, we are of the opinion that it may be resorted to in the following instances: First, when the court of appeals is without jurisdiction to review the judgment in question; second, when in a clear case it refuses to be guided or controlled by the law as laid down in the prior decisions of this court. In this event it would become our imperative duty to resort to it, in order to enforce uniformity of decision in the appellate courts of the state.

In the present case it is not claimed that the judgment of the court of appeals is contrary to any prior decision of this court, but that in rendering the particular judgment complained of it applied to the undisputed facts of the case a rule of law at

61 P.—38

variance with the settled doctrine upon the subject under consideration, and that, if its jurisdiction to review the judgment of the district court be conceded, it nevertheless had no authority to render the judgment it did. In other words, it appearing from the testimony that no moral disqualification prevented the father from receiving the custody of the child, and that he was financially able to provide for all its wants, and raise it in the station of life in which it was born, the court had no power to deprive him of its custody, notwithstanding, under all the circumstances, the best interests of the child would be subserved by its remaining with respondents. It is said that no court has the authority, for such reason, to deprive the father of his natural and statutory right to the guardianship of his infant child, and in so doing the court of appeals exceeded its lawful authority in the premises. If the court of appeals had jurisdiction to review the case before it, it is clear that such jurisdiction was not affected by the manner in which it decided. While it is true that jurisdiction includes, not only the power to hear and determine, but also the power of the court to render the particular judgment in the particular case,—that is, it may not render a judgment not within the issues, but must have properly before it the particular question it assumes to decide,—yet from this it by no means follows that, if it wrongly decides a question within the issues, it thereby exceeds its jurisdiction. In other words, its jurisdiction is not affected by the correctness or incorrectness of its decision. In this case the court of appeals was called upon to determine whether, under the facts and circumstances of the case as presented by the record before it, the district court had correctly adjudged the right to the custody of the child. It was therefore within its jurisdiction to determine that question, and whether it correctly or incorrectly applied the rule of law to the facts thus presented is not open to inquiry in this proceeding. If it is, as contended by counsel, a proper exercise of our superintending control to determine this question, then every case within the final jurisdiction of the court of appeals might be brought before this court for review.

The remaining question is whether the court of appeals had jurisdiction to review the judgment of the district court, it being a judgment in a habeas corpus proceeding. Counsel for petitioner contend that no review of such judgment can be had on appeal or error unless the same is expressly provided for by statute. Whatever may be the rule in this regard applicable to the usual judgment in habeas corpus discharging a party from illegal imprisonment, we think that in a case where the controversy involves the right to the custody of an infant, although the writ of habeas corpus is used to determine that right, it is nevertheless a civil suit, and, the judgment rendered

being a final adjudication in regard to such custody, it is clearly reviewable by the court of appeals, under the statute creating that court. Our conclusion is that the petition presented is insufficient to justify the issuance of the writ prayed for, and the demurrer thereto should be sustained, and the petition dismissed, which is accordingly done.

PEOPLE ex rel. LIVINGSTON et al. v.
COURT OF APPEALS OF
COLORADO.

(Supreme Court of Colorado. June 4, 1900.)

CERTIORARI—OPINION IN CONFLICT WITH
FORMER DECISIONS.

Certiorari will not lie to review a judgment of the court of appeals, affirming a judgment setting aside a chattel mortgage at the suit of an attaching creditor, on the grounds that the court disregarded decisions of the supreme court, denying to an attaching creditor the right to bring a creditors' bill, where the court considered such former decisions, but based its decision on peculiar facts not existing in the former cases.

Certiorari to court of appeals.

Certiorari by the people, on relation of Isaac Livingston and others, to review a decision of the court of appeals. Dismissed.

C. S. Essex, for relators. E. C. Glenn, W. B. Vates, W. B. McNeel, Bicksler, McLean & Bennett, and Rogers, Cuthbert & Ellis, for respondent.

PER CURIAM. This is also one of the cases referred to in *People v. Court of Appeals* (Colo. Sup.) 61 Pac. 592, and is an application for a writ of certiorari to review a judgment of the court of appeals in the case of *Livingston v. Dry-Goods Co.*, affirming a judgment of the district court of Pueblo county. The facts out of which the controversy arose are fully set forth in the opinion of the court of appeals reported in 12 Colo. App. 320, 56 Pac. 351, and are in brief as follows: One I. S. Glass, a merchant of Pueblo, while indebted to plaintiffs and others for the purchase price of goods in the sum of about \$5,000, gave certain chattel mortgages upon his stock of goods to relators, and turned over the mortgaged property to Livingston, who was his brother-in-law, to hold and dispose of the same, and shortly after absconded from the country, going to Europe, where he has since remained. The plaintiffs, some of whom had commenced suits by attachment, and had seized and taken from Livingston's possession goods amounting to about \$2,000, commenced this action to set aside the chattel mortgages, upon the ground that they were fraudulent, and were given and received with intent to hinder and delay plaintiffs in the collection of their claims. A receiver was appointed by the district court, who took possession of the property for the purpose of discharging the claims of plaintiffs and other creditors of Glass, and wound up the insol-

vent estate. On error to the court of appeals the judgment of the district court granting the relief prayed for was affirmed. It is insisted that, in upholding the right of simple contract creditors to maintain an action in the nature of a creditors' bill, the court of appeals ignored several decisions of this court, and disregarded the law as therein announced. By referring to the opinion of the court of appeals, it will be seen that this claim is unfounded. Instead of ignoring the former decisions of this court upon the subject, the learned writer of that opinion specifically referred to, and carefully considered, them, and accepted the law as therein laid down as correct and controlling as a general proposition, but sustained the right of the plaintiffs to maintain this action, although their claims had not been previously reduced to judgment, upon the sole ground that the facts and circumstances surrounding the transactions in question took this case out of the general rule laid down in those cases, and brought it within certain well-recognized exceptions. We can find nothing in the reasoning or conclusions of the court of appeals that shows any disposition to disregard the law upon this subject as laid down by this court, or any attempt to announce a doctrine that in any manner conflicts therewith. It has simply, in the exercise of its jurisdiction, decided that the peculiar facts of this particular case do not bring it within the general rule that controls the right to maintain an action in the nature of a creditors' bill. Our conclusion is that the opinion of the court of appeals is not obnoxious to this objection, and the other objections urged do not bring the case within any rule that would justify our interference in this proceeding. The demurrer is therefore sustained, and the petition dismissed.

INGERSOLL v. COURT OF APPEALS OF
COLORADO et al.

(Supreme Court of Colorado. June 4, 1900.)

CERTIORARI—DEFECTIVE RECORD ON APPEAL
—PETITION.

1. Certiorari will not lie to review a decision of the court of appeals of an appeal over which the court had jurisdiction, on the ground that the record did not contain an authenticated copy of the judgment sought to be reviewed, and that the bill of exceptions was not signed in time, and that the error for which the case was reversed was not assigned, where the opinion of the appellate court showed that the cause was submitted on an amended abstract, which contained facts sufficient to entitle the court to determine the cause.

2. A petition in certiorari to review a decision of an appellate court, in which an opinion is on file, should include a copy thereof.

Certiorari by L. G. Ingersoll against the court of appeals of the state of Colorado, the judges thereof, and the Little Valeria Gold Mining & Milling Company. Application denied.

Henry Trowbridge, for petitioner. Patterson, Richardson & Hawkins, for respondents.

PER CURIAM. This is one of the cases referred to in *People v. Court of Appeals* (Colo. Sup.) 61 Pac. 592, and is instituted for the purpose of bringing here for review a judgment of the court of appeals in the case of *Little Valeria Gold Min. & Mill. Co. v. Ingersoll*, reversing a judgment of the district court of El Paso county. The facts relied on as entitling petitioner to this relief are, in brief, as follows: The petitioner obtained a decree establishing a lien for the sum of \$2,129.25, together with attorney's fees and costs, amounting in the aggregate to less than \$2,500, against the property of the *Little Valeria Gold Mining & Milling Company*. On error to the court of appeals, this decree was reversed, and the cause remanded, with instructions to dismiss the action. The jurisdiction of the court of appeals to review this decree, if properly before it, is admitted, but it is alleged that the record filed in the court of appeals did not contain an authenticated copy of the judgment sought to be reviewed, and was in other respects incomplete; that the bill of exceptions was not signed in time to entitle it to be considered in the court of appeals; and that the assignment of errors did not contain the specific error upon which the court of appeals reversed the judgment. By reference to the opinion of the court of appeals, a copy of which should have been annexed to this petition (reported in 59 Pac. 970), it will be seen that these same objections were urged, and it was held that their discussion was foreclosed by a stipulation entered into by the parties, whereby the cause was submitted for final hearing on the amended abstract, which was found to contain facts sufficient to entitle the court to hear and determine the cause. The present application, therefore, amounts to this: That because, as it is averred, the court of appeals disregarded its own rules, and refused to follow the practice therein prescribed, we should, in the exercise of our superintending control, review its action, and determine whether or not it committed an error in passing upon the sufficiency of the record before it. It is manifest that such a case does not come within either of the instances in which our power should be exercised. *People v. Court of Appeals*, supra. The demurrer to the petition is therefore sustained, and the application denied.

HOWARD v. PEOPLE.

(Supreme Court of Colorado. June 4, 1900.)

DISORDERLY HOUSE—INFORMATION—SEPARATE OFFENSES—EVIDENCE—GENERAL REPUTATION—FORMER CONVICTIONS—ADMISSIBILITY.

1. Under Mills' Ann. St. § 1323 (Gen. St. 1883, § 839), prohibiting the keeping of a lewd house or place for the practice of fornication,

an information charging that accused unlawfully kept a lewd house and place for the practice of fornication does not charge separate offenses, since the keeping of a house of the kind designated and the keeping of a place of the same character are but different ways of violating such statute.

2. Under Mills' Ann. St. § 1323 (Gen. St. 1883, § 839), prohibiting the keeping of a disorderly house, to the encouragement of idleness, drinking, fornication, or other misbehavior, an information charging accused, in the language of the statute, with keeping a disorderly house, and instead of "other misbehavior" substituting open lewdness, fighting, the willful disturbance of the peace, etc., does not charge distinct offenses, since such concluding portion is of the same general character as the offenses previously mentioned.

3. Under Mills' Ann. St. § 1323 (Gen. St. 1883, § 839), prohibiting the keeping of a disorderly house to the encouragement of idleness, drinking, fornication, and other misbehavior, an information in the language of the statute is sufficiently definite, as the particular acts of idleness, etc., need not be set out.

4. The trial court's refusal of a bill of particulars in a prosecution for keeping a disorderly house will not be disturbed, except in case of gross abuse of discretion.

5. An accused cannot complain of the court's allowing the jury to take the information and affidavit on which it was based, on retiring, where his counsel, knowing of it, interposed no objection.

6. On a prosecution for keeping a disorderly house, it is competent to show the general reputation of accused and other occupants of the house, and also the general reputation of the house.

7. On a prosecution for keeping a disorderly house, former convictions of accused for previous offenses of the same character as that charged are competent evidence, as showing general reputation.

8. On a prosecution for keeping a disorderly house, a petition to the city council, signed by citizens of the community in which accused lived, referring to her as a lewd woman, is inadmissible to establish her general reputation.

9. Where accused is charged with keeping a disorderly house, it is incompetent for a witness to testify that he heard another person say that he had drunk beer in accused's house, since such evidence was hearsay, and not competent to prove the reputation of the house.

10. Where an information charges a continuing offense, the prosecution cannot be confined in its evidence to acts within the period mentioned in the information, but may show acts committed within the statutory period of limitation, prior to the returning of the information.

Error to Mesa county court.

Emma Howard was convicted of keeping a disorderly house, and she brings error. Reversed.

The information under which the conviction was had charges in the first count that on or about the 1st of August, 1898, and each and every day thereafter, till November 10th, the defendant knowingly and unlawfully maintained and kept a lewd house and place for the practice of fornication; and in the second count, containing the same allegation as to time, that defendant knowingly and unlawfully kept a common, ill-governed, and disorderly house, to the encouragement of idleness, gaming, drinking, fornication, open lewdness, the solicitation by prostitutes

therefrom, fighting, the willful disturbance of the peace and quiet of the neighborhood, loud and unusual noises, threatening, and traducing.

Henry W. Ross and S. N. Wheeler, for plaintiff in error. David M. Campbell, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., and Dan B. Carey, Asst. Atty. Gen., for the People.

CAMPBELL, C. J. A large number of errors have been assigned and argued. The transcript of the record is prepared without reference to chronological order of the proceedings below. Both the record and the abstract are confusing, and it has been a laborious task to obtain a satisfactory understanding of the questions sought to be raised.

The attorney general in his brief states that there is no affirmative showing in the record, as certified here, that all of the evidence heard at the trial is contained in the bill of exceptions, or that all of the instructions given by the court are thus preserved. In the reply brief this statement is not controverted, but the record, as a whole, shows a reasonable compliance with our practice in these particulars. The certificate by the stenographer of the court, it is true, does not take the place of the certificate of the trial judge, but, by necessary implication, the correctness of the stenographer's certificate in this record appears from other recitals made by the judge. We make the foregoing reference, however, that we may call to the attention of the profession the slovenly manner in which records are sometimes prepared. To examine them with a view to do justice to the litigants involves unnecessary labor for the court, which considerate members of the bar should perform for themselves. A remedy for such carelessness or ignorance of our rules is a summary dismissal, which will be used if the practice continues, but there are certain features in this case which cause us to relax strict adherence to wholesome practice.

1. It is said that in the first count an attempt was made to charge two entirely distinct and separate offenses, viz. knowingly and unlawfully maintaining a lewd house, and knowingly and unlawfully maintaining a place for the practice of fornication. Counsel either misapprehend or misstate the import of this count. Section 1323, Mills' Ann. St. (section 839, Gen. St. 1883), upon which it is based, reads: "If any person shall * * * maintain or keep a lewd house or place for the practice of fornication," etc. It might well be said that "house" and "place" are used as synonymous terms. But, if they do not have in the statute the same meaning, then the keeping of a house of the kind designated and the keeping of a place of the same character are but different ways or methods of violating the statute; and, being stated therein disjunctively, these acts, when they relate to the same transaction, and are

committed by the same person, at the same time, and for either or both of which the punishment is the same, may be charged each separately, or both conjunctively, as constituting but one offense, without violating any rule of criminal pleading.

2. It is stated that the second count is based upon two distinct and separate sections of the statute, viz. sections 1323, 1305, Mills' Ann. St. (sections 839, 821, Gen. St. 1883). In this contention, also, plaintiff in error is clearly wrong. This count is based upon the concluding part of section 1323, which provides a punishment "if any person * * * shall keep a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking, fornication or other misbehavior." The language of this count is in the precise terms of the statute down to and including the word "fornication," and then proceeds by the addition of the other language found therein. For several reasons the insertion of this language may be upheld, and the count regarded as being based upon section 1323. The concluding portion may be included in the expression "other misbehavior" found in the statute, for the reason that the specific acts set forth may be regarded as of the same general character as those previously mentioned. If not of the same nature, they may be regarded as surplusage, and enough would be left in the count to constitute an offense.

The further point sought to be made, that two distinct offenses are contained in this count, viz. (1) the keeping of the kind of a house designated, and (2) fighting, disturbing the peace, etc., is palpably erroneous. The substantive part of the offense is that defendant kept a disorderly house, to the encouragement of idleness, gaming, fighting, etc., and not that she kept a house of that kind, and also indulged in drinking, disturbing the peace, etc. There is but one offense charged in either one of these counts, and the authorities cited by counsel for plaintiff in error to the proposition that two entirely separate and distinct offenses cannot be combined in one count, because it would be thereby rendered double, are not applicable.

3. Another objection is that neither count of the information charges any specific offense against the defendant under the law. The argument in support of the contention is that the particular acts of lewdness or disorder complained of should have been set forth, so that defendant might know in advance for what offense she was placed on trial. This, also, is a misconception, or misstatement, of the real nature of the offense. Both counts are in the exact language of the statute, and ordinarily that is a sufficient compliance as to definiteness and precision of statement. Manifestly, neither count is subject to the criticism, for in the first the defendant is charged with unlawfully maintaining and keeping a lewd house

at a certain time and a certain place, and in the second count with keeping a disorderly house to the encouragement of idleness, gaming, drinking, etc.; and it is not essential that the particular acts of idleness, gaming, or drinking should be set out in the information, because the charge is that the disorderly house was kept to the encouragement of those things, and not that the defendant was guilty of the things themselves which the keeping of the house encouraged. *Leary v. State*, 39 Ind. 544; *State v. Hayward*, 83 Mo. 209; *U. S. v. Cruikshank*, 92 U. S. 543, 23 L. Ed. 588.

4. The court refused to order the district attorney, at the request of the defendant, to furnish her with a bill of particulars. As a general proposition, it rests in the sound discretion of the trial court to order or refuse a bill of particulars, and, except in the case of gross abuse of discretion, the ruling of the court below will not be disturbed. *Whart. Cr. Pl. & Prac.* (9th Ed.) §§ 157, 705. But it follows from our holding that the allegations of the information were sufficiently specific and definite, that the ruling denying a bill of particulars was also right. We might affirm this particular ruling of the trial court upon the ground that the record discloses that the application came at so late a time that, for such reason alone, the court might properly have refused to grant it.

5. At the conclusion of the trial the court gave to the bailiff, to be taken to the jury room along with the instructions, the information and the affidavit of the city marshal upon which the information was based, and it seems (at least, it is claimed to have been shown by affidavits produced by counsel in support of the motion for a new trial) that this information, and especially the accompanying affidavit, were read by the jury, and that they mainly relied upon their contents in rendering their verdict of guilty. Without passing upon the main question sought to be raised, it is sufficient, for the purpose of this opinion, merely to say that the defendant is not in a position to be heard upon it. She was represented at the trial by two attorneys, one of whom only makes an affidavit respecting what occurred in regard to the sending of this affidavit to the jury, and even he does not swear that he did not at the time know of the action of the court, but only that he was not aware at the time he filed his motion for a new trial that this affidavit was "used and read by the jury in its deliberations." There is no affidavit by or claim in his behalf made that the other attorney for the defendant, who was present at the time, did not then know that the affidavit was sent to the jury. In other words, for aught that appears, both counsel knew of this action of the court at the time it was done, and neither interposed any objection. We do not say in this case that counsel permitted this to be done for the purpose of taking advantage

of it in case the verdict was against their client, but we do say that courts will not tolerate the practice which would allow counsel to stand quietly by, without interposing any objection, and see the court do an improper act that might result to the injury of their client, and then seek to take advantage of the error in case of an adverse verdict. *State v. Nichols*, 29 Minn. 357, 13 N. W. 153.

6. Many errors have been assigned and argued to the rulings of the trial court upon the admission and rejection of testimony and to the instructions. These will not be noticed in detail, as for lack of proper objections, and for failure of plaintiff in error to comply with our rules of practice, she is not in a position as to some of them to ask for a review. But our refusal in this matter is to be taken neither as an approval or disapproval of such assignments. We are, however, compelled to reverse the judgment. We are free to say that we have endeavored to affirm it, but in several particulars the trial court so palpably violated well-established principles of criminal law, which are the property of every defendant accused of crime, irrespective of the nature of the offense charged, that we cannot approve of its action without disregarding previous well-considered decisions of this and other courts. We do not set aside the verdict upon the ground so strenuously urged, that the evidence is not sufficient to uphold it; for the jury was the proper tribunal to determine that question, and there was sufficient legal evidence to sustain the finding. But to that verdict there contributed erroneous rulings of the trial court which make it necessary to overthrow it. The evidence is largely, if not altogether, circumstantial in character, as in the nature of things in cases of this kind it must be. It was proper to introduce competent evidence as to the reputation of the plaintiff herself, since she was an inmate of the house, and also the general reputation of the house itself. Likewise was it proper to introduce legitimate testimony as to the reputation of the men and women, if any, who resorted to the house. Evidence of former convictions in the police magistrate's court of the defendant for previous offenses of the same general character as that included in this information was proper, if for no other reason than that it tended to show her reputation in the community where she lived in the very particular which was involved in this charge. But the admission of evidence that a petition signed by a number of citizens of the community where defendant lived had at one time been presented to the city council, in which she was referred to as a lewd woman, was erroneous. It is an improper method of establishing general reputation. So, also, was there error in admitting the testimony of the witness Keller that he had heard another person say that the latter had drunk a glass of beer in defendant's house. It was not only hearsay, but was not the proper

way in which to establish the general reputation of the house as one in which drinking was carried on. Other similar errors in the admission of testimony might be enumerated, but the foregoing are sufficient to indicate the objectionable character of the rulings attacked, and in the event of a new trial they should be avoided.

The errors assigned to those instructions given by the court of its own motion which plaintiff in error is in a position to press we do not consider tenable, and our attention has not been called to any substantial objection thereto. The instructions given by the court at the instance of the district attorney ought not to have been given at all, for some of them were not founded on any evidence in the case. In so far as they enunciate correct principles of law, under the facts, they had already been given by the court of its own motion; and in so far as they were a departure from, or addition thereto, they were erroneous.

Counsel for plaintiff in error have criticised the action of the trial court in admitting testimony within a period of 18 months (the statutory period of limitation) prior to the time of the returning of the information, which charged a continuing offense. They say that under the Massachusetts rule this was error, and that the evidence should have been confined to the period between the first and last date mentioned in the information. This rule has been adopted by the Texas court of appeals, but we concur in the opinion of Mr. Bishop, who, in his work on Criminal Procedure (2d Ed. § 402), declares that the rule is not based upon principle, and should not be followed. See, also, 1 Bish. Cr. Proc. (2d Ed.) § 388; *State v. Nichols*, 58 N. H. 41.

From what has already been said, the trial court will not, in the event of a new trial, fall into the errors contained in this record; but we desire to say, further, that in its instructions the court did not observe the legal distinction between fornication and adultery, and, while the instructions given as to the degree of evidence required may not be reversible error, yet the jury should have been given to understand more clearly that their conclusion must be upon the evidence beyond a reasonable doubt. Other instructions given may be subject to the criticism of incompleteness, but, taken as a whole, we do not think they are subject to the many objections urged.

We are constrained to remark that the prejudicial errors committed in this case were due to the improper insistence upon the part of the district attorney. In their zeal to secure a conviction, prosecuting officers should not, as they sometimes do, offer incompetent evidence, and contend for instructions which are of doubtful soundness, particularly where a jury may safely be trusted to do substantial justice under legitimate evidence and instructions which have stood the test of searching criticism in appel-

late tribunals. Because of the errors pointed out, the judgment must be reversed, and the cause remanded; and it is so ordered. Reversed.

SMISSAERT et al. v. PRUDENTIAL INS. CO. OF AMERICA.

(Supreme Court of Colorado. June 4, 1900.)

COURT OF APPEALS—PENDING CAUSE—REMOVAL TO SUPREME COURT—TIME OF MOTION—DELAY—JURISDICTION OF COURT OF APPEALS—OBJECTION—WAIVER.

Laws 1899, p. 173, provided that any party to a cause pending in the court of appeals, but not within its final jurisdiction, might remove such cause to the supreme court before or when the same was reached and ready to be assigned for argument, and that a failure to do so should waive the right to have the judgment of the court of appeals reviewed. Ct. App. Rule 40 (33 Pac. viii.) requires the calling of the submission docket monthly on a certain day, when application for oral argument must be made, and the cause assigned therefor. *Held*, that a motion to remove such a case to the supreme court, made after the calling of the submission docket and the assigning of the case for argument, but before argument, was made too late to permit the review of the trial court's judgment by the supreme court; the effect of the latter clause of the statute being to make the judgment of the court of appeals final in such a case.

Appeal from district court, Arapahoe county.

Action between Jacob H. Smissaert and others and the Prudential Insurance Company of America. From a judgment in favor of the insurance company, Smissaert and others appealed to the court of appeals. A motion of appellants to remove the case to the supreme court was granted. Motion by appellee to remand to the court of appeals. Sustained.

Doud & Fowler, for appellants. Benedict & Phelps, for appellee.

PER CURIAM. The appeal in this cause was taken and the record lodged in the court of appeals before the act of 1899, regulating the jurisdiction of that and this court to review causes on appeal, took effect. February 12, 1900, this cause was set down for oral argument by the court of appeals, to be had on April 10th following. April 5th preceding the date set for such argument, appellants moved to transfer the cause to this court, which motion was granted. Appellee now moves to remand upon two grounds: (1) No questions are involved giving this court jurisdiction; (2) the application to the court of appeals to remove to this court was not made within the time required by law. We shall only consider the second ground. In so doing, the following provision of the Laws of 1899 (page 173) must be construed: "Any cause pending in the court of appeals at the date of the taking effect of this act, and which, at said time, has not been finally submitted for the determination of said court, and which, under the terms of the act to which this is an amendment, is not within the final jurisdiction thereof, may, by any party thereto, be

removed into the supreme court at any time before, or when the same is reached and ready to be set down upon the calendar of the said court for argument or submission, and that a failure so to do shall be deemed a waiver of the right to have the judgment of the court of appeals reviewed by the supreme court." Rule 40 of the court of appeals (33 Pac. viii.) provides: "On the second Monday of each month, the first twenty-five cases then undisposed of on the submission docket will be called. Application in person or by attorney for oral arguments in any such cases must then be made, when they will be set down as the business of the court may permit. If no application be made, the causes will stand upon the submission docket for determination." Under this rule this case was called and set down for oral argument as above noted. After such order the motion to transfer to this court was made. Counsel for appellee claims that the motion to remove from the court of appeals was made too late; in other words, not having been interposed at the time when the cause was called for oral argument, or before, it has been waived. On behalf of appellants it is contended that, according to the language of the statute above quoted, the motion to remove was in apt time, because made before final submission, in that, as they construe the statute, a failure to make such motion shall only be deemed a waiver of the right to have the judgment of the court of appeals reviewed by the supreme court; their position being (quoting from their brief): "Appellants are not asking for the review of the judgment of the court of appeals here. They ask for the review of the judgment of the district court of Arapahoe county. The waiver of a right not claimed is certainly not conclusive against a different right which is claimed." The object of the act from which we have quoted is to require parties to actions pending in the court of appeals, which had not been finally submitted at the time it took effect, to take certain steps within a specified time; otherwise, the judgment of that tribunal in actions involving questions of which this court would have jurisdiction to determine is final. Our construction of the rule above quoted is that causes are called for the purpose of determining whether or not counsel upon either side desire oral argument. If a request for such argument is made, the cause is set for oral argument on a specified date; if not, it stands submitted. The statute provides that, when such call is made for the purpose specified in the rule, unless application is then made for removal to this court the right to have the judgment of the court of appeals reviewed is waived. That is the final date when the party desiring a removal must take steps to that end. True, the statute says that unless interposed at that time the right to a review of the judgment of the court of appeals is waived. That result follows, because the motion to remove has not been interposed at or before the time fixed therefor, and for the reason that consent-

ing to an oral argument, or to the submission of the cause without one, and without demand for a removal, submits the cause to the final jurisdiction of that court. The limitation of the time when affirmative action must be taken to remove logically precludes the right to exercise it after that date. The motion to remove from the court of appeals came too late, and for this reason the motion to remand is sustained. Motion to remand sustained.

DE BORD v. PEOPLE.

(Supreme Court of Colorado. June 4, 1900.)

ASSAULT—CRIMINAL'S PROSECUTION OF HIMSELF—SUBSEQUENT PROSECUTION—FORMER CONVICTION.

Under Mills' Ann. St. § 2768, providing that, if one accused of an assault confess himself guilty, he shall be punished as in other cases, where one who has committed an assault goes before a justice of the peace, swears to a complaint against himself, is convicted on his own evidence, and assessed less than the maximum punishment for such offense, he cannot plead such proceeding in bar of a subsequent prosecution for the same offense instituted on complaint of the person assaulted, though on the trial of the latter action he is not assessed a greater punishment than in the first proceeding.

Appeal from Saguache county court.

Daniel H. De Bord was convicted of an assault, and he appeals. Affirmed.

Ira J. Bloomfield, for appellant. David M. Campbell, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., and Dan B. Carey, Asst. Atty. Gen., for the People.

CAMPBELL, C. J. The plaintiff in error (defendant below) on the 7th of April, 1890, in the county of Saguache, committed an assault upon one H. C. Burton. On the same day he voluntarily went before Dewitt C. Travis, a justice of the peace of that county, and swore to a complaint charging himself with such assault, thereby confessing his guilt, whereupon the justice heard his testimony only, and sentenced him to pay a fine of three dollars and costs, which was at once paid. Upon the same day, and, it seems, after the Travis case was initiated, Burton (the one assaulted) went before another justice of the peace of that county (Peter W. Luengen), and swore to a complaint against the defendant, charging him with the same assault. A warrant was thereon issued, and under it the defendant was arrested and brought before the said justice for trial after the termination of the proceedings above mentioned. A plea of former conviction before Justice Travis was interposed and overruled, trial was had, and defendant fined five dollars and costs, from which he appealed to the county court of Saguache county. In the county court the defendant again interposed, and in writing, a plea of former conviction before Justice Travis. To this plea the district attorney filed a replication,—in

substance, being that the judgment which Justice Travis rendered was by a court without jurisdiction, and was a farce and void as against the people; that such proceedings were fraudulent, and instituted by defendant himself merely for the purpose of enabling him to escape proper punishment for his offense, and to evade the law and bar a prosecution duly conducted by the people. Issue was joined upon this plea before the county court without a jury, and the court found against the defendant, and assessed a fine against him of three dollars and costs. To review this judgment the defendant has sued out a writ of error.

There is only one question in the case, and that is whether a defendant may voluntarily go before a justice of the peace, swear to a complaint charging himself with an assault, confess himself guilty,—the justice hearing only the evidence of the defendant himself,—and thereafter successfully plead a judgment against himself, rendered in such a proceeding, as a bar to a subsequent prosecution for the same offense by the duly-authorized representative of the people in a court of competent jurisdiction. It is the contention of the plaintiff in error that since he was fined by the justice of the peace, before whom he voluntarily went, the same amount that was imposed by the county court at the trial in which the district attorney appeared, no fraud was committed, and the law was vindicated. It has been held, where there was a statute so providing, that one accused of a small offense might voluntarily go before a court having jurisdiction, and confess himself guilty, and that the judgment imposed in such a case would be a bar to a subsequent prosecution for the same offense. But even there the statute was strictly construed, so as to minimize the chances for perpetrating fraud. We have no such statute. Section 2768, Mills' Ann. St. (section 2044, Gen. St. 1883), provides that, if any person accused of assault or assault and battery shall confess himself guilty, the jury, or, if a jury be waived, the justice, shall hear evidence and assess a fine, and the justice shall enter a judgment and issue execution, subject to appeal, as in other cases. This, however, means that the accusation shall be made, not by the defendant himself, or some one acting in his behalf, but by some disinterested person. To countenance such a practice as the defendant insists is proper would furnish to any defendant the means of escaping, in whole or in part, the punishment which his offense merits, and enable him to make a travesty of criminal prosecutions. Mr. Bishop, in volume 1 of his *New Criminal Law*, at section 1010, thus states the rule: "If one procures himself to be prosecuted for an offense which he has committed, thinking to get off with a slight punishment, and to bar a real prosecution in the future,—if the proceeding is really managed by himself, either directly or through the agency of another,—he is, while thus

holding his fate in his own hand, in no jeopardy. The plaintiff state is no party in fact, but only such in name. The judge, indeed, is imposed upon, yet, in point of law, adjudicates nothing. 'All was a mere puppet show, and every wire moved by the offender himself.' The judgment, therefore, is a nullity, and is no bar to a real prosecution." There are authorities which hold that, if the legal penalty is an exact one,—for example, a fine of a fixed sum, or imprisonment for a certain term,—and the person carrying on the cause against himself has borne it in full, not merely in part, the state thereby has suffered nothing, and the judgment would not be deemed fraudulent. This exception, if it be sound (as to which we express no opinion), is not applicable to this case, for the penalty for assault, under our statute, is imprisonment in the county jail for a term not exceeding six months, or a fine not exceeding \$100. Many authorities might be cited in support of the conclusion reached, some of which are *State v. Little*, 1 N. H. 257; *Watkins v. State*, 68 Ind. 427; *Gresley v. State*, 123 Ind. 72, 24 N. E. 332; *Shideler v. State*, 129 Ind. 523, 28 N. E. 537, 29 N. E. 36; *Com. v. Alderman*, 4 Mass. 477; *Com. v. Dascom*, 111 Mass. 404; *Bradley v. State*, 32 Ark. 722; *McFarland v. State*, 68 Wls. 400, 32 N. W. 226; *State v. Simpson*, 28 Minn. 66, 9 N. W. 78; *Drake v. State*, 68 Ala. 510; *State v. Smith* (Kan. Sup.) 47 Pac. 541; *State v. Atkinson*, 9 Humph. 677; *State v. Colvin*, 11 Humph. 599; *State v. Epps*, 4 Sneed, 552; *State v. Green*, 16 Iowa, 239; *Com. v. Jackson*, 2 Va. Cas. 501; *Clark's Cr. Proc.* 393; *De Haven v. State*, 2 Ind. App. 376, 28 N. E. 562. The judgment is affirmed. Affirmed.

STANDLEY et al. v. HENDRIE & BOLT-HOFF MFG. CO. et al.

(Supreme Court of Colorado. May 21, 1900.)

EQUITY—CREDITORS' SUIT—INSOLVENT CORPORATION—APPOINTMENT OF RECEIVER—CERTIFICATES OF INDEBTEDNESS—ISSUANCE—CONTINUANCE OF BUSINESS—POWER OF COURT OF EQUITY.

Mills' Ann. St. § 497, provides that courts of equity shall have power to dissolve any corporation and appoint a receiver therefor, who shall have authority to do all things necessary to close up its affairs as commanded by the decree of the court. *Held*, that after the property of a corporation had been sold under mortgages, and the equity of redemption had expired, the court had no power, in a creditors' bill filed by stockholders, to authorize a receiver appointed therein to issue certificates of indebtedness to enable him to work the mine, which constituted the corporate property, and make the same a lien thereon in preference to the mortgages, since after the expiration of the equity of redemption the stockholders had no interest in the property, and the power of the court was limited to closing up the affairs of the corporation.

Appeal from district court, Arapahoe county.

Creditors' suit by the Hendrie & Bolthoff Manufacturing Company and another

against Joseph Standley and others. From an order authorizing a receiver to issue certificates of indebtedness, defendants appeal. Reversed.

On August 7, 1897, the Hendrie & Bolthoff Manufacturing Company and A. C. Schlesinger filed a complaint in the district court of Arapahoe county against the Crown Point & Virginia Gold-Mining Company, wherein it is alleged that they were judgment creditors of the company, and also that the appellants had theretofore recovered judgment against the company, transcripts of which respective judgments were duly recorded in the office of the recorder of Clear Creek county, Colo.; that the company had made no defense to any of the actions in which said judgments were rendered; that some of the judgments are false and fraudulent as against the creditors of the company, and that the company had, collusively and without consideration, permitted them to be rendered against it for the purpose of defrauding certain of its stockholders, who were in the minority, and the other creditors of the company; that the management and control of the stock and concerns of the company were in the hands of George A. Kessler and George Semel, both nonresidents of the state of Colorado, who were fraudulently and recklessly managing its affairs and business operations for the purpose of wrecking the company; that none of said judgments have been paid by the company, or any one for it, and that it is making no effort to pay the same, but is allowing its property to be seized and sold by some of said judgment creditors, and is making no effort to redeem its property from such sale; that the mining properties of the company were valuable, if properly managed and worked, and that sufficient money could be obtained through the extraction of ore therefrom to pay all of its just debts; that an execution had been issued upon a certain judgment obtained by Benjamin F. Lowell and others; that a demand had been made by the sheriff of Gilpin county upon the company to pay the money due upon the execution issued upon said judgment; that the company has allowed said judgment to remain unsatisfied for 10 days after such demand, by reason of which the sheriff had levied said execution upon the mining property of the company, and a valuable part of said mining property was on February 15, 1897, sold at sheriff's sale to satisfy the judgment; and that the time for the redemption from such sale would expire on August 15, 1897. It is also alleged that the meetings of the directors of the company had all been held outside of the state of Colorado, and in the city of New York, without any notice to S. A. Josephi, the only resident director of said corporation; that said corporation as managed is, and will be, entirely insolvent. They prayed judgment in behalf of themselves and all

others similarly situated; the appointment of a receiver, with the usual powers and duties, and with the usual directions to take into possession and sequester the property and effects of the company, and convert the same into money, for the use of the creditors, and that the corporation be dissolved, and its business closed up, according to the statute in such case made and provided. Neither the appellants, although alleged to be judgment creditors of the company, nor the directors charged with fraud and mismanagement of the company's affairs, were made defendants to the suit. S. A. Josephi, the resident director of the company, acknowledged service of summons in the case on August 2, 1897. On the day the complaint was filed a petition in intervention by Samuel Hyman and Jonas Hiller was also filed, containing similar allegations to those of the complaint. On the same day Josephi was appointed receiver. On August 13, 1897, a petition for his removal, setting forth several grounds therefor, was filed by the company. On August 19, 1897, the appellants, with the exception of Mayhew, filed a petition in intervention, asking to be permitted to become parties defendant for the purpose of resisting the application for receiver, and to protect their rights in the property involved, wherein they alleged, in substance, that they were mortgage creditors of the defendant company, who had foreclosed their mortgages and sold the property under decrees of foreclosure, and held certificates therefor; that the judgment mentioned in paragraph 8 of the complaint was obtained in an action to foreclose a first mortgage on the east 750 feet of the Crown Point and Virginia claims, which had been given to secure a portion of the purchase price thereof; that a decree of foreclosure in the district court of the First judicial district of Colorado, in and for the county of Clear Creek, had been duly entered on May 25, 1897, making the same a first lien upon said premises, under which decree the same had been sold on July 12, 1897, and purchased by appellant Standley, as trustee (one of the creditors therein), who held a certificate of purchase therefor, duly recorded in the office of the recorder of Clear Creek county; that the judgment recovered by Thomas H. Potter and Edward W. Williams on May 25, 1897, was obtained by foreclosure of a first mortgage on the west 750 feet of the Crown Point claim, under which decree the property was sold on June 20, 1897, and purchased by Potter and Williams, who held a certificate of purchase, duly recorded; that the judgment in favor of Thomas H. Potter and the Hawley Merchandise Company was obtained on May 25, 1897, in an action for the foreclosure of a first mortgage upon the property of said defendant known as the "Bantala Lode-Mining Claim," and was also given to secure the purchase price of said property,

under which decree the same had been sold June 28, 1897, and purchased by them, and a certificate of purchase made and delivered to them, and duly recorded; that neither of said judgments has been paid. It is further alleged that the receiver, Josephi, had been the sole manager of defendant company's affairs until about January 1, 1896, during which time all the debts mentioned in the complaint had been created; that he was wholly unacquainted with mines or their management, and incompetent to take charge of the workings thereof. It was also charged, on information and belief, that the suit was collusive, and brought to procure the appointment of Josephi as receiver, and that the mining of the ore now developed in said mines under the receivership would constitute a waste and destruction of the property itself, and of all that was of any value therein. The petition was granted, and petitioners made parties defendant.

On September 6, 1897, Josephi was removed, and Michael Spangler appointed receiver. On December 4, 1897, Mr. Spangler met with a fatal accident, and died a few days thereafter. On December 23, 1897, A. B. McGaffey was appointed as his successor. On January 20, 1898, he filed his first report, wherein he showed that debts had been contracted under Spangler's administration to the amount of over \$5,000, and filed a petition for authority to issue certificates of indebtedness to provide funds with which to meet these obligations and future charges for the preservation of the property, and that the same be made a lien upon the property; and alleged that, if money was not raised, the men then on the property would quit work, the mines would be filled with water, and almost, if not quite, destroyed; that mechanics' liens would be placed upon the property, and that it was probable, if the men were not paid, they might become desperate and destroy or damage the property; that the property had been sold for taxes, and there was then due for taxes \$787.20; that, to enable him to meet the obligations incurred and to be incurred, provision should be made for the issuance of certificates in amount not exceeding \$6,500. To this petition these interveners appeared, and resisted the application. On January 20, 1898, Frank Mayhew filed his answer to the petition, alleging: That on October 12, 1896, Benjamin F. Lowell and Eugene Clark, co-partners under the firm name of Lowell & Clark, recovered a judgment in the county court of Gilpin county, Colo., against the defendant company, for \$1,988.84 and costs, and on October 13, 1896, filed a certified transcript of said judgment in the office of the clerk and recorder of Clear Creek county. On January 14, 1897, they caused an execution to issue on said judgment. That thereafter, and on January 19, 1897, the sheriff of Clear Creek county, under said execution, levied upon the following described property

of the Crown Point & Virginia Gold-Mining Company, to wit: The Williams, the Knickerbocker, the Hauchhaus, and the Sam Lee lode-mining claims,—and on February 15, 1897, in and by virtue of said execution and levy, the sheriff duly sold the property to Lowell & Clark for the sum of \$2,085.35, and issued to them a certificate of purchase. On December 22, 1896, he (Mayhew) duly recovered a judgment in the district court of the First judicial district of Colorado, in and for Clear Creek county, against defendant company, for the sum of \$5,718.28 and costs, and caused a certified transcript of said judgment to be recorded in the office of the clerk and recorder of said county. After the expiration of six months, and before the expiration of nine months, from the sale under the Lowell & Clark judgment, to wit, on August 17, 1897, as such judgment creditor he re-deemed the premises sold under the Lowell & Clark judgment, and after the expiration of 60 days thereafter, to wit, on November 13, 1897, received a sheriff's deed for said property. That no work was done on any of said claims after November 1, 1897, by the receiver, and that he did not have possession of any of said claims after that date. That it was not necessary at any time for said receiver to do any work or anything whatever for the preservation of said claims, and he objected to the issuance of any receiver's certificates, to become a lien upon said premises. Upon this application, hearing was had, and on March 1, 1898, the court entered an order and decree authorizing the receiver to issue certificates of indebtedness, commonly known as "receiver's certificates," for the amount of the indebtedness theretofore incurred, amounting in the aggregate to \$5,167.60, and for an additional sum of \$1,000 to be used in the future preservation and protection of the property, to bear interest at the rate of 8 per cent. per annum, and be a lien upon all the property that went into the possession of the receiver on August 7, 1897, prior to, and to have precedence over, each and all of the mortgage claims, sheriff's deeds, or judgment liens owned by the appellants. From this judgment and decree they prosecute this appeal.

J. McD. Livesey, Alvin Marsh, Thomas, Bryant & Lee, and Chase Withrow, for appellants. Daniel E. Parks and E. C. Miles, for appellees.

GODDARD, J. (after stating the facts). It will be observed that the original action in which the order complained of was made was in the nature of a creditors' bill, and was brought under section 497, Mills' Ann. St., wherein the appointment of a receiver is expressly authorized. The controlling question presented for our consideration, therefore, is whether the court below, in exercising the special jurisdiction conferred upon it by this statute, had authority, through

its receiver, to operate, during the pendency of the suit, the mines and mining property of defendant corporation, and to provide for the payment of the expenses so incurred by the issuance of receiver's certificates, that should become a first and paramount lien on the property in his hands. So much of the statute as is pertinent to this inquiry reads as follows: "Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, to appoint a receiver therefor, who shall have authority by the name of the receiver of such corporation (giving the name), to sue in all courts, and to do all things necessary to closing up its affairs as commanded by the decree of the court." It is strenuously insisted by counsel for appellees that under and by virtue of this provision the receiver being clothed with power to do all things necessary to close up the affairs of the company as commanded by the decree of the court, and the court having determined that the doing of such work, and the issuance of receiver's certificates in payment therefor, were necessary to that end, its judgment is conclusive as to such necessity and the power of the receiver in the premises. We do not think that such is the purport or intent of the statute, but that it contemplates only the doing of those things which are necessary to the closing up of the affairs of the insolvent corporation, and that while, by the appointment of a receiver, he becomes, eo instanti, vested with the legal title and right of possession of all the property of the corporation, both real and personal, for the purpose of subjecting the same to the claims of its creditors, he has no power, nor can the court clothe him with the power, to continue or carry on the business of the corporation. In other words, the statute, while conferring upon courts of equity power and authority they would not otherwise possess, to decree the dissolution of a corporation at the suit of an individual, and, to that end, authorizing the taking charge of its property through a receiver for the purpose of closing up its affairs, does not confer upon the court any other or greater powers in the administration of such trust than it can exercise in other cases where, in the exercise of its equity jurisdiction, it may appoint a receiver to administer the affairs of an insolvent private business corporation during pending litigation. The well-settled rule applicable in the latter class of cases, recognized and approved by this court in the recent case of *International Trust Co. v. United Coal Co.*, 60 Pac. 621, is that a court of equity has not the power to authorize a receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property in his hands, but only such expenses as are necessary to its care and custody, and expenses of realization and preservation which may be incurred under the order of the court, can be so made a para-

mount lien. Chief Justice Campbell, who delivered the opinion of the court, after a thorough and exhaustive review of all the cases upon this subject, said: "After a careful consideration of all the authorities cited, we are of opinion that, in administering the affairs of an ordinary insolvent private business corporation, for which a receiver has been appointed, a court of equity has not the power to authorize the receiver to incur indebtedness for carrying on the business, and to make the same a first and paramount lien upon the corpus of the property, superior to that of prior lienholders, without their consent. While it may, in a proper action, and with the proper parties present, through the instrumentality of a receiver carry on the business of private corporations or individuals temporarily, and incur obligations therefor that may be made a paramount lien on the corpus of the property, such obligations must have been contracted for, and must relate strictly to the preservation of the status of the property at the time of the appointment of the receiver." The facts disclosed in the case at bar emphasize the necessity of strictly enforcing this wholesome and just rule. At the time the original action was instituted, the appellants had, under decrees of foreclosure of their respective liens, purchased the entire mining property of the company, and the only interest which the company then had was an equity of redemption; and at the time the receiver made his application for leave to issue the certificates in question, on January 20, 1898, and consequently when the order and decree complained of were made, the time for the redemption by the defendant company from such sales had expired, and it had no interest or title in the premises to which the liens sought to be created thereby could attach. And it also appears that the indebtedness for which the receiver was authorized to issue his certificates was not essential to the preservation of, but had been incurred in operating, the mine, against the protests and over the objections of appellants; the \$1,000 being for its future preservation, which, under the condition of the title, would be solely for the benefit of appellants themselves. In these circumstances, the decree complained of was clearly unwarranted, and no reason exists upon which it can be upheld. It should therefore be reversed, and it is so ordered. Reversed.

WRIGHT v. PLATTE VAL. IRR. CO.

(Supreme Court of Colorado. May 21, 1900.)

IRRIGATION CONTRACT—LIMITATION TO DESCRIBED TRACT—LIMITATION TO NECESSARY AMOUNT—USE OF WATER ON OTHER TRACT—QUANTITY ABSOLUTELY LIMITED—LIMITATION TO CERTAIN PURPOSES—VALIDITY—USE OF ENTIRE QUANTITY—INJUNCTION.

1. Where defendant, a consumer of water furnished by plaintiff irrigating company under a contract that only such amount of water should be used as was necessary to irrigate

a described tract, and that the water should be used only on such tract, admits, in his answer to plaintiff's suit to enjoin his more extensive use of the water, that he is using it to irrigate another tract, but denies that he is using more water, or for a longer time, than is necessary to irrigate the described tract, the irrigation of the other tract being accomplished from the surplus remaining after watering the described tract, such answer admits a violation of the contract, and is demurrable.

2. Mills' Ann. St. § 2283, prohibits any person from running through his irrigating ditch more water than is absolutely necessary for irrigating his land and for domestic purposes. Defendant's contract with plaintiff irrigating company provided that defendant should not use more water than was necessary to irrigate a described tract and for domestic purposes, and in no event more than a specified quantity. *Held*, that the contract gave the defendant only the right to the use of the company's ditch to conduct such volume of water as might be necessary for the purposes specified, and no more, and that defendant's use of the surplus remaining after the purposes specified were accomplished, and up to the quantity limited, for the irrigation of other lands, was ground for an injunction against him.

Appeal from district court, Weld county.

Bill for injunction by the Platte Valley Irrigation Company against Isaac Wright. From a decree in favor of complainant, defendant appeals. Affirmed.

The appellee is a duly-organized ditch corporation, and has the management and control of a certain irrigating ditch, known as the "Platte Valley Ditch," taken from the Platte river, in Weld county. It has sold to sundry owners of land lying under its ditch, including appellant, a large number of rights for the carriage of water, to be used upon their lands for agricultural purposes. By the contracts entered into between it and its consumers, the water is to be applied upon the lands therein specified. On the 11th day of April, 1888, it sold to appellant one-half of one 80-acre water right under a contract in the usual form, and which provides, *inter alia*, as follows: "That in consideration of the stipulations herein contained, and the payments to be made as hereinafter specified, the first party hereby agrees to sell unto the second party one-half water right to the use of water flowing through the canal of said company, each right representing 1.44 cubic feet of water per second, to be measured over a weir or in other such manner as the first party may from time to time deem best, subject to the following terms and conditions, to which the said Isaac Wright and his assigns expressly agree: (1) That said company agrees to furnish the said water to the said Isaac Wright or his assigns, during the irrigating season, except as hereinafter provided, and at no other time. (2) Said water shall be used only to irrigate the following described tract of land, and no other land, to wit: The east half of the northeast quarter of the northwest quarter, and the north half of the southeast quarter of the northwest quarter, of section four (4), township three (3) north, range sixty-six west, in Weld county, but may be used for domestic purposes during the irrigating sea-

son; but under no circumstances shall said water, or any portion thereof, be used for mining, milling, or mechanical power, or for any other purpose not directly connected with or incidental to the purposes first herein mentioned. (3) The said Isaac Wright or his assigns shall not permit said water, or any portion thereof, furnished as aforesaid, to run to waste, but, as soon as a sufficient quantity shall have been used for the purposes herein allowed and contracted for, the said Isaac Wright or his assigns shall shut off said water, and keep the same shut and turned off until the same shall be again needed for the purposes aforesaid; but in no case shall the amount of said water taken or received by said Isaac Wright or his assigns exceed the quantity hereby sold." On November 24, 1896, the appellee instituted this action in the district court of Weld county to enjoin the appellant from using and applying the water so purchased upon other and additional lands, and, as ground for such relief, alleges that, while still using and applying the same upon the forty acres described in said contract, he has "lately been using and attempted to use the said water on other and different lands than the lands described in said contract, to wit, upon the S. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and about half of the N. W. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$; also, the balance of the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$,—all of section 4, township 3 north, range 66 west, thus irrigating and attempting to use the water right for 40 acres to cultivate and irrigate about 120 acres of land; that thereby defendant has been using and attempting to use a larger amount of water than is necessary for the said 40 acres of land, and for a much longer time than was required for the irrigation of the said 40 acres of land; that by reason of the premises defendant is placing, and attempting to place, an additional burden upon the said water right, and to greatly enlarge the said water right, to the great injury and damage of this plaintiff and the several water right owners in said ditch and the consumers of water therefrom; that during the irrigating season of 1896 the said defendant has asserted and enjoyed the said enlarged use of said water right, and has irrigated the most of said 120 acres of land, and in so doing has called for and used more water than was necessary for the irrigation of said 40 acres of land, and employed the said water right, and the use of water thereunder, for a period of time greatly exceeding the time required to use the said water right upon the said 40 acres of land." To this complaint appellant interposed five defenses: First, as an answer to the allegations of the complaint above quoted, he states: "This defendant admits that he used some of said water during the irrigating season of 1896 on another and different small tract than that described in said contract, and did thereby attempt to irrigate a small tract more than the said tract of land described in the contract, but denies that thereby he (the defendant) used, or attempted to use, a larger amount of water than was

necessary for the said tract of land described in the contract, or for a longer time than was required for the irrigation of said last-named tract of land, described in said contract; denies that by reason of said premises he (the defendant) is placing, or attempting to place, an additional burden upon his said water right, or to enlarge the water right, to the injury of the plaintiff or any water right owners under said ditch or consumers of water, or in any other manner whatsoever, because that the small additional tract of land which he (this defendant) attempted to or did irrigate lies adjacent to the tract of land mentioned in said contract, and below the same as respects the matter of elevation, and the irrigation of said additional tract was accomplished by the use of a small portion of the water to which this defendant was entitled under his contract, by conducting the surplus remaining after irrigating the said tract mentioned in the contract to said adjoining tract, which surplus could not be returned to the plaintiff's ditch, and, except for the use aforesaid, must necessarily have run to waste." For a second defense appellant attacks that clause of the contract which provides that the water shall be used only to irrigate the certain tract of land in the said contract mentioned, as being harsh, unreasonable, and contrary to public policy; that the appellee, acting only in the capacity of common carrier, had no right to impose such limitation, and was guilty of illegal exaction in requiring appellant, as a condition to the furnishing of water, to sign said contract; that he signed the same under protest, being compelled so to do or else fall of the procurement of water; "and, further, that that certain other provision in the said contract to the effect that, as soon as a sufficient quantity of water shall have been used for the purpose of irrigating the particular tract of land mentioned, this defendant, or his assigns, shall shut off said water, and keep the same shut and turned off until the same shall be again needed for the irrigation of said tract of land, is likewise an unnecessary, unreasonable, harsh, and unjust provision, not required for the protection of said plaintiff in its business as a common carrier, or for the protection of its patrons, and is likewise contrary to public policy and void." For a third defense he denies that the action is instituted, as alleged, in the interests and on behalf of other users of water from its ditch, or that it is seeking the relief demanded for their protection, but says it is brought solely for the purpose, on the part of appellee, of imposing an additional burden upon appellant and its other consumers, without giving any added benefit. The fourth defense is in substance the same as the second, and presents the question as to the right of plaintiff to exact, as a condition to supplying water, a stipulation that the water for which the consumer pays was not to be used upon any other than the specified tract. For a fifth defense it is averred that, at the time of entering into the contract, the water there-

in contracted for was scarcely sufficient to irrigate, during the irrigating season of the year, the tract of land described therein; that since that time, by reason of continued cultivation of said land, and by reason of various causes connected with continued use, irrigation, and cultivation of same, the land does not now require much more than half the quantity of water which, at the time of making the contract, it did require, and the quantity of water sold to appellant is now sufficient to properly irrigate the land mentioned in said contract, and also a small additional tract adjoining; and avers "that by reason of the premises he hath become and is entitled to use, and is therefore attempting to use, water for the irrigation of said small adjoining tract, but in so doing this defendant hath not used, and does not purpose to use or attempt to use, any other or greater quantity of water, nor for any longer period of time, nor any more continuously, than he, at the time of the making of said contract or agreement, could lawfully and properly use said water for the particular tract mentioned." A demurrer was interposed and sustained to these defenses, appellant electing to stand by his answer. A decree was entered in favor of appellee, awarding it the relief prayed for in the complaint. To review this judgment the defendant below brings the case here on appeal.

Benedict & Phelps, for appellant. J. W. McCrury, for appellee.

GODDARD, J. (after stating the facts). 1. The first error discussed by counsel for appellant is predicated upon the action of the court below in sustaining the demurrer to the first defense. Their contention is that this defense traversed a number of material allegations of the complaint, and put in issue the fact as to whether there had been a violation of the contract as alleged; and that, therefore, no decree could go in favor of appellee without proof on its part of the existence of this controverted fact. By reference to that portion of the answer which is relied on as constituting such traverse, as above set out, it will be seen that it contains no denial of the specific acts alleged to have been committed by appellant in violation of the contract, to wit, that during the year 1896 he not only used the water to irrigate the 40 acres specified in the contract, but also to irrigate and cultivate altogether about 120 acres, but does contain an admission that he had, during that year, used the water on other and different land, and did thereby attempt to irrigate a small tract more than that described in the contract. From this admission, and these undisputed averments, notwithstanding the denial, in general terms, that the appellant thereby used a larger amount of water than was necessary, or for a longer time than was required, for the irrigation of the particular tract described, it sufficiently appears that appellant used the

water in violation of the terms of the contract.

2. It is unnecessary to determine in this case the question, so fully and ably discussed by counsel, as to whether or not a consumer of water under a ditch can, without the consent of the ditch company, change the use of water to another and distinct tract of land from that specified in the contract, since, under the averments of the complaint, appellant has not made, or attempted to make, such a change. Nor is the action brought to prohibit such a change. The only important question presented by the pleadings is whether the third provision of the contract, in so far as it limits the use of the water right in question to the necessities of the particular 40 acres therein described, is valid and enforceable against appellant; in other words, whether, notwithstanding this limitation, the appellant can use the water for all necessary purposes upon the land specified, and at the same time apply it to the irrigation of other and adjacent land. Counsel for appellant insist that this provision is harsh, unreasonable, against public policy, and void, because, it is said, the ditch company, being simply a "common carrier," is clothed merely with the right to carry water and receive compensation therefor, and the consumer under the ditch, who applies the water to a beneficial use, being really the appropriator of the water, and hence the owner of the water right, is entitled to apply the water thus appropriated to any land he may desire, and any attempt on the part of the ditch company to limit or control his exercise of this right is beyond its power. We cannot agree fully with counsel upon either of these propositions. It is true, as has been frequently announced by this court, that a ditch company is not the owner of the water it diverts through its ditch; neither is its status, in the strict legal sense of the term, that of a "common carrier." As was said in *Wheeler v. Irrigation Co.*, 10 Colo. 582, 17 Pac. 487: "The carrier must be regarded as an intermediate agency existing for the purpose of aiding consumers in the exercise of their constitutional right, as well as a private enterprise prosecuted for the benefit of its owners." Its status is more like that of a private carrier, whose duties are measured by the obligations it assumes towards its consumers, and such as the law imposes by reason of the nature of the business in which it is engaged. While it may not impose conditions that operate to deprive consumers of the enjoyment of their constitutional rights, it may require them to exercise such rights under reasonable regulations and limitations. The consumer, by reason of his application of the water to a beneficial use, is said to be an appropriator, yet we do not think he occupies the exact status of one who appropriates the water directly from the public stream. His contract with the company is not the purchase of a given volume of water, but the purchase of

the right to use the canal as a means to conduct a given volume, or so much thereof as may be necessary to irrigate a certain number of acres; while one who diverts the water through his own channel directly from the stream, having made an appropriation of a given volume without any such limitations imposed, is at liberty to divert that volume, when such diversion does not interfere with the prior rights of others, and apply it to the use for which it was originally intended, or on an acreage exceeding that for which the diversion was originally made. In other words, the consumer under a ditch, by the express terms and limitations of his contract, does not acquire a right to the continuous use of the maximum of the water right conveyed, and which may have been necessary to irrigate the specified number of acres originally, but only acquires the right to have so much thereof furnished for such length of time as the land, in its existing condition, requires. We are unable to see wherein such limitation is against public policy, or is in any sense an illegal or unreasonable exaction on the part of the ditch company. It is intended to prevent the waste of water, or a use of the same in excess of the necessities of the particular piece of land specified, and is directly in line with the policy prescribed by the legislature upon this subject. Section 2283, *Mills' Ann. St.*, provides: "During the summer season it shall not be lawful for any person or persons to run through his or their irrigating ditch any greater quantity of water than is absolutely necessary for irrigating his or their said land, and for domestic and stock purposes; it being the intent and meaning of this section to prevent the wasting and useless discharge and running away of water." We think that the provision under consideration was a legitimate subject of contract between the appellant and the ditch company, and measures the extent to which appellant may avail himself of the water right in question. The decree of the court below was in conformity with this view, and is accordingly affirmed. Affirmed.

DENVER & R. G. R. CO. v. SPENCER et al.
(Supreme Court of Colorado. May 21, 1900.)

ACTION FOR DEATH—CARRIERS—LICENSEE AT DEPOT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTIONS FOR JURY—RES GESTÆ—DAMAGES.

1. Plaintiff's intestate went to defendant's depot to meet a relative. The space used to receive and discharge passengers was between two tracks, one of which was occupied by a train. When both tracks were so occupied the space between the cars was 5 feet 8 inches wide. A baggage truck, so constructed that it could be easily veered at either end, had been placed on this space by defendant's employees. Its width was such that, if placed equidistant between the two tracks, it would clear the train on either side by 1 foot 7 inches. The engine and two cars cleared the truck, but the next car, though of the same width as the others, came in contact with it and hurled it

against deceased, inflicting fatal injuries. *Held*, that the question whether the placing of the truck in the limited space provided was negligence was for the jury.

2. A railroad is liable for injuries to one who comes to its depot to meet a relative expected on an incoming train, when caused by the negligence of its employes in placing a baggage truck on a narrow space used for receiving and discharging passengers.

3. Where the injury to plaintiff's intestate was caused by the negligence of defendant's employes, and the evidence showed that the presence and position of the truck did not suggest imminent danger to the minds of defendant's fireman and engineer whose train came in contact with the truck, the question whether deceased was guilty of contributory negligence was for the jury.

4. Evidence of conversations between the deceased and his daughter showing he had arranged to meet her was admissible as part of the *res gestae*, to explain his presence at the place where he was injured.

5. Where children in no manner dependent on their father seek to recover for his death, their recovery must be limited to the sum which he by his personal exertions, less his necessary personal expenses and those of his wife during her life, would have added to his estate.

6. The evidence in an action for the death of plaintiff's father, who was 68 years old, showed that his previous accumulation of property over and above all liabilities amounted to only \$6,400, and that his annual income arising from his personal exertions, after deducting his personal expenses, was about \$1,000. *Held* that, though the maximum amount allowed by the statute conferring the right of action was \$5,000, a verdict of \$4,000, under the evidence, was excessive.

Appeal from district court, Arapahoe county.

Action by Henry C. Spencer and others against the Denver & Rio Grande Railroad Company. From a judgment for plaintiffs, defendant appeals. Reversed.

This action was commenced by the appellees to recover damages for the death of their father, caused by the alleged negligence of the appellant. From a verdict and judgment in their favor, the defendant appeals.

Wolcott & Valle and Henry F. May, for appellant. N. Q. Tauquary, for appellees.

GABBERT, J. At the station of Colorado Springs appellant maintains several parallel tracks. At the time deceased received the injuries resulting in his death, one of these tracks, adjacent to the station proper, was occupied by a Rock Island train, which was "cut" to allow access to trains arriving on tracks beyond. Employes of appellant left a truck, used for handling baggage, between the track occupied by the Rock Island train and the one next beyond, so situate, it is claimed, that trains upon each of the tracks between which it was placed would clear it. When these tracks were each occupied by trains, the space between the sides of the cars would be 5 feet 8 inches in width. The width of the truck was such that, if placed equidistant between the two tracks, it would clear the trains upon each by 1 foot and 7 inches. The space between these tracks where the truck was placed

was used by appellant to receive and discharge passengers. The deceased went upon this space for the purpose of meeting his daughter-in-law, whom he expected upon one of appellant's trains, which arrived over the track next to the truck, and next to the one upon which the Rock Island train was standing. He was moving up and down this space, in the near vicinity of the truck, when the expected train arrived. The engine, baggage, and smoking cars cleared the truck, but for some unexplainable cause, other than the inference that it must have been moved by some one, the next, though no wider than those that had passed, did not, but hurled it against deceased, inflicting injuries from which he shortly expired. He was seen to have passed and repassed this truck before the arrival of appellant's train. The truck was noticed by the engineer and fireman of the incoming train, who concluded that their train would clear it. The engineer also noticed people in the vicinity of the truck. It was so constructed that it could be easily veered at either end. Upon this state of facts, counsel for appellant contend that no negligence upon its part has been shown, and, even if there was, the accident would not have happened but for the negligence of the deceased.

The first question presented is, was the placing of the truck between the tracks in the limited space provided, and in the immediate vicinity of where the trains of appellant received and discharged passengers, negligence? Although originally so placed that a moving train upon either track next to which it stood would clear it, yet its construction was such that it could be easily veered, when its position would be such that it would come in contact with a moving train. This would result in danger to those within that space, in line with the direction the truck would be impelled by contact with a moving train. From these facts and circumstances, the jury concluded that appellant was guilty of negligence. When the question of negligence is dependent upon inferences to be drawn from acts and circumstances of that character that different intelligent minds may honestly reach different conclusions on the question, it is for the jury to determine, under appropriate instructions, whether or not negligence has been established. *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. 148; 2 *Thomp. Neg.* 1236; *Railroad Co. v. Martin*, 7 Colo. 592, 4 Pac. 1118; *Shear. & R. Neg.* § 11; *Packing Co. v. Vaughn*, 26 Colo. —, 59 Pac. 749. Under this rule, the evidence is clearly sufficient to support the conclusion of the jury that placing the truck between the tracks was negligence on the part of appellant.

The next question presented is whether or not deceased was guilty of negligence, but for which the accident would not have occurred. In this connection counsel for appellant make some suggestions relative to the comparative degrees of care which a carrier

is required to exercise as between passengers and those who are not. We do not believe it is necessary to go into a discussion of this question. Deceased was lawfully at a place provided by appellant for the purpose for which he was there, at the proper time to carry out that purpose; and injuries received by him at this place through the negligence of its employes, while in the exercise of due care and caution upon his part, appellant is responsible for. *Hamilton v. Railway*, 64 Tex. 251; *Pierce, R. R.* 275; *Tobin v. Railroad Co.*, 59 Me. 183; *Railroad Co. v. Mushrush* (Ind. App.) 37 N. E. 954.

It is urged by counsel that, as deceased must have seen the truck, he should have comprehended the situation, realized the danger to which he was exposed, could have avoided it, and, having failed to do so, such failure was contributory negligence upon his part, which caused the accident. When, on the question of contributory negligence, the facts and circumstances are such that different minds may honestly draw different conclusions therefrom on this subject, it is within the province of the jury to determine that question. *Railroad Co. v. Twombly*, 3 Colo. 125; *Lord v. Refining Co.*, supra; *Moffatt v. Tenney*, 17 Colo. 189, 30 Pac. 348; *Tramway Co. v. Reid*, 22 Colo. 349, 45 Pac. 378. While, on the other hand, if the undisputed facts are such that the inference of contributory negligence is the only conclusion which can be logically deduced, the question is one of law, for the court. For the purpose of ascertaining whether or not, on the established facts, deceased was so clearly guilty of negligence that this question is one of law alone, or whether, from the evidence, it was for the jury to determine, as a matter of fact, it is only necessary to refer briefly to the evidence, and the acts of the employes of appellant. If the presence of the truck, in the position it was, should have at once suggested to the mind of an ordinarily prudent person that it was liable to come in contact with the incoming train, then certainly it would have been the duty of the engineer and fireman, who were aware of its location, and who knew that persons were in its immediate vicinity, to have taken steps to prevent such a disaster, and their failure to do so would have been wantonly reckless conduct upon their part. When this case was here before (25 Colo. 9, 52 Pac. 211), it was held, upon evidence which is substantially the same as now presented by the record in the case at bar, that an instruction to the effect that, if the jury found from the evidence that deceased was guilty of contributory negligence, appellant was not responsible, unless it appeared that its servants and employes were guilty of reckless conduct, was erroneous, for the reason that the evidence did not justify any such an instruction; there being no evidence tending to prove reckless conduct on the part of such employes. The conclusion deducible from

this holding is that the presence of the truck, in the situation it was, did not suggest imminent danger. If this danger was not suggested to the minds of railroad employes whose experience would cause them to anticipate dangers from sources which would not make a similar impression upon the minds of those not versed in the hazards of railroad-ing, it certainly cannot be said, as a matter of law, that deceased should have detected danger which the employes of appellant did not. It is apparent, therefore, from the facts and circumstances, that whether or not the truck, situated as it was, should have suggested to deceased the danger to which he was exposed from that source, is a question upon which different intelligent and honest minds might draw different conclusions, and the question of contributory negligence was therefore properly left to the determination of the jury. The finding that he was not guilty of such negligence is fully supported by the evidence.

Errors are assigned and argued, based upon the giving and refusal of certain instructions. From the views expressed on the two questions of negligence already considered, it is apparent that appellant cannot complain of either the instructions given or refused, and it becomes unnecessary to notice them in detail.

For the purpose of explaining the presence of the deceased at the place where he received the injury resulting in his death, evidence was admitted, over the objection of appellant, to prove that he had gone there for the purpose of meeting his daughter-in-law, who was expected to arrive from Denver. In the former opinion in this case it was held that a conversation between the deceased and his daughter-in-law, from which it appeared that he had arranged to meet her, was admissible as part of the *res gestæ*, to explain his purpose in being at the place where he was injured. That ruling is therefore the law of the case on this subject, and cannot be disturbed; but counsel for appellant contend that the declarations of third persons cannot be received for the purpose of proving this arrangement. From an examination of the evidence, it does not appear that the declarations of third persons were admitted. The witness who testified on this subject only purported to give what he remembered and understood was the conversation which took place between the daughter-in-law and deceased with respect to her request that he should meet her at Colorado Springs on the arrival of a train from Denver, to which he assented.

The final question relates to the amount of damages assessed by the jury. The verdict was in the sum of \$4,000, which appellant contends is excessive. The right of appellees to maintain this action is purely statutory. It did not exist at common law. The damages which they are entitled to recover must be limited to those of a compensatory character,—in other words, to such pecuniary

damages as they have sustained by reason of the death of their father. As aptly stated by the late Justice Elliott in *Pierce v. Conners*, 20 Colo. 178, 37 Pac. 721: "The true measure of compensatory relief in an action of this kind, under the act of 1877, is a sum equal to the net pecuniary benefit which plaintiff might reasonably have expected to receive from the deceased in case his life had not been terminated by the wrongful act, neglect, or default of defendant; * * * but it must be borne in mind that the recovery allowable is in no sense a solatium for the grief of the living, occasioned by the death of the relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue, resulting from the death of the deceased, that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law." At the time of his death his wife was living, and survived him about two years. The appellees were in no manner dependent upon him for support. The mere relationship between them and deceased cannot be made the basis of a recovery in this case, however much they may have grieved over his untimely death. Therefore, as stated in the former opinion in this case, "the pecuniary loss, if any, that resulted to them by reason of the death, was in being deprived of their share of the money that he might accumulate during his expectancy of life." Or, under the evidence, their recovery must be limited to the sum which the father, by his personal exertions, less his necessary personal expenses, and those of his wife during her life, would have added to his estate, and which would have descended to the appellees, as his heirs at law. The court so instructed the jury. Was this instruction followed? At the time of his death, deceased was upward of 68 years of age. His expectancy of life was about 9½ years. There is testimony to the effect that at the time of his death his annual income, arising from his personal exertions, after deducting his personal expenses, equaled the sum of about \$1,000 per annum, although the evidence is not entirely satisfactory upon this point, for the reason that the witness testifying on this subject was not certain that he was fully advised regarding the personal expenditures of the father. The money earned by deceased from this source consisted of a salary of \$1,500 per annum as an employé of a bank, and about \$500 more per annum, earned as a conveyancer and notary, in connection with his bank duties. He had considerable income from investments, but this cannot be considered. In estimating his annual savings. We mention this, however, because it appears that his net worth at the time of his death could not have been so very much in excess of the value of his bank stock, which was \$6,400, because it appears that his other investments were incumbered in such an amount that, after deducting interest, there was but little left in the way of

61 P.—39

income from these sources, after payment of taxes. Had he lived the full term of his expectancy, and during that period been able at all times to continue to engage in the work in which he was employed at the time of his death, his net personal earnings would have exceeded much more than the damages awarded. It cannot be fairly assumed, however, or expected, that, at his advanced age, he would have continued to labor during all the future years of his life. In considering this question, account should be taken of his liability to illness, his incapability of further exertions by reason of age, and that he might, on account of his years, conclude to retire from active work; that, in all probability, his age would soon incapacitate him from discharging his duties as an employé in the bank, in which he was engaged; that, if he did continue to earn money for a portion of his expectancy of life, he would at least expend a part so earned for personal use during the remaining years. All these are contingencies which must be considered. Necessarily, the ascertainment of damages, dependent upon a variety of circumstances and future contingencies, is difficult of exact computation; but, nevertheless, they cannot be presumed and arbitrarily given. Undoubtedly much latitude must be given a jury in cases of this character, but there must be some basis of facts upon which to predicate a finding of substantial pecuniary loss. *Diebold v. Sharpe* (Ind. App.) 49 N. E. 837. Except for the statute, appellees could not maintain this action. Its provisions are beneficial, but limited. In no case under it can damages exceed the sum of \$5,000. Taking into consideration the evidence upon which the award of damages is based in this case, the contingencies to which we have directed attention, the improbability that deceased, during the remaining years of his life, would have saved from net personal earnings a sum anywhere nearly approximating the damages awarded, and the disproportion of that sum to his previous accumulations, it is evident that the jurors certainly failed to consider the instructions of the court on the subject of damages, but must have been influenced by considerations other than those which the law recognizes as elements of damages in such cases. For these reasons, the judgment of the district court is reversed, and the cause remanded for a new trial. Reversed and remanded.

CAMPBELL, C. J., not participating.

ADAMS v. WARREN et al.

(Supreme Court of Colorado. March 19, 1900.)

APPEAL—REVERSAL—SUBSEQUENT PROCEEDINGS—COUNTERCLAIM—NEW CAUSE OF ACTION—DEPARTURE—NECESSITY OF MOTION—OBJECTION TO EVIDENCE.

Where a judgment for plaintiff in an action to establish a trust in real estate was affirmed, but the cause was remanded after

reversal on appeal, with directions to take an accounting for the amount paid by the defendants and their ancestor for taxes, which should be paid as a condition precedent to investing the title in the plaintiff, it was error to allow plaintiff to interpose a counterclaim to such accounting for items not included in his complaint, since such counterclaim introduced a new cause of action.

On Rehearing.

1. Where, on remanding a cause to the trial court for an accounting of the taxes paid by defendants and their ancestor as a condition precedent to investing the title to the land in controversy in plaintiff, the court said, "Appellants are entitled to an accounting for the amount of taxes paid by them and their ancestor, and to be reimbursed for all sums so paid in excess of the money, if any, received by such ancestor for the plaintiff," such language cannot be construed as meaning that the plaintiff could interpose a counterclaim, consisting of items not included in plaintiff's original complaint, to defendants' right to recover such taxes.

2. Where a judgment for plaintiff in an action to establish a trust in certain real estate was affirmed, but the cause was remanded, with directions to take an accounting of the amounts paid by the defendants and their ancestor as taxes, and to such accounting plaintiff interposed a counterclaim for items not included in his original complaint, an averment in the replication that such ancestor had received funds belonging to the plaintiff for which no accounting had been made was not sufficient to connect the items of the counterclaim with the original trust, and therefore would not entitle defendants to introduce evidence thereof.

3. Where a cause has been remanded to take an accounting for taxes paid by defendants and their ancestor, and plaintiff offered evidence of counterclaims not set up in the original complaint, advantage could be taken of such departure by objection to the introduction of evidence of the items alleged in the counterclaim, without a motion or demurrer for that purpose.

Error to district court, Arapahoe county.

Action by Andy M. Adams against Elizabeth I. Warren and others. A judgment in favor of plaintiff was reversed and remanded (36 Pac. 604), with directions that an accounting be made of the amount paid by defendants and their ancestor for taxes. To the accounting plaintiff interposed a counterclaim, and from a judgment in his favor, allowing him an offset to the extent of taxes, but not for the excess of such counterclaim over the taxes, plaintiff brings error. Reversed. Motion for rehearing denied.

This action was originally commenced by plaintiff in error against defendants in error to establish a trust in certain real estate which had descended to them as the heirs of John W. Iliff, deceased. From a judgment in his favor defendants in error appealed to this court, where the judgment was affirmed, but the cause remanded, with directions to take an account of the amount of the taxes paid by the deceased and defendants in error, and that the repayment of the same should be made a condition precedent to the divestiture of title. *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604. Pursuant to this order, defendants in error filed an answer in the court below setting up their claim on account of taxes

paid upon the lands in controversy which they were entitled to have repaid. To this answer plaintiff in error filed a counterclaim, by which it was asserted that on account of moneys collected by the deceased, and property disposed of which had been placed in his hands, there was due him from the estate of the deceased a sum largely in excess of the amount paid for taxes on the lands in question, for which sum he prays judgment against defendants in error. Testimony of witnesses to establish this claim was received over the objection and exception of the defendants in error, the ground of such objections being that by the former opinion of this court the inquiry was limited to the amount of taxes paid upon such lands by deceased and themselves, and that the items of the account, as stated in the counterclaim, have reference to dealings with the deceased in no manner connected with the lands in controversy. From the evidence introduced by the respective parties the court found that the taxes paid, which defendants in error were entitled to be repaid, amounted to the sum of \$2,762.10, and that the value of the personal property taken and held by deceased, and money collected by him, belonging to plaintiff in error, to the sum of \$24,750. On these findings of fact judgment was rendered offsetting against the claim of defendants in error for taxes paid the value of the personal property held by deceased and money collected by him on account of plaintiff in error, but that the latter was not entitled to a judgment for the difference. From this judgment plaintiff in error brings the case here for review, claiming that he is entitled to a judgment in his favor for the difference between the two sums. Defendants in error assign, as cross errors, the judgment of the trial court in offsetting the value of the personal property claimed to have been turned over to deceased and the money collected by him against the amount advanced for taxes; and also the action of the court in overruling their objections to the introduction of testimony in support of the counterclaim. The parties to this proceeding bear the same relation as in the trial court, and for that reason will be referred to in the opinion as plaintiff and defendants.

Stuart & Murray and Joseph C. Helm, for plaintiff in error. Daniel Prescott and Thomas Macon, for defendants in error.

GABBERT, J. (after stating the facts). Counsel for plaintiff contend that he is entitled to establish his counterclaim against the estate of deceased, and incidentally, as a personal obligation of defendants, to the extent that they may have received property as the heirs of deceased, for the reason that such property, to a value sufficient to satisfy his claim, is held by them in trust for that purpose. Defendants, having been defeated in their contention that the land in question was their absolute property, were entitled to be

repaid the taxes paid thereon by the deceased and themselves. When the cause was remanded they asserted this right by an answer. To defeat this claim, plaintiff could properly plead, by way of replication, and prove, any facts constituting a defense to it which were purely defensive, or, by way of reply, could controvert or avoid the claim for taxes, but nothing more. He could not do so, however, by pleading or attempting to prove a new cause of action over the objection of the defendants, for the reason that such a defense to their right to be reimbursed for taxes paid would be a departure from the cause of action stated in his complaint. Bliss, Code Pl. (2d Ed.) § 396. The transactions between plaintiff and deceased, as stated in the complaint, and the counterclaim interposed to the claim of defendants to be reimbursed for taxes, were entirely distinct and separate. Neither had any connection with the other. In his former pleading no claim was attempted to be asserted by plaintiff upon the transaction which he now seeks to make the basis of a cause of action against the defendants in his counterclaim; consequently, by the latter, he has attempted to state a new and independent cause of action, and not matter which merely supported the one stated in the complaint, and therefore by his replication has clearly departed from the cause of action originally pleaded. *Durbin v. Flisk*, 16 Ohio St. 533; *Lillenthal v. Hotaling Co.*, 15 Or. 371, 15 Pac. 630; 6 Enc. Pl. & Prac. 461.

Plaintiff is limited in his recovery to the cause stated in his complaint, in which the land in question was the only subject-matter of controversy. For these reasons, the items of the counterclaim could not be made the basis of a set-off as against the taxes advanced by the deceased, Iliff, or the defendants, nor established as a claim against the latter, in this action for the excess. The testimony received in support of plaintiff's counterclaim should have been rejected. The judgment of the district court is therefore reversed upon the cross errors assigned by defendants, and the cause remanded, with directions to dismiss the cross complaint of plaintiff, and render judgment in favor of defendants for the amount of taxes found to have been paid by them and deceased upon the lands in question, with interest, and that such sum, together with the costs incurred by them in this court in this case, as well as below on the accounting, be repaid by plaintiff before title to such lands vested in him, and that, on failure to pay such sum within some reasonable time to be fixed by the trial court, the decree establishing the trust be set aside, and the action of plaintiff dismissed. Reversed and remanded.

On Petition for Rehearing.

(June 30, 1900.)

PER CURIAM. In his petition for rehearing counsel for plaintiff urge upon our at-

tention three points: (1) That the order for an accounting was by the express direction of this court, independent of anything which appeared in the pleadings in the cause then considered, and, being so, he was entitled to at least offset the money received by deceased against the taxes advanced on the land in question; (2) that we are mistaken in concluding that the matters set up by plaintiff in his counterclaim were not connected with the original trust; (3) that failing to attack the cross complaint by an appropriate plea amounted to a waiver on the part of defendants to have the question of its materiality determined.

The first proposition is based on the opinion in the original cause (19 Colo. 515, 36 Pac. 604), which is as follows: "It is finally asserted by counsel for appellants that, if the decree can be maintained upon other grounds, it is erroneous in not decreeing an account of the amount of taxes paid by appellants and their ancestor. It is admitted that no such claim was made in the pleadings, nor in any way asked in the court below. This question, therefore, is not presented by the record, and cannot be considered on this review. We, however, agree with counsel that, upon an affirmance of this decree, appellants are entitled to an accounting for the amount of taxes paid by them and their ancestor, and to be reimbursed for all sums so paid in excess of the money, if any, received by Iliff for plaintiff, and that the payment of the same should be made a condition precedent to the divestiture of the title." In directing that the decree of the trial court should be affirmed, this court stated that such decree should "not take effect as to the conveyance of the title until the amount found to be due appellants, if any, on account of the payment of taxes, shall be first paid," and remanded the cause, with directions to the trial court to take such accounting. This direction did not contemplate that either party should introduce a new cause of action. On the contrary, it merely held that a matter which was part of, and connected with, the original cause should be determined. This could only be done, so far as defendants were concerned, by an amendment which they filed for the purpose of presenting this question for adjudication. By so doing, they interposed a defense only, and not new matters, or a new cause of action. To this answer, as we have said, plaintiff could plead and prove facts which were simply defensive, but nothing more. The opinion in the original cause, from which we have quoted, does say that defendants shall be reimbursed for taxes paid in excess of the money, if any, received by deceased for plaintiff. This language cannot properly be construed into meaning that a new cause of action could be interposed by plaintiff, and therefore could only refer to moneys which he had paid Iliff for that express purpose; in other words, to

moneys which he could prove Illff had received under plea of payment on this account. No such plea was interposed.

We think we are correct in asserting that the items of the counterclaim of plaintiff are not connected with the original trust. In any event, he failed to make a claim on this account originally, and, even if these items were connected with the trust in the lands, pleading them as a counterclaim was stating a cause of action upon which no claim such as is now sought to be asserted was founded under the original pleadings in the cause. In this connection, we notice it is claimed that in the replication of plaintiff filed in the original cause it was averred that deceased had received funds belonging to plaintiff for which no account was ever rendered. From the averments of this pleading, it is manifest there was no thought or intention of setting up a claim against defendants on account of these funds, except for the purpose of avoiding the effect of their plea that they and their ancestor had paid the taxes upon the lands for a long period of time antedating the time the original action was commenced, by pleading inferentially that deceased must have applied these funds to liquidate such taxes, and had also applied them in procuring quitclaim deeds reconveying to deceased the title acquired by virtue of a sale of such lands for taxes. Hence it is clear that this plea was in no sense a counterclaim in the original action.

Relative to the third point made, counsel cite from Bliss, Code Pl. (2d Ed.) § 396, as follows: "As to the proper mode of correcting a departure, whether by demurrer or motion, courts are not in perfect harmony, but all agree that if the parties go to trial without raising the question judgment will not be arrested." This is undoubtedly a correct statement of the law on this subject, but objection was made to the introduction of evidence in support of the counterclaim. As a general rule, a question of departure should be raised by some appropriate plea; but where, as in this case, the questions to be determined were indicated in advance, the objection to the introduction of evidence saved the point that the counterclaim was not only a departure from the original cause of action, but embraced matters outside of the inquiry to which the trial court was limited. The petition for rehearing is denied. Petition denied.

McCLURE v. PEOPLE

(Supreme Court of Colorado. June 4, 1900.)

BANKS AND BANKING—DEPOSITS—KNOWLEDGE OF INSOLVENCY—LARCENY—INDICTMENT AND INFORMATION—DUPLICITY—EVIDENCE—INSTRUCTIONS.

1. In a prosecution against a bank president, under Mills' Ann. St. § 222, providing that any bank president who receives or assents to the reception of a deposit with knowledge of the bank's insolvency is guilty of larceny, *held*,

that an information under such statute was not invalid by reason of the fact that it charged the receiving and assenting to the reception of a deposit in one count.

2. In a prosecution against a bank president for larceny in receiving deposits with knowledge of the bank's insolvency, the insolvency of the bank was not denied, and it failed within three days after the deposit was received. *Held*, that under Mills' Ann. St. § 222, providing that the failure of a bank within 30 days after a deposit is prima facie evidence of knowledge of the bank's insolvency on the part of person charged at the time the deposit was received, a prima facie case of knowledge of insolvency was made out, and unless overcome by evidence produced by defendant, or rejected under his offer, the proof was sufficient to sustain a conviction.

3. In a prosecution against a bank president for larceny in receiving deposits with knowledge of the bank's insolvency, the court charged that a crime consists in the violation of a public law, in the commission of which there shall be a union of act and intention, or criminal negligence. *Held*, that such an instruction was correct, it not being necessary to show a specific intent to harm, and criminal negligence will supply the place of intention or guilty knowledge.

4. An officer of a bank cannot relieve himself from criminal liability for receiving deposits when the bank was insolvent by intentionally absenting himself from the bank, and abstaining from participating in its management, and purposely neglecting to avail himself of means of information as to its financial condition, or by showing that if he had given his attention to its business, by reason of his lack of fitness and ignorance of banking methods, he could not have ascertained its true condition.

5. In a prosecution against a bank president for receiving or assenting to the reception of deposits with knowledge of the bank's insolvency, he need not be shown to have assented to that particular deposit, since his recognition of the general authority of the teller to receive deposits, without taking any steps to prevent such receipt, after he knew, or in law was charged with knowledge, of the bank's insolvency, was an assent to the reception of a deposit by his employé.

6. In a prosecution against a bank president for larceny in receiving deposits with knowledge of the bank's insolvency, the court charged that so long as defendant retained the presidency of the bank he was presumed to know, and it was his duty to know, its condition as to solvency. *Held*, that such an instruction was erroneous, since defendant was only bound to exercise reasonable care and diligence to ascertain and keep himself informed regarding the bank's financial condition.

7. In a prosecution against a bank president for larceny in receiving deposits with knowledge of the bank's insolvency, it was error to refuse to allow defendant to introduce evidence to show what steps he had taken to inform himself regarding the bank's solvency.

Campbell, C. J., dissenting.

Error to district court, Montezuma county.

James E. McClure was convicted of larceny as a bank president, and he brings error. Reversed.

The defendant (plaintiff in error) was convicted of statutory larceny, in that, as president of the Bank of Rico, which was incorporated and doing a general banking business under the laws of the state of Colorado, he received and assented to the reception of a certain deposit in said bank, knowing at the time that the institution was then insol-

vent. The statute on which the information was based declares: "If * * * and president * * * of any * * * bank, or banking institution, * * * shall receive or assent to the reception of any deposit of money * * * in such bank or banking institution, * * * after he shall have had knowledge of the fact that such * * * bank or banking institution is insolvent, he shall be deemed guilty of larceny," etc. Sess. Laws 1885, p. 50; 1 Mills' Ann. St. § 222.

Gerry & Taylor, C. A. Johnson, and A. B. Seaman, for plaintiff in error. David M. Campbell, Atty. Gen., Calvin E. Reed, Asst. Atty. Gen., and Dan B. Carey, Asst. Atty. Gen., for the People.

CAMPBELL, C. J. (after stating the facts). The propositions urged by the plaintiff in error, and relied upon for a reversal of the judgment, may be thus stated: First, the information is double; second, the evidence of the people admitted by the trial court failed to show defendant's personal knowledge of the insolvency of the bank, and evidence offered by the defendant to show his lack of knowledge thereof, and as an excuse for his ignorance, was erroneously rejected.

1. It is strenuously argued by counsel that the receiving of a deposit in the circumstances named in the statute is one offense, and the assenting to its reception is another and a distinct offense, and that, while the two may be separately set forth in the same information, it is improper to combine them in one count. Unquestionably, the rule at common law, as well as in most of the states of the Union, is that offenses which are entirely distinct and separate, and require different proof, may not be included in the same count of an indictment, even though they may, when relating to the same transaction, be included in different counts thereof. A number of authorities have been called to our attention under which, it is said, this information is bad. The case upon which plaintiff in error seems mainly to rely is *U. S. v. Cadwalader* (D. C.) 59 Fed. 677, where the indictment was for violating the national bank laws. The statute prohibited the "embezzling, abstracting or willfully misapplying the moneys" of the bank, and the court held that each of these acts constituted a separate crime or offense, which may be joined in one indictment, but must be stated in separate counts. The federal statute was really decisive of the point, but the court in part rested its conclusion upon the rules of common-law pleading. In the opinion the district judge used this language: "If the statute describes only different stages, degrees, or phases of one and the same offense, these degrees or phases may undoubtedly all be set forth and charged in the same count of the indictment; but if the statute defines different and distinct offenses, each requiring different proof to es-

tablish it, there can be little doubt that they should not be joined in the same count, though they may all, or any of them, be united in different counts in the same indictment." The controlling question seemed to be that, in the judgment of the court, the proof to establish either one of these offenses would be wholly inadequate to make out a case under either of the others. A number of cases are referred to by the learned judge as recognizing the principle upon which the decision was put. Other cases cited by plaintiff in error, which are, in some respects at least, in his favor, are: *People v. Cooper*, 53 Cal. 647; *State v. Haven*, 59 Vt. 399, 9 Atl. 841; *Larlson v. State*, 40 N. J. Law, 256, 9 Atl. 700; *People v. Tower*, 135 N. Y. 457, 32 N. E. 145. In most, if not in all, of the authorities relied upon by him, some material element, not present in the case at bar, differentiates them from it. Fairly considered, none of them controls the decision here.

Our statute seems to be substantially the same as that of Missouri, and counsel say that the decisions there are in their favor. In *State v. Wells*, 134 Mo. 238, 35 S. W. 615, it was held that, where a defendant was charged with receiving a deposit, a conviction could not be sustained, where the evidence was only to the effect that he assented to its reception. (In passing, we may say that, in many respects, the facts of that case are essentially different from the facts of the case in hand. But this authority is cited to the proposition that the receiving and assenting to the reception are different offenses. The facts of the case did not call for any decision as to whether or not the act of receiving and the act of assenting thereto might or might not be charged in the same count, and therefore, if there is language in the opinion either for or against the practice, it would be obiter. If, however, any legitimate inference can be drawn therefrom one way or the other, it is that such a union may be made; for the court in its opinion cites with approval *State v. Batson*, 31 Mo. 343, and *State v. West*, 21 Mo. App. 309. In the former case the indictment was under a statute declaring that every person who "shall willfully and maliciously break, destroy or injure the door or window of any dwelling house" shall, upon conviction, be adjudged guilty, etc. (Rev. Code Mo. 1855, p. 584, § 60); and the indictment, following the language of the statute, charged in one count that the defendant "broke and injured the door of a dwelling house," and in another count that he "broke with force and arms the windows of a dwelling house." The court said: "The terms 'break, injure or destroy' being used disjunctively in the statute, the offense is well described by charging it to have been committed as in the second count by a breaking alone, or as in the first by both a breaking and injuring. It is an offense to willfully and maliciously break, destroy, or injure. To do either act is to commit an offense, and one or all these things may be

charged in an indictment according to the circumstances of the case." In the latter case the indictment was under a statute providing: "If any public officer * * * shall be intoxicated while in the performance of any official act or duty, or shall become so intoxicated as to be incapacitated to perform any official act or duty, * * * he shall be declared guilty of a misdemeanor in office," etc. Rev. St. Mo. 1879, § 1642. The indictment was based on the second clause, and in speaking to the objection urged against the same the court said: "It is to be borne in mind that the section of the statute is in the disjunctive, and contains two offenses. The first is for being intoxicated while in the performance of any official act or duty, and the second is for becoming so intoxicated as to be incapacitated to perform any official act or duty at the time and in the manner required by his office. It was competent to indict him, according to the facts, for either or both of these offenses."

In *State v. Sattley*, 131 Mo. 464, 33 S. W. 41, the indictment against the defendant contained two counts,—one for receiving a deposit, the other for assenting to the creation of an indebtedness,—and the court sustained a general verdict of guilty, and upheld a sentence as for one offense, on the ground that the several offenses charged arose out of one and the same transaction. The court in that case did not hold that those offenses might not be charged in one count. That they might be stated separately is not at all conclusive that they may not be combined. And the general verdict would not have been upheld, and on principle could not be sustained, except on the ground that receiving and assenting are but different ways of charging the same offense, and when they relate to the same transaction, and are the act of one and the same person.

In *Clifford v. State*, 29 Wis. 327, it was held where a statute makes it a crime to do any one of several things mentioned disjunctively, all of which are punished alike, it is a general rule that the whole may be charged conjunctively in a single count as a single offense; for in that case all are regarded as constituting but one offense, and the conviction or acquittal is regarded as a sufficient bar to all or either, whether separately or conjointly pleaded.

In *State v. Bielby*, 21 Wis. 206, defendant was convicted of vending, selling, dealing, and trafficking in and giving away liquors. Dixon, C. J., in replying to an objection to the form of the indictment, said: "It is objected that the complaint is bad for duplicity, because the several acts named in the statute, if charged separately, would each constitute a distinct offense. This may be so, but still the complaint is not double. An indictment in such case may pursue the language of the statute, charging the commission of the several acts conjunctively, and as constituting all together one offense,

in which case there can be but one conviction and one punishment, as for one offense."

Hinkle v. Com., 4 Dana, 518, was a case where the defendant was convicted under an indictment charging him with setting up and keeping a gaming table, and inducing another to bet at it, and the court says: "Although the setting up of a gaming table may alone be an indictable offense, and the keeping of such table, and the inducing of any person to bet upon it, another, when each shall have been committed by different persons or at different times, nevertheless, as they are co-operating acts, constituting all together one offense, when committed by the same person, at the same time, an indictment for that combined act, in violation of law, may properly charge the whole in one count, and but one punishment can be inflicted, as for one offense."

In *State v. Nelson*, 29 Me. 320, it was held that the buying and receiving and aiding in concealing stolen goods constitute but one offense, which may be committed in three different modes, and all three may be charged in the same count of the indictment.

In *State v. Price*, 11 N. J. Law, 203, the indictment charging the defendant in the same count with burning, and causing to be burned, a dwelling house, was held good.

Byrne v. State, 12 Wis. 519, 529, seems quite in point here, for the indictment charged the defendant with "knowingly receiving and sanctioning the reception of an illegal vote," and the language of the court, by Dixon, C. J., seems particularly appropriate: "The rule is well settled that where a statute makes either of two or more distinct acts, connected with the same general offense, and subject to the same measure and kind of punishment, indictable separately and as distinct crimes, when each shall have been committed by different persons or at different times, they may, when committed by the same person at the same time, be coupled in one count, as constituting all together but one offense. In such cases the several acts are considered as so many steps or stages in the same affair, and the offender may be indicted as for one combined act in violation of law. * * * There can be no doubt that the receiving and sanctioning the reception of a vote, under the circumstances stated in the statute, are distinct offenses, and when committed separately may be indicted as such, but the indictment is not double or uncertain because both are joined in the same count, for the reasons above stated."

If that reasoning is good, and it seems to us to be so, certainly it applies with equal force to the reception, and assenting to the reception, of a deposit. It has frequently been held that an indictment for forgery which charges that the defendant "forged and caused to be forged" is good. See, also, *Com. v. Twitchell*, 4 Cush. 74; *Ben v. State*,

22 Ala. 9; *State v. Fletcher*, 18 Mo. 425; *State v. Morton*, 27 Vt. 310; *Bish. Dir. & Forms*, §§ 19-21; *Bish. St. Crimes*, § 244; *Bish. Cr. Proc.* §§ 434-453; *Boldt v. State*, 72 Wis. 7, 38 N. W. 177.

We have thus reviewed some of the authorities cited, but might content ourselves with citing only the decisions of our own court. In *Pettit v. People*, 24 Colo. 517, 52 Pac. 676, and *Chipman v. Same*, 24 Colo. 520, 52 Pac. 677, the same doctrine is laid down. It is true that in most of these cases the question of duplicity was decided in misdemeanor cases, and it is urged that a different rule applies to felonies. There might be ground for this distinction at the common law, when almost all felonies were punishable by death, and followed by forfeiture of the offender's lands and goods; but under the modern practice, and under the statutes of most of the states of the Union, we are of opinion that there is no valid distinction in this respect between informations charging misdemeanors and those relating to felonies. *State v. Warner*, 60 Kan. 94, 55 Pac. 342; 10 Enc. Pl. & Prac. 532 et seq., and cases cited.

In *Robertson v. People*, 20 Colo. 279, 38 Pac. 326, the indictment, under the same statute, was precisely the same as that here, in that it charged defendant with receiving, and assenting to the reception, of certain deposits of money. The opinion does not refer to this, and it does not appear whether an objection thereto was made. We make the reference only for the purpose of showing a practice which has long prevailed in this state, whereby, under statutes enumerating several acts in the alternative, the doing of any of which is subjected to the same punishment, all of such acts may be charged conjunctively in one count as one offense.

If the position of plaintiff in error is correct that the receiving of a deposit, and the assenting to its reception, by one person, at the same time (as the charge here is), are entirely distinct and separate offenses in the sense contended for, then so much of the act as punishes one who assents to the reception of a deposit is void as not properly coming within the title of the act, which provides only for the punishment of a person receiving deposits, and, indeed, such is the contention of counsel. But the same objection would pertain to the act in relation to larceny of live stock, found in *Sess. Laws 1891*, p. 130; but this act, in *Re Pratt*, 19 Colo. 138, 34 Pac. 680, has been held constitutional. We are of opinion that where, as in the information here, the receiving of a deposit and the assenting thereto are charged as having been done by the same person at the same time, and relate to the same transaction, and the punishment for both or either is the same, they may be combined in one count, and together constitute but one complete offense, for which

there can be but one punishment. In other words, where two or more acts, stated in the statute disjunctively, either of which is an offense by itself if done by different persons or at different times, when done by the same person and at the same time, and relate to the same transaction, and are followed by the same penalty, they may be united in one count of an indictment or information, as constituting but one offense.

2. The Bank of Rico was organized under the state banking laws. It had a president (the defendant McClure), a vice president, and a cashier. The defendant resided in the town of Montrose, about a hundred miles distant from the town of Rico, where the business of the bank was carried on. He was rarely present at the bank,—probably not more than once or twice a year,—and the management was exclusively intrusted to the other officers named. The defendant did not deny the insolvency of the bank, but maintained that he had no personal knowledge of its affairs. He was not present at the bank, or in the town of Rico, at the time the deposit in question was received into the bank. It was, on the contrary, received by an employé of the bank, whose duty, among other things, was to receive deposits in the ordinary course of business. The concluding portion of the statute under which the indictment was framed provides that the failure of a bank at any time within 30 days after a deposit is prima facie evidence of knowledge on the part of the person charged that such bank was insolvent at the time of its reception. This bank failed within 3 days after the deposit was made for receiving and assenting to which the defendant was informed against. The fact of this failure, then, if the statute be valid, was prima facie evidence of defendant's knowledge of the bank's insolvency. The proof is clear that the bank was insolvent.

The validity of this portion of the act is attacked by plaintiff in error, but its constitutionality was settled by the decision of this court in *Robertson v. People*, supra, and in addition thereto, supported, as it is, by the cases cited in the opinion, we refer to other subsequent decisions under similar provisions: *Meadowcroft v. People*, 163 Ill. 56, 45 N. E. 303, 35 L. R. A. 176; *Brown v. Same*, 173 Ill. 34, 50 N. E. 106; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *State v. Beach*, 147 Ind. 74, 46 N. E. 145, 36 L. R. A. 179. There was, then, before the court, a prima facie case of knowledge of insolvency made out, and unless it was overcome by evidence produced in behalf of the defendant, or rejected under his offer, the proof was sufficient in this respect to sustain the conviction, and this presents the most important question in the case.

3. The theory of the people was that the defendant had reorganized this bank, had induced the public to deal with it as a safe

and solvent institution, had given it credit and standing in the community by the use of his name as president, which was uncontradicted, and in the circumstances, occupying the position he did, it was his official duty to know the condition of the bank, and that he could not be permitted as a defense to plead ignorance or want of knowledge of its insolvency in the manner attempted. Upon the other hand, the defendant, in order to show lack of knowledge of, while not denying, the bank's insolvency, offered to show that he did not reside in the town in which the bank was doing business, gave little or no attention to it, that the actual management and control were in the hands of others, and that he did not possess any actual knowledge whatever as to its condition. To excuse himself for not knowing about its financial condition, he offered to show that he was an illiterate man, possessing no knowledge of banking or bookkeeping, and that he was totally unable to determine from the books of the bank its condition, even if he had made an examination with that purpose in view; that he was unacquainted with the people of the town of Rico, and with the value of the securities held by the bank; that he had no personal knowledge of their value, and was dependent for what information he did have upon representations made to him by the officers in charge. These representations were that on their face the securities were double the total liabilities of the bank. He offered, further, to produce evidence showing the entire history of the bank and his connection with it; that, among other things, the books had been fraudulently and improperly kept by the officers in charge; that speculations by them of the bank's assets had been made; and that after the failure the cashier, upon whom he placed the responsibility for the failure, had absconded. Such, in substance, as stated by counsel for plaintiff in error, was the character of testimony which he sought to introduce. The court refused to admit it, and accepted the theory of the prosecution, which has already been briefly stated.

The specific errors assigned to the rulings upon the evidence, and to the action of the court in giving and refusing instructions, need not be separately considered; for whether such rulings and acts are correct or erroneous depends entirely upon our decision as to which of the two theories governs. If the court was right in rejecting the offer of evidence, it was also right in its ruling upon the instructions; for the one ruling was entirely consistent with the other.

The court in one of its instructions told the jury that, under the law of this state, a crime consists in the violation of a public law in the commission of which there shall be a union, or joint operation, of act and in-

tention, or criminal negligence. This is in the exact language of the statute. But counsel for plaintiff in error says that in this kind of a crime criminal negligence cannot take the place of intention or guilty knowledge. In *State v. Tomblin*, 57 Kan. 841, 48 Pac. 144, the court held that it was proper for the jury to take into consideration the defendant's relation to the bank as a managing officer, and the duties he owed to it, for the purpose of determining whether he actually knew its insolvent condition, but that mere negligence would not render him guilty of a crime; and to the same effect is cited *People v. Comstock*, 115 Mich. 305, 73 N. W. 245. The Michigan case is not in point, for the statute construed in terms declared the offense created thereby was one that involved an intent to defraud, and the court decided that a specific intent was meant. *State v. Warner*, supra, is cited as probably the strongest case in support of the contention of plaintiff in error. The defendant was charged as having been the president of an incorporated bank, which was insolvent, and having accepted and received deposits knowing the bank to be insolvent. The court there held that, in order to sustain a conviction, the proof must show that the defendant had some direct personal connection with the receipt or acceptance of the deposit. The facts that he was the president, and in a back room of the bank at the time the deposit was received, and that he knew that the institution was open for business, were held insufficient to sustain his conviction under such charge. The statute of Kansas is not exactly the same as ours, and the court held that, as framed, it seemed to denounce its penalties against the individual who should actually and physically take deposits into the bank when he knows it to be insolvent, and also against all others who should knowingly connive at their reception. The court expressly declined to pass upon the question whether the evidence given at the trial was sufficient to uphold a charge against the defendant of having permitted or connived at the reception of the deposit, but only that it was not sufficient to sustain the charge of having received it directly. So it will be seen that the case is not authority as to that part of the present information which charges the defendant with assenting to the reception of a deposit, and is squarely opposed to the decisions of the courts of other states, under statutes more nearly like ours, which declare the doctrine that an officer of a bank may be criminally liable for the act of an employé who physically receives the deposit. *State v. Cadwell*, 79 Iowa, 432, 44 N. W. 700; *Same v. Yetzer*, 97 Iowa, 423, 66 N. W. 737. These cases from Kansas are the only ones which have been called to our attention which seem to hold that personal knowledge of insolvency upon the part of the person charged must be established, that he must

have received the deposit in person, and that ignorance of insolvency due to criminal negligence is not equivalent to knowledge.

We think the theory of the prosecution is sustained by the following among other cases, in addition to those elsewhere cited in opinion: *Meadowcroft v. People*, supra; *State v. Beach*, supra; *State v. Shove*, 98 Wis. 1, 70 N. W. 312; *State v. Buck*, 120 Mo. 479, 25 S. W. 573; *Martin v. Webb*, 3 Sup. Ct. 428, 24 L. Ed. 49; *Baker v. State*, 54 Wis. 368, 12 N. W. 12; *Carr v. State*, 104 Ala. 4, 16 South. 150. In *Baker v. State*, supra, it was said: "A bank implies capital, and capital invites confidence. A man holding himself out as a banker or broker thereby gives public proclamation that he has money, and property readily convertible into money, in his possession, and subject to his control, and for that reason he may be safely trusted. It requires no argument to show that such assurance is most inviting and influential with the mass of the people, especially with those unacquainted with the history and character of the man. With them the banker or broker is intrusted with money merely because he is a banker or broker, and hence supposed to have surplus capital as a standing guaranty of his agreements and his integrity. For an insolvent banker, company, or corporation to continue the business of banking is to hold out assurances of responsibility and surplus capital where neither exists. To do so knowingly is to secure the confidence, and hence obtain the money, of the ignorant and unwary by an implied deception." In *State v. Buck*, supra, it was held that as a bank officer it was defendant's business to know the financial condition of his bank at any and all times; and in *Meadowcroft v. People*, supra, it is said: "If one is a banker or person doing a banking business, and receives on deposit the money of his customer, it is to be presumed that he knows, at the time of receiving such deposit, whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent, and it is criminal negligence for him not to know of his own insolvency."

We think this is as applicable to the president as to the owner of a private bank. Under this statute it is not necessary to show any specific intent upon the part of the defendant to injure another. If he does the act enjoined with knowledge of the insolvency of the bank, no specific intent to harm need be shown. Such being the case, if the defendant has been criminally negligent in not informing himself as to the condition of the bank, that fact, coupled with the proof that he did the act prohibited, will be sufficient to warrant a conviction. 8 Am. & Eng. Enc. Law (2d Ed.) 285-289. The au-

thorities there cited establish the proposition that the negligent performance of a duty imposed by law, or assumed by contract or wrongful act, may render the person guilty of such negligence criminally liable. Of course, mere negligence does not, but criminal negligence does, supply the place of intention or guilty knowledge, under this act. *Clark, Cr. Law*, pp. 45-48.

The question then is, may a banker, or an officer of a bank, exempt himself from criminal liability under the statute, by intentionally absenting himself from the bank, and abstaining from participating in its management, and purposely neglecting to avail himself of means of information as to its financial condition, or by showing that, if he had given attention to its business, his lack of fitness, and unfamiliarity with banking methods, would not enable him to ascertain its true condition? The mere statement of the proposition, it seems to us, is its own refutation.

After a careful examination of the entire record, the writer of this opinion is thoroughly convinced that the offer of evidence made by the defendant and refused by the court amounts to nothing more than this: That the defendant was ignorant of the insolvency of the bank because he willfully ("willfully" in the sense of "intentionally") neglected the means whereby he could or might have ascertained its condition, and paid no attention whatever to its business, though holding himself out as the president of a solvent institution, thereby encouraging persons to deal with it; or his lack of knowledge arose from the fact that his unfamiliarity with business methods was so pronounced that he could not have ascertained its true condition had he made an examination into its affairs, but would have been obliged to depend (as he did) upon statements of its solvency made to him by those who had active management of its affairs. A person cannot, upon such a pretext, escape the natural and necessary consequences of his own voluntary acts, which, in this case, clearly amount to criminal negligence. In line with the other authorities cited in support of this conclusion, is *Carr v. State*, supra, which in all essential particulars is on all fours with the case at bar. The opinion contains an excellent statement of the law applicable to this case as to the duty of a bank officer to know its financial condition, and any excerpt would fail to disclose what only a careful reading of the entire opinion reveals. See, also, *State v. Cadwell*, 79 Iowa, 432, 44 N. W. 700; *Same v. Yetzer*, 97 Iowa, 423, 66 N. W. 737.

It may be true that in the management of a bank the power of its president is less than that of the cashier. But we submit that the president cannot shield himself from criminal liability by casting the responsibility of failure and insolvency upon other officers, who were more immediately

and directly contributory to it, by a plea of ignorance of the straits into which the institution has fallen, when that ignorance is due entirely to his criminal negligence in failing to acquaint himself with its affairs, or to his inability, natural or otherwise, to acquire knowledge had he exercised his faculties to that end. The person who took the deposit in question was an employé of the bank, authorized by its officers to receive deposits into the bank in the ordinary course of business. Defendant, as president, either joined in conferring this authority, or, with knowledge of its existence, acquiesced in it. After the bank was insolvent, and after defendant knew it, or would have known it, had he not kept himself in ignorance of its financial condition by criminal negligence, he neither revoked the authority of the teller, nor did anything to discourage or put a stop to the taking of deposits by closing the doors, or giving notice that deposits would not be received. By such conduct he clearly assented to the reception of deposits. It was not essential to a conviction that he should assent to this particular deposit, or that he should have acquiesced in its reception after he obtained actual knowledge that it had been made. His recognition of the general authority of the teller to receive deposits, without taking any steps to prevent such action, after he knew, or, in law, is charged with knowledge, of insolvency, is an assent to the reception of this deposit by his employé. *State v. Sattley, supra*. My conclusion is that the offer by defendant to show his want of knowledge of the bank's insolvency was properly rejected, for the facts, if admitted to be true, furnish no excuse or justification whatever, in the light of his own admissions, for his not knowing, or attempting to ascertain, the financial condition of the bank, and that instruction No. 16, under the facts in evidence, taken, as it should be, with all the other instructions, was right. Therefore I believe the judgment should be affirmed.

My associates, however, while agreeing with me as to the general law of the case as hereinbefore declared, are of opinion that the trial court erred in rejecting the testimony offered by the defendant to show what steps he had taken to ascertain the solvency of the bank, and in giving instruction numbered 16, the latter part of which they interpret as laying down the doctrine that the president of the bank is practically an insurer of its solvency, which they hold is not the law. Their reasoning for this conclusion may thus be stated: By instruction No. 16 the jury was, in effect, advised that, so long as plaintiff in error retained the presidency of the bank, he was presumed to know, and it was his duty to know, its condition as to solvency or insolvency. This practically declared that at all times, and under all circumstances, he

was conclusively presumed to know the financial condition of the bank, without respect to what steps he may have taken to ascertain this fact, which is not the true rule; for, in effect, it made him the absolute guarantor of the solvency of the bank. As an official of that institution, he was bound to exercise that reasonable degree of care and diligence in the management of the affairs of the bank which an ordinarily prudent person would do in like circumstances. This would impose upon him the duty of exercising reasonable care and diligence for the purpose of ascertaining and keeping himself advised regarding its financial condition. The knowledge on this subject which could have been thus obtained he is presumed to possess. As a witness in his own behalf, he was asked to state what the value of the assets of the bank was at the time it was organized. He was also interrogated relative to the information he gained on the question of the solvency of the bank at the time he visited that institution. He was further interrogated regarding the statements of the officials who appear to have been in the active charge of the affairs of the bank relative to the representations they made to him regarding the value of the securities held by the bank, and if they stated that the assets were more than the liabilities. He was also asked what information he had with respect to the value of loans and discounts of the bank. To each of these questions objections were interposed on behalf of the state, and sustained. That plaintiff in error had no knowledge regarding the financial condition of the bank at the time of its failure (which want of knowledge resulted from his own acts in either failing to give proper attention to its management, or in intentionally neglecting to ascertain its condition) would not overcome the prima facie case made by the state. Whether or not, however, he had exercised that degree of care and diligence in keeping himself informed regarding its condition which an ordinarily prudent business man would have done, was a question of fact for the jury to determine. If he had, and by the exercise of this care obtained information which honestly led him to believe that the bank was solvent at the time of its failure, then he would not be guilty, although mistaken in his judgment. The instruction given by the court ignored this rule. The evidence above noted should have been admitted, as it tended to prove what steps the plaintiff in error had taken in the way of informing himself regarding the solvency of the bank. It will thus be seen that, while the members of the court are in harmony as to the law governing the case, they differ in their interpretation of the instruction noted, and as to the character of the evidence offered and rejected. The majority holding there was error of the trial court in these respects, the judgment should be reversed, and the cause remanded; and it is so ordered. Reversed.

WEIR et al. v. IRON SPRINGS CO. et al.
(Supreme Court of Colorado. June 4, 1900.)

TRUST DEEDS—POWER IN MORTGAGOR TO
SELL—EXECUTION OF POWER—DEFAULT—
WAIVER—ADDITIONAL SECURITY.

1. A stipulation, in a deed of trust, that the mortgagor should be allowed to sell a part of the mortgaged premises free of the mortgage lien, for cash, or, when not for cash, for at least one-fourth cash and balance secured by a trust deed on the premises conveyed, to be, with a certain proportion of the cash received, assigned to the trustee for the benefit of the mortgagee, the lien on the trust deed to be released, does not authorize the sale of a part of the mortgaged premises by the mortgagor by a bond for a deed, providing for one-fourth in cash and the deposit in escrow of the mortgagor's deed, to be delivered on the payment of the balance; and the grantee, the trust deed being of record, acquired no right, as against the trustee, to require the latter to release the premises from the lien of the mortgage.

2. A trust deed provided that, until default, the mortgagor should have the right to sell a part of the mortgaged premises, free from incumbrances, on payment of a certain part of the purchase price to the mortgagee. The mortgagor executed a chattel mortgage to secure certain sums advanced by the mortgagee to pay taxes and interest, which, by the terms of the trust deed, it was the duty of the mortgagor to pay, failure to pay which constituted a default in the mortgage. *Held*, the acceptance of the chattel mortgage constituted a waiver of such defaults as occurred prior to the execution thereof, and one purchasing from the mortgagor after a default in the payment of taxes becoming delinquent subsequent thereto acquired no right, as against the mortgagee, to require the latter to release the conveyed premises from the lien of the trust deed, on payment to it of the proportion of the purchase price.

Error to district court, El Paso county.

Action by Robert D. Weir and another against the Iron Springs Company and others. From a judgment dismissing their complaint, plaintiffs bring error. *Affirmed*.

This action was commenced by plaintiffs in error for the purpose of obtaining a decree releasing certain real estate in an addition to the town of Manitou from a mortgage lien, and to set aside the proceedings foreclosing such mortgage, so far as it affected the subject-matter of the controversy. From a decree dismissing their complaint, and denying the relief demanded, they bring the case here for review on error. The facts upon which the rights of the respective parties depend will be found in the opinion, in connection with the questions determined.

J. W. Ady and John K. Vanatta, for plaintiffs in error. A. E. Pattison, for defendants in error.

GABBERT, J. April 1, 1893, the Iron Springs Company executed a deed of trust upon certain real estate, which included that in controversy, to the Metropolitan Trust Company, for the purpose of securing certain bonds. This deed of trust, as subsequently amended, provided, so far as necessary to notice at present, that the mortgagor was at liberty to make sales of parcels of the mort-

gaged premises, and to procure the release of the property so sold from the lien of the mortgage, upon the terms therein provided. These terms, so far as material to the questions now considered, were to the effect that no sale of any parcels of the real estate included in the mortgage should be made for less than one-fourth cash; that deferred payments on the property so sold should be secured by a deed of trust thereon, as a first lien; that the notes taken for the unpaid purchase price should be payable in gold coin, and bear interest at a specified rate; that a certain proportion of the cash paid, together with notes taken, were to be transferred to and held by the trustee, which, upon receipt thereof, was to execute a release of the deed of trust of the Iron Springs Company on the property so sold. February 20, 1895, a bond for a deed was made by the Iron Springs Company to plaintiff Weir, as trustee, by which the former agreed to sell and convey to the latter the premises in question for the sum of \$4,000, to be paid as follows: \$1,000 on or before March 20, 1895, \$1,000 on or before March 20, 1896, \$1,000 on or before March 20, 1897, and \$1,000 on or before March 20, 1898, with interest on the deferred payments at the rate of 8 per cent. per annum. March 18, 1895, plaintiffs paid the Iron Springs Company the first payment, as provided in the bond, and gave their notes for the remainder of the purchase price, in accordance with the terms and conditions of the bond. On July 11, 1895, the Iron Springs Company executed a deed to plaintiffs for the premises in controversy, and later deposited it in escrow with defendant Frost, with instructions to deliver the same to the grantees upon payment of the balance of the purchase price, in accordance with the terms and conditions of the bond. On March 13, 1896, plaintiffs tendered to Frost the balance of the purchase price due upon the premises, and demanded the deed, which he refused to deliver. August 21st following, the Iron Springs Company received from Frost this deed. Plaintiffs then paid to this company the balance of the purchase price, with interest, and received the deed. Thereupon the Iron Springs Company transmitted to the trustee this sum, with the request that it execute and return a release of the deed of trust upon the premises in dispute, which request was refused, and the remittance returned to the Iron Springs Company, which, in turn, repaid the same to the plaintiffs, who subsequently tendered it to the trustee, which tender was again refused. Subsequent to these acts, the deed of trust was foreclosed.

The first question to determine is, what rights have plaintiffs acquired under and by virtue of their contract entered into with the Iron Springs Company, or the deposit of the deed in escrow with Frost, independent of any other considerations, or subsequent action upon their part? The stipulation in the deed of trust, respecting sales of parcels of the mortgaged premises,

authorized the Iron Springs Company to sell and transfer title to the premises in dispute, discharged of the lien of the deed of trust (Woodward v. Jewell, 140 U. S. 247, 11 Sup. Ct. 784, 35 L. Ed. 478), provided, however, that the sale was made strictly in accordance with the terms and conditions of the deed of trust, upon compliance with which a release thereof was to be executed by the trustee (1 Jones, Mortg. § 79). In other words, this stipulation authorized the mortgagee to convey portions of the mortgaged premises, free and clear of the mortgage lien, upon certain terms and conditions. When not for cash, the deferred payments were to be secured by mortgage or deed of trust upon the premises conveyed, which, with the notes for such payments, together with a certain proportion of the cash, were to be transferred to the trustee. In lieu of the mortgage lien upon the premises so sold. The contract entered into originally between the Iron Springs Company and plaintiffs did not contemplate any such an arrangement; on the contrary, for the deferred payments they gave only their individual notes. There is no provision, in this stipulation in the trust deed, which required the trustee to recognize any contract made between the Iron Springs Company and the plaintiffs with respect to the deposit of the deed in escrow, to be delivered upon payment of the sums specified; in short, as to the deferred payments there was no attempt whatever to comply with the stipulation in the deed of trust, empowering the mortgagor to sell parcels of the mortgaged premises, discharged of the lien of the deed of trust. It was upon record. Plaintiffs were bound to take notice of its provisions, and in fact, as the evidence discloses, did examine a copy. The contract of February 20, 1895, not being one which the trustee was bound to recognize under the stipulation in the deed of trust relative to partial releases, plaintiffs are not entitled to the relief demanded by virtue of any of the terms and conditions of that contract. The same is true with respect to the deposit of the deed in escrow. None of the authorities cited by counsel for plaintiffs, in support of their proposition that they acquired rights under the contract of February 20, 1895, or the deposit of the deed with Frost, contravene this conclusion, but, on the contrary, support it. In those cases it was held, as we decide here, that a mortgage authorizing the mortgagor to sell parcels of the mortgaged premises upon certain terms, and obtain a release of the mortgage lien on the premises so sold, conferred power upon the mortgagor to sell, free and clear of the lien created by the mortgage, only upon the terms and conditions specified in the mortgage, and, the sales having been made in accordance with the provisions of the mortgage with respect thereto, the vendee was entitled to have the property purchased discharged of the mortgage lien. Vawter v.

Crafts, 41 Minn. 14, 42 N. W. 483; Crisman v. Hay (C. C.) 43 Fed. 522; Nims v. Vaughn, 40 Mich. 356; Lane v. Allen, 162 Ill. 423, 44 N. E. 831; Clark v. Fountain (Mass.) 10 N. E. 831. We recognize this doctrine to its full extent, but it cannot avail plaintiffs, for the simple reason that the deed of trust by the Iron Springs Company did not authorize the mortgagor to sell the premises in controversy on the terms mentioned in the contract of February 20, 1895, or to secure deferred payments by depositing the deed in escrow; and hence neither the bond for a deed nor the escrow agreement initiated rights in the plaintiffs which obligated the trustee, upon compliance with the terms and conditions of either, to release the deed of trust upon the premises so sold.

The next question presented is whether plaintiffs are entitled to relief by virtue of the payment of the last three installments of the purchase price, the tender thereof to the trustee, and the demand for a release of the deed of trust upon the premises in controversy. The deed of trust provided: "Until default shall be made by the Springs Company, as specified herein, and at any time when no such default shall exist, the Springs Company shall at all times be at liberty to make sales, in its discretion, of its real and personal property hereby conveyed in trust, and to procure the release of the property so sold by the trustee in the manner and upon the terms herein provided." The solution of this question depends primarily upon whether or not, on the tender to Frost, at the time of the payment to the mortgagor, August 21, 1896, or when the tenders were made to the trustee, the Iron Springs Company was in default in the performance of any of the conditions upon it imposed by the deed of trust. The reservation in a mortgage, authorizing the mortgagor to convey parcels of the mortgaged premises free and clear of the mortgage lien, upon the terms and conditions defined in the mortgage, confers an express, but limited, authority, which can only be exercised within the terms of the power reserved to the mortgagor. 1 Jones, Mortg. § 981. It follows, therefore, that if, at the time plaintiffs tendered the money to Frost, made the payment of August 21, 1896, and at the time of tendering the same to the trustee, the mortgagor was in default in the performance of conditions imposed by the deed of trust, its power to sell, free and clear of the lien of the deed of trust, did not exist. Pierce v. Kneeland, 16 Wis. 672. This instrument provided that the mortgagor should discharge the taxes levied upon the mortgaged premises before the same became delinquent. The interest on the bonds secured by the deed of trust was payable semiannually, on the 1st day of October and April of each year. By the terms of the deed of trust the mortgagor could sell the premises in dispute for cash. The aggregate of the last three payments to the Iron Springs

Company and the amount tendered Frost and the trustee was all the latter could demand as a condition precedent to releasing the premises purchased by plaintiffs from the lien of the deed of trust. This payment was first tendered to the defendant Frost upon the 13th day of March, 1896. He refused to accept it. The tender was made him because the deed from the Iron Springs Company to the plaintiffs had been deposited with him in escrow. August 21st following, plaintiffs paid the president of the Iron Springs Company the sum originally tendered Frost, with interest. This sum was at once transmitted to the trustee, with a request for a release of the deed of trust upon the premises purchased by plaintiffs, which was refused, and the money returned to the company. Counsel for plaintiffs contend that the Iron Springs Company, on each of these dates, was not in default in the performance of any of the conditions imposed by the deed of trust. This proposition is based upon the fact that on the 26th day of November, 1895, the Iron Springs Company executed and delivered to the defendants Frost and Peltz, as trustees, a chattel mortgage upon personal property as additional security for the payment of the bonds of the Iron Springs Company, and also for the purpose of securing the mortgagees the repayment to them of moneys advanced for taxes and insurance on the property of the mortgagor, originally incumbered to secure these bonds. The Iron Springs Company failed to pay the taxes assessed against the real estate described in the deed of trust for the years 1894 and 1895. It defaulted in the payment of interest maturing October, 1895, and April, 1896. The most that can be claimed, as to the effect of the execution and acceptance of the chattel mortgage to the defendants Frost and Peltz, is that it resulted in a waiver of all defaults existing on the part of the Iron Springs Company at the time it was executed and delivered. It was not intended to waive any defaults which might occur in the future. On March 13, 1896, the first half of the taxes for the year 1895 upon the mortgaged premises was delinquent. Therefore, if the tender to Frost upon that date was one which the trustee in the deed of trust was bound to recognize, provided that on this date the conditions were such that the plaintiffs were entitled to a release of the deed of trust by virtue of such tender, it was of no avail, because of the default of the Iron Springs Company in the respect noticed. August 21st following, the date of the payment to the Iron Springs Company, which was at once transmitted to the trustee, as also at the time of the tender by plaintiffs to the latter, the whole of the taxes for 1895 were delinquent, and the interest maturing April 1st preceding was unpaid. So, conceding that the execution of the chattel mortgage was a waiver of all defaults existing at the time it was

given, inasmuch as it did not affect defaults subsequently occurring, the plaintiffs cannot enforce rights by virtue of its execution and delivery. Under the facts relative to the defaults of the mortgagor, it had no authority to sell the premises in dispute, free and clear of the mortgage lien, on March 13, 1896, or on either of the dates the money was paid to it or tendered the trustee.

The next and final question to determine is whether or not any arrangement was entered into between the plaintiffs and parties authorized to represent the bondholders, by which an agreement to purchase the premises in controversy was effected upon terms and conditions different from those provided in the deed of trust, which can be enforced in this action. It is contended by counsel for plaintiffs in error that defendants Frost and Peltz were the representatives of the bondholders and the trustee, and, as such representatives, had authority to consent to the arrangement entered into between the Iron Springs Company and plaintiffs, and that, therefore, this agreement should now be enforced, even though it does not comply with the terms and conditions of the deed of trust, which authorized the Iron Springs Company to sell portions of the mortgaged premises free and clear of the mortgage lien. It is doubtful if the plaintiffs are entitled to have this question considered, because their complaint seems to have been drawn solely upon the theory that the bond for a deed, under which plaintiffs' rights were initiated, is a contract which, by the terms and conditions of the deed of trust, can be enforced. It is not necessary, however, to go into an analysis of the pleadings for the purpose of determining this question, as it is evident, from the testimony, that plaintiffs never entered into the agreement for the purchase of these premises relying upon any representations made by either of the defendants Frost or Peltz that such agreement, although not complying with the terms and conditions of the deed of trust, would nevertheless be recognized by the bondholders. For this reason it is not necessary to determine what the relation of these defendants may have been to the bondholders or the trustee, or what authority they may have had to represent either of these parties with respect to the mortgaged premises.

The evidence as to what occurred between plaintiffs and the defendants Frost and Peltz is, briefly, as follows: Weir testifies that he made inquiries of Frost, prior to the purchase, relative to the interest on bonds and taxes on the mortgaged premises, and that Frost advised him to purchase, because he thought the premises were worth the sum agreed to be paid; that he was also told by Frost that the company was not in default at the time of this conversation. He claims that, at the time of the execution of the bond for deed, he was not aware of the fact that the deed of trust made no provision for any such an instrument, or, rather, as he subse-

quently explained, he considered that a bond for a deed would be the same as a deed and trust deed together; that, according to the terms and conditions of the deed of trust, he knew that, to secure the deferred payments of the purchase price for the premises in controversy, a deed of trust should be given, and that the Iron Springs Company should certify to the trustee a report of the sale of the premises which he desired to purchase. In short, it appears from his own testimony that he familiarized himself with the terms and conditions of the deed of trust, upon which the Iron Springs Company might sell free and clear of the deed of trust, and that he was fully aware that the bond for a deed did not comply with any of its conditions in this respect. The testimony of plaintiff Helstand on the subject under consideration is to the effect that, prior to the purchase, the only person with whom he conferred regarding the title to the property was the president of the Iron Springs Company, from whom he learned that the company had the right to sell the premises in dispute; but he does not claim that he made any inquiry for the purpose of acquainting himself with the terms and conditions upon which title, free and clear of the deed of trust, could be acquired. He also states that he had a conversation with Frost, who advised him to buy, because the price agreed upon was reasonable, and that he would make arrangements to let him have the money to make the contemplated improvements. Neither of the plaintiffs claims to have had any conversation with Peltz, which is material to consider. It will be observed that neither of them claims that Frost advised them that the contract which they entered into with the Iron Springs Company could be enforced, as against the trustee or bondholders, so as to release the property purchased from the lien of the deed of trust, or that such contract would be recognized by the bondholders independent of the deed of trust. Frost testifies: That in November, 1895, plaintiff Weir came to him, and talked about buying the premises in dispute, and asked him regarding its value. Something was said about title, and Weir asked him what he meant, to which he replied that it would be necessary to obtain a release of the deed of trust, and that he also advised him what he understood was the process by which this release could be obtained. That afterwards one or the other of the plaintiffs informed him that they had concluded to take their chances by taking a bond for a deed, and later told him they thought the mortgagor would discharge the taxes so they could get a release. Why the deed executed by the Iron Springs Company was deposited with Frost in escrow is not free from dispute, but it does not appear that this deposit was made pursuant to any understanding or arrangement that the bondholders should recognize the agreement entered into between the Iron Springs Company and the plaintiffs, as evidenced by the bond for a

deed. The evidence of defendant Peltz, so far as it is necessary to notice, is, in effect: That in September or October, 1895, he had a conversation with plaintiffs at Colorado Springs, at which Weir spoke of obtaining a deed of the property, and a release of the deed of trust, in reply to which he told him that he could not get a release at that time, because the mortgagor was in default, and it would be necessary for it to pay up all arrears before the trust company would execute a release; that the interest maturing on the 1st of October would also have to be taken care of. That he said to Mr. Weir that, if he made improvements without the defaults being arranged, they would do so at their peril, to which Weir replied (employing the language of the witness), "They were in a bad box." Neither of the plaintiffs controverts the above statements of the defendants Frost and Peltz. This evidence certainly does not tend to establish the claim that plaintiffs were led to believe that their contract with the Iron Springs Company would be recognized as one binding upon the bondholders, independent of the deed of trust. Neither does it tend to support their claim that the acts of either Frost or Peltz misled them, to their injury. On the contrary, it clearly appears that they understood fully how the purchase must be made from the Iron Springs Company, whereby the release of the deed of trust could be obtained, but, for some unexplained reason, chose to take their chances by entering into the contract which they did. For this reason, as we have already noticed, it is unnecessary to determine what authority Peltz and Frost had, relative to entering into a contract on behalf of the bondholders for the purchase of the premises by plaintiffs, because neither of them attempted to enter into any such contract as the representative of the beneficiaries in the deed of trust. Neither is it necessary to consider the question of estoppel, argued by counsel for plaintiffs, as, from the facts clearly established by the evidence, they are not in a position to invoke relief upon this ground. We fully recognize that plaintiffs will suffer a considerable loss by reason of the foreclosure of the deed of trust, and their failure to obtain a release upon the premises which they purchased, for which a part of the purchase money has been paid, and a considerable sum expended in the way of improvements. The position, however, in which they are placed, is the result of their own negligence and failure to exercise ordinary business prudence. The premises they purchased were incumbered, of which they were fully aware; they knew what steps had to be taken in order to secure title, free of this incumbrance; no one has misled them; and the courts are powerless to extricate them from a difficulty for which they, alone, are responsible. The judgment of the district court must be affirmed, and it is so ordered. Affirmed.

WHEELER et al. v. MAYHER et al.

(Court of Appeals of Colorado. June 11, 1900.)

TRUSTS—CONVERSION—EXCESSIVE DECREE—PLEADING—GENERAL DENIAL.

1. A corporation assigned a claim, due it from a city, to the defendant as trustee, to pay the interest on an indebtedness due from the corporation, and to create a sinking fund for the payment of the principal. In an action by the creditor's assignees against a bank and the trustee, the complaint alleged that the bank had received \$755 of the trust funds from the trustee, with notice of the trust, contrary to its terms, and that the trustee had converted \$2,100 to his own use. Plaintiffs' evidence showed that the trustee had received the full amount due the corporation, about \$5,000, from which the trustee paid the bank \$755 in settlement of its claim against the corporation, and the trustee's uncontradicted testimony showed that he had paid an amount about equal to that charged in the complaint to the other creditors. Thereupon plaintiffs' counsel asked for a decree for \$2,105 against the trustee, and for \$837 against the bank. The court so ordered, and then entered a decree for \$4,332 against the trustee, and for \$1,068 against the bank. *Held* that the decree was erroneous, since it was for an amount about twice that charged in the complaint, and for more than plaintiffs' own evidence showed that the trustee had received, and since it gave the trustee no credit for the money which his uncontradicted testimony showed he had paid to creditors.

2. In an action for the conversion of trust funds, defendant may prove that he appropriated the funds in accordance with the trust, under a general denial.

Error to district court, Weld county.

Action by William Mayher and others against Charles H. Wheeler and another for conversion and misappropriation of trust funds. Judgment for plaintiffs, and defendants bring error. Reversed.

James E. Garrigues, for plaintiffs in error. Patton & Esteb and Felker & Dayton, for defendants in error.

BISSELL, P. J. The sole question to which counsel have addressed themselves in their argument respects the proof which may be made under a general denial. The appeal will be made to turn on a different consideration, and we shall only discuss or decide one phase of the scope of a general denial, and the proof properly admissible under it. We do not care to undertake to lay down the general rule. It is a very debatable matter, on which courts might easily disagree, and support their conclusions by arguments of apparently equal force, and we prefer to await the determination of the supreme court, when the question is one of such universal interest. If it was necessary, we should not attempt to avoid it; but since the appeal is resolvable on other considerations, and we shall order a replender, we feel quite at liberty to omit the discussion, or any other decision of the matter than that which appears in the opinion.

In stating the complaint and the evidence we shall go no further than is required to

clearly exhibit the controversy. Prior to 1893 the Greeley Electric Light Company was indebted to Warren Currier or his estate in a considerable sum. The corporation was likewise indebted to some of the banks in Greeley in a further amount. To secure these debts the corporation executed mortgages on real estate, on the plant, and on sundry chattels. There was a foreclosure of these securities, but the sale left about \$11,000 unpaid, of which different portions were due to the different parties. The complaint set up the corporate character of the light company, the interest of Currier and his estate, the title which passed to the purchasers, and the relations which Gale and Charles H. Wheeler, who is one of the defendants, sustained to the light company and to the creditors. All matters of record were admitted. After the sale the light company attempted to make some provision for the payment of the interest on \$11,000, and to provide a fund for its ultimate liquidation. To this end the company, acting in its corporate capacity, on the 1st of September, 1893, executed to Gale a written authority, substantially providing that for a valuable consideration the company assigned and transferred to him \$175 per month of the money due it monthly from the city of Greeley for arc lights, and authorized him to receive and receipt for it. The transfer provided that the money, when collected, should be first used to pay the interest on the loan from the Currier estate and on the loan held by Smith as trustee, and the balance, if any, should be put in a sinking fund to pay the principal of the loans. Gale died, and it became necessary to appoint a substitute. Just exactly what was done with reference to this matter is not very clear, and we are unable to state whether the corporation, acting as such, appointed another trustee. Whether this be or be not true, in March, 1895, the president executed another instrument exactly similar in terms to the one antecedently given to Gale, wherein Charles H. Wheeler, one of the defendants, was named as trustee. There was nothing to show that the corporation as an entity, or acting by the authority of its board of directors, executed this paper. Whether thereby Wheeler would have acquired title had the corporation objected to the execution of the authority conferred we need not determine; nor are we called on to decide whether Wheeler could have been compelled to act, nor whether thereby any obligation was imposed on him. It is enough to say that, after the instrument was executed by the president, it was left with the treasurer of the municipality, who, upon its authority, issued most of the warrants for monthly payments for lights furnished the city in the name of Wheeler as trustee, to the knowledge of the corporation. These warrants appear to have been drawn regularly, were put in a pocketbook used for this purpose, and taken therefrom by the

manager of the corporation, and ultimately turned over to the Greeley National Bank, of which Wheeler was the cashier. After indorsement by the corporation they were placed to its credit in the bank. It does not appear whether Wheeler ever indorsed them, or what he did about them. Wheeler's testimony shows—though whether it be true or not we do not decide—that he applied much of the funds represented by them to the liquidation of the claim due the Currier estate, and the claims due his own bank and the Union Bank of Greeley. The complaint sets up that \$755 of this money was paid over to the Greeley National Bank, contrary to the terms of the assignment and trust, and that the balance, amounting, as stated, to \$2,100, had been converted by Wheeler to his own use, and had not been applied to the liquidation either of the principal or the interest of the claims. The defendant answered by general denial, save as to particular admissions of corporate capacity, etc., intending thereby to take issue on the allegations of the complaint, which alleged the creation of the trust, the receipt of the money, and its misappropriation and conversion. When the case came to trial the plaintiffs attempted to maintain their cause of action by the production of the assignment to Wheeler, and the various warrants issued by the city and payable to the order of Wheeler as trustee. These we state generally, without intending to be exactly accurate. They were about 21. In 18 or thereabouts, Wheeler was named as payee and trustee, but in the other 3 the light company was the payee. All of them went into the account of the company in the bank. The plaintiffs did not attempt to show any misappropriation by Wheeler, nor any direct conversion, nor, as we read the record, did they prove that nothing had been received by the Currier estate, or by Smith as trustee for the other creditors. The plaintiffs relied on proof of the receipt of the money, and left it for the defendants to show what had been done with the money, and whether any of it had been paid. According to the warrants produced, the total sum received by Wheeler was about \$5,000,—nearly twice what the plaintiffs alleged was due, and nearly twice as much as they alleged the Bank of Greeley and Wheeler had received and converted. It must be stated the plaintiffs alleged that \$755 had been paid to the Greeley National Bank, contrary to the terms of the trust, and that the bank was bound to repay it, having received it with notice of the trust. There was no proof of this notice, otherwise than as to the presumption deducible from the fact that Wheeler, as its cashier, handled the fund, and was the transferee, if such he was, by the instrument executed by Thompson. At the trial it was conceded that \$755 had gone to the Greeley Bank at a date named. When it came to the defense, the defendants undertook to prove the circumstances

under which the trust was created, contending all the while that the instrument did not express the true trust, as they term it, but that, if any was created, it was the result of a conversation between Currier and Wheeler, who undertook to handle the funds and distribute them in a certain way. Then they also attempted to show the exact amount of money which had come into Wheeler's possession, and the manner in which it had been paid out and distributed. All this was objected to on the theory that, since the defendants had only denied generally, they could offer no such proof, being bound to plead affirmatively the special facts constituting their defense, and set up payment if they would establish it to reduce the plaintiff's claim.

From this statement the difficulty of the proposition is quite apparent. The reason which influences the court to decline to decide the proposition in its entirety will further appear when we state the history of the trial. The court refused to permit the defendants to show this conversation, or to show the terms of the trust, because they had pleaded nothing concerning it. We do not intend to decide the question, because it is an exceedingly close one, and the court may have been measurably right, though it was partially wrong. When the case goes back, the district court will direct a repleader. The defendants will then, if they be so advised, set up what they concede to be the truth respecting the creation of the trust, pleading such facts as they may be advised, and this whole difficulty will be avoided. The court can, on that answer, determine whether or not what he pleads constitutes a good defense. There will necessarily remain for the decision of the court, dependent on the plea, the further question whether, if the defendant concedes the appointment, he is not bound as a voluntary trustee, since he undertook to carry out the agreement, and might thereby become bound to perform the duties which he voluntarily assumed. We feel quite certain it would not lie with Wheeler to contest his duty or his obligation, if he voluntarily undertook to execute the terms of the written appointment, and all parties in interest accepted that as his obligation. We are quite inclined to the opinion that Wheeler would be bound to carry it out according to its terms, because of his voluntary assumption of duty. If it should appear that thereafter money came into his hands, he would probably be bound to see to its proper application. We do not intend to decide that any duty was laid on Wheeler to collect the fund, by litigation or otherwise; but, if the fund came into his hands under such circumstances that he had power to control it, he was bound to retain it, and apply it according to the terms of the assignment. It is unnecessary, nor are we able, under the case as it appears in the record, to do more than state these general propositions.

We will now come to the troublesome matter in the case, and that which compels the reversal of the decree. When the defense put Wheeler on the stand, they attempted to show the amount of money which he had received, the sums which he had paid out, and the parties to whom he had paid it, and thereby establish that he had measurably, at least, performed his duty, and to the extent of the performance must be discharged. We quite agree. The court likewise agreed with counsel, but the interlocutory discussion in the record shows that the court lost sight of this in its ultimate finding. The defendant had a right to show the actual amount of money received under the trust, and how much he had paid out according to its terms. The court was doubtless right about it, but the error which it committed was in refusing to permit this to be done, or in disregarding the proof which the defendant made, and which was not overcome. In response to inquiries, Wheeler testified that he had received \$2,507.90 of the fund. His counsel, however, admitted that he had received \$2,707.90, and claimed that Wheeler had paid out \$2,381.66, and had on hand \$126.24. Pursuing the inquiry, Wheeler was asked how much of the funds coming into his hands he had paid out. This was objected to on the theory that the inquiry ought to have been "what should have come into his hands." The court sustained the objection, but permitted an answer to the question "how much he had paid out." To this the witness responded, "\$3,485.24," which, of course, is largely more than the sum which he admitted he had received. Further answering, he admitted he had in his hands \$126.24. The witness was then asked whether he paid out whatever came into his hands to discharge either the interest or the principal of the secured claims. The plaintiffs objected, on the theory that the evidence showed he had done nothing of the kind, as he had gotten a large amount of warrants, payable to his order as trustee, and he could not answer that he paid it at all out, but must show the individual payments. Probably, to this extent, the plaintiffs were right. The inquiry was not pursued by counsel with an observance of the rules of evidence respecting the production of testimony, nor were the inquiries put in the form in which they ought to have been put to elicit the facts which were the proper subject-matter of proof. Barring all this, however, the witness, on cross-examination, after restating that he had paid out \$3,485.24, testified that he had paid the Union Bank, one of the cestuis que trustent, \$270, to the Currier estate \$1,917.29, to the Greeley National Bank \$1,052.50, and, further, to the Union Bank \$150. Here the evidence stops in the most abrupt and unsatisfactory fashion, leaving us entirely in the dark as to the exact condition of the fund. Again, if we should concede that Wheeler was

chargeable with the total of all the warrants which the plaintiffs traced into his hands, which were payable to him as trustee, yet the ultimate judgment is not justified, for two reasons: In the first place, the sum total of the warrants produced by the plaintiffs, payable to Wheeler's order as trustee, does not amount to the sum named in the decree. The Greeley National Bank and Wheeler were only chargeable with the total of what both defendants had received of the trust fund. But even this cannot be conceded, because, according to the case as alleged by the plaintiffs, the trustee was only bound to receive \$175 per month, and apply that amount to the payment of the interest and the principal. If we take the 18 warrants which were payable to Wheeler as trustee, and multiply by 175, the total of what he received only amounted to \$3,150, for which the bank, if liable at all, was liable for \$755, thus leaving a claim against Wheeler, providing he paid out nothing, for a trifle more than \$2,300. Further trouble appears from the fact that the court permitted Wheeler to testify about the amount which he had received under the trust, and the amount he had paid out; and thereby it appears—and this testimony was totally uncontradicted—that he had paid to the cestuis que trustent, to wit: The Currier estate, \$1,917; to the Union Bank, \$429; and to the Greeley National Bank, \$1,052.50. This apparently covered the whole sum which ought to have come into his hands at the rate of \$175 per month. We do not intend to decide nor determine the amount he got, the amount he paid out, the regularity and lawfulness of any payments, nor whether these payments ought, or ought not, to have been proven in reduction of the plaintiffs' claim. The record is too barren of evidence to permit us to do it. Yet it is so evident that he received no such sum as that for which the decree was entered, and it so clearly appears from his own testimony that he had disbursed to the Currier estate nearly \$2,000 of the fund, that we must conclude the decree is not sustained by the proof. What we have said about these payments and these claims is not to be taken as a decision of the matter, or to conclude the court in any wise in making its ultimate finding, but to demonstrate the apparent error which inheres in the decree, and for which it must be reversed.

But it otherwise appears that the decree is erroneous. This is easily determinable by a reference to its terms. The court made findings, and found that Wheeler had received city warrants of a specific amount. Each warrant represented the sum total due from the city for each monthly payment. It gave him no credit for the sums which he testified he had paid out, which were not disputed, and then proceeded to enter a decree against the Greeley National Bank for \$1,068.08 and against Wheeler for \$4,332.14. The complaint only charged the bank with

\$755 and interest, and Wheeler with \$2,100. This was the amount it alleged Wheeler had converted. The decree was therefore entered for more than twice the *ad damnum*. It cannot be sustained because of the difference between the decree and the *ad damnum*, and for the further reason that there is nothing in the plaintiffs' case, as laid or proven, which entitled them to a decree for that amount of money. Wheeler was not charged, nor could he be charged, for the sum total of the warrants which were payable to him as trustee, under the case as the plaintiff laid it, or under any theory based on the proof. According to the plaintiffs' case, he was only chargeable with \$175 a month of the amount due from the city for arc lighting. There is nothing in the record which would make him liable for the face of the warrants.

There is a still further difficulty. It is recited in the bill of exceptions that the foregoing was all the evidence received, and thereupon the plaintiffs' counsel asked for judgment and decree, as prayed in the petition, for \$2,105.08 against Wheeler, and \$837.54 against the bank. The court ordered that the decree be so entered. The defendants' counsel then said: "I thought there was going to be an accounting." The court then stated: "The testimony, as it now stands, shows the amount due, if there is anything due, and the decree will be entered as of this time." It then proceeded to enter judgment and decree for more than twice the sum asked. The court had antecedently stated, in response to arguments respecting the extent of the proof, that the case called for an accounting, and that the credits to which the defendants were entitled could be shown. At the conclusion the court stated the evidence showed the amount that was due; apparently, so far as we can see, proceeding on the hypothesis that the testimony showed the amount that had been paid out and the credits to which Wheeler was entitled, and that the testimony, taken together, would establish the exact liability. The court, however, disregarded Wheeler's uncontradicted testimony in regard to his payments, and entered a decree for more than the amount asked. If we should accept the plaintiffs' hypothesis, that the bill did seek an accounting, and that they might have judgment for all the sums which they had proved, yet we are quite of the opinion that it does not lie with counsel on the conclusion of the case, which the court treats as an accounting, to insist that he was only entitled to a decree for less than \$3,000, and take one for more than \$5,000. We are equally clear that when Wheeler testified that he had paid the Currier estate, from the funds which he had gotten from the city, about \$2,000, he was entitled to that credit, and the recovery should have been diminished by at least that sum.

We now come to the legal inquiry respecting what may be proven under a general denial. Under the case made by the plaintiffs'

bill and proof, the defendants were entitled to show that there was no such sum due as the plaintiffs claimed. Evidence might be introduced tending to prove disbursements made under the terms of the trust which had been voluntarily assumed. What is admissible under this plea has in a limited way been decided by the supreme court in two cases: *Brown v. Tourtelotte*, 24 Colo. 204, 50 Pac. 195; *Teller v. Ferguson*, 24 Colo. 432, 51 Pac. 429. The court held that under a general denial the defendant might prove that the note was a forgery; that, where the cause of action was the balance due on an account stated, the defendant might show that the account was due to somebody else, or that the amount alleged was not due in whole or in part,—following the case of *Field v. Knapp*, 108 N. Y. 87, 14 N. E. 829. As we look at it, the present case is totally different from these, which hold that where a plaintiff sues on a debt or on a note, and the defendant claims payment, he must aver it. Here there was no "debt," in the general sense of the term, for which *assumpsit* would lie, but a fund had been received by one chargeable as a trustee. The plaintiffs alleged that he received a certain amount of money, which he converted to his own use. It ought to be true that, if the defendant is not wholly able to defeat a recovery, he ought to be permitted to reduce it by showing that he had turned over to the *cestuis que trustent* a greater or less amount of the funds which he had received. It is in no exact sense a payment, but it is proof of the performance of a trust obligation. When the plaintiffs allege that a certain sum is due under a trust, and the supreme court holds, as in the *Teller Case*, that he may show that the amount is not due the plaintiffs, but is due to somebody else, he may also show that the sum alleged to be due is not due, because the plaintiffs have received part of the fund which they claim he has converted. Conversion and misappropriation are really one of the fundamental bases of the plaintiffs' bill, and any evidence which tends to show that the defendant has not converted, but has properly applied, what came into his hands, would be proof tending to overcome the plaintiffs' case, and certainly ought to be a defense admissible under a general denial. Whether this be or be not true is a matter not really important and essential for us to decide, and we have only referred to it in deference to the arguments of counsel. What we have already said demonstrates that the decree is manifestly wrong, and ought not to stand.

Since the case must go back for a new trial, the court is directed to order the defendants to replead. Both sides will then be prepared for the trial of the issues thus framed, and, on the incoming of the proof, the court can enter the decree which the testimony warrants. For the reasons expressed, this judgment will be reversed, and sent back for a new trial in conformity to this opinion. Reversed.

OGILVIE v. OGILVIE.

(Supreme Court of Oregon. July 2, 1900.)

DIVORCE—ABANDONMENT—WILLFUL—BURDEN OF PROOF—EVIDENCE—OFFER TO RESUME MARITAL RELATION—CONTRACT OF SETTLEMENT—ASSENT TO DESERTION.

1. The party alleging desertion as a ground of divorce has the burden of proving that it was willful and wrongful.

2. A husband went on a trip to England leaving ample provision for his family. A short time before he returned his wife left his home, and went to her relatives, in a distant city, without disclosing her intention to any of the members of her husband's family, or leaving any message for him. Her husband did not hear anything from her until about three months after her departure, when he met her, and she told him that she left because she had feared bloodshed on account of a man whose intimacy with her he had objected to. *Held*, that the conduct of the wife amounted to a willful and intentional desertion, and that the husband was entitled to a divorce on that ground, after the expiration of a year from her departure.

3. Where a wife deserted her husband, on account of a fear of consequences of her own wrong, and returned to him three months thereafter, and made a settlement with him as to money matters, and went away without making any reference to reconciliation, the fact that the husband testified in a suit for divorce that if she had shown a proper spirit at the time the settlement was made, and had asked him to take her back, he might have done so, was immaterial as affecting the husband's right to a divorce for desertion.

4. A wife having deserted her husband for fear of the consequences, of her own wrong, wrote to him three months thereafter to come and see her. She thereafter met him in a public place, and told him she wanted to see him, but he excused himself, and they never met thereafter. *Held*, that neither the letter nor the subsequent conversation amounted to an offer by the wife to resume her marital duties, nor was the husband thereby put in the wrong, so as to constitute an abandonment on his part.

5. A wife testified that three months after she had left her husband she had an interview with him, in which she told him that she had returned to resume her marital duties, but that he refused to permit her to do so. The husband admitted the interview, but denied that she had made any offer to return to him. It appeared that at such interview a settlement was drawn up between them, in which it was recited that the wife had deserted him. She told the attorney who drew up the settlement that it was not proper for them to live together at the present time. *Held*, that, even if the wife's statements were true, the attendant circumstances indicated that the offer to return was not made in good faith, and would not put the husband in the wrong, as having refused to permit the wife to resume her marital duties.

6. A wife left her husband for fear of the consequences of her own wrong, and three months thereafter returned to him, and demanded a settlement of their money affairs, to which he consented, and they entered into a written agreement which recited that she had deserted him; that she demanded a settlement of their property affairs; and that, in consideration of her relinquishing her right to his property, she should receive certain provision for her support. *Held*, that the written agreement did not amount to an assent by the husband to the separation, and he was entitled to a divorce on the ground of desertion, after the expiration of one year from the time the wife had first left him.

Appeal from circuit court, Gilliam county; W. L. Bradshaw, Judge.

Suit for divorce by A. G. Ogilvie against Rose Ogilvie. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is a suit for divorce by the husband against the wife upon the ground of willful desertion for the period of one year. For a defense, the wife denies the desertion, and alleges that she left the plaintiff's home temporarily, at a time when he was absent in England, without any intention of deserting him, and that she returned, and proffered to resume her marital duties, but that he refused to allow her to do so.

The parties were married in 1885, and three children were born to them, to wit, Robert Gordon, Patrick Alexander, and Charles Freeland, aged, respectively, 13, 9, and 7 years. They lived together happily until about June, 1897, at which time the defendant admitted to plaintiff that she had permitted one Fred Earl, some time in the fall or December preceding, to put his arms about her. For this offense the husband chided her, or, as he says, told her that he "didn't think such conduct was right, as a mother and a wife," and, as she says, threatened that if he (Earl) ever stepped his foot on the ranch he would kill him and kick her out, and, upon meeting Earl, he directed him not to come about his ranch any more. This incident appears to have been amicably reconciled at the time, which is shown by the wife's testimony. She was asked, "He had made your home very unpleasant for you during that summer, had he?" to which she answered: "Yes, sir; that is, remembering the threat. Of course, he tried to make it cheerful enough afterwards." And, again, "He seemed to have forgotten the threat?" to which she replied, "It appears so." Plaintiff was a sheep raiser by occupation, and lived upon a ranch some six or eight miles from the town of Fossil, but in September, 1897, preparatory to going on a visit to England, and for the purpose of making his family more comfortable during his absence, he purchased a dwelling in Fossil, and moved there with his family, including his mother, who had been living with the family for several years. He started to England the latter part of September, leaving ample provision for the comfort of his family until his return, and was absent until late in February, 1898. While away, he wrote to his wife frequently, and advised her as to the time of his return, telling her that he had presents for her and the children, sent by his relatives. On the 28th of January, 1898, without indicating her purpose to his mother, she left her home, and went to Albany to her relatives. The plaintiff returned in her absence, and was informed by neighbors that she had left home indefinitely, and had been advised by friends to sue for a divorce. This was the first intimation he had of her absence. He says that the first intelligence he had of her whereabouts was obtained the

latter part of May, through a letter from her uncle requesting the return of money he let her have, which he paid, as desired. Touching the money matter there is some dispute, as defendant testifies that it was paid at her request after she went back to Fossil. She returned to Fossil on the 7th day of May, 1898, and went directly to a hotel; but, owing to plaintiff being on his ranch, he did not meet her until about June 5th following. She testifies that upon the morning of her arrival she went to their residence at Fossil, and, finding no one at home, she went in, prepared, and ate her breakfast; that she returned again at noon, and finding no one there, and the door locked, she returned to the hotel. Concerning these circumstances, the plaintiff asserts that he had no knowledge until informed by her. When the parties met the plaintiff was talking to some men, and as she came up they recognized each other, and shook hands. She asked him to go aside for an interview, but he arranged a meeting with her at the residence, where she gave as her excuse for leaving him that it was to prevent bloodshed, which was afterwards explained to mean that she was afraid Earl would be hanging around, and that it would end in bloodshed. He states that she expressed a desire to have what was coming to her, and, when asked what she thought it was, replied that she would leave it to him; whereupon he told her that when they were married she had in the neighborhood of eight or nine hundred dollars, to which she assented. He then told her that he would give her \$3,650, to which she was perfectly agreeable, and thereupon they arranged to go down to Mr. Hendricks' office the next morning and have the papers prepared. On cross-examination, he said his chief desire was to place her above want, and that the amount agreed upon at 10 per cent. would give her an income of a dollar a day. He made no suggestion to her that she could remain at the house or live with him again. As touching his desire for a reconciliation, the following testimony was elicited: "Q. Well, do you mean to say that under the circumstances you could not live with her? A. I should say I could not, knowing what I knew. Q. Then, of course, you made no suggestion to her that she could remain at your house or live with you? A. I made no suggestion to that effect. Q. And if she had suggested that she desired to live with you, under the circumstances, you could not have permitted her to do so? A. I cannot be answerable for my feelings with regard to that matter. Q. What would you have said to her if she had asked to return to you at that time? A. I cannot say, under the circumstances, what I would have said. Q. But you can say that under the circumstances you could not have lived with her? A. Of course, my feelings were naturally outraged at her conduct. Q. And, feeling in that way, you could not have lived with her? A. I cannot say. If she had shown a due

disposition, probably it might have been patched up. * * * I can't say but what, if she had shown a due disposition and a sincere regret of what had taken place, what would have happened." She testifies that she first told him at this interview "she had come home to take up her family duties," and he replied "that he was done with women," and then it was she told him, at his urgent solicitation, that she would not ask for more property than she had when they were married. The plaintiff denies emphatically that she ever offered to return to him or to take up her family duties. His language is: "The facts of this conversation were that she made no request whatever of me in any form to return to me or be taken back as my wife." She testifies that when she went back to Fossil she wrote two letters to her husband in her effort to see him, and that she kept copies of the letters. These copies were introduced in evidence, and marked Exhibits "A" and "B," over the objections of the plaintiff, without an effort to obtain the originals or to show their loss. It does not appear that the originals were posted, or in what manner, if at all, they were forwarded. The copies are in the following language: Exhibit A: "My Dear Husband: I thought I would drop you a few lines to let you know where I am. I am at Mrs. Spears' hotel. Come up Sunday. I want to see you. I have your ring, and I wear it, and when I take it off my finger you will know I am not true to you. You have mine. So believe me your ever loving wife, Rosina J. Ogilvie." Exhibit B: "My Dear Husband: I thought I would write to you, and let you know where I got my money to go away on. I sold my black dress for seven dollars. That took me to Portland. I stayed with Mrs. Robberson a week. Then I got ten dollars from Cyrus Buffington. Then I went to Albany. There I remained with my father's folks till I was ready to come home. Then I borrowed twelve dollars from Uncle Davie Froman, and I want you to let me have the money to send him, for I shall not see H. H. Hendricks about anything; so I want the money to send right away. So believe me your wife, R. J. Ogilvie." The plaintiff in his rebuttal does not deny having received these letters, nor was his attention called to them. On the day defendant returned to Fossil, Harry Reed, who was then living in the plaintiff's house with his family, took plaintiff's mother and his children out to the mother's homestead, some four or five miles from town, and there is evidence in the record that she hurried the children away after hearing of defendant's return; but it appears that the latter went out to the homestead, visited the children, had dinner with her mother-in-law, and passed the time pleasantly. On the day following the interview of the parties at the house they entered into the following agreement, which was drawn up by the attorney for the plaintiff: "This agreement, made this 13th day of June, 1898,

at Fossil, in Gilliam county, Oregon, by and between Alex. G. Ogilvie, party of the first part, and Rose Ogilvie, party of the second part, witnesseth that whereas, the said Rose Ogilvie, having had in property at her marriage with Alex. G. Ogilvie of the value of nine hundred dollars, which her husband, Alex. G. Ogilvie, has had the use of in his business, and the said Rose Ogilvie having deserted the said Alex. G. Ogilvie, and now asks for a division and final settlement of all property affairs and interests between them, it is hereby agreed that the said Alex. G. Ogilvie shall, in consideration of the nine hundred dollars aforesaid, and in the further consideration of the said Rose Ogilvie relinquishing all her right in all the real and personal property of the said Alex. G. Ogilvie, which he now has or may hereafter acquire, forever, which the said Rose Ogilvie hereby agrees to do, pay unto the said Rose Ogilvie the sum of thirty-six hundred and fifty dollars on or before five years from date, with interest at ten per cent. per annum, payable quarterly, and that he will give his note as evidence thereof, and give satisfactory security therefor. It is also agreed that Alex. G. Ogilvie shall educate and support the children, issue of their marriage, to wit, Robert, Patrick, and Charlie Ogilvie, and have the care and custody thereof, but that he will not refuse the said Rose Ogilvie at any time to visit them." Mr. Hendricks testifies touching this paper that when the parties came to his office he inquired into the matter of their agreement; that the plaintiff said, among other things, "My wife has left my home indefinitely," to which she freely assented, but remarked "that she believed that they might some time live together, but it wasn't proper for them to try to do so now." It appears further from the testimony that in the December prior to her departure she met Earl at the home of her sister, some seven or eight miles from Fossil, and she was heard to say to him, "Well, Fred, I am going away, whether you do or not." She freely admits this interview. It further appears that she wrote a letter to Earl, and sent it to him inclosed in another letter directed to a friend. This letter was read to him by another person, who testifies to its contents, which were, in effect, that she wanted him to meet her at the back porch of their residence in Fossil, at 8 o'clock of the evening designated; but she testifies that he did not meet her at the time, and states that her reason for wanting to meet Earl was to request him to go away so that no harm could come to him from her husband. The plaintiff and defendant next met in the latter part of January following at the Perkins Hotel, in Portland, Or., which was the only other meeting they had within a year from the time of her leaving him. At this time the defendant signified to plaintiff her desire to have an interview with him. He excused himself by saying he did not have his breakfast, but agreed to return to

the hotel and see her later, which he failed to do. They had other conversations on the 9th and 10th of July, 1899, but these are not material to this controversy, and will not be further alluded to.

W. H. Wilson, for appellant. H. H. Hendricks, for respondent.

WOLVERTON, C. J. (after stating the facts). This is a brief resumé of the evidence in the case, without attempting to quote the witnesses at large, and upon this testimony it is insisted (1) that it has not been shown that the defendant willfully deserted plaintiff; and (2) that it has been shown that the plaintiff assented to her living separate and apart from him, and therefore that desertion contrary to his will and without his consent has not been established.

"Desertion" has been defined by Mr. Bishop in his work on Marriage, Divorce, and Separation (volume I, § 1662) to be the "voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or wrongful conduct of the other." This language is quoted with approval in *Sisemore v. Sisemore*, 17 Or. 542, 21 Pac. 820. Perhaps a more terse definition is that given in 9 Am. & Eng. Enc. Law (2d Ed.) 764. The author says: "'Desertion' is the willful termination of the marriage relation by one of the married parties without lawful or reasonable cause, or a refusal without reasonable cause to renew the marriage relation after the parties have been separated." An intentional desertion is willful, within the meaning of the term as defined by the statute. The term does not carry with it the element of malice or a purpose of doing injury. The act is willful when there is a design to forsake the other spouse wrongfully or without cause, and thereby break up the marital union. *Benkert v. Benkert*, 32 Cal. 467. Before the plaintiff can prevail, he must therefore show that the defendant willfully—that is, intentionally and wrongfully, or without cause—deserted him, and continued in such desertion for the space of one year. Aside from what defendant said to Earl, there is nothing in the record to show her intention except the circumstances attending the act. She left home without leaving any message for her husband, of whose early return from England she had been advised, or without disclosing her purpose to her mother-in-law, with whom she left her children. She remained away some three or four months, without writing to any of the family except her son. There appears to have been no legitimate cause or sufficient excuse for her going. The only one assigned by her is that she was afraid there might be bloodshed; but, if there was ever any real danger of such a thing, it was wholly within

her power to have prevented it by a considerate loyalty to her husband. The intention to desert may be shown by the acts and circumstances attending the separation. *Morrison v. Morrison*, 20 Cal. 431; 1 Nels. Div. & Sep. § 107. In the present instance, such intention is palpably manifest. The burden is also with the plaintiff to show that the desertion was wrongful or without just cause, and there is no question but that this has been shown, as it relates to the separation primarily.

This brings us to the second feature of the case, which, under the facts proven, is more difficult of solution. It may be predicated of the statute that the desertion must continue for the period of one year,—that is to say, the act is continuing in its nature,—and, if suspended in the meanwhile by reconciliation or by the repentance of the party at fault, with a proper and sincere effort towards reconciliation, manifesting a purpose to return and again resume the marital relations, then the desertion is at an end. If the parties separated by mutual consent and understanding, then there is no desertion, because of the consent to the existing relations. So, if there is willful desertion without cause, and the party in fault in good faith seeks a reconciliation, and the other party repels it without other cause for continuing the separation, he thereby assents to the prevailing condition. What is more, he is himself put in the fault, and is guilty of desertion, such as will constitute a cause for divorce against him. *Crow v. Crow*, 23 Ala. 583. The rule is well stated and illustrated by Mr. Justice Bailey, in *Albee v. Albee*, 141 Ill. 550, 31 N. E. 153, under a statute making two years' desertion a cause of divorce. The case is so apt that we may be pardoned if we quote somewhat at length: "However willful the desertion may be, and however destitute of reasonable cause, it is no ground for divorce, unless it is continued for two years. At any time during that period the offending party has an undoubted right to put an end to it, and if that is done no cause of divorce has arisen. If at any time during the two years the party guilty of the desertion, in good faith and with an honest intention to resume marital relations, returns, or offers to return, to the deserted husband or wife, the continuity of the desertion is broken. Nor can the deserted party prevent this by refusing to receive back and to resume marital relations with the one guilty of desertion. He or she cannot, because the other has taken a position, however willful or causeless it may have been, hold him or her to it. For the two years the door for repentance and return must be kept open, and, if it is closed and barred when an offer to return is made in good faith, not only is the desertion terminated, but the circumstances may be such as to reverse the legal attitude of the parties, and constitute the

party originally offended against, from that time forth, the offender." Nor has the husband, as declared by Mr. Vice Chancellor Van Fleet in *Newing v. Newing*, 45 N. J. Eq. 498, 18 Atl. 166, a "right to require his wife, even when she is in the wrong, to crawl back to him. It is his duty to take her back upon such terms as will permit her to preserve her self-respect." The husband, however, is not called upon, where the wife has willfully deserted him, to make overtures to her, or to entreat her to return, upon pain of having his silence construed as a consent to her separation from him. Closely allied to this thought is another, which is that the relationship could not be changed by an inquiry as to what he might have done if his wife had made proper overtures for reconciliation. Such an inquiry is speculative and conjectural, and is not a suitable test of the husband's purpose. "No person knows what he would have done under conditions in which he was never placed." *Monteath v. Monteath*, 51 Ill. App. 126. Mr. Justice Holmes has covered both phases of the question in *Ford v. Ford*, 143 Mass. 577, 10 N. E. 474, wherein he says: "When one party terminates the cohabitation by desertion, the other is not bound to take any steps to restore it. If he remains silent until he files his libel, his silence does not take away his right to a decree. Conduct which in itself is proper cannot be made improper by inquiring what he would have done in an event which did not happen. The mode of testing that was for the wife to offer to return. A tender under a contract would not be excused by the contractee's subsequent admission that he would not have accepted it if made, provided he had done no overt act or waiver. In general, a person does not lose rights which he may lawfully renounce until he has renounced them by an overt act." There are authorities which seem to impose a larger duty upon the husband, and require him to seek the wife, and entreat or make some especial effort to induce her to return. See *Newing v. Newing*, supra; *Herold v. Herold* (N. J. Ch.) 20 Atl. 375, 9 L. R. A. 696; *Wright v. Wright*, 80 Mich. 572, 45 N. W. 365. But it is doubtful whether these authorities go to the extent of holding that such advances should be made where the husband is entirely blameless for his wife's acts. The whole doctrine seems to be well stated in *Herold v. Herold*, supra, as follows: "It is abundantly established that a husband who, not being blameless for the act, makes no effort to prevent his desertion by his wife, and appears to acquiesce in and be satisfied with its continuation, cannot appeal successfully to the court for a divorce on the ground of desertion." Again, it is a question for the court to determine, under the circumstances of the case, whether the offer to return and renew the cohabitation is made in sincerity, and

with a bona fide intention to renew the marital duty. McClurg's Appeal, 66 Pa. St. 366.

With this understanding of the law, we must now inquire whether the defendant has, in fact and in good faith, made overtures to the plaintiff, with a genuine purpose of reconciliation, and, if so, whether the plaintiff has, without good cause, rejected them, so as to put him in the fault, or in the position of having consented to her separation from him. The letters of Mrs. Ogilvie, written to her husband at Fossil, purported copies of which were received in evidence by the court below, are relied upon somewhat as showing her desire to return. It may be well doubted whether these are properly in evidence for any purpose; but, even if we admit them as evidence in the case, they do not prove what is contended for them. In the first she says: "I thought I would drop you a few lines to let you know where I am. I am at Mrs. Spears' hotel. Come up Sunday. I want to see you. I have your ring, and I wear it, and when I take it off my finger you will know I am not true to you." There is here no indication that she desired to again renew the marital relations between them, nor does she intimate that the purpose of the desired interview was to effect a reconciliation in any manner with her husband. That she still wore the ring as a sign that she was true to him could not be construed that she desired a reconciliation. The second letter was entirely concerning money matters, and does not even request an interview. She testifies that she told him at the interview at the house that she had come back to take up her family duties again; but the offer does not impress one as having been made with a sincere purpose, if, in fact, she made it at all, which is doubtful, in the face of his strong denial, accompanied by circumstances tending to his corroboration. It does not appear to have been attended with any attempted explanation of her acts, and, standing alone, is a meaningless formality. Upon the next day, by the terms of the written agreement, she formally declared that she had deserted her husband. This she could hardly have been induced to do if she had a genuine yearning for the restoration of the marital relations with him. She may not have been settled in her own mind as to what she might do in the future, as she said to Mr. Hendricks that she believed they might live together some time, but she had determined that it "wasn't proper for them to try to do so now." The manner of her attempted interview with her husband at Portland does not indicate any desire upon her part to return to him, as she merely asked for an interview, without disclosing any purpose whatever, and for aught that appears she may have had in view something entirely foreign to a reconciliation of their differences. In view of all the evidence, and in the light of surrounding circumstances, we can come to no other conclusion than that defendant is still in the fault, that plaintiff has in no wise

assented to her desertion of him, and is therefore entitled to a divorce.

Another question was presented in connection with the written agreement between the parties, which is that the writing shows an assent by the husband to the separation. This agreement was made, however, after it had actually taken place by the desertion of the wife; and it was held in *Henderson v. Henderson* (Or.) 61 Pac. 136, that where a separation has been induced, not by collusion, but by the vicious conduct of one of the parties, without inducement or fault of the other, and it has furnished just grounds for divorce, then a contract looking to settlement of the property rights and the proper maintenance of the one not in fault could properly be entered into, as not repugnant to public policy. Such an agreement does not justify an inference that there was a separation by mutual consent. *Nichols v. Nichols* (Ky.) 11 S. W. 286. The decree of the court below will be affirmed.

CURREY v. BUTCHER et al.

(Supreme Court of Oregon. July 2, 1900.)

ATTORNEY AND CLIENT—RELATION—EXAMINATION OF TITLE—NEGLIGENCE—EVIDENCE—SUFFICIENCY—ADMISSIBILITY—HARMLESS ERROR—PLEADING—SUFFICIENCY—FORMAL OBJECTIONS—LAND—CONTRACT TO PURCHASE—PROOF—SUBSCRIBING WITNESS—WAIVER—INSTRUCTION.

1. Plaintiff alleged that defendants, a firm of attorneys, contracted with her to examine a title to certain land, and that they failed to discover the existence of a judgment lien against the land; that afterwards, on discovering its existence, they fraudulently concealed it from plaintiff's knowledge, but permitted her to make the purchase relying on their previous representations; that they then bought the judgment themselves, transferring it in trust to a third party, and compelled her finally to purchase it from him. *Held*, that the averment of the contract of employment did not change the action from one for negligence in the performance of a duty, arising from the relation of attorney and client, to one on the contract, and the complaint therefore stated but a single cause of action; the reference to the subsequent purchase of the judgment by defendants being properly pleaded as matter in aggravation of damages.

2. In an action against a firm of attorneys for negligence in examining a title, defendants objected to the introduction of evidence on the ground that the complaint did not constitute a cause of action because it did not describe the land; because it did not state that an execution could legally issue on the judgment alleged to have been a lien, and not reported; because it did not allege that the judgment debtors were insolvent; and because it did not appear that the judgment antedated the decree in the foreclosure suit brought by plaintiff's vendor against the judgment debtor. *Held*, the objections being merely technical, and not having been raised until evidence was offered at the trial, plaintiff was entitled to the benefit of all intendment in favor of the pleading, and the objections urged were cured by the verdict.

3. Where there is uncontradicted parol evidence, in an action against attorneys for negligence in examining a title, tending to show that plaintiff authorized her husband to employ defendants to make the examination, the admission of the record of a power of attor-

ney from plaintiff to her husband, if error, is harmless, since, if the defendants were employed by the husband to act for the plaintiff, and did act in that capacity, they cannot defend the action on the ground that the husband had no authority to employ them.

4. Where an objection to the admission of a contract for the purchase and sale of land in evidence—that its execution was not proved by the subscribing witness—was not made at the time it was offered, it will not be considered on appeal.

5. Where no issue was made in the pleadings in an action against attorneys for negligence in failing to discover the existence of a judgment lien against land, the title to which they were examining, the admission of a certified copy of the judgment lien docket in evidence, showing the judgment, was not prejudicial error.

6. Where there is some evidence, in an action against attorneys for negligence in examining a title, that they were employed by plaintiff's husband, acting for plaintiff, the overruling of defendants' motion for nonsuit, and refusal to instruct the jury to find for the defendants, on the ground that the relation of attorney and client was not proven to exist, was proper.

7. On an issue whether the defendant firm of attorneys was employed by plaintiff's husband, acting for the plaintiff, to examine a title for her, it is error not to instruct, at defendants' request, that if they were employed by the plaintiff's husband, and were not aware that he was acting as the agent of his wife, the relation of attorney and client did not exist between them and the wife, and they were not liable in an action by the wife for negligence in failing to discover the existence of a judgment lien.

8. Plaintiff sued a firm of attorneys for failure to discover the existence of a judgment lien against land, the title to which she alleges she employed them to examine, and which judgment she further alleges they fraudulently bought themselves, having it transferred in trust to a third party, and compelled her to purchase it from him. *Held*, that it was error to refuse to instruct that, if the jury found defendants were employed by plaintiff's husband, and, while making the examination, were not aware that he was acting as the agent of his wife, the fact that they subsequently bought the judgment, and compelled her to purchase it from their agent, would not expose them to liability in this action.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Action by Lulu P. Currey against W. F. Butcher and another. From a judgment for plaintiff, defendants appeal. Reversed.

The defendants are attorneys at law, and this action is brought against them to recover damages for an alleged negligent performance of professional duties. The complaint alleges, in substance, that, at all the times therein mentioned, the defendants were partners, engaged in the practice of law in the courts of Oregon, under the firm name and style of Butcher & Eastham; that in the month of June, 1898, they were employed by the plaintiff to manage and conduct negotiations relative to the purchase of certain real estate in Baker county, and to examine the public records of such county to ascertain whether such property was subject to liens by judgment, mortgage, or otherwise; that they agreed and undertook to make such examination, and afterwards stated and represented to the plaintiff that they

had done so, and that there were no liens by judgment or otherwise on the land, except certain judgments and decrees known to both plaintiff and defendants; that plaintiff, believing such representations and relying thereon, and being advised and counseled by defendants that she might safely do so, entered into a written contract with the owners of the land, by the terms of which she purchased their right and title thereto for the sum of \$1,575; that in truth and in fact there was then existing on the records of such county a judgment in favor of one Griswold, and against P. R. Bishop, a former owner of the land, and one Stuller, upon which there was then a balance of \$575.87 due, which judgment was a lien upon the property referred to; that defendants failed and neglected to examine the public records of the county, or to discover such lien, or to advise plaintiff of the existence thereof, but, on the contrary, being informed of its existence about the time plaintiff consummated the contract for the purchase of the land, they wickedly kept and concealed such knowledge from her, and fraudulently purchased the judgment for themselves, causing it to be assigned and transferred to one A. A. Kerr, who held the same in trust for them; that thereafter defendants procured other attorneys to act for and on their behalf, and to demand of plaintiff the payment of the amount due on such judgment, and, in the name of Kerr, their said trustee, had the land levied upon and advertised for sale; that during all such times the plaintiff was ignorant of the true ownership of the judgment, and was consulting and advising with defendants in relation thereto, and they were pretending to counsel with and advise her as her attorneys and counselors, and were charging her for said pretended services; that at and during said time, and before the plaintiff discovered the truth respecting the ownership of such judgment, she was compelled to and did employ legal assistance in the city of Portland, at an expense of \$150, and was put to other expense in sending an agent to Portland, and in telegraphing and telephoning, amounting, in the aggregate, to \$102.80; that, after plaintiff discovered the fraud the defendants had practiced upon her, she immediately endeavored to buy the judgment and stop the sale on execution, and did finally arrange with a relative of hers to buy the same for her, and on the 25th of February, 1899, consummated the purchase by paying to the defendants' agent the sum of \$350, the lowest sum defendants would accept for such judgment. A motion to strike out all that portion of the complaint in reference to the purchase of the Griswold judgment by the defendants, and the expenditure of money by the plaintiff on account thereof, was overruled, and defendants answered separately. The defendant Butcher, by his answer, denies all the material allegations of the complaint, except the partnership between himself and co-defend-

ant, and the rendition, docketing, and existence of the judgment in favor of Griswold and against Bishop and Stuller, and for a further and separate defense alleges that all or any services ever at any time performed by the firm of Butcher & Eastham, or either of them, in connection with the purchase, or contract for the purchase, of said lands, were done and performed for one H. E. Curry alone, and consisted of separate acts and services done under separate directions given by him, and for him only, and that there never was a general contract between them, covering negotiations for the purchase, or contract for the purchase, of any lands whatever; that Curry never at any time requested of defendants, or either of them, to make a full or complete examination of the records of Baker county regarding the lands, or the title thereof; that defendant suggested to him, before any purchase was made, or any contract entered into concerning such lands, that he should procure an abstract for the purpose of ascertaining the true condition of the title, but he refused to have the same made, or to pay therefor. The defendant Eastham, by his answer, denies all the material allegations of the complaint, except the partnership between himself and the defendant Butcher, and the existence of the judgment of Griswold against Bishop, and, for a further and separate defense, sets up substantially the same facts pleaded by the defendant Butcher. A reply was filed, putting in issue the new matter contained in the answers. Upon the issues thus joined, a trial was had, resulting in a verdict and judgment in favor of the plaintiff for the sum of \$520, and the defendants appeal, assigning as error divers and sundry rulings of the trial court made during the progress of the trial, and its refusal to give certain instructions requested by them.

W. F. Butcher and T. H. Crawford, for appellants. Dell Stuart, for respondent.

BEAN, J. (after stating the facts). After the jury had been impaneled, but before any evidence was offered, the defendants moved the court for an order requiring the plaintiff to elect whether she would rely for a recovery upon a breach of the contract of employment, or upon that feature of the complaint which charges that, in the course of the employment, the defendants purchased an outstanding title or lien on the property, to her damage. The overruling of the motion constitutes the first assignment of error. It was based upon the contention that the complaint states two causes of action,—one for a breach of contract, and the other in tort for certain alleged fraudulent acts of the defendants in the course of their employment. But, as we understand the pleading, the gist of the action is the negligence of the defendants in the performance of a duty which they owed to the plaintiff by rea-

son of their employment. She avers that they undertook and agreed to examine for her the title to certain land, which she contemplated purchasing, and that the work was so negligently and carelessly done that they failed to discover and report to her a judgment lien thereon, by reason of which she was damaged. Where one adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, the law imposes a duty to exercise reasonable care and skill, and, if an injury results to his client from want thereof, he is liable to respond in damages to the extent of the injury sustained. This duty and liability arises from the relation of the parties under the contract, rather than from the contract itself, and at common law the injured party could sue, either in assumpsit, for a breach of the implied promise, or in case, for the neglect of duty. 3 Enc. Pl. & Prac. 107. In the latter instance it is necessary to aver the contract of employment, showing the relation of attorney and client, as a matter of inducement, because without such contract there could be no duty to the plaintiff, and hence no liability. As stated by Mr. Justice McDonald in *Emigh v. Railroad Co.*, 4 Bliss. 114, Fed. Cas. No. 4,449: "When there is a contract, either express or implied, from which a common-law duty results, an action on the case lies for a breach of that duty, in which case the contract is laid as mere inducement, and the tort arising from the breach of duty as the gravamen of the action. Thus, if a lawyer or physician is engaged by special contract to render professional services, and if, in the performance of such services, he is guilty of gross ignorance or negligence, an action on the case will lie against him, notwithstanding such special contract." And Mr. Bliss, after quoting from Chitty that "the inducement or averment by way of introductory allegation is peculiarly proper where a party is charged upon, or in respect of, the breach of a contract or implied duty resulting from any particular character or capacity of defendant," says: "This doctrine is applied to declarations against attorneys, physicians, and mechanics, for negligence, and against carriers and innkeepers for loss of goods; the contract or possession of the property and the injury being the gist or substance, while the allegations showing the occupation of the defendant, in reference to which the contract was made or the duty arose, show matter of inducement." Bliss, Code Pl. (3d Ed.) § 150. It is clear, therefore, that the averment of the contract of employment does not change the action from one of negligence on account of the failure of the defendants to perform the duty arising out of the relation of attorney and client to an action on contract. And the allegations in reference to the subsequent purchase by the defendants of the Griswold judgment, and the other matters in relation thereto, were properly pleaded as matter in aggravation of damages. The complaint, therefore, states

but one cause of action, and there was no error in overruling the motion.

It is next urged that the court erred in overruling defendants' objection to the introduction of any evidence because the complaint does not state facts sufficient to constitute a cause of action. This objection having been raised upon the trial, the plaintiff is entitled to the benefit of all intendments in favor of the pleading which she could invoke after verdict. *Specht v. Allen*, 12 Or. 117, 6 Pac. 494; *Baker City v. Murphy*, 30 Or. 405, 42 Pac. 133, 35 L. R. A. 88.

The particular objection made to the complaint seems to be that it is defective because (1) it does not describe the land which defendants were employed to assist the plaintiff in purchasing, or to which the lien of the *Griswold* judgment attached; (2) it appears therefrom that no execution could lawfully issue on the *Griswold* judgment without a revivor thereof; (3) it contains no allegation that *Bishop* and *Stuller* were insolvent; and (4) no averment that the *Griswold* judgment antedated the decree in the foreclosure suit of *Balfour, Guthrie & Co.* against *Bishop*. All these points are technical, and amount only, in effect, to an objection that the cause of action is imperfectly stated; and such objections are cured by verdict.

The next assignment of error is the action of the court in admitting the record of a power of attorney from the plaintiff to her husband, *H. E. Currey*; but this, if error, was immaterial, for there is uncontradicted parol evidence tending to show that her husband had authority to act for her in the purchase of the land in question, and to employ the defendants to examine the title and assist in such purchase. If the defendants were employed by *H. E. Currey* to act as the attorneys for and represent the plaintiff in the purchase of the land and the examination of the title, and assumed to and did act in that capacity, they certainly cannot defend an action brought by her against them for negligence on the ground that *H. E. Currey* had not sufficient authority to employ them.

It is further insisted that the contract for the purchase and sale of the land, made by *Balfour, Guthrie & Co.* and the plaintiff, was improperly admitted in evidence, because its execution was not proven by the subscribing witnesses. A sufficient answer to this position is that no such objection was made to the introduction of the instrument when offered in evidence; hence it is unavailing now.

The claim is also made that the court erred in admitting a certified copy of the judgment lien docket, showing the *Griswold* judgment; but no issue was made in the pleadings upon that question, and therefore the admission of this testimony was immaterial, and could have effected no substantial interest of the defendants.

It is next contended that the court erred in overruling defendants' motion for a non-

sult, and in not instructing the jury to find a verdict in favor of the defendants. This motion was based upon the contention that there was no proof that defendants were actually employed by the plaintiff to examine the title to the land referred to, or that the relation of attorney and client existed between them. It is sufficient to say that an examination of the record discloses that there was some evidence tending to support the plaintiff's claim upon this point. Its sufficiency was for the jury, and not the court. It is not necessary to quote or particularly refer to the testimony. Indeed, in view of the conclusion we have reached upon another point, which will necessitate a new trial, comment thereon would be improper.

Error is also assigned because the court refused to give the following instruction, requested by the defendants: "If you find from the evidence in this case that the defendants, as attorneys, were employed by *H. E. Currey* to assist him in negotiating a purchase of the land named in the complaint, and to look up and pass upon the title thereto, and that at the time the defendants were so employed, and performed the work of looking up the title to said land, they had no knowledge or information that said *H. E. Currey* was acting as the agent of the plaintiff, *Lulu P. Currey*, then I instruct you that the relation of attorney and client did not exist as between the plaintiff and these defendants, or either of them, in connection with such employment, and your verdict should be for the defendants." We think this instruction ought to have been given. The principal questions of fact seem to be (1) whether the defendants were, in fact, the attorneys of the plaintiff or of *H. E. Currey*; and (2) whether they were employed to examine and report upon the title to the land in question, or to do certain specific acts not embracing such examination. It was important, therefore, that the question of defendants' employment be clearly and distinctly submitted to the jury, so that they might intelligently pass upon this feature of the case. "It is a general doctrine, sustained by an overwhelming weight of authority," says Mr. Justice Van Fleet, "that an attorney is liable for negligence in the conduct of his professional duties, arising only from ignorance or want of care to his client alone; that is, to the one between whom and the attorney the contract of employment and service existed, and not to third parties." *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 31 L. R. A. 862. And Mr. Jaggard, in his recent work on Torts, says: "In actions against members of the bar for negligence it is well settled that only the person with whom the attorney contracts can maintain the action, for it is to him alone that the attorney owes a particular duty." 2 Jagg. Torts, 904. This rule, with its limitations, is adverted to and exhaustively discussed by the supreme court of the

United States in the case of *Bank v. Ward*, 100 U. S. 196, 25 L. Ed. 621, which was an action for damages against an attorney by a party who loaned money upon a defective certificate of title to a certain piece of real estate, furnished by the attorney to another. It was held that the plaintiff could not maintain the action, because there was no privity of contract between him and the attorney; the court saying: "Beyond all doubt, the general rule is that the obligation of the attorney is to his client, and not to a third party, and, unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the position of the defendant must be sustained." And so it has been held that an attorney employed to draw a will is not liable to a person who, through the attorney's ignorance or negligence in the discharge of his professional duties, was deprived of the portion of the estate which the testator instructed the attorney should be given such person by the will. *Buckley v. Gray*, supra. And again, an attorney employed by a mortgagee to examine the security, and who gives his client a certificate of title, is not liable to an assignee of the mortgagee for loss by reason of error in the certificate. *Investment Co. v. Hughes* (C. C.) 20 Fed. 39, and note to same, 24 Am. Law Reg. 197, 202; 2 *Shear. & R. Neg.* (5th Ed.) § 562; *Mechem, Ag.* § 836. Unless, therefore, the relation of attorney and client existed between the plaintiff and the defendants, she cannot maintain an action against them for negligence in examining the title for another; nor is this rule any the less applicable in this case because H. E. Currey may have, in fact, been the agent of the plaintiff and acting for her in the employment of the defendants, unless that fact was known to them. The relation of attorney and client is a personal relation, and can only be entered into by the consent of both parties. Mr. Weeks says: "It is said that two things are necessary to establish the relation between attorney and client: (1) The agreement of the attorney to be an attorney for the party; and (2) the agreement of the party to have the other for an attorney." *Weeks, Attys. at Law* (2d Ed.) § 185. If the defendants knew, as plaintiff contends, that H. E. Currey was, in fact, the agent of and acting for the plaintiff, and so employed them, they would, of course, be liable to her the same as if the employment was by her in person; otherwise, not.

It may be urged that the court substantially instructed the jury in accordance with the rule of law above indicated, in its general charge, but we cannot concur in that view. It is true, the court charged the jury in two or three instances that, to enable the plaintiff to recover, she must establish by a preponderance of the evidence that she employed the defendants to look up the title to the land, as to liens thereon, etc.; but, in view of the two important

questions of fact, these instructions could well be understood by the jury to apply particularly to the character of the defendants' employment, rather than to the person by whom they were employed. In any event, the defendants were entitled to have the question clearly and distinctly submitted to the jury, and it was error for the court to refuse the instruction requested upon this point.

The defendants also requested the court to charge the jury that: "The gist of this action is the breach of an alleged contract by the defendants, as the attorneys of plaintiff, in failing to discover certain defects in the title to real estate claimed to have been purchased by the plaintiff, which defect consisted of an outstanding judgment lien, which judgment lien the plaintiff was afterwards compelled to buy at a cost of \$350; and, before plaintiff can recover in this case, she must establish, by a preponderance of the evidence, this contract of employment and the breach thereof; and, failing to do that, the fact that the defendant Eastham afterwards, in November, purchased this judgment, and compelled the plaintiff to pay him therefor the sum of \$350, would not make, and cannot make, the defendants liable in this action. The only matter you can consider the purchase of this judgment by the defendant Eastham for is in ascertaining and determining the amount of damages the plaintiff is entitled to recover, provided she satisfies you by a preponderance of the evidence that the defendants, prior to such purchase, in June, 1896, negligently and carelessly failed to discharge their duty as attorneys under her employment of them in negotiating the sale and looking up the title to this land, if such employment ever existed." This instruction was evidently intended to advise the jury that the plaintiff was not entitled to recover in this action solely on account of the purchase by the defendant Eastham of the Griswold judgment, some months after the contract for the purchase of the land was entered into by the plaintiff; and it was proper that the jury should have been so instructed upon this feature of the case. As before suggested, the gist of the action is the negligence of the defendants in failing to discover and report the Griswold lien; and, unless such negligence is shown, the purchase by the defendants, or either of them, of the outstanding judgment lien, would not, in itself, expose them to liability to the plaintiff in this action. The proposed instruction quoted is open to some objection, and was perhaps properly refused on account of its language, because, among other things, it states that the action is for the breach of an alleged contract, when, as we have seen, it is an action of negligence pure and simple; yet the point referred to should have been covered by the instructions of the court.

For the refusal to give the instruction requested, in reference to the employment of

the defendants by H. E. Currey, the judgment of the court below must be reversed, and the cause remanded for a new trial; and it is so ordered.

FANNING et al. v. GILLILAND et al.

(Supreme Court of Oregon. July 2, 1900.)

HIGHWAYS—NECESSITY—EMINENT DOMAIN—DAMAGES—POLITICAL QUESTION—APPEAL—WRIT OF REVIEW.

1. Hill's Ann. Laws, § 4063, authorizes an appeal to the circuit court from the assessment of damages sustained by parties over whose land a public road is sought to be laid. Section 585, as amended by Laws 1889, pp. 134, 135, authorizes a writ of review concurrent with the right of appeal. *Held*, that an appeal from the assessment of damages does not waive the right to have the proceedings establishing the road reviewed by writ of review, since, on an appeal under section 4063, a review of the regularity of the proceedings establishing the road cannot be had.

2. Where a road sought to be laid over private property will be open, when laid, to all who may desire to use it, the laying of the road will not constitute a taking of private property for private use, forbidden by the constitution, though it may in fact accommodate but a single family.

3. The claim in a petition for a public road over private property that it is necessary, and that the property of the petitioners cannot be reached by any convenient highway, is not issuable, since the manner of its determination is a legislative question, and since the legislature has provided that the appearance of these facts in the petition shall be sufficient to authorize the court to appoint viewers to lay out the road.

4. The report of viewers appointed by the court to lay out a public road over private property that the road has been so laid as to cause the least damage is not issuable, since the question raised is political in its nature, and the procedure authorized by the legislature for its ascertainment makes provision for a hearing only on the ultimate question of compensation for the damage.

5. On petition for a public road over private property, designating the exact route desired, the court ordered that the road be laid in accordance with the petition. The viewers appointed by the court thereafter reported that they had laid the road as ordered, and so "as to do the least possible damage to the land over which it passed." *Held*, that while the order of the court might imply that the road should be laid exactly as called for in the petition, regardless of damage, the report of the viewers that it had been so laid as to cause the least damage cured the defect.

Appeal from circuit court, Umatilla county; Stephen A. Lowell, Judge.

Writ of review by C. O. Fanning and others against J. M. Gilliland and another. From an order dismissing the writ, plaintiffs appeal. *Affirmed*.

This is a proceeding by writ of review to test the legality of the establishment by the county court of Umatilla county, Or., of a road of public easement across the lands of the plaintiffs. The sworn petition presented for the location and establishment of the road shows that F. B. Clopton, one of the petitioners, is the owner of 40 acres of land situate in township 2 N., range 32 E. of the

Willamette meridian; that he has a dwelling house situated thereon, which is occupied by J. M. Gilliland, the other petitioner, under a lease; that said dwelling is situate immediately south of the Umatilla river, which becomes so swollen in the winter and spring as to render it impassable; that McKay creek, which flows on the south and west of said dwelling, is also impassable during the same seasons, and there is no public highway across either of the streams, accessible to petitioners' residence; that there has been a road from their residence to the city of Pendleton, but that about January 31, 1899, C. O. Fanning, upon whose lands it was located, closed it up and refused to permit petitioners to use it; that petitioners' residence is not reached by any convenient public road or otherwise; that it is necessary that petitioners and the public have ingress and egress to and from such residence, and that by reason of the closing of said road all such means of ingress and egress have been cut off; that a good road, convenient to petitioners' residence, can be laid out, constructed, and established upon the line of the old road so closed, without doing unnecessary damage. The prayer of the petition is that a county road and public highway, 30 feet in width, be laid out and established, commencing at the gate in the doorway fence of the petitioners' residence, and running thence upon the line of the old road, as nearly as practicable, to a designated point, "at which commences county road No. 430," and that viewers be appointed to locate and establish the same, and to assess the damages, if any, accruing to the individuals over whose lands it passes. To this petition an answer was filed by the objectors, the plaintiffs herein, protesting that the court had no jurisdiction over the subject-matter, and putting in issue all the material allegations thereof, which, after argument and hearing, was stricken out upon motion of the petitioners. In pursuance of the petition the county court made an order reciting the facts therein stated as being shown under oath, and appointing viewers, with directions to meet at the beginning of the said proposed road on the 22d day of March, 1899, and lay out, locate, and establish a 30-foot road, in accordance with the petition, and to assess the damages sustained to the parties through whose premises it should be located, according to law, and to report their proceedings to the court at the May term following; and the court further directed that a copy of the order be served upon the persons affected. In due time the viewers made a report, to which objections were filed, with a prayer that the objectors be allowed to produce evidence to show that it was not just. These were stricken out, and, a motion subsequently filed to vacate the same being overruled, the court entered an order confirming the report and establishing the road; and a writ of review to the circuit court having been thereupon sued out by plaintiffs, and there dismissed, they appeal to this court.

J. H. Raley and J. J. Balleray, for appellants. James A. Fee, for respondents.

WOLVERTON, C. J. (after stating the facts). The respondents moved to dismiss the appeal for the reason that the plaintiffs had appealed to the circuit court from the assessment of damages, it being contended that by prosecuting such appeal they have waived the right to prosecute their remedy by writ of review. In this contention we cannot concur, for two reasons: (1) It was not the purpose of the statute, in giving the appeal from the assessment of damages, to permit the regularity of the proceedings for the establishment of the road to be questioned therein; and (2) by section 585, Hill's Ann. Laws Or., as amended by the act of 1889 (Sess. Laws 1889, pp. 134, 135), the writ of review is made concurrent with the right of appeal, so that an appeal from the assessment of damages does not waive the right to have the proceeding to lay out and establish the road reviewed at the same time. As bearing upon the question whether the remedies are concurrent, see *Hill v. State*, 23 Or. 446, 32 Pac. 160; *Kirkwood v. Washington Co.*, 32 Or. 508, 52 Pac. 568. The motion is therefore denied.

It is urged that it was error to strike out the answer to the petition for the location and establishment of the road, because it tendered issues upon matters of law and fact essential to be established before the prayer of the petition could be granted. Among them were (1) that the use for which it was proposed to appropriate the plaintiffs' lands was not a public use; (2) that the residence of the petitioners was at that time reached by a convenient public road; and (3) that the road proposed by the petition was not located so as to do the least damage to the premises of the plaintiffs. It was sought to produce evidence upon all these questions, and to obtain a hearing upon them as questions of fact, and it is urged that the court was powerless to proceed without it, issues thereon having been tendered. The law has made no provision for any such hearing, although it requires notice to be given of the appointment of viewers to lay out the road, and assess the damages accruing by reason of its location and establishment. It cannot be doubted but that all these questions are matters for judicial determination. The first two must be adjudicated and determined before the viewers can be appointed, but the latter is to be resolved with their assistance, when authorized to act.

As it pertains to the first question or issue, the proposition is advanced that private property cannot be taken for private use, even with compensation, and therefore it must be first determined that the proposed taking is for a public use, before damages can be legitimately assessed; hence, that an adjudication of the fact that the use is public, without an opportunity of being heard, is the taking of property without due process of law, and inimical to the national constitu-

tion. This is a question which challenges the jurisdiction of the court; for, if it be true that a road of public easement such as is provided for by statute is not the taking of property necessary to its establishment for a public use, then the court is without authority to act, and the proceeding ought to stop whenever attention is called to it. This court has, however, decided that the taking of property for such a purpose is a taking for a public use. Mr. Justice Bean, in *Towns v. Klamath Co.*, 33 Or. 225, 232, 53 Pac. 606, says: "The principle to be deduced from the adjudged cases bearing upon the question seems to be that if, by a fair construction and operation of the statute, the road, when laid out, is in fact a public road, for the use of all who may desire to use it, the law is not liable to the charge of unconstitutionality, and is valid, though the road may be laid out on the application of, paid for and kept in repair by, the petitioner, and primarily designed for his benefit; but if such road is to become a mere private way, and not open to the public, the law sanctioning it is void."

* * * Within this principle, the act in question is valid. The road provided for is an open, public way, thirty feet in width, which may be traveled by any person who desires to use it. The fact that it may accommodate but a limited portion of the public, or even but a single family, is no objection to the validity of the law providing for its location. The test is whether it is an open, public way, or one for the exclusive use and benefit of the petitioner." We are aware that the question whether the use is in fact public is one for ultimate determination, under the constitution, by the judiciary; that while the legislature usually takes the initiative, and, in its adoption of laws looking to the purpose, necessarily passes upon their constitutionality, it is yet within the exclusive and peculiar functions of the courts to determine the question, whenever appropriately brought to their notice. *Lumbering Co. v. Johnson*, 30 Or. 205, 46 Pac. 790, 34 L. R. A. 368; *Transportation Co. v. Garbade*, 32 Or. 582, 52 Pac. 573, 54 Pac. 307, 882; *Railroad Co. v. Wiltse*, 116 Ill. 449, 6 N. E. 49; *Lewis, Em. Dom.* § 158; 10 Am. & Eng. Enc. Law (2d Ed.) 1069b. The question being one of jurisdiction, it may be heard at any stage of the proceeding, as well in the circuit as in the county court; and, under the settled rulings of this court, it may be heard here for the first time. There is no issue of fact to be joined upon the question. The statute has prescribed what may be done, and the matter of determination whether the appropriation of the lands necessary to the establishment of the road is for a public use is capable of being solved, under the statute, from the record. No facts that may be proven can present a different issue than such as the law itself has tendered, and the notice which is required to be given by a service of

the order of appointment of the viewers gives ample opportunity for hearing upon this jurisdictional question, so that it cannot be said that the taking is without due process of law. In reality the county court passed upon the question when it entertained cognizance of the cause against the protests of the plaintiffs that it was without jurisdiction over the subject-matter.

The next question, viz. whether the residence of the petitioners could be reached by any public highway, and another closely allied to it, whether it is necessary that such persons and the public shall have ingress and egress to and from the residence of such persons, are political or legislative in their character, and the mode and manner of their ascertainment and determination are matters wholly within the authority of the legislature to devise. *Towns v. Klamath Co.*, supra; *Zimmerman v. Canfield*, 42 Ohio St. 463; *People v. Smith*, 21 N. Y. 595. The legislature having provided that, upon a sworn petition of the person whose residence is not reached by a convenient public road, the court may appoint viewers, the law has prescribed that this is sufficient to set the court in motion. These facts are not issuable, because not made so by statute, and are sufficient when appearing by the petition, because it fulfills or constitutes the mode of procedure pointed out by the law. As was said in *Towns v. Klamath Co.*, supra, touching the question of the exercise of eminent domain, "It is sufficient for the protection of his constitutional rights if he has notice, and is given opportunity at some stage of the proceedings to be heard upon the question of compensation for his land so appropriated."

The third question, viz. whether the road proposed by the petition was located thereby so as to do the least damage to the premises over which it passes, is one to be ascertained by the viewers for the advisement of the court. This is not a preliminary question, as are the preceding ones, to be determined by the court, and essential to the exercise of the power and authority to proceed, but is an issue subsequent to the acquirement of jurisdiction, and constitutes but a method of procedure in laying the road. The procedure must be substantially followed in the establishment of the road; but the objectors thereto are not permitted to form an issue touching the fact of "least damage" to be tried in any other way than by the report of the viewers. This they try without issue being made upon the pleadings, and make report of their findings under the law. Like the last preceding questions, it is legislative in its character, and the procedure adopted for the ascertainment of the fact may be pursued without an opportunity for a hearing, where provision is made therefor, upon the ultimate question of damages as compensation for the taking. Nor do we think that the objectors were entitled to a hearing upon the justice of the viewers' report. That is

a matter to be determined from the report itself, and it cannot be disputed by any method not prescribed by statute.

There is another question presented by the record, upon which much stress was laid at the argument. The petition asking for the establishment of the road described the proposed course with some particularity, and the order of the court directed the viewers to lay it out in accordance with the petition, and to assess the damages sustained by reason of its establishment. The viewers made report that, "in accordance with the prayer of the petition and the direction and orders of the county court, we proceeded to and did * * * lay out, locate, and establish a road thirty feet in width, commencing," etc., which follows the line designated in the prayer of the petition, and "that said road was laid out on the most practical route from the point of commencement to the termination, and upon the route designated in said order appointing us as viewers, and in accordance with the prayer of the petition, and we so laid out said road as to do the least possible damage to the land over which it passed." It is urged that the order of the county court left no discretion with the viewers in the selection of the route of the road so as to do the least damage to the land over which it passed, and therefore that the court exceeded its powers. True, the order directs that the road shall be located in accordance with the petition, and this is the language of the statute. But the report of the viewers would indicate that they have located it so as to do the least possible damage to the lands over which it passes, while at the same time they show that they located it upon the line designated in the petition. This is equivalent, in our opinion, to saying that the line designated in the petition is the one which, after carefully viewing the situation, in the judgment of the viewers would do the least damage to the property owners, and this is the fulfillment of the statute. It was intimated in the case of *Sullivan v. Cline*, 33 Or. 260, 54 Pac. 154, that it was probably not the intentment of the statute that the petitioner should set out the exact course on which it is desired the road should be laid, but that it is sufficient if the petition shows the place of residence, that it cannot be reached by any public road, and that it is necessary that the public and himself shall have ingress to and egress from such residence. The petition in this case has gone further, however, and has designated the exact route; and while the court has directed that the road be located according to the petition, which may imply that it should be located upon the route therein defined, yet the report of the viewers shows that the road so laid out was located so as to do the least damage to the land through which it passes. The ultimate result was therefore in full accord with the intentment of the statute, and, while it may have proceeded somewhat irregularly, the purpose of the

statute has been subserved, and the order establishing the road will therefore not be disturbed. The judgment of the court below will be affirmed, and it is so ordered.

CHURCH v. ADAMS.

(Supreme Court of Oregon. July 2, 1900.)

PARTNERSHIP—ACTION FOR DISSOLUTION AND ACCOUNTING—PUBLIC LANDS—SALE BY CLAIMANT BEFORE FINAL PROOF.

1. When a partnership was organized, the firm purchased of one of the partners property owned by him, and on its dissolution issue was made as to whether a certain timber-culture claim was included therein. One of the partners, who was corroborated by a clerk, stated that a certain amount was paid for such timber-culture land, and such owner was paid for trees set out by him, and that such owner was to deed the land to the firm so soon as he received a patent therefor. A schedule of such owner's property, made at the time of the formation of the partnership and purchase of the property, corroborated such witnesses as to the partnership agreement and the property purchased. Such owner testified that he was to deed a pre-emption claim to the partnership, but no reference was made to purchasing the timber claim or paying for the trees thereon. Held to support the contention that the timber-culture claim was to be assets of the firm, to be conveyed as soon as such owner made final proof and acquired title.

2. 20 Stat. 113, § 2, governing timber-culture claims, and providing that a person applying for the benefit of the act shall make affidavit that the entry is for the cultivation of timber for his exclusive use, and on final proof shall show that he has planted a certain number of trees, and cultivated and protected them for a certain time, does not inhibit the claimant, who has made entry in good faith, from contracting to sell his claim prior to final proof.

Appeal from circuit court, Malheur county; M. D. Clifford, Judge.

Action by J. M. Church, administrator of the estate of R. M. Steel, deceased, against I. H. Adams. From a decree, plaintiff appeals. Modified.

C. H. Finn, for appellant. J. A. Fee, for respondent.

BEAN, J. This is an appeal from part of a decree in a suit brought by plaintiff's intestate to dissolve a partnership and for an accounting. The only question for the consideration of this court is whether two tracts of land, known and referred to in the record as the "Timber-Culture Claim" and the "Weaver Place," belong to, and are part of, the partnership assets. On November 17, 1885, the plaintiff's intestate, R. M. Steel, and the defendant, Adams, entered into a partnership, to continue for 10 years, under the firm name and style of Steel & Adams, for the purpose of carrying on the business of farming and stock raising in Baker county. Under the terms of the partnership agreement, Steel was to, and did, advance to the partnership \$10,000, to remain invested in the business during its continuance, in consideration of which Adams agreed to furnish the labor and services of himself and

family in the prosecution and management of the business. At the time of the formation of the partnership, Adams was the owner of a pre-emption claim consisting of 160 acres, and a timber-culture filing on another quarter section, one-quarter interest in the Nevada ditch, and horses, cows, wagons, and farming machinery. Immediately after the formation of the partnership, the firm purchased of Adams the property then owned by him for \$11,601, paying for it with the \$10,000 advanced by Steel and \$1,601 loaned by him to the company on its demand note. The partnership continued the business until the expiration of the time limited in the articles of co-partnership, at which time, the parties being unable to settle their affairs, this suit was brought by Steel for a dissolution of the partnership and an accounting, pending which Steel died, and Church, having been appointed administrator of his estate, was substituted as plaintiff.

The questions presented are, first, whether Adams' timber-culture claim is part of the assets of the partnership. At the time of its formation, there were present and participating in the negotiations R. M. Steel, his son, George A. Steel, and the defendant, Adams, and upon the testimony of these three persons must the question be determined.

R. M. Steel, in referring to the matter, says, in answer to interrogatory No. 16: "Two thousand dollars of the amount furnished by me to the firm of Steel & Adams, on November 18, 1885, which was paid to I. H. Adams immediately after coming into possession of the firm, was invested in land, that sum being paid for the east half of the northeast quarter, and the east half of the southeast quarter, of section twenty-four;" and in answer to interrogatory No. 17: "Two hundred dollars was paid for the improvements on the west half of the southeast quarter, and the east half of the southwest quarter, of same section, this sum being for improvements consisting of fifteen acres of clearing and five hundred trees; the title to the land being then in the United States, the defendant having entered same under the timber-culture act. All subsequent improvements were to be made at the expense of the firm, including fees for making final proof, and when patent issued defendant was to deed the land to the firm forthwith, without further consideration. * * * Defendant had no means at the time articles of co-partnership were entered into, except such property as he sold the firm, and all the moneys so received for said property were required and used to pay his indebtedness. I do not know of his having acquired any means in his own right since that time, as his time has been devoted to the care and management of the business of the firm without salary, the necessary wearing apparel for defendant and his family even having been purchased from firm assets and advanced to defendant, no part of which advances have been reimbursed to the firm. I believe defendant claims now

to own said timber culture in his own right, notwithstanding the fact that all his rights to same were purchased by the firm immediately after its organization, and that it always has been considered to be firm property. The subsequent improvements on the land were all made by the firm, and cost probably two or three thousand dollars."

George A. Steel, the confidential clerk and accountant of his father, took part in the negotiations leading to the formation of the partnership, and has since been more or less familiar with its business. He says, in answer to interrogatory No. 16: "From the sum of \$10,000, invested by the plaintiff in accordance with the articles of co-partnership, November 18, 1885, and the sum of \$1,601, loaned by the plaintiff to the partnership on that date, which were invested at the same time, the sum of \$2,000 was invested in the east half of the northeast quarter, and the east half of the southeast quarter, of section twenty-four;" and, in answer to interrogatory No. 17, says: "Seventy-five dollars was advanced and paid to defendant for clearing the fifteen acres, and one hundred and twenty-five dollars was paid the defendant for trees set out and growing on the west half of the southeast quarter, and the west half of the southwest quarter, of said section twenty-four, which land belonged at that time to the government, and which the defendant had entered under the timber-culture act. It was agreed between the defendant and plaintiff that in consideration of the formation of the partnership and the purchase of property from the defendant, as contemplated thereby, and the payment of the sum of two hundred dollars above mentioned, together with the making of all subsequent improvements necessary to enable the defendant to make final proof upon said land, the defendant was to deed the said land to the firm so soon as he received the patent therefor. At the time of the formation of the partnership, and upon facts furnished from statements made to me by the defendant, I made up a schedule of all property owned or controlled by him at that time after he should have repurchased from the Oregon Construction Company certain freight teams fully equipped, which he had theretofore sold them, which said schedule, marked 'Exhibit D,' is attached to the deposition of R. M. Steel in this case. The total amount of property, according to the valuation placed thereon by the defendant, amounted to the sum of \$12,011. This valuation was afterwards reduced by agreement between plaintiff and defendant by the sum of \$410, leaving the balance of the property, as agreed upon between plaintiff and defendant, \$11,601, which sum was afterwards paid defendant by the firm for such property. * * * I know of no means acquired by the defendant in his own right since the formation of the partnership. The west half of the southeast quarter, and the east half of the southwest quarter, of said section twenty-four,

known as the 'Timber Claim,' has always been held, used, and considered to be property belonging to the firm, and improvements thereon, which have been very extensive, have been made by the firm in such a manner as would not have been pursued with property not belonging to them. The cost of such improvements, considering the clearing, preparing for irrigation, by means of construction of wheels, pumps, windmills, water wheels, flumes, ditches, setting out and growing of fruit trees, and water therefor, would, in my judgment, amount to several thousand dollars. No detailed account of the expenditures in the way of labor on the above-described land was ever reported or kept, nor were the other expenditures charged up to defendant's account, as would have been the case if it had been considered to be his individual property. Upon the books of the firm the total investment in real estate is shown to be \$400, the remaining \$1,800 of the total \$2,200 allowed defendant for the east half of the northeast quarter, and the east half of the southeast quarter, the west half of the southeast quarter, and the west half of the southwest quarter, of said section twenty-four, being represented by note of the defendant to the firm, dated November 18, 1885, due June 30, 1891, without interest; it being calculated that the defendant would have made final proof by this date upon the timber culture, and he was then to deliver forthwith the deed of said land to the firm, without further consideration than the surrendering of the note in question. A memorandum was made by me at the time of the agreement between plaintiff and defendant, reading as follows: 'The attached note is to be canceled at maturity by deed to timber claim, all improvements on which are to be done by Steel & Adams, without charge to I. H. Adams, consideration for 160 acres to be \$1,800.' And this agreement has at all times since remained attached to the note, and said note and agreement attached is appended to the deposition of R. M. Steel in this case, and marked Exhibits 'E' and 'F.' " As explaining why Adams' note for \$1,800 was taken by the firm, to be delivered and surrendered up when the timber-culture claim should be deeded to it, and in explanation of the entry in the books in reference thereto, the witness says, in answer to cross interrogatories 12 and 14: "The memorandum of Adams' property, and the value thereof, made as a basis for the formation of the partnership, was used to form the basis of the entries on the books, and these prices are correct as agreed upon, with the exception of the valuation of the real estate and improvements on the timber culture, which are erroneous as they appear on the books and as testified by me in answer to interrogatory No. 17 of the direct examination; the amount charged to bills receivable for I. H. Adams' note, dated November 18, 1885, \$1,800, being in fact chargeable to real estate. The reason of this entry being made in this

manner was that the defendant had not made final proof on the timber-culture claim, and it was feared that the knowledge of the actual transaction between defendant and the firm of Steel & Adams, if entry was correctly made, might prevent the making of such final proof. * * * The amount agreed upon which I. H. Adams was to receive for the 160 acres of land owned by him in November, 1885, and his interest in the timber-culture claim and improvements thereon, all subsequent improvements necessary to enable him to make final proof, and all future expenses in connection therewith, to be made and paid for by the firm, who would then be entitled, upon the issuing of the patent, forthwith to the deed from I. H. Adams of the timber culture, was \$2,200; but, owing to the fact that I. H. Adams had not made final proof of the timber-culture claim, and for the reason stated in answer to interrogatory No. 12, the price paid for the 160 acres of land is entered at \$400, and no mention is made of the timber culture, while the difference of \$1,800 between the amount of \$400 mentioned and the valuation of \$2,200 agreed upon for the 160 acres of land and timber culture was charged to bills receivable, for I. H. Adams' note, dated November 18, 1885, for that amount, which said note was made to fall due in 1891, at a time when it was calculated that Mr. Adams would have made final proof upon the timber-culture claim, and which he was then forthwith, and without consideration, except the surrender of the \$1,800 note, to deed to the firm of Steel & Adams." Upon the schedule of Adams' property which the witness George A. Steel says he made up at the time of the formation of the partnership and its purchase of the property, and which was identified and introduced in evidence, and marked "Exhibit D," appears an item of \$75 for clearing 15 acres of the timber claim, and \$125 for trees planted thereon, which tends to corroborate the testimony of both R. M. and George A. Steel as to the terms of the partnership agreement and the property purchased by it from Adams.

The testimony of the Steels in reference to this matter is contradicted by Adams, who testifies that he was to deed the pre-emption claim to the partnership for \$2,000, but nothing was said about purchasing the timber claim, or paying for the trees or clearing thereon, although both places were to be improved and worked together; that he never kept any account of the cost of the improvement made on the timber-culture claim, but thinks it amounted to three or four thousand dollars; nor did he keep any account of the income therefrom, but it was treated as the property of the firm. The witness seems to rely principally upon his recollection of what occurred at the time of the formation of the partnership, and he is contradicted by R. M. and George A. Steel, whose testimony is corroborated by written memoranda made at the time. It is

true the defendant offered in evidence what purports to be a list of his property at the time the partnership was entered into, which he insists is the schedule upon which the purchase was made. It corresponds substantially in all particulars with Exhibit D, except that the items for clearing a portion of the timber claim, and for 500 trees thereon, amounting in the aggregate to \$200, are omitted from defendant's list, and instead thereof is an item of \$200 for the potato crop thereon. The testimony of the defendant shows that this list, marked "Exhibit 9," was discovered among his papers after the commencement of this suit, and is in the handwriting of George A. Steel. George A. Steel testifies that in his opinion it was made out, together with other statements, for the convenience of Mr. Adams, some time subsequent to, or perhaps prior to, the formation of the partnership, but that it was not considered when the partnership was formed, nor did it form the basis thereof. The witness says that during the negotiations looking to the formation of the partnership several lists of property owned by Adams, with differing valuations, were made out, but he testifies that the list which formed the basis of the partnership is the one made out by him, introduced in evidence by the plaintiff, and marked "Exhibit D," which contains the items of clearing the tree claim and the 500 trees; and, when the defendant's particular attention was called to Exhibit D, and he was asked if he was willing to swear that he did not see it at the time the partnership was formed, he said: "Well, I saw something of this kind, but I would not swear it was this one. This one seems to be made in pencil, and I don't remember whether that was in writing or not, or in pencil. There is no date to this. It was done ten years ago. Q. Are you willing to swear, Mr. Adams, that that wasn't made at your dictation at that time? A. I probably dictated the instrument that was made at that time, but I wouldn't swear to this one. No, sir; there is no signature to it that I could prove anything or that could be identified positively." So that, upon the whole, we are of the opinion that the manifest weight of the testimony is in favor of the plaintiff's contention that it was understood and agreed at the time the partnership was formed that the timber-culture claim should belong to and become a part of the assets of the firm, and be conveyed to it as soon as Adams should make final proof, and acquire title from the government.

It is argued, however, that such a contract is void as against public policy. In support of this position, reliance is had upon a line of authorities holding that the courts will not enforce specific performance of a contract made by a homesteader to convey his claim after final proof. *Clark v. Bayley*, 5 Or. 343; *Brake v. Ballou*, 19 Kan. 397; *Warren v. Van Brunt*, 19 Wall. 646, 22

L. Ed. 219; *Brewster v. Madden*, 15 Kan. 249; *Oaks v. Heaton*, 44 Iowa, 116; *Anderson v. Carkins*, 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272. The homestead law requires the applicant to make an affidavit at the time of his entry that it "is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person" (Rev. St. U. S. § 2290); and, on making his final proof, "that no part of such land has been alienated, except as provided in section 2288" (Id. § 2291), viz. "for church, cemetery, or school purposes, or for the right of way of railroads." Under this provision of the federal statute, it is held that, as a homestead claimant who has sold or contracted to sell his homestead, or a part thereof, cannot make final proof without perjuring himself, a contract to do so is against public policy, and will not be enforced in a court of equity. But we are not directed to any such provision in the law governing timber-culture claims, nor to any provision therein against alienation. It provides (20 Stat. 113, § 2) that a person applying for the benefit of the act shall make affidavit at the time of his entry "that this filing and entry is made for the cultivation of timber, and for my own exclusive use and benefit; that I have made the said application in good faith, and not for the purpose of speculation, or directly or indirectly for the use or benefit of any other person or persons whomsoever; that I intend to hold and cultivate the land, and to fully comply with the provisions of this said act." And the only provision in reference to final proof is that "the person making such entry, or, if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they have planted, and, for not less than eight years, have cultivated and protected such quantity and character of trees as aforesaid; that not less than twenty-seven hundred trees were planted on each acre, and that at the time of making such proof that there shall be then growing at least six hundred and seventy-five living and thrifty trees to each acre." We do not understand this provision to inhibit the timber-culture claimant, who has made his entry in good faith, from contracting to sell his claim prior to the final proof, and the law seems to be so interpreted by the land department of the United States. *Sims v. Busse*, 4 Land Dec. Dep. Int. 369; U. S. v. Read, 5 Land Dec. Dep. Int. 313.

So far as the Weaver place is concerned, the evidence shows that it was deeded to the defendant's wife by Weaver some time after the formation of the partnership of Steel & Adams, and there is no testimony, except mere inferences, on behalf of the plaintiff, that it was purchased or paid for with the partnership funds. On the other hand, the defendant, his wife, and their son all testify that it was purchased and paid

for by Mrs. Adams with her own money, and this evidence is substantially uncontradicted. Moreover, Mrs. Adams is not a party to this suit, and therefore no decree could be made, in any event, which would be binding upon her. The decree of the court below will be modified in accordance with these views.

BOYCE v. CUPPER.

(Supreme Court of Oregon. July 2, 1900.)

STREAM—RIPARIAN OWNER—USE FOR IRRIGATION—LOWER RIPARIAN OWNER—APPROPRIATION OF SURPLUS—ADVERSE USER—LIMITATION OF LOWER OWNER'S SUPPLY—EVIDENCE OF IRRIGATION—PERCOLATION—RIGHT OF RECAPTURE.

1. Where defendant's grantor obtained title to a certain tract of land, and used the water of a stream to irrigate it, and afterwards plaintiff, a lower riparian owner, appropriated the surplus water for the irrigation of his land, and afterwards defendant's second grantor conveyed to him an intermediate tract, which at the time defendant did not intend to irrigate, he cannot afterwards appropriate to the irrigation of the intermediate tract the surplus water theretofore used by plaintiff.

2. Where it appears that defendant's use of the water of a stream for irrigation purposes was not so extensive as to render the water supply of plaintiff, a lower riparian owner, insufficient, such use by defendant is not so adverse to plaintiff's right as to form a basis for a claim of title by adverse user.

3. The fact that plaintiff, a lower riparian owner, has growing on his land fruit trees 25 years old, which must have perished unless sufficiently irrigated from the water of a stream, is a circumstance going to prove that defendant, an upper riparian owner, did not use the water of the stream to such an extent as to deprive plaintiff of a sufficient supply.

4. Where, in a suit to enjoin defendant, an upper riparian owner, from appropriating the water of a stream to the irrigation of his land, in derogation of plaintiff's prior appropriation thereof, it appears that the water of the stream comes from swamps and marshes on a tract owned by defendant still higher up the stream, from which it proceeds by percolation, and without any well-defined channel, to the stream, such fact does not give the defendant the right to recapture the water for the irrigation of his lower tract, since his title to the swamp water ceases when the water reaches the stream.

Appeal from circuit court, Grant county; Robert Eakin, Judge.

Suit by Clara Boyce against H. A. Cupper. From a decree in favor of defendant, plaintiff appeals. Modified.

This is a suit to enjoin the diversion of the water of a nonnavigable stream. The plaintiff alleges, in substance, that she is the owner in fee of 20 acres of fruit land in Grant county, Or.; that about 1870 her predecessor in interest diverted the water of a small stream known as "Cupper Creek," and made a prior appropriation of all the water thereof, which he and his successors have since constantly used in irrigating said land, until about June 12, 1898, when the defendant unlawfully diverted and appropriated the water of said creek to which she is entitled, in consequence of which her fruit

trees were damaged, and that if such diversion be permitted to continue she will suffer irreparable injury. The defendant denies the material allegations of the complaint, and avers, in effect, that about 1870 his predecessors in interest settled on unsurveyed public land of the United States embracing said creek, and made a prior appropriation of all the water thereof, which he and his successors have since constantly used in irrigating said land, and that the water so used by plaintiff and her predecessors was the surplus which he permitted to flow down to her premises. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree that defendant was entitled to all the water of said creek above his ditches, and the plaintiff appeals.

T. Williams, for appellant. J. J. Balleray and V. G. Cozad, for respondent.

MOORE, J. (after stating the facts). The evidence shows that said creek is a small nonnavigable stream which rises in the foothills of the western spur of the Blue Mountains, in Grant county, flows in a southerly direction, and empties into the North Fork of the John Day river. The snow from these mountains, melting in the early spring, causes the creek to carry quite a volume of water, but as the season advances it gradually decreases, until about the middle of July, when the bed of the stream, except the lower part thereof, which is supplied by springs, usually becomes dry. About June, 1869, one Robert Ogle settled upon a tract of unsurveyed public lands of the United States, and, having thereafter appropriated the water of said creek to the irrigation thereof, he transferred his interest therein to William Welch, who sold the same to the defendant. The land having been surveyed, the defendant filed pre-emption and timber-culture entries thereon of 160 acres each, but, having made final proof and secured the title to his pre-emption, he relinquished the timber-culture entry, and filed a homestead thereon, by which he secured a title thereto. Marcus Anderson settled upon 160 acres of land on said creek below defendant's, and above plaintiff's, land, and, having secured a title thereto, conveyed the premises to the defendant. The plaintiff's predecessor in interest settled upon the public lands on the North Fork of the John Day river at the mouth of Cupper creek about August, 1869, and appropriated water from the latter stream, which he and his successors have used in irrigating the land now owned by plaintiff, raising thereon fruit and vegetables. The court found that defendant's predecessor made a prior appropriation of the water of Cupper creek, and, while there is some conflict in the testimony respecting the priority of the appropriation, we think the finding is supported by the weight of the testimony.

Whether it was Ogle's intention to secure

the title to 320 acres when the land upon which he settled was surveyed does not appear, but it is evident that defendant, when he purchased the improvements thereon from Welch, did not intend to irrigate the land upon which Anderson settled. Plaintiff's predecessor appropriated the excess of the water flowing in Cupper creek after Ogle's prior right was supplied, and Anderson was not entitled to use any water so long as plaintiff's needs remained unsatisfied. The court further found that defendant, after securing the title to the Anderson land, had appropriated water to the irrigation thereof, and used the same more than 10 years adversely, whereby a right had been acquired, as against plaintiff, to continue such use.

The use of the water in irrigating the Anderson land could not become adverse to plaintiff's dominant estate until it infringed her right by depriving her premises of the use of the water which was appurtenant thereto. *Wimer v. Simmons*, 27 Or. 1, 39 Pac. 6; *Milling Co. v. Coughanour*, 34 Or. 9, 54 Pac. 223. The testimony shows that there are fruit trees growing on plaintiff's land, some of which have been set out about 25 years, and that, without the use of water from Cupper creek to irrigate them, they must inevitably have died. This physical fact is a circumstance tending to disprove the theory that the irrigation of the Anderson land was adverse to plaintiff's use. It also appears that in most seasons the creek affords sufficient water to supply the use of every appropriator, and that plaintiff's land was never deprived of the use of the water in the early irrigating season until 1896, when it was unusually low.

We think the testimony fails to show that the defendant acquired an adverse user of the water of Cupper creek to irrigate the crops on the Anderson place, and hence he cannot use such water thereon when by doing so it would infringe plaintiff's right. The transcript shows that on the defendant's pre-emption and homestead claims there are several springs or marshes, the waters from which do not flow in any defined channel, but percolate the soil, and reach Cupper creek below his ditches on said claims, but above the Anderson place. These springs undoubtedly supply much of the water used by plaintiff and her predecessors in irrigating the land now owned by her. It is contended by defendant's counsel that the water from these springs situate on their client's land, not being confined to any ascertained surface or subterranean channel, is a part of his estate, and, this being so, he has a right to permit it to flow into and down the creek to the Anderson place, and there capture and use it in irrigating said land. The rule is general that water percolating the soil beneath the surface, the course of which is unknown and unascertainable, belongs to the realty on which it is found. *Gould, Waters*, § 290; *Taylor v. Welch*, 6 Or. 198; *West v. Taylor*, 16 Or. 165, 13 Pac. 635; *Wheatley*

v. Baugh, 64 Am. Dec. 721; Hanson v. McCue, 42 Cal. 303; Railroad Co. v. Dufour, 95 Cal. 615, 30 Pac. 783, 19 L. R. A. 92; Roath v. Driscoll, 20 Conn. 533; Trustees, etc., v. Youmans, 50 Barb. 316; Crescent Min. Co. v. Silver King Min. Co. (Utah) 54 Pac. 244. The springs and marshes situate on defendant's pre-emption and homestead claims having no perceptible outlets, the water percolating the soil therefrom continued to be his property as long as it remained a part of the soil with which it was intermingled, but when it reached the channel of the creek defendant's property therein ceased, because it had passed his power of ordinary control. In the absence of surface water caused by rains or melting snow, the volume of water found in the bed of a stream necessarily depends upon the springs which furnish the supply. If such springs have a well-defined channel which conducts the water into a stream, an appropriation of the waters of the latter is ipso facto an application of the water of the springs to a beneficial use. Low v. Rizer, 25 Or. 551, 37 Pac. 82. When a stream is supplied by percolation, if the ownership of the water, after it reached the channel, continued in the person from whose land it imperceptibly emanated, thereby entitling him to recapture it in the stream at any point below, the right of prior appropriation would be practically denied; but, as such right is fully recognized and firmly established by the courts in the arid regions of the Pacific Coast states and territories, it follows that the right insisted upon does not exist. The defendant having no right to irrigate the land purchased of Anderson from the waters of said creek, whether it comes there by percolation below his ditches or is the excess over his use thereof, the decree will be modified in this particular, and the defendant enjoined accordingly.

SUSEWIND v. LEVER et al.

(Supreme Court of Oregon. July 2, 1900.)

EVIDENCE—PRIVATE MEMORANDA—ADMISSIBILITY.

A memorandum made by a corporation's agent of the time an employé worked for it, and the compensation he was to receive, is not admissible in evidence without showing that the agent's memory was faulty respecting such statement, or that he knew it was true when he made it.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Action by H. C. Susewind against W. S. Lever and the Union Woolen-Mill Company, garnishee. From a judgment for plaintiff, garnishee appeals. Reversed.

This action was commenced in the circuit court for Union county to recover of W. S. Lever the sum of \$410.50, and, a writ of attachment having been issued therein, a certified copy thereof and a notice of garnishment

were served upon the Union Woolen-Mill Company, a corporation, and, its certificate in response to such notice being unsatisfactory to the plaintiff, he served upon it written allegations and interrogatories respecting a debt alleged to be due on account of labor performed by the defendant for it, and, such averments and questions having been answered in writing under oath by the president of said corporation, issue was joined thereon, and, a trial being had, judgment was rendered against the garnishee for the sum of \$175, and it appeals.

L. Lomax, for appellant. T. H. Crawford, for respondent.

MOORE, J. It is contended by appellant's counsel that the court erred in admitting in evidence, over their objection and exception, what purported to be a memorandum containing a statement of the time the defendant was employed by the Union Woolen-Mill Company, the compensation he was to receive therefor, and the amount due on account thereof. J. F. Lever, a witness for plaintiff, testified that as superintendent of the Union Woolen-Mill Company he kept the time of all persons in its employ; that he secured a correct statement of the time defendant worked for said corporation; that he prepared a memorandum of such time, which, upon its being exhibited to him, he recognized as his handwriting, whereupon said memorandum was offered in evidence, and is as follows:

"Union Woolen-Mill Co., Dr., to W. S. Lever, for Labor.

July, 1897. Work on factory roof, 14 days, \$1.75	\$ 24 50
August, 1897. Work on factory setting up machinery, 26 days at \$3.00	78 00
Sept., 1897. Work at factory, 26 days, \$3.00	78 00
Oct., 1897. Work at factory, 26 days, \$3.00	78 00
Nov., 1897. Work at factory, 25 days, \$3.00	75 00
Dec., 1897. Work at factory, 26 days, \$3.00	78 00
Jan., 1898. Work at factory, 19 days, \$3.00	57 00
Feb., 1898. Work at factory, 24 days, \$3.00	72 00
March, 1898. Work at factory, 15 days, \$3.00	45 00
April, 1898. Work at factory, 26 days, \$3.00	78 00
May, 1898. Work at factory, 26 days, \$3.00	78 00
	<hr/> \$741 50"

Private writings adverse to the interest of the person making them are admissible as evidence of the facts stated therein when such person is dead or without the state. Hill's Ann. Laws Or. § 767. If it be admitted that the memorandum objected to was against the interest of J. F. Lever, who made it as agent of the garnishee, he was present at the trial, and by inspecting the writing, if his memory was refreshed thereby, he could have testified as to its contents, thus superseding the necessity of offering it in evidence. A

witness is allowed to refresh his memory respecting a fact by anything written by himself, or under his direction, at the time when the fact occurred or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew the same was correctly stated in the writing. *Id.* § 836. The memorandum, however, is not admissible in evidence, except when the memory of the person who wrote it or caused it to be made is not refreshed by its inspection, and as a witness he testifies that he knew the writing was correct when made, but that he is unable to detail the particulars from recollection. *Wood, Prac. Ev.* § 134; *Thomp. Trials*, § 402, subd. 4, and notes. It is the duty of a party to introduce the best evidence that is within his power to produce, and if he call a witness who, after examining a memorandum made by him or under his direction, remembers the facts therein stated, the knowledge of the witness in this respect is superior to the memorandum, and better subserves the purpose of a trial, because it affords an opportunity of cross-examination, thereby rendering the writing inadmissible. *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396; *Paine v. Sherwood*, 19 Minn. 315 (Gil. 270); *Field v. Thompson*, 119 Mass. 151; *Com. v. Ford*, 130 Mass. 64; *Com. v. Jeffs*, 132 Mass. 5. Where, however, the memory of the witness is not refreshed by an examination of the writing he has made, so as to enable him to state the particulars from recollection, and he testifies that he knew when the memorandum was made that it correctly stated the facts, it then becomes admissible, because it is the best evidence procurable under the circumstances. "A great variety of American cases," says Mr. Justice Cowen in *Merrill v. Railroad Co.*, 16 Wend. 586, "have arisen where the witness, having made the entry or memorandum, could swear to his belief of its truth, but had entirely forgotten the facts which he recorded, in which the paper thus attested has been received and read in evidence to the jury." Further in the opinion, after citing several cases which support the legal principle thus announced, the distinguished jurist concludes by saying: "The result is that original entries, attested by the man who makes them, may be read to the jury, though he remembered nothing of the facts which they record." See, also, *Spann v. Baltzell*, 1 Fla. 301; *Bank v. Culver*, 2 Hill, 531; *Bank v. Cowan*, 7 Humph. 70; *Sasser v. Bank*, 4 Md. 409; *Haven v. Wendell*, 11 N. H. 112; *Watson v. Walker*, 23 N. H. 471; *Webster v. Clark*, 30 N. H. 245; *State v. Shinborn*, 46 N. H. 497; *Sickles v. Mather*, 20 Wend. 72. The transcript does not show that J. F. Lever's memory was faulty respecting the statement which he prepared, or that he knew it was true when he made it. The proper foundation for the introduction of this memorandum not having been laid, it was error to admit it in evidence, and the judgment must therefore be reversed, and the cause remanded for a new trial.

MENDELSON v. MENDELSON.

(Supreme Court of Oregon. July 2, 1900.)

DIVORCE—CRUEL AND INHUMAN TREATMENT—HUSBAND—WIFE'S RELATIVES—REQUEST TO LEAVE—VIOLENT TEMPER—EQUAL WRONG.

1. A husband demanded of his wife that she compel her brother, who lived with them, to pay board. The wife objected to asking the brother to do so, out of gratitude to him for furnishing part of the money for the purchase of the home in which she and her husband lived. The brother was in the habit of coming home very late at night, to the disturbance of the household, and of rising late in the morning; thus disarranging the wife's breakfast plans. He would also sing vile songs in the presence of the family. *Held*, that the fact that the husband requested the brother to leave the house was not such cruel and inhuman treatment of his wife as to warrant her separating from him.

2. A husband had threatened to inflict, and had actually inflicted, bodily injury on his wife 10 years before she sued for divorce. Both had violent tempers, and she did not fear him. No further trouble occurred between them until shortly before the suit was begun, when she made some exasperating remarks to him, and he told her to go in the house, or he would kill her with a monkey wrench. In January, 1898, he quarreled with plaintiff and her daughter, and threatened to throw a flatiron at them; calling them "sons of ——— and damned fools." In June, 1898, she asked him for money; and he told her: "No; damn you! you have all you will get from me,"—and asked her to collect board from her brother, who lived with them, to which she replied, "I will see you in hell first." Defendant gave money to plaintiff's brother, and she called him a "God-damned fool." *Held*, that it appeared that defendant's conduct was provoked by plaintiff, and that she was not free from fault, and her suit for divorce was properly dismissed.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Suit for divorce by Etelle Mendelson against Louis Mendelson. From a judgment of dismissal, plaintiff appeals. Affirmed.

J. A. Fee, for appellant. C. A. John, for respondent.

MOORE, J. This is a suit for a divorce, brought by the wife on the ground of cruel and inhuman treatment, and personal indignities rendering her life burdensome. The cause, being at issue, was referred to J. S. Beckwith; and from the testimony taken by him the court found that the material allegations of the complaint were not substantiated, and rendered a decree dismissing the suit, from which plaintiff appeals.

The parties were married September 5, 1887, and their family consists of their daughter, Ida, 10 years old, and Ethel, 15 years old, plaintiff's daughter by a former husband. The plaintiff testifies: That within a year after their marriage the defendant kicked nearly everything in their house to pieces, and a few months before Ida was born he struck her, causing her face to bleed, whereupon she left him and lived with a neighbor about a week, but upon his promise to treat her with

greater consideration she returned to their home, the happiness of which was again soon disturbed; for just after their child was born he drove her out of the house with a pistol, saying he would soon end the business. That at his request she undertook to keep a boarder, at whom the defendant threw a plate of soup, and, seizing a carving knife, drove him from the house. That about October, 1897, having made some light remark concerning a harness which the defendant was repairing, he told her that if she did not go into the house he would kill her with a monkey wrench which he then held in his hand, but, remaining where she stood, he came within reach of, but did not strike, her. That about January 15, 1898, the defendant threatened to throw a flatiron at her and her daughter Ethel, calling them "sons of ——— and damned fools." That about June 8, 1898, she requested him to give her some money to purchase supplies for the family, to which he replied: "No, damn you! you have all you will get from me;" and, having said that she would not live with him any longer unless he provided for her necessities, he violently shook her, and, for pulling him away, he told Ethel she must leave the house, and threw a flatiron and a box of dirt at her. That about July 23, 1898, the defendant told her that she was too extravagant and was keeping too many boarders, for whom he did not intend longer to provide, to which she replied that it was not necessary for him to furnish her any more provisions unless he chose to do so, at which remark he became angry, shook his fist in her face, and cursed and swore at her, saying that he was master there, and intended to see that their household affairs were conducted to suit him, whereupon she left home, and has since lived separate and apart from him. This is the substance of plaintiff's testimony, and the defendant's acts and language thus detailed constitute the cruel and inhuman treatment and personal indignities of which she complains. Mr. and Mrs. W. C. Miller, appearing as plaintiff's witnesses, seem to corroborate her testimony respecting a circumstance which she detailed. They say that about 10 years prior to the trial herein, and just before Ida was born, the plaintiff came to their house, in Baker City, crying and holding a blood-stained handkerchief to her face and lips, which were swollen and bleeding. James Ash testifies that defendant, in answer to a suggestion by plaintiff that it was unnecessary to remove the shoes from a horse that had just been shod, told her to go into the house and attend to her own business, threatening to throw something at her that he held in his hand, but that she did not obey his command, nor did he execute the threat. The defendant testifies: That about June 8, 1898, he took plaintiff by the arm to lead her into the house, to show her that he had some property therein, whereupon her daughter Ethel struck him and called him a "dirty dog." That on July 23, 1898, plaintiff having asked him for some money, he told

her that, if she needed more money than he was able to furnish, she ought to ask her brother Lawrence, who had been staying with them about nine months, to pay his board, saying that he had secured work, and was then able to pay, to which she replied: "I will see you in hell first, before I ask him to pay board. Not while he lives in this house." That he told Lawrence the same day that he could not board him any longer, saying that the house would not hold them both, whereupon the plaintiff and her brother told him to leave, which he at first thought of doing, and went away and got a valise, but upon returning he notified Lawrence that he was the person who must leave. The defendant, further testifying, says that, plaintiff having requested him to let her brother have some money, he gave him at one time \$3.50, and, having so notified her, she said: "You God-damned fool! What did you give it to him all at once for? You ought to give it to me, so I could give him fifty cents at a time." The reason defendant assigned for not keeping plaintiff's brother any longer was that he drank, gambled, and visited houses of ill repute, usually returning about 3 or 4 o'clock in the morning, waking him and disturbing his rest; that such dissipation prevented Lawrence from rising in time for breakfast, necessitating the preparation of an extra meal for him, after eating which he would use vile language and sing vulgar songs in the hearing of his daughter and her sister Ethel; and that he heard the latter humming the tune of one of such songs. The defendant denies that he ever struck plaintiff or used bad language in her presence, but she does not deny the profane language so imputed to her, nor is defendant's testimony concerning Lawrence controverted. The difficulty which resulted in the final separation of the parties was caused by the conduct of plaintiff's brother, who, upon being notified by defendant to quit his house, replied that he would not leave. The plaintiff held the legal title to their home, in the purchase of which her brother contributed \$200, and he also furnished her \$500 to pay off a mortgage she and the defendant had given on the premises. Plaintiff's gratitude to her brother for this financial aid undoubtedly furnishes the reason for her refusal to ask him to pay his board when so requested by the defendant, but, notwithstanding this, the defendant's demand that he should leave was not such cruel and inhuman treatment towards her as to warrant their separation. If it be admitted that the defendant called plaintiff the vile names which she says he did, and that she used the profane language imputed to her, she could not have been very much shocked by what she heard; for her own remarks to the defendant when he informed her that he had given her brother \$3.50, and when she was requested to ask her brother to pay his board bill, imply a familiarity with the use of such epithets as she claims the defendant applied to her. That the plaintiff did not seriously fear the defendant is evidenced by the fact

that she did not flee when he threatened to strike her with the monkey wrench, though it is true her courage may have been stimulated by the presence of Ash, whom she may have thought able to defend her against his assaults. The defendant was certainly not a model husband, and may have struck plaintiff soon after their marriage, as she testifies; but for more than 10 years thereafter, and until June 8, 1898, it does not appear that he laid violent hands upon her, and in that instance the assault was provoked by her. Believing, as we do, that the plaintiff was not free from fault, and that she is somewhat responsible for the treatment of which she complains, the decree must be affirmed, and it is so ordered.

STATE v. MAHONEY.

(Supreme Court of Montana. July 2, 1900.)

RAPE—INDICTMENT—DUPLICITY—FAILURE TO DEMUR—WAIVER—FAILURE TO OBJECT BELOW—EFFECT ON APPEAL—FEMALE UNDER SIXTEEN—ALLEGATION OF VIOLENCE—SURRENDER—PROOF NOT NECESSARY—INSTRUCTION ADVISING ACQUITTAL—EVIDENCE OF FEMALE'S AGE—PROPER REFUSAL—LETTER URGING PROSECUTRIX'S SILENCE—DEFENDANT'S HANDWRITING—FOUNDATION FOR ADMISSION—RELEVANCY—INSTRUCTIONS—COMMENTS ON WEIGHT OF EVIDENCE—SUBSTANCE ALREADY GIVEN—PROPER REFUSAL.

1. Pen. Code, § 450, defines "rape" as sexual intercourse either with a female under 16, or with one whose resistance is overcome by force. Section 1922 makes charging more than one offense in an indictment a ground of demurrer; and sections 1930, 2200, and 2320 provide that a failure to demur shall waive demurrable defects appearing on the face of the indictment. Defendant was charged with carnally knowing a female of the age of 15 years, violently and against her will. *Held*, that the objection that the indictment charged two offenses was waived by a failure to demur.

2. Where defendant's objection that an indictment is bad, as charging more than one offense, under Pen. Code, § 1922, subd. 3, making such duplicity ground for demurrer, is not taken in the trial court, it will not be considered for the first time on an appeal.

3. Where an indictment in a rape case charges defendant with carnal knowledge of a female under 16, violently and against her will, and there is ample evidence that the female was under 16, it is not incumbent on the state to also prove that she resisted defendant's assault, and that he violently overcame her resistance, even though it has been so alleged.

4. Pen. Code, § 2036, authorizes the trial court, when it deems the evidence insufficient to warrant a conviction, to advise the jury to acquit, the jury not being bound to do so. Defendant was charged with having had carnal knowledge of a female under 16, violently and against her will, and there was ample evidence that she was under 16, though the evidence of her resistance was weak. *Held*, that the instruction authorized by the Code was properly refused, the crime being complete without the element of violently overcoming the female's resistance.

5. Where defendant, in jail on a charge of rape, sends a note to the prosecutrix, also detained as a witness, in which he urges her to deny everything, not to sign or say anything, and remember her promise, and she testifies on the trial that the promise referred to was that she would tell nothing concerning the sexual intercourse between them, the note is relevant,

and properly admitted in evidence against defendant.

6. Where a prosecutrix in a rape case receives a note urging her to deny everything, not to sign or say anything, and to remember her promise, and promising that "we" will be happy yet, and she testifies that she has seen the defendant's handwriting, and thinks the note is in his handwriting, though unable to swear positively that it is so, such testimony is a sufficient foundation for the reception of the note in evidence against the defendant.

7. Where instructions requested by defendant contain comments on the weight of the testimony, and directions and advice as to inferences of fact to be drawn from the evidence, such instructions are properly refused.

8. Where instructions requested by defendant have already been given in substance, it is not error to refuse his request.

Appeal from district court, Silverbow county; William Clancy, Judge.

Edward Mahoney was convicted of rape, and he appeals. Affirmed.

M. J. Cavanaugh, for appellant. C. B. Nolan, Atty. Gen., for the State.

PIGOTT, J. Edward Mahoney, convicted of the crime of rape, appeals from the judgment of conviction and an order denying his motion for a new trial.

1. The information charges that the defendant, on or about the 10th day of January, 1897, and before the filing of the information, "did willfully and unlawfully and feloniously and violently, in and upon one Nellie Corbitt, a female then and there under the age of sixteen years, to wit, of the age of fifteen years, the said Nellie Corbitt not being the wife of the said defendant, Edward Mahoney, make an assault, and her, the said Nellie Corbitt, then and there, violently and against her will, feloniously did ravish and carnally know." As defined by section 450 of the Penal Code, "rape is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, under either of the following circumstances: (1) Where the female is under the age of sixteen years. * * * (3) Where she resists, but her resistance is overcome by violence or force. * * *" The first point argued by the defendant is that the information charges two offenses, and is therefore violative of that part of section 1836, Id., which declares that the information must charge but one offense. The only method by which the supposed fault now urged can be taken advantage of is by a demurrer interposed under subdivision 3, § 1922, Id. The failure so to demur is a waiver of the objection. Sections 1930, 2200, 2320, Id. Again, if the offense be single, the question of whether it should have been set forth in different forms under separate counts was not raised in the trial court, and is therefore not considered here. Any objection to the inclusion in one count of the statement of different forms of the same offense must be made in the district court, and before plea.

2. The defendant next insists that the evidence was wholly insufficient to support the

verdict. After a careful reading of the transcript, we are satisfied that the evidence was sufficient to justify the verdict. One of the suggestions made by counsel for the defendant is that, since the information charges the defendant with ravishing the prosecutrix violently and against her will, it was incumbent upon the state to prove that her resistance was overcome by force or violence, even if she was under the age of consent when the defendant copulated with her. Such is not the law. A woman under the age of 16 years is not in Montana capable of giving consent to sexual intercourse. Her submission or want of resistance is not, and cannot be, consent. She is incapable of forming a criminal intent to commit the act, and hence, in legal contemplation, is not an accomplice to her own violation. If the prosecutrix was under the age of 16 years when the defendant carnally knew her, the defendant is guilty. Whether she submitted with or without resistance, or even solicited his embraces, is immaterial, except, perhaps, as bearing upon the extent of the punishment to be imposed, and the allegation that the act was done violently and against her will, not being descriptive, may be rejected as surplusage. But, if she was 16 years of age or over, the allegation that the act of sexual commerce was perpetrated by violence and against her will (or some like averment) is essential, and must be proved. In the case at bar the evidence tending to show resistance by the prosecutrix was weak. There was, however, ample evidence showing that she was under the age of 16 at the time the defendant accomplished the act of sexual intercourse with her.

The defendant requested the court to give the following instruction: "You are further instructed that in the opinion of the court the evidence in this case is insufficient to warrant a verdict of guilty, and you are therefore advised to render a verdict of not guilty, but this instruction is not binding upon you, and you may notwithstanding this instruction find the defendant guilty as charged." Error is assigned upon the action of the court in refusing the request. Section 2096 of the Penal Code provides that "if at any time after the evidence on either side is closed, the court deems it insufficient to warrant a conviction, it may advise the jury to acquit the defendant. But the jury is not bound by the advice." This section is applicable to those cases only in which the trial court deems the evidence, although tending to prove every element necessary to constitute the crime charged, insufficient in weight to warrant a conviction. The interpretation of this section in *State v. Welch*, 22 Mont. 92, 55 Pac. 927, and in *State v. Fisher*, 23 Mont. at page 555, 59 Pac. at page 923, is approved. There was therefore no error committed in refusing to instruct the jury as prayed.

3. While the defendant was confined in

the jail upon the charge of rape, and while the prosecutrix, Corblitt, was also held in the same jail as a witness, the defendant secretly conveyed to the prosecutrix a letter in which he advised her to "deny everything," and saying: "If you are taken down on Jack Rand's case, you say nothing. * * * We will be happy together yet. The world is against us. I have got no home, and you have got none, but we will have one, and if you stay true to your promise we need not fear. Be careful not to sign anything or say anything. Give your note to Edith. She will send it. Write on the back of this. Remember your promise." The promise made to the defendant, if the prosecutrix is to be believed, was that she would tell nothing concerning the sexual intercourse which had taken place between them. She also testified that she had seen other writings of the defendant, and that, while not willing to swear that the note was written by him, she thought it was in his handwriting. To the reception of the note or letter in evidence the defendant objected on the ground that it was irrelevant and immaterial, and did not relate to any of the issues of the case; and, further, because there was no evidence to show that it was in the defendant's handwriting, or that he ever sent it to the witness. The grounds urged were manifestly untenable, and the note was properly admitted.

4. Many specifications of error are based upon the refusal of the court to give instructions prayed by the defendant. Most of the prayers contain comments upon the weight of the evidence, and directions or advice from the court in respect of the inferences of fact to be drawn by the jury from the evidence; hence such requests were properly refused. The requests for instructions which were free from these vices were, in substance, given in the charge of the court.

Finding in the record no error prejudicial to the defendant of which he complains, the judgment and the order denying a new trial are affirmed. Affirmed.

BRANTLY, C. J., and WORD, J., concur.

(24 Mont. 292)

KILLHONIC v. NUSS et al.

(Supreme Court of Montana. July 3, 1900.)

APPEAL AND ERROR—DESIGNATION OF ERRORS—BRIEF—ARGUMENT—DISMISSAL OF APPEAL.

Where appellant fails to file a brief, or appear and make an argument, after he has received notice of the time at which the cause has been set down for argument, he will be deemed to have abandoned his appeal, and the judgment appealed from will be affirmed, since it is incumbent on him to point out the errors relied on for a reversal.

Appeal from district court, Missoula county; Frank H. Woody, Judge.

Action by Elmer Killhonic against Charles A. Nuss and another. From a judgment in

favor of plaintiff, defendants appeal. Affirmed.

Wm. M. Bickford, for appellants.

PER CURIAM. This appeal is from a judgment entered on the 12th day of February, 1898. The cause was on the 28th day of May, 1900, set for argument to-day, and the parties were duly notified by the clerk of the setting. The appellants have neither filed a brief nor made any argument. All they have done in this court is to lodge the transcript with the clerk. It is incumbent upon the appellants to point out, in the manner provided by the rules of practice, the errors upon which they rely for a reversal. The failure so to do will operate as an abandonment of the appeal, and require the affirmance of the judgment. *Adams v. Association*, 13 Mont. 222, 33 Pac. 192; *State v. Dakin*, 15 Mont. 556, 39 Pac. 848; *Brewster v. Johnson*, 51 Cal. 222; *Edmondson v. Alameda Co.*, 24 Cal. 350. The judgment is affirmed. Affirmed.

PENN et al. v. OLDHAUBER.

(Supreme Court of Montana. July 2, 1900.)

MINING CLAIM—ASSESSMENT WORK—CUSTOMS—VALIDITY—APPEAL AND ERROR.

1. Rev. St. U. S. § 2324, provides that the miners in each mining district may make regulations, not in conflict with the laws of the United States, governing the amount of work necessary to hold possession of a mining claim, provided that no less than \$100 worth of labor shall be performed or improvements made on each claim during each year. *Held*, that a custom among miners in a certain district that 20 days' labor shall constitute \$100 worth of work is in conflict with this section, and therefore void; for the test is, not the number of day's work performed, but the reasonable value thereof.

2. Where, in an action of ejectment for the recovery of a mining claim, the evidence of plaintiff's compliance with the law as to doing the required amount of assessment work is conflicting, the judgment of the trial court in refusing a new trial will be affirmed.

Appeal from district court, Deer Lodge county; Theo. Brantly, Judge.

Ejectment by G. W. Penn and others against Claus Oldhauber. From a judgment in favor of defendant, and from an order denying a motion for a new trial, plaintiffs appeal. Affirmed.

This action is a suit in ejectment brought by plaintiffs against defendant to recover possession of a quartz lode mining claim, known as the "Blue Bell," situated in an unorganized mining district in Deer Lodge county. In his answer the defendant denied the ownership and right of possession of the plaintiffs to the premises described in the complaint, and, as a further and separate defense, alleged that neither the plaintiffs, or either of them, nor any one in their behalf, performed \$100 worth of development or representation work, or any work at all, upon

said Blue Bell quartz lode claim, or upon any part thereof, during or for the year 1895, and therefore, if said plaintiffs, or either of them, ever had any right, title, or interest in or to said quartz location, that they have forfeited the same. The case was tried to the court without a jury, by stipulation of counsel in words as follows: "In the above cause it is hereby stipulated and agreed that the only issue to be tried, or on which testimony shall be introduced, is, Did the owners of the said Blue Bell quartz lode mining claim, mentioned in said complaint, do or cause to be done \$100 worth of work and labor and improvements on said claim during the year 1895?—and, if the jury or court shall answer this question in the affirmative, that the plaintiffs shall have judgment for said mining ground and costs, but, if they or the court shall answer in the negative, then the defendant shall have judgment in his favor. It is agreed that all other facts necessary to entitle either party to recover shall be taken as proved; either the plaintiff or defendant to have the right of appeal to the supreme court. Dated the 29th day of March, 1897." Upon the single question stated in the stipulation, evidence was introduced by plaintiffs and defendant; and upon this evidence the court below found "that the plaintiffs had not performed one hundred dollars worth of work during the year 1895, and that therefore the ground included within the Blue Bell location became vacant and subject to relocation." The court further held that testimony concerning the rules and customs in the district in which the property in dispute was situated, as to the number of days' work that constituted \$100 worth of work, was inadmissible.

Jas. W. Forbis and C. M. Parr, for appellants. Rodgers & Rodgers, for respondent.

WORD, J. (after stating the facts). In the progress of the trial certain of plaintiffs' witnesses were each asked, in substance, the question: "Do you know what were the rules and customs among miners in that district [meaning the district in which the Blue Bell lode was situated] as to the number of days' work that constituted a hundred dollars' worth of work?" The answer in each instance was, substantially: "Yes; twenty days' work." To this question, whenever asked, the defendant's counsel objected on the ground that the same was incompetent, irrelevant, and immaterial, for the reason that the rules and customs as to the number of days' work that constituted \$100 worth of work is not the standard by which the value of the work done upon a mining claim should be measured. The court admitted this evidence subject to defendant's objection, but afterwards excluded it from consideration on the ground that it was incompetent. This ruling of the court is the only error assigned by appellants, and upon which they ask a reversal of the case.

The appellants contend that in the year 1895 there was in existence in the district in which the property in controversy is situated a custom to the effect that 20 days' work performed upon a claim satisfied the requirements of section 2324, Rev. St. U. S., as to annual work, and that evidence of such custom was admissible under section 1321 of the Code of Civil Procedure (Statutes of Montana). Section 2324, Rev. St. U. S., among other things, provides that "the miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the state or territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: * * * On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year." And said section further provides that, upon a failure to comply with this condition, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made. A rule or custom like the one appellants sought to establish must not only be reasonable, but it must not be in conflict with the laws of congress or of the state. Nor can such a custom authorize a less annual expenditure than that named in the federal statute. *Sweet v. Webber*, 7 Colo. 443, 4 Pac. 752; *Jackson v. Roby*, 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 900; *Chambers v. Harrington*, 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452. From a consideration of this statute of the United States, it appears that, when the contention is as to whether or not a mining claim has been represented for a given year, the test is, not as to the number of days' work done upon it, but what is the worth or reasonable value of the labor performed or improvements made thereon. The value of work done or improvements made is to be measured, not in days, but in dollars. Such work or improvements may add nothing to the value of the claim, but if, when completed, said work or improvements are reasonably worth the sum of one hundred dollars, then this requirement of the statute has been fulfilled. Such, in effect, is the holding of this court in *Mattingly v. Lewisohn*, 13 Mont. 508, 35 Pac. 111, and that ruling we now approve. Were the principles contended for by appellants to prevail, the sole question to be determined in a case like the one now under consideration, where the value of each day's work had been fixed by custom, would be, how many days' work has been done upon the claim? All questions as to the worth or reasonable value of the work done or improvements made, or of the good faith of the owner, would be eliminated. Again, under the provisions of section 2324, Rev. St. U. S., we have a uniform rule as to the performance

and as to the value of annual labor. Such would not be the case if the customs of a mining district, as to the representation of claims are to be followed. In one district the actual value of the work performed upon a claim within the number of days fixed by custom might be \$100, while in another district, possibly adjacent, the reasonable value of the work done or improvements made, because of a custom requiring a less number of days to represent a claim, might fall far short of the amount required by statute to be expended on a claim during each year. The actual cost to the same owner of representing claims in different districts, even though the custom as to the number of days' work required to be performed was the same in each, might vary, owing to the difference in the price of labor. Other instances wherein the rule as to the value of the work done or improvements made in representing a mining claim, if the customs of a mining district are to prevail, would conflict with that established by section 2324 of the Revised Statutes of the United States, readily suggest themselves. That a custom such as that appellants sought to establish does conflict with said section 2324 is plain. The ruling of the court below excluding the evidence offered by appellants as to the rules and customs of the mining district in which the claim in controversy is situated is approved. A careful examination of the evidence shows a substantial conflict therein, and the judgment of the court below and the order refusing a new trial are accordingly affirmed. Affirmed.

PIGOTT, J., concurs. BRANTLY, C. J., being disqualified, takes no part in the foregoing opinion.

TRENT et al. v. SHERLOCK.

(Supreme Court of Montana. July 2, 1900.)

CORPORATIONS — SUPERINTENDENT—IMPLIED POWERS — UNAUTHORIZED ACTS — ACQUISITION—BILL OF SALE—PRESIDENT—RATIFICATION—DELEGATION OF POWERS.

1. The superintendent of a mining company had been permitted in one instance to contract for the purchase of machinery, and to sign the contract as "manager," and on another occasion he had deposited the corporate money in his own name, and issued his personal checks thereon, but this had been stopped by the president. *Held*, that such acts did not constitute such a consent and acquiescence on the part of the corporation in the exercise of powers by the superintendent as to authorize him to pledge the company's property for a corporate debt, due for the price of property bought by the company, even though his previous acts might have conferred on him the implied power to purchase property.

2. A creditor of a mining company importuned its president to give him a bill of sale of ore mills of the company as security for a debt. The president refused to do so, but referred the creditor to the company's superintendent, who, he said, had full authority in the matter. The creditor then went to the superintendent, who signed a bill of sale as "manager" of the company. The president was authorized by the company's by-laws to buy and sell property for the company, but

was given no power to delegate that authority. *Held*, that the act of the president in referring such creditor to the superintendent did not authorize the latter to execute the bill of sale, nor did his act amount to a ratification of the superintendent's act, though he had an imperfect knowledge of what had been done; and such bill of sale was void as against a subsequent attaching creditor.

3. A bill of sale of a portion of a mining company's property, by the superintendent, which he had no authority to make, was not prima facie binding on the corporation, and did not tend to show that he had an implied power to make it.

Appeal from district court, Jefferson county; *M. H. Parker*, Judge.

Action by *L. C. Trent* and *S. V. Trent*, partners as *L. C. Trent & Co.*, against *Henry L. Sherlock*, for possession of personal property. From a judgment in favor of plaintiffs, and an order overruling a motion for a new trial, defendant appeals. Reversed.

Action in claim and delivery. The plaintiffs, *L. C.* and *S. V. Trent*, are co-partners, engaged in the business of manufacturing and selling mining machinery at Salt Lake City, Utah, under the firm name of *L. C. Trent & Co.* This suit was brought by them to recover the possession of two Bryan roller quartz mills complete, with attachments, the value of which is alleged to be \$3,900. Their right of recovery is based upon their prior possession under the following instrument, which purports to have been executed by the Hope Mining Company, a corporation organized under the laws of the state of Washington, and engaged in mining and milling ores at Basin, Mont., by its manager, *P. A. H. Franklin*: "The McDermott. *B. F. Locke*, Manager. Butte, Montana, March 12, 1897. Know all men by these presents that the Hope Mining Company of Seattle, Washington, has, in consideration of five hundred dollars, sold & transferred to *L. C. Trent & Company* two Bryan roller quartz mills and all extras and fittings belonging thereto. Said *L. C. Trent & Company* hereby agree to reconvey said property to the said Hope Mining Company on the payment to them of twenty-eight hundred dollars, if such amount is paid within ninety days from date hereof. In witness whereof said parties have hereunto set their hands & seals this twelfth day (12th day) of March, 1897. Hope Mining Co. *P. A. H. Franklin*, Manager Hope Mining Co." The facts leading up to and attending the execution of the instrument are the following: *L. C. Trent & Co.*, during the month of October, 1896, sold to the Hope Mining Company, through its superintendent, *Franklin*, two Chilian roller quartz mills at the price of \$2,800. The contract of sale was made by a letter of *L. C. Trent & Co.* to *P. A. H. Franklin*, as manager of the mining company, in which the terms of the sale were set forth in full, and upon which was written an acceptance in the name of the Hope Mining Company by *Franklin*, as manager. The mills were to be shipped within 35 days from the date of the contract, but payment was

not to be made until after trial by actual operation of them in the works of the company at Basin; the plaintiffs retaining title until full payment should be made. The machines were shipped under this agreement on December 12, 1896, and, after some delay, were installed in the works at Basin. In the meantime the mining company had purchased the Bryan mills in controversy from the Risdon Iron & Locomotive Works, in San Francisco, Cal. These had been shipped to Basin, and, at the time this controversy arose, were lying at the works of the company near the railroad, where they had been unloaded from the cars. On February 28, 1897, the purchase price of the Chilian mills became due. Payment not having been made, *L. C. Trent* went to Basin on March 8th to effect some arrangement about it, or, in default of it, to recover the mills under the contract. He proposed to *L. J. Pitner*, the president of the mining company, that the company give to *L. C. Trent & Co.* a bill of sale of the Bryan mills. This *Pitner* refused to do, saying that it would not be fair treatment of the Risdon people to sell property just purchased from them in this way. Thereupon *Trent*, *Franklin*, and *Pitner* went to Butte, stopping at the McDermott Hotel. During the time they were there, *Trent* again sought to induce *Pitner* to give him a bill of sale for the Bryan mills. *Pitner* again refused to do it. *Trent* then went to the room of *Franklin*, who executed the instrument quoted above. There is some evidence tending to show that *Pitner* told *Trent*, at the McDermott Hotel, when urged to execute the bill of sale, to go to *Franklin*; that *Franklin* had full authority to act in the matter; and that anything he did would be satisfactory. *Trent* testifies to this, and also that he told *Pitner*, immediately after his return from *Franklin's* room, that *Franklin* had executed the bill of sale. *Pitner* denies all connection with the transaction, and says he had no knowledge of it until about April 27th; he having gone to Boston shortly after March 12th, where he remained until the latter date. On the next morning after the arrangement was made in Butte, *Trent* went to Basin, and took possession of the mills. After being there for some two or three days, and putting notices upon the mills, he returned to Salt Lake City, leaving the mills lying where he found them, but in charge of the railroad agent. On April 1, 1897, the defendant, as sheriff of Jefferson county, attached and took the mills in a suit brought by the Risdon Iron & Locomotive Works against the Hope Mining Company to recover judgment for the price of them. The consideration for the instrument in question was an extension of time for 90 days for the payment of the amount due *L. C. Trent & Co.* for the Chilian mills, and an agreement to let the mining company have on credit some other articles needed to repair the machinery in the works. These articles were never furnished, and the

Chilian mills were retaken by L. C. Trent & Co. in May or June, 1897, and sold to satisfy their claim. After the amount received for them was applied upon the original purchase price, there still remained due \$1,500. The complaint is in the usual form. The answer joins issue by general denial, and sets up title in the Hope Mining Company, and justification under the attachment issued in the case of Risdon Iron & Locomotive Works v. Hope Min. Co. From a judgment in favor of plaintiffs, and an order denying his motion for a new trial, defendant has appealed.

Wm. H. De Witt and Geo. F. Cowan, for appellant. McHatton & Cotter, for respondents.

BRANTLY, C. J. (after stating the facts). A reversal of the judgment herein is sought upon two grounds: (1) That the trial court erred in admitting in evidence the paper purporting to be a bill of sale executed by P. A. H. Franklin, as manager for the Hope Mining Company; and (2) that it committed error in refusing to give instruction No. 6, as requested by defendant, as follows: "An authority of Franklin to make the sale of the property in controversy, as it is claimed by plaintiffs that he did, cannot be implied from evidence that he did attempt to make the sale in question."

1. No principle of law is more clearly settled than that an agent to whom is intrusted by a corporation the management of its local affairs, whether such agent be designated as president, general manager, or superintendent, may bind his principal by contracts which are necessary, proper, or usual to be made in the ordinary prosecution of its business. *Thomp. Corp.* § 4850; *Mining Co. v. Fraser*, 29 Pac. (Colo. App.) 667; *Sparks v. Transfer Co.*, 104 Mo. 531, 15 S. W. 417, 12 L. R. A. 714; *Ceeder v. Lumber Co.*, 86 Mich. 541, 49 N. W. 575; *Stokes v. Pottery Co.*, 46 N. J. Law, 237; *Academy v. Estill*, 77 Ga. 409. The fact that he occupies, by the consent of the board of directors, the position of such an agent, implies, without further proof, the authority to do anything which the corporation itself may do, so long as the act done pertains to the ordinary business of the company. *Mathias v. Association*, 19 Mont. 359, 48 Pac. 624; *Ceeder v. Lumber Co.*, supra; *Mining Co. v. Senter*, 26 Mich. 76; *Marlatt v. Cotton-Press Co.*, 10 La. 583; *Siebe v. Machine Works*, 86 Cal. 391, 25 Pac. 14. Even where the contract in question pertains to matters without the ordinary course of business, but within the power of the corporation,—that is, such as is not prohibited by its charter or by express provision of law,—the authority of the agent may be established by proof of the "course of business between the parties themselves, by the usages and practice which the company may have permitted to grow up in its business, and by the knowledge which the board, charged with the

duty of controlling and conducting the transactions and property of the corporation, had, or must be presumed to have had, of the acts and doings of its subordinates in and about the affairs of the corporation." *Mahoney Mining Co. v. Anglo-Californian Bank*, 104 U. S. 192, 26 L. Ed. 707. See, also, *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, 28 L. Ed. 49; *Sparks v. Transfer Co.*, supra. "There is no reason, and can be no legal principle, which will put the agent of a corporation on any different footing than the agent of an individual in regard to the same business." *Ceeder v. Lumber Co.*, supra.

Applying these general principles to the facts in this case, what rights, if any, did L. C. Trent & Co. acquire under the instrument in question? This instrument is denominated in the record "a bill of sale." It is clear from an inspection of it, however, in the light of the facts surrounding its execution, that it is in fact, and was intended to be, a pledge of the Bryan mills as security for the price of the Chilian mills, which fell due on February 28, 1897. The ground of the objection to its introduction in evidence was, among others, that the proof did not show either an express or implied authority to enter into the arrangement disclosed by it. The proofs presented by the plaintiffs show that Franklin was in fact the superintendent of the mining and milling operations of the company at Basin, and not the general manager. One W. D. Field was the business manager, and had control over the finances of the corporation. Pitner was the president, and in supreme charge of its local affairs. The checks of the company were signed by Field under authority of Pitner, and countersigned by Franklin. Some time before the date of the transaction in question, Franklin had exceeded his authority by depositing the company's money in his own name and issuing his personal checks; but this had been stopped by Pitner as soon as it came to his knowledge. In one instance, before the purchase of the Chilian mills from plaintiffs, Franklin had contracted for machinery, and signed the contract as manager. There was no proof that he had any authority from the directors to sell or pledge the property of the company, nor that he had ever assumed authority to do so before. Assuming that, by acquiescence by the company in his previous conduct, he had the implied authority to purchase machinery for use in the mills, and pledge the credit of the company for it, it does not therefore follow that he was authorized to sell or pledge the property thus purchased. Buying and selling, or pledging, are acts of a different nature. An authority to do the one by no means implies the authority to do the other; and, when it is sought to show an implied authority in the agent to do the act in question by proof of consent or acquiescence of the principal, this can be done only by proof

of consent to, or acquiescence in, acts of a similar nature, or by proof of such acts as tend to show a general power. *Am. & Eng. Enc. Law*, 1002; *McAlpin v. Cassidy*, 17 Tex. 449; *Rankin v. Mining Co.*, 4 Nev. 78; *Thomp. Corp.* § 4633. The fact that Franklin, on two occasions, assumed to act as general manager of the business of the company in the purchase of machinery for use in the mill at Basin, does not in any way tend to show such a usage or practice in its affairs as that one dealing with him would be justified in acting upon the presumption that he had authority to execute the instrument in question.

Nor do we think the proof tends in any way to establish a ratification of the transaction on the part of the company. The proof on this point is meager and unsatisfactory at best, for it rests entirely upon a conflict of statement between Pitner and L. C. Trent. At most, it shows merely that Pitner had referred Trent to Franklin, and had knowledge of some sort of an arrangement about the matter, made between them at the McDermott Hotel in Butte. True, it appeared from defendant's proof that Pitner was authorized by the by-laws of the company to make contracts for the purchase and sale of all property bought or sold by the company; but there was no power given him to delegate this authority to any other person. It is the rule that in the absence of authority, either express or implied, to employ a subagent, the trust committed to the agent is personal, and cannot be delegated to another. *Mechem, Ag.* § 185. This is especially true where the performance of the agency requires the exercise of special skill, judgment, or discretion. *Id.* § 186. There was no proof tending to show that the directors ever knew anything of the transaction. Upon the theory, therefore, that the company could confer upon Pitner the authority to sell any or all of its property in Montana, whenever, in his judgment, it might be proper to do so, and that this authority included the power to mortgage or pledge the property at his discretion, he could not, unless also clothed by the company with the power of substitution, delegate this trust to Franklin. If he could not delegate this trust to Franklin, neither could he, under the circumstances, ratify Franklin's act, at least not until he was fully informed of the nature of it, which did not occur until long after the rights of the Rison Iron & Locomotive Works had accrued under the attachment in defendant's hands. It was then out of Pitner's power to defeat the rights of the attaching creditor by any act of ratification. The instrument in question not being *prima facie* binding upon the corporation, because not executed by Franklin within the scope of his authority in the ordinary course of business, and the proof having failed to show that it was authorized by the usage of the business, or ratified by the company, it was clearly not competent evidence in favor of

the plaintiffs, and should have been excluded.

2. To comment upon the instruction requested and refused would be to reiterate in large measure what has already been said. The making of the contract was clearly not within the scope of the ordinary authority of the superintendent. It was not *prima facie* binding upon the company. The fact that Franklin did attempt to enter into it did not tend in any way to show that he had the implied authority to make it. Even proof of previous acts of the same kind on his part would not be sufficient to show an implied authority from the company, unless it be also shown that they were done so frequently, and under such circumstances, as to warrant the inference that it was the custom or usual course of the business. *Bank of Deer Lodge v. Hope Min. Co.*, 3 Mont. 146; *Helena Nat. Bank v. Rocky Mt. Tel. Co.*, 20 Mont. 379, 51 Pac. 829. The jury should therefore have been instructed as defendant requested.

It is ordered that the judgment and order appealed from be reversed, and that a new trial be granted. Reversed and remanded.

PIGOTT, J., concurs. WORD, J., takes no part in the foregoing opinion.

FINCH et al. v. KENT et ux.

(Supreme Court of Montana. July 2, 1900.)

CREDITORS' SUIT—PLEADING—FRAUD—ISSUES AND PROOF—SALE OF PROPERTY—CHANGE OF POSSESSION—LIABILITY OF PURCHASER—EVIDENCE—POSSESSION OF THIRD PARTY—OWNERSHIP—PROOF—GENERAL REPUTATION—COPY OF BILL OF SALE—ADMISSIBILITY—TRANSFER OF PROPERTY—INTENTION OF PARTIES—DEBT—JUDGMENT—TRIAL BY JURY—STATUTE OF LIMITATIONS.

1. Where a creditors' bill to set aside a sale as fraudulent averred that the sale was made with the actual intent to defraud the creditors of the vendor, the burden of proof is on the plaintiff to show facts which will invalidate the sale.

2. Where a creditors' bill to set aside a sale as fraudulent averred that the sale was made with the actual intent to defraud the creditors of the vendor, a finding of constructive fraud, based on the fact that there was no continued change of possession after the sale, is not sufficient to support a judgment for the plaintiff, since he cannot plead actual fraud and recover on proof of constructive fraud.

3. Where plaintiff in a creditors' suit pleaded actual fraud in a sale by a husband to his wife, and introduced evidence of constructive fraud, in that there was no change of possession of the property, the fact that defendants did not object to the introduction of such evidence did not constitute a waiver of their right to raise the question that the proof was not responsive to the pleadings.

4. Comp. St. 1887, div. 3, § 226, provides that every sale of chattels by a vendor in his possession or under his control, not accompanied by immediate delivery and followed by an actual and continued change of possession of the thing sold, shall be conclusive evidence of fraud, as against the creditors of the vendor. *Held*, in a creditors' suit to set aside a sale of sheep as fraudulent because there was no continued change of possession, where only a part of them remained in the possession of the purchaser at the time the creditors secured their lien, a judgment that the purchaser should

deliver to the sheriff, for the benefit of creditors, all the sheep purchased, or account for their proceeds, was erroneous, since the purchaser was liable, under the statute, only for the identical chattels, remaining in his possession at the time the creditors' lien attached.

5. In a creditors' suit to set aside a sale as fraudulent, the judgment roll in another suit is not admissible to show that the title to the property was undetermined, where such record does not disclose that it concerns any party to the present action.

6. On the issue whether a sale of property was fraudulent as to creditors of the vendor, the plaintiff having introduced evidence that there was no continued change of possession after the sale, for the purpose of showing constructive fraud, it was competent for the defendant to show in rebuttal that a third person had possession of the property after the sale.

7. Where an execution was returned nulla bona, and in proceedings supplemental to execution the defendant was examined as to his property, his testimony so given was competent against him in a subsequent creditors' suit to set aside a sale of his property as fraudulent.

8. In a creditors' suit to set aside a sale by the husband to his wife as fraudulent, a transcript of a bill of sale of the property from the husband to the wife, filed in the county recorder's office, is admissible in evidence for the purpose of showing the nature of the transfer, where the original was shown to have been lost.

9. In a creditors' suit to set aside a sale of sheep by a husband to his wife as fraudulent, both the husband and wife may testify that the transfer was not made with the intention of defrauding any creditors, since their intention was material to the issue.

10. In a creditors' suit to set aside a sale of property made on January 3, 1893, as in fraud of a judgment obtained by the vendor's creditors against him on February 17, 1894, evidence that defendant did not owe plaintiff anything at the time of the sale was relevant.

11. In a creditors' suit to set aside a sale of property made on January 3, 1893, as in fraud of a judgment obtained by the creditors against the defendant on February 17, 1894, evidence of defendant that he did not owe the amount of the judgment is properly excluded, since the judgment was conclusive evidence of his liability, in the absence of evidence on his behalf tending to show fraud, accident, mistake, or satisfaction.

12. In a creditors' suit to set aside a sale of 3,400 sheep by a husband to his wife as fraudulent, evidence that the wife was generally reputed in the neighborhood where they resided to be the owner of the sheep was incompetent, as hearsay.

13. Under Const. art. 3, § 23, providing that the right of trial by jury shall be secured to all, and shall remain inviolate, the direction of a verdict in a creditors' suit to set aside a sale as fraudulent was not an infringement on defendant's right to a trial by jury, though the testimony in the case was conflicting, since such cases were within the exclusive jurisdiction of chancery at the time the constitution was adopted, and the constitution did not enlarge the right of trial by jury.

14. Under Comp. St. 1887, div. 1, § 42, subd. 4, providing that an action for relief on the ground of fraud shall be commenced within two years, where an action to set aside a sale of property as in fraud of a judgment against the seller was commenced in the year after the rendition of the judgment, it was not barred by limitations, since the right of action did not accrue until plaintiff's judgment was obtained.

Appeal from district court, Yellowstone county; C. H. Loud, Judge.

Action by George R. Finch and others against Thomas Kent and wife. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendants appeal. Reversed.

Gib A. Lane, for appellants. Campbell & Stark, for respondents.

PIGOTT, J. This action, in the nature of a creditors' bill, was brought to set aside, as fraudulent and void, a sale of 3,400 sheep made by the defendant Thomas Kent to the defendant Mary Kent on the 3d day of January, 1893. The complaint states that on the 3d day of January, 1893, the defendant Thomas Kent, being then the owner of the sheep, sold them to his wife, the defendant Mary Kent; that the sale was fraudulent, without any consideration, and void as against the plaintiffs and the other creditors of Thomas, and was made for the purpose of hindering, delaying, and defrauding his creditors; that the defendant Mary Kent, for the sole and only purpose of assisting Thomas in his intent to hinder, delay, and defraud, took the sheep at that time, and has ever since pretended to be the owner thereof, but that she holds title to the sheep in trust for Thomas, the real owner; that the defendant Thomas has no property other than these sheep which is subject to the levy of an execution; that on the 17th day of February, 1894, the plaintiffs recovered a judgment against the defendant Thomas for \$1,000, with interest and costs, upon which they subsequently caused a writ of execution to be issued to the sheriff of the county of Yellowstone, where the defendants reside and the sheep were situate, which execution was duly returned, with the sheriff's certificate thereon to the effect that he had been unable to find any property of the defendant therein subject to the writ; that thereafter proceedings supplemental to execution were had, under which the defendant Thomas was examined, and the judge of the court, by order, authorized the plaintiffs to bring an action to subject to the satisfaction of their judgment the interest of the defendant Thomas in the sheep transferred by him to his wife. The answer contains denials of the allegations of fraud, and sets up affirmatively that the 3,400 head of sheep were on the 12th day of January, 1893, by the sheriff of Yellowstone county, levied upon under an execution issued on a judgment in favor of a certain bank against one John Tinkler, and that thereafter one Sweetman, as bailee, replevied them from the sheriff, one Ramsey; that the action of Sweetman against Ramsey was determined in favor of the defendant therein; and that the cause is now pending on appeal in the supreme court of Montana. Defendants pleaded, also, that the remedy of the plaintiffs was barred by subdivision 4 of section 42 of the first division of the Compiled Statutes of 1887. By reply, the affirmative matters of the answer were denied. Upon

the trial the plaintiffs moved the court to direct a verdict for the plaintiffs, and to enter its decree setting aside the transfer of the 3,400 sheep, and requiring Mary Kent to account to the sheriff for the proceeds of the sale, or to deliver the sheep over to the sheriff, to be sold on execution to satisfy the judgment against Thomas Kent, for the reason that it conclusively appeared that there was no actual or continued change of possession of the property after the making of the bill of sale, and that Thomas Kent continued in the possession and control thereof. The court granted the motion, and the jury, under the direction of the court, returned their verdict that the sale was made for the purpose of defrauding the plaintiffs and other creditors of Thomas Kent, and was void. The court thereupon found, as a conclusion of law, (1) that the sale of the 3,400 sheep by Thomas Kent to Mary Kent was fraudulent and void, and made for the purpose of defrauding the plaintiffs and other creditors of Thomas Kent; and, as a conclusion of fact, (2) that there was never any change of possession of the sheep, and that Kent had continued in the possession of them ever since the time of the sale. A judgment was thereupon entered to the effect that Mary Kent deliver to the sheriff of Yellowstone county the 3,400 head of sheep alleged to have been sold to her, or that she account to him for the proceeds of the sheep, or of so much thereof as may be necessary to satisfy the demands of the plaintiffs. From the judgment, and from an order denying a new trial, the defendants have appealed. In the absence of an attack thereon by demurrer, by objection to the introduction of evidence, or otherwise, we shall, for the purposes of the appeal, treat the complaint as stating facts sufficient to constitute a cause of action.

1. The complaint charges that the sale or transfer by Thomas Kent to Mary Kent was made with the actual intent to defraud the creditors of the seller, and that the purchaser entertained the like intent. The court found fraud in fact, and also fraud in law, or constructive fraud; basing its judgment upon both these findings. We think that the defendants have inferentially presented the contention that the finding in respect of constructive fraud, arising out of want of an actual and continued change of possession, is without the issues joined. True, the continued possession of the seller is some evidence tending to prove actual fraud in the sale, but, unless it be alleged, a judgment overturning the sale on the ground of such constructive fraud only is erroneous. Where the purchaser sues to recover chattels sold to him by a debtor, and seized as the property of the debtor while in the latter's possession, an answer denying the title of the purchaser and justifying under the writ is sufficient to raise the question of whether there was actual fraud, as well as the question of whether there was con-

structive fraud, in the sale; for in such a case the burden is upon the plaintiff to establish his title to the property, and, in order to prove his ownership and the consequent right to recover, he must show a sale valid as against the creditor. Under these circumstances the burden is upon the plaintiff purchaser to prove that the sale was accomplished by an immediate delivery, and followed by an actual and continued change of possession, such as will satisfy the requirements of the statute. A. sues B. to recover chattels or their value, alleging title in himself. B.'s answer denies A.'s title, and justifies under a writ of execution issued on a judgment for money rendered against C., whose property he asserts the chattels to be. As soon as it appears upon trial that B. took the property from the possession of C., the presumption arises that C. was then the owner; and A., to prevail, must overcome the presumption. If he bought the chattels from C., who at the time of the sale was in possession or control, he must establish the immediate, actual, and continued change of possession contemplated by the statute; else, the sale is void as to B., who seized the chattels under the writ and a valid judgment. If, however, the chattels were levied upon in A.'s possession, he may in the first instance safely rely upon the prima facie presumption of ownership arising from possession, and the necessity of introducing evidence tending to show a purchase by him from C. in actual or constructive fraud of B. is upon the latter. The necessity of adducing evidence respecting ownership may, during the progress of the trial, shift from one party to the other. The onus of establishing the evidentiary or intermediate facts often shifts to B.,—as, for example, when he would prove actual fraud vitiating as to him the sale by C. to A., or when the property is, on execution, taken from A., who purchased from C. But the burden of proving the ultimate fact, namely, a title in A. which is valid as to B., remains upon A. throughout. He has asserted title. The wrong alleged is invasion by B. of the rights flowing from, and dependent upon, ownership. Title is denied by B. Unless title be shown to be in A., he fails to prove a cause of action. A sale or transfer in fraud of B. is void as to him. So far as he is concerned, the situation is the same as if the sale or transfer had not been made. Proof of either actual or constructive fraud on creditors is, as to the demand of B., fatal to the title of A., or, rather, establishes conclusively that A. did not acquire a title which can be maintained against B. The burden is upon the plaintiff, A.; and, if no evidence were received, B., the creditor, having denied A.'s allegation of ownership, would prevail. But a different rule, founded upon other principles, applies to a case like the one at bar, in which, if no evidence were received, the defendants would be entitled to judgment.

Here the plaintiffs aver that a sale was made by Thomas Kent to Mary Kent, and seek to have it set aside and declared void. It becomes necessary, therefore, for the plaintiffs to allege and to prove the facts which invalidated the transaction. It is incumbent upon them to point out the particulars which render the sale void as to them, and the evidence is to be restricted to proof of these allegations. If the vice which renders the sale null as to them was the existence of actual fraud, the complaint must, as the complaint in this case does, charge its presence. If the vice was constructive fraud, then it is incumbent upon the plaintiffs to state the matters which constitute that cause of action. Of course, both actual and constructive fraud may be pleaded in the same complaint; but if actual fraud only be set up, then, although proof of constructive fraud may be evidence having a tendency to support the allegation of actual fraud, yet the finding of constructive fraud is not of itself sufficient to support a judgment, for the allegations and proofs must correspond. Evidence tending to show want of change of possession may be introduced upon the issue of a personal intent to defraud. Such evidence is not obnoxious to the objection of incompetency or of irrelevancy, and therefore its reception without objection would not be deemed a waiver by the defendants of their right to insist that the judgment shall be based upon the questions presented by the pleadings. In other words, by the admission of such evidence without objection, the defendants are not to be considered as having consented to a trial of the issue of constructive fraud. When a cause is tried upon the theory, adopted by the losing party, that a certain question not presented by the pleadings was in issue, and the issue is decided, the judgment will not be reversed for that reason. It does not appear, however, in the case at bar, that the evidence touching the want of a continued possession in the purchaser was adduced for any purpose except as tending to prove fraud in fact, and the defendants do not seem to have had their attention directed to its bearing upon constructive fraud (the existence of which was not suggested by the pleadings) until the motion was made upon that ground for judgment, which was granted without hearing argument; the defendants excepting. The finding of constructive fraud is not responsive to the issues. The judgment, therefore, in so far as it is based upon the existence of mere constructive fraud, is erroneous. Had constructive fraud been pleaded, the judgment, if based upon that ground, would be incorrect, in so far as it requires Mary Kent to deliver to the sheriff the 3,400 head of sheep, or that she account to him for the proceeds of the sheep, or of so much thereof as may be necessary to satisfy the demands of the plaintiffs, for the reason

that the evidence falls short of proving that there remained in her possession or under her control sheep to the number stated. The evidence shows only that she still had some of these sheep, and the well-recognized rule is that the subject of a sale constructively fraudulent because of a want of a change of possession may be seized by a creditor,—the property itself may be taken,—but that the purchaser at such sale is not liable for its proceeds, nor for the property taken in exchange for the property sold, provided the proceeds arise or the exchange be effected before the creditor obtains a lien. As to the proceeds or the property taken in exchange, the seller did not have possession or control, nor was either obtained or purchased from him. *Weeks v. Prescott*, 53 Vt. 57; *Capron v. Porter*, 43 Conn. 383. Hence the declaration in section 226 of the fifth division of the Compiled Statutes of 1887 that every sale made by a vendor of chattels in his possession or under his control, unless it be accompanied by the immediate delivery, and followed by an actual and continued change of possession, of the thing sold, shall be conclusive evidence of fraud, as against the creditors of the vendor, cannot be successfully invoked as against the purchaser guilty of constructive fraud only, so as to reach any property other than the identical chattels transferred, unless the chattels have been converted or exchanged after the creditors have secured a lien. As we have seen, under the pleadings no issue was raised of fraud in law, as contradistinguished from fraud in fact; nor did the trial proceed, so far as the defendants were concerned, upon the theory that such question was before the court. The suggestion of the plaintiffs that the judgment must be sustained upon the ground that the evidence tended to show constructive fraud, even though there may have been errors committed in the exclusion of evidence offered by the defendants with respect of the existence of actual fraud, cannot be adopted. Having eliminated the matter of constructive fraud as a substantive cause of action, we proceed to ascertain whether the court erred to the prejudice of the defendants; restricting the inquiry to the rulings of the court made in the investigation of the question of the actual fraud alleged in the complaint.

2. The defendants offered in evidence the judgment roll in the case of *Sweetman against Ramsey*, to which reference has been made, for the purpose of showing that the legal status of the sheep was then undetermined. So far as the record discloses, *Sweetman against Ramsey* was an action in no wise involving or concerning any party to the present suit. The record in that action was therefore not relevant as evidence for or against either the plaintiffs or the defendants in this. The proceedings in the action of *Sweetman against Ramsey* were, for

aught that is shown, *res inter alios acta*. Of course, competent evidence tending to show that Sweetman, after the sale to Mary Kent, had possession of the sheep, would be relevant.

8. The defendants complain of the admission in evidence of the report of the testimony given by the defendant Thomas Kent before the referee on proceedings supplemental to execution. This evidence, under the circumstances of the case, was both relevant and competent upon at least two grounds: (1) As declarations of a party to the action; and (2) as statements touching ownership made by the seller of chattels while remaining in possession after the sale,—there being testimony having a tendency to show that he was still in possession at the time the declarations were made.

4. The defendants, after showing the loss of the original, offered in evidence a copy of the bill of sale made by Thomas Kent to Mary Kent; the copy being a transcript in the office of the county recorder. It was error to exclude this item of evidence, for it had some relevancy. It must be remembered that the sale was attacked for actual fraud. While the bill of sale might not have been competent as proof of the truth of the recitals therein (upon which question we express no opinion), still the paper was part of the *res gestæ*, and should have been admitted for the purpose of shedding light upon the issue of whether the transfer was made with the intent that the sheep should be held in trust for the seller. Ordinarily the omission to execute some written evidence of the sale of several thousand sheep might properly be regarded as an unusual, and perhaps suspicious, circumstance. But neither the bill of sale, nor the so-called list of separate property of Mrs. Kent, was admissible by virtue of any provision contained in section 1432 of the fifth division of the Compiled Statutes of 1887. Section 1439 of the same division (being part of an act approved March 3, 1887) by implication repealed that part of section 1432, *supra*, requiring a list to be recorded in the office of the register of deeds. *Kelley v. Jefferis*, 13 Mont. 170, 32 Pac. 753; *Lambrecht v. Patten*, 15 Mont. 260, 38 Pac. 1063.

5. While testifying in his own behalf, the defendant Thomas Kent was asked the following question: "Did you transfer these sheep with the intention of defrauding any creditor?" The answer to this question was: "I did not." On motion of the plaintiffs, the question was stricken out, as a conclusion of the witness. A like question was put to Mary Kent, and objected to as incompetent because a conclusion, which objection the court sustained. These questions were proper; for whenever, in an action like the case at bar, the actual or personal intent becomes a material inquiry, the seller or the purchaser may testify that he did or did not have a fraudulent intent. The cases announ-

cing this doctrine are many. Indeed, the admissibility of such evidence is almost universally conceded.

6. The defendant Thomas Kent testified that at the time the sale was made he was not indebted to the plaintiffs. The defendants insist that the court excluded this evidence, but it is impossible to determine from the transcript whether or not the contention of the defendants is well founded. If the court struck out the evidence or disregarded it, as irrelevant, error was committed; for the defendants had the right to show that at the time of the sale Thomas Kent was neither indebted, nor anticipated becoming indebted or otherwise liable, to the plaintiffs. We observe, in passing, that it does not appear that there was a debt or liability on the 3d day of January, 1893, when the sale was made, or at any time before the 17th day of February, 1894, when the judgment was rendered. The rejection of Kent's statement that he did not owe the amount of the judgment was proper, for the reason that, in the absence of evidence tending to show fraud, accident, mistake, or satisfaction, the judgment was conclusive evidence of his liability.

7. To a witness for the defendants was put the following question upon direct examination: "What is the general reputation throughout that neighborhood as to her [Mary Kent] being the owner of sheep and property running on the Crow Indian reservation and other places?" The question was ruled out as incompetent. In this there was no error. The question was too general. It was not confined to the sheep in controversy. Furthermore, the question seems to have been propounded for the purpose of eliciting hearsay testimony, which, if received, would have been immaterial. We are unable to perceive in what way evidence showing that Mary Kent was generally reputed to be the owner of sheep purchased by her could have served to show good faith towards creditors. The inquiry seems to have been into a collateral matter. In *Griswold v. Boley*, 1 Mont. 545, which is cited by the defendants in support of their contention that evidence of such general reputation is competent and relevant, it appeared that the plaintiff had allowed her husband to control the property, to call it his own, and to exercise acts of ownership over it, with her consent, whereby the defendant supposed, and had a right to suppose, that the husband was the owner. The court said that, for the purpose of rebutting the allegation and proof as to fraud and conspiracy by the plaintiff and her husband, it was competent for her to show that it was generally known in the neighborhood that the property belonged to her, and was competent, also, for the reason that it tended to show that the defendant had not been fraudulently deceived as to the ownership of the property. In so far as the views expressed on this subject in the *Griswold Case* may be deemed pertinent to

the facts in this action, we are of the opinion that the rule of evidence there laid down is incorrect, and must be disapproved.

8. The assertion is repeatedly made in the brief of the defendants that the questions of fact should have been submitted to the jury, and determined by them, and not by the court. The remedy sought in the case at bar is purely equitable, and therefore the court, sitting as a chancellor, must determine the issues for itself, and may direct a verdict, if there be a jury, even though the evidence be conflicting. *Sanford v. Gates*, 21 Mont. 277, 53 Pac. 749; *Power v. Lenoir*, 22 Mont. 160, 56 Pac. 106. Technically correct practice is not followed when, in such a case as the one at bar, the court directs a verdict. Strictly proper practice requires the court to take the matter entirely from the jury and decide the cause itself. The same result is, however, substantially accomplished by the course pursued in this case. Section 23 of article 3 of the constitution of Montana ordains that the right of trial by jury shall be secured to all and remain inviolate, but this means nothing more than that the right of trial by jury as it existed when the constitution was adopted shall remain inviolate and be secured to all. The section does not enlarge the right to jury trial, nor does it extend that right to suits which were within the exclusive jurisdiction of chancery at the time the constitution became the organic law of Montana. Such an action as the one at bar was then, and ever has been, cognizable upon the equity side, and upon the equity side only, of the court.

9. Subdivision 4 of section 42 of the first division of the Compiled Statutes of 1887 provides that "an action for relief on the ground of fraud or mistake (the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud or mistake) shall be commenced within two years." The present action is one based upon an alleged fraud against creditors. Its purpose is to annul a sale because of such fraud. The right of action did not accrue (that is to say, the cause of action did not arise) until, at the least, the plaintiffs had recovered judgment against Thomas Kent; for before that time they were, in the absence of a lien acquired by attachment, mere general creditors. *Brown v. Campbell*, 100 Cal. 635, 35 Pac. 433; *Weaver v. Haviland*, 142 N. Y. 534, 37 N. E. 641. The judgment against Thomas Kent was rendered on the 17th day of February, 1894, and this action was commenced during the following year. It is plain, therefore, that the remedy is not barred by statute.

We have now considered all the errors assigned which are worthy of attention, with the exception of the specification that the evidence is insufficient to justify the decision of the court. As the judgment must be reversed, and the cause remanded for a new

trial, it is deemed proper to reserve any expression of opinion upon the specification last referred to.

The transcript is so disfigured with erasures, corrections, and interlineations, and is so deficient in punctuation marks and neatness, as to be in parts scarcely legible, and it is occasionally unintelligible. Such a transcript should not have been filed. The brief of the defendants, although it specifies the errors relied upon, is not to be approved in respect of the manner of argument. Instead of setting out separately and distinctly the arguments applicable to the different points, the brief commingles all propositions relied upon for a reversal into one rambling discussion, out of which it has been impossible to extract the reasons urged in support of any one proposition without much labor, rendered necessary by the slovenly arrangement mentioned. Attention is called to these matters, so that more care may be observed and a greater degree of diligence exercised by those whose duty it shall be to prepare transcripts and briefs. The order denying a new trial and the judgment are reversed, and the cause is remanded. Reversed and remanded.

BRANTLY, C. J., and WORD, J., concur.

HURLEY v. O'NEILL.

(Supreme Court of Montana. July 3, 1900.)

NOTICE OF APPEAL—SCOPE OF UNDERTAKING—ABANDONMENT—DISMISSAL.

Code Civ. Proc. § 1724, provides that, before an appeal can be taken from a judgment or order denying a new trial, the appellant shall serve notice thereof, designating the specific part from which he desires to appeal, and shall also file an undertaking therefor. *Held*, that where an appellant served notice that he desired to appeal from a judgment and an order denying a new trial, but the undertaking referred to an appeal from the judgment only, the appeal will be treated as abandoned, as far as it relates to the order denying a new trial, and to that extent will be dismissed, irrespective of the intention of appellant.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by Mary Ann Hurley against Patrick O'Neill. From a judgment in favor of defendant, and an order overruling a motion for a new trial, plaintiff appeals. On motion to dismiss the appeal as to the order denying a new trial. Dismissed.

Sinclair & Dygert, for appellant. John N. Kirk, for respondent.

PER CURIAM. Motion to dismiss an appeal from an order denying plaintiff's motion for a new trial. It is based on the ground that this court has no jurisdiction of the appeal, for the reason that appellant has filed no undertaking to make the appeal effectual under section 1724 of the Code of Civil Procedure. It appears from the record that the appellant gave notice of appeal

both from the judgment and from the order denying her a new trial, but the undertaking filed recites the appeal from the judgment only, and contains no reference to the appeal from the order. Under these circumstances, the only inference permissible is that the appeal from the order was abandoned. Whether this was done intentionally or not, the result is the same; for, though we have held that, upon an appeal from a judgment and an order denying a new trial, only one undertaking need be filed (*Watkins v. Morris*, 14 Mont. 354, 36 Pac. 452; *Ramsey v. Burns*, 24 Mont. —, 61 Pac. 129), we cannot agree that an undertaking is sufficient to effectuate the appeal from the order where the undertaking contains no reference to an appeal therefrom. The question here presented was decided by this court adversely to appellant in *Withers v. Kemper* during the present term.¹ See, also, *Berniaud v. Beecher*, 74 Cal. 617, 16 Pac. 510; *Schurtz v. Romer*, 81 Cal. 244, 22 Pac. 657; *Paving Co. v. Bolton*, 89 Cal. 154, 26 Pac. 650; *Duncan v. Times-Mirror Co.*, 109 Cal. 604, 42 Pac. 147. The motion must therefore be sustained. Dismissed.

In re PORTER'S ESTATE. (S. F. 1,644.)
(Supreme Court of California. June 30, 1900.)

CONSTITUTIONAL LAW—VESTED RIGHTS—ADMINISTRATORS—SALES OF REALTY.

Since it is within the power of the legislature to provide for the care of property of an intestate, and the title to such property, though vesting at his death, vests subject to existing statutory conditions, Code Civ. Proc. § 1536, authorizing an administrator to sell real property on order of the superior court when for the best interests of the estate, is not unconstitutional, as impairing a vested right, and confers jurisdiction to order a sale of real property of an intestate who died after the enactment of such statute, where such property is expensive to maintain, and depreciating in value.

Commissioners' decision. In bank. Appeal from superior court, Sonoma county.

Petition by T. G. Young, administrator of the estate of James Porter, deceased, for an order permitting a sale of real estate for the purpose of conserving the estate. From an order denying the petition, the administrator appeals. Reversed.

W. F. Cowan, D. E. McKinley, and C. B. Pond, for appellant. W. F. Fitzgerald, for respondent.

HAYNES, C. James Porter died intestate in the county of Sonoma in November, 1897, leaving an estate consisting of real and personal property; the latter being more than sufficient to pay all debts and liabilities of the estate, and the costs and expenses of administration. He left, however, no known heirs, relatives, or other person who would be entitled to inherit his estate, and the

court so found. The court also found as follows: "That said real estate is expensive to properly maintain and manage; that a portion of the same is planted to vines, which need the constant care and attention of some person qualified to attend to the same; that the remainder of said real estate requires to be cultivated, and the fruit trees growing thereon attended to; that the fences and buildings on said premises will become dilapidated unless properly attended to; that said real estate, by reason of its not being occupied by some person interested therein, will deteriorate and depreciate in value; that said real estate can be sold at the present time for a better price than if sold later; that it will be difficult to lease said premises for a fair compensation, by reason of there being no dwelling house thereon; that the expense of maintaining and caring for said premises by said administrator, if he is compelled to employ labor and help therefor, will largely exceed the revenues derived therefrom, and, coupled with the taxes to be annually collected on said premises, will be a source of expense which will be a disadvantage to the parties entitled to said estate." As a conclusion of law, the court found that it had no jurisdiction to make the order prayed for, and denied the petition, and from that order this appeal is taken.

The court placed its refusal to grant the order upon the ground that the following provision found in section 1536, Code Civ. Proc., is unconstitutional: " * * * or when it appears to the satisfaction of the court that it is for the advantage, benefit and best interests of the estate, and those interested therein, that the real estate, or some part thereof, be sold, the executor or administrator may sell any real as well as personal property of the estate upon the order of the court. * * * " The portion of said section above quoted was inserted therein by an amendment approved March 23, 1893. Prior to said amendment, property of the estate was authorized to be sold for the payment of the family allowance, or debts due from the decedent, expenses of administration, or payment of legacies. It is said the court below relied principally upon the case of *Brenham v. Story*, 39 Cal. 179, to justify its conclusion that it had no jurisdiction to make the order prayed for. That case arose under a special act of the legislature passed in 1861 (St. 1861, p. 152), after the death of Charles White, authorizing his administrator to sell any portion of the real estate held, claimed, or owned by White at the time of his death, as in the judgment of the administrator would best promote the interests of those entitled to said estate; and said act was held invalid upon the ground that the title to the property had vested in the heirs before the passage of the act, subject only to the power of the court to order a sale for the purposes specified by the statute in force at the time of White's

¹No written opinion filed.

death. The distinction, however, between that case and this, lies mainly in the fact that here the amendment of 1893 was in force before the death of Porter, and therefore the estate vested in the heir, if any he had, subject to the exercise of the power given to the court by the amended statute. This amended statute has heretofore been called to the attention of this court in but one case, so far as I am aware, namely, *In re Packer's Estate*, 125 Cal. 396, 58 Pac. 59. In that case *Brenham v. Story*, supra, was followed, because Packer died, while a resident of this state, before the said amendment of 1893 was enacted; and for that reason this court declined to consider whether said amendment was constitutional when applied to the property of persons dying after its passage, as that question did not arise. Here the question is properly before us, and must be decided.

It is a fundamental proposition that governments are formed, among other things, for the protection, not only of the rights of property, but of property itself; and their power to provide for the custody, care, and the descent and distribution of the property of intestates, real and personal, as well as the disposition of it by will, is unquestioned. In *re Wilmerding's Estate*, 117 Cal. 281, 284, 49 Pac. 181. It is true that, under our statute, upon the death of the ancestor the property of the intestate at once vests in the heir; but it vests subject to conditions imposed by the statute, such as the qualified possession and control of the administrator, under the direction of the court, for its care, and its appropriation to the payment of the debts of the decedent, expenses of administration, and other liabilities enumerated in the statute; but, the right of the heir to inherit the estate being itself the creature of the statute, there can be no question as to its power to impose these liabilities upon the estate, subject to which the property vests in the heir. That the administrator, under the control and direction of the court, is charged with the duty of preserving the property until final distribution, cannot be doubted. He must, if there are funds, preserve the title to the real estate by the payment of taxes, and its value by making necessary repairs, and is entitled to receive the rents and profits until the estate is settled, and must "preserve it from damage, waste, and injury." So, the administrator, under the order of the court, at any time after receiving letters may sell "perishable and other personal property likely to depreciate in value, or which will incur loss or expense by being kept" (Code Civ. Proc. § 1522), whether there are debts or other liabilities to be paid or not; and this direction of the statute has no other basis than that of the preservation of the best interests of those in whom the statute vests the right of property, when it is not required to meet some charge imposed by law, and cannot be immediately

delivered to the heir. So perishable property may be attached under a disputed contract liability, and be sold by order of the court before the defendant's liability is established. These instances in which the state, by its statutes, disposes of private property, are familiar and unchallenged, and are based upon the duty and power of the government to prevent injury by converting one kind of property into another for the benefit of the owner. The statute before us involves no different principle, nor the exercise of any different power. We see no difference in principle between the sale of "personal property likely to depreciate in value, or which will incur loss or expense by being kept," and the sale of real estate under the facts found by the court in this case, nor any difference in the exercise of legislative power in the two cases. The statute under consideration divests no one of his property, but authorizes one's real estate to be transmuted into personal property under such circumstances that the consent of the owner, if capable of giving it, would be presumed. The administration is in a condition to be closed if there were known heirs to whom it could be distributed. If none should appear, it will escheat to the state under the provisions of the Civil Code (sections 1404-1406). But in *People v. Roach*, 76 Cal. 294, 18 Pac. 407, it was held that a proceeding on behalf of the state for the purpose of obtaining a decree that the estate had escheated to the state is premature, if commenced within five years after the death of the intestate. This estate must therefore remain in the hands of the administrator until such proceeding can be taken, unless within that time an heir capable of inheriting it should appear. The order denying the petition should be reversed, with directions to the court below to amend its conclusions of law to conform to this opinion, and grant an order of sale as prayed for.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying the petition is reversed, with directions to the court below to amend its conclusions of law to conform to this opinion, and grant an order of sale as prayed for.

129 Cal. 90

HOUSER & HAINES MFG. CO. v. HARGROVE. (Sac. 738.)

(Supreme Court of California. June 30, 1900.)
APPEAL—NOTICE—TIME OF SERVICE—SALES—
TITLE—TAX SALE.

1. A notice of appeal from a judgment and order denying a motion for new trial, served nearly two years after entry of the judgment, though less than sixty days after the order on said motion, will give the supreme court jurisdiction of the appeal from the order denying the motion for new trial, but not of that from the judgment.

2. Nearly two months after an offer to purchase a harvester, the acceptance of the offer, and the delivery of the machine the purchaser signed a receipt therefor, reciting that the machine should remain the property of the vendor until payment of the purchase money, and that on default the vendors should have the right to take possession of the machine without legal process. *Held*, that the title to the machine vested in the purchaser upon delivery, and that the subsequent attempt to convert the transaction into a conditional sale was of no effect as against a subsequent purchaser from the vendee without notice.

3. Under Pol. Code, § 3628, requiring all property in a county subject to taxation to be assessed to the persons by whom it is owned, or in whose possession or control it is, a purchaser at tax sale of a harvesting machine, which has been assessed to a person in whose possession it has remained for several years, and who is the apparent owner thereof, acquires a good title.

In bank. Appeal from superior court, Madera county.

Judgment in department (59 Pac. 947) reversed, and order of lower court affirmed.

Louttit & Middlecoff, for appellant. R. L. Hargrove, for respondent.

VAN DYKE, J. The appeal in this case is taken from the judgment, as well as from the order denying plaintiff's motion for a new trial. The judgment was entered on the 12th day of August, 1897, and the notice of appeal served August 2, 1899, nearly two years after the rendition of the judgment. This court, therefore, cannot entertain the appeal from the judgment. The order denying the plaintiff's motion for a new trial was entered June 6, 1899, and the notice of appeal therefrom, as already shown, was in time. The motion for a new trial, under our Code and practice, is a proceeding independent of the judgment. The motion may be granted, even after a judgment has been affirmed on appeal. *Brison v. Brison*, 90 Cal. 327, 27 Pac. 186; *Water Co. v. Gage*, 108 Cal. 243, 41 Pac. 299. The action is to recover the possession of one Haines-Houser improved combined harvester, of the alleged value of \$1,000. The court below found that the plaintiff was not at the time of the commencement of the action the owner or entitled to the possession of the harvester, and further found that the defendant was at the time the action was commenced, and still is, the owner and entitled to the possession of the harvester, and that the value thereof was \$1,000. Judgment was entered accordingly. The plaintiff relies for recovery upon the following receipt or agreement: "Stockton, Cal., August 4, 1893. Received of Houser, Haines & Knight one Haines-Houser improved combined harvester, No. —, for which, delivered at Stockton, Cal., upon the terms stated below, the undersigned agrees to pay to Houser, Haines & Knight the sum of fourteen hundred dollars in U. S. gold coin, as follows, to wit: \$500 by his note September 1, 1893; \$500 by his note September 1, 1894, to bear interest at the rate of ten per cent. per annum from September, 1893,

until paid; and \$400 by his note September 1, 1895. And it is agreed that said Houser, Haines & Knight do not part with the title to said harvester until all said deferred payments or notes are fully paid; that time is of the essence of the agreement; that, should the undersigned make default in any of said payments, then said Houser, Haines & Knight shall, at their option, and without notice, terminate this agreement, and, with or without legal process, take and retain said harvester, wherever it may be situated, and all moneys paid by the undersigned prior to such default shall be compensation for the privilege of using said harvester prior to such default; and should Houser, Haines & Knight, by reason of such default, incur any expense, the undersigned agrees to reimburse them the sum total of all such expenses, including reasonable counsel fees. I. M. Rowe." Indorsed: "The Houser & Haines Mfg. Co., by G. W. Haines, Vice President." In pursuance of said receipt or agreement, said Rowe at the same time as the date thereof executed the notes therein mentioned, and subsequently paid the sum of \$750 on the same. The court, however, finds, and the evidence supports the finding, "that on the 10th day of June, 1893, Houser, Haines & Knight delivered to I. M. Rowe the harvester described in plaintiff's complaint upon the following order, and the terms and conditions mentioned therein: '\$1,400.00. Messrs. Houser, Haines & Knight: Please ship to the undersigned one harvester, twenty-foot cut, including the usual extras (see printed list of extras furnished). Consign to I. M. Rowe, Athlone. For which the undersigned agrees to pay \$500 September 1, 1893; \$500 September 1, 1894; and \$400 September 1, 1895; all amounts due after September 1, 1893, to bear interest at ten per cent. per annum until paid. Machine to be delivered free on board cars or boat in Stockton. These machines are all warranted to be well made, of good material, and durable, with proper care. If, upon one week's trial, the machine should not work well, the purchaser shall give immediate notice to said Houser, Haines & Knight, or their agent, and allow time to send a person to put it in order. If it cannot then be made to work to the entire satisfaction of the purchaser, he shall return it at once to the agent of whom he received it, and his payment, if any has been made, will be refunded. Continuous use of the machine, or use at intervals through harvest season, shall be deemed an acceptance of the machine by the undersigned. Dated the 10th day of June, 1893. Postoffice, Minturn; county, Fresno; state, Cal. I. M. Rowe.' That said harvester was delivered to said I. M. Rowe at Minturn, in the county of Madera; that said I. M. Rowe then and there accepted said harvester, and at all times since said 10th day of June, 1893, up to June 2, 1896, said I. M. Rowe retained and had possession, charge, and control of said harvester in said county of Madera." The court also found

that said Rowe gave in the harvester in question to the assessor of Madera county for the year 1896, and that it was sold for non-payment of taxes thereon on June 2, 1896, and bid in by the defendant Hargrove, to whom a certificate of sale was issued by said assessor. The court also finds that on June 2, 1896, said Rowe executed a bill of sale of his right, title, and interest in said harvester to the defendant, and that thereupon the possession of said harvester was delivered to the defendant. It appears, therefore, that upon June 10, 1893, said Rowe offered to purchase the harvester in question from Houser, Haines & Knight on the terms stated in his written offer, the machine to be delivered as therein stated. Houser, Haines & Knight accepted that offer by delivering the machine according to said offer. The sale, therefore, became complete on the delivery of the machine to Rowe. The character of the transaction was fixed at that date. After the purchase and receipt of the machine, as stated, Rowe used it for his harvesting that season for about two months before the receipt relied upon by the plaintiff was given. The instrument of August 4th says: "Received one Haines-Houser improved combined harvester, No. —, for which, delivered at Stockton, California, upon the terms stated below, he agrees to pay," etc. The offer to purchase and order for the machine of June 10th says: "Please ship one harvester, twenty-foot cut, including the usual extras."

It would appear from the language used in the two instruments that they referred to different machines, but the parties at the trial, and also on appeal, seemed to consider them as referring to one and the same machine. The instrument of August 4th is drawn as though the machine therein referred to was thereafter to be delivered. It says, "for which, delivered at Stockton," and also recites that Houser, Haines & Knight do not part with the title to the said harvester until all said deferred payments or notes are paid, etc.; whereas, the fact is, as already shown, that the machine in question had been shipped and delivered to Rowe under and in pursuance of his offer to purchase the same, and that he had been in possession as such purchaser and used such machine for about two months prior to such receipt of August 4th. Both the title and possession of the machine had therefore become vested in Rowe long before this attempt to convert an absolute sale into a conditional sale. From the time the property was delivered to Rowe under his offer of purchase of June 10, 1893, up to the date of the sales to the defendant, three years thereafter, to wit, June 8, 1896, it had remained in the possession and under the control of Rowe as the apparent owner thereof. Conditional sales, intended, as this evidently was, as security in lieu of a mortgage, are not favored. As said in *Society v. Purvis*, 112 Cal. 241, 44 Pac. 561: "By reason of

the opportunities for fraud presented by this character of contract, courts are inclined to scrutinize them closely." See, also, *Palmer v. Howard*, 72 Cal. 293, 13 Pac. 858. In *Wright v. Vaughn*, 45 Vt. 369, it was said: "If one sell and deliver property to another absolutely, and the party subsequently attempt to make it a conditional sale, a change of possession is necessary as against creditors and vendees." In *Caraway v. Wallace*, 2 Ala. 542, it was said: "A contract absolute in its inception, and consummated by delivery, will not be converted into a conditional sale by an ambiguous phrase indorsed upon it afterwards, even if such words would have been its effect if a part of the original contract."

We also think the defendant's title under the tax sale was good. The harvester was properly assessed to Rowe, under section 3628 of the Political Code. It was in his possession and control when the tax accrued, and he had been invested with all the indicia of ownership by the act of the plaintiff and its assignors. The addition of other names to that of Rowe on the assessment roll did not invalidate the assessment to him, and the sale (the property being personal) was properly made to the highest bidder, irrespective of the amount of the delinquent tax.

The court below correctly held, upon the facts found, that the sale to Rowe was absolute, and not conditional; that plaintiff is not the owner or entitled to possession of the property in question; but that defendant is such owner, and entitled to possession. Order affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; TEMPLE, J.

129 Cal. 58

SMITH et al. v. STEARNS RANCHO CO.
et al. (L. A. 672.)

(Supreme Court of California. June 25, 1900.)

INJUNCTION—TIME OF GRANTING—VERIFIED COMPLAINT—TENANTS IN COMMON—PARTIES—IRRIGATION CANAL—INTERFERENCE WITH WATERS—ALLEGATION OF DAMAGE—OWNERSHIP—SUFFICIENCY.

1. Under Code Civ. Proc. § 527, authorizing injunction at the time of issuing summons on the complaint, and any time afterwards before judgment, on affidavits, it was within the jurisdiction of the court to grant injunctions on an amended complaint in the form of an affidavit after the summons thereon was issued.

2. Under Code Civ. Proc. § 381, authorizing tenants in common in lands to unite in an action against one claiming adversely, tenants in common of a ditch may join as plaintiffs in an action to restrain interference therewith.

3. An allegation in a complaint to enjoin interference with waters flowing through an irrigation canal that such waters are necessary to irrigate and preserve the life of fruit trees, and that such interference would result in great and irreparable injury, is a sufficient allegation of irreparable damage.

4. Where a complaint for injunction alleged part ownership of an irrigation canal, and that deprivation of the use thereof was threatened by interference with the waters therein, for

nonpayment of assessments charged to be improper, such complaint was sufficient, without allegation of the quantity of water owned.

Commissioners' decision. Department 2. Appeal from superior court, Riverside county.

Injunction by J. W. Smith and others against the Stearns Rancho Company and others. From an order denying defendants' motion to dissolve an injunction, they appeal. Affirmed.

E. W. McGraw, Shirley C. Ward, and Frank D. Lewis, for appellants. Purlington & Adair and John G. North, for respondents.

SMITH, C. Appeal from an order denying defendants' motion to dissolve an injunction pendente lite, restraining defendants "from stopping the flow in the North Riverside and Jurupa Canal of the water of the hereinafter named persons and plaintiffs, and from interfering in any way with the distribution and delivery of the said water to the said persons, and from in any way preventing the said persons from turning into the said canal and conveying there through and recovering therefrom their said water; the same being the number of inches of said water, measured under a four-inch pressure, hereinafter set opposite the names of said persons and plaintiffs, respectively." There is attached to the order a list of the plaintiffs, 55 in number, with the amount of water pertaining to each opposite their names, respectively; the whole aggregating 242 inches. The case comes up on a bill of exceptions, in which it is stated that the papers used on the hearing of the motion consisted of the amended complaint, order of injunction, and motion to dissolve, which are set out in the bill. The facts on which the injunction was granted, as they appear in the second count of the amended complaint, were substantially as follows: Each of the plaintiffs is the owner of certain water flowing in the county of San Bernardino, and of a certain undivided share of the canal known as the "North Riverside and Jurupa Canal," and of the carrying capacity therein, and of the right to carry water there through. The plaintiffs own lands in San Bernardino county, planted to fruit trees, etc., and irrigated with the water belonging to them as aforesaid, which is conducted to the lands by means of the canal, and have no other means of irrigating the same; and without the use of these means their trees will die, etc. The defendants claim the right to control and operate the canal, and to collect from plaintiffs certain assessments solely for the necessary expenses of maintaining and repairing the canal, and claim that certain assessments are due from the plaintiffs, and threaten to prevent the water of the plaintiffs from flowing in said canal for nonpayment of the assessments, which, it is alleged, would result in great and irreparable injury to them. The

assessments made by the defendant include numerous items, specified in the complaint, and alleged not to be proper charges for maintaining or repairing the canal, and it is alleged that there are others of the same character, which the plaintiffs are unable to specify; and plaintiffs aver that they are ready to pay such portion of the assessments as may be adjudged to be a lawful charge, etc.

It is objected by the appellants' counsel that the injunction was granted after issuing of summons upon the amended complaint alone, and that the court was therefore without jurisdiction to grant it. The objection rests upon the language of section 527, Code Civ. Proc., which is that "the injunction may be granted at the time of issuing the summons upon the complaint, and at any time afterwards before judgment upon affidavits." Whether the injunction was granted before or after the issuing of summons does not appear on the record; but, waiving this, it is a sufficient answer to the objection to say that the amended complaint was itself an affidavit, and there is no reason that it should not have been used as such. *Falkinburg v. Lucy*, 35 Cal. 52; *Delger v. Johnson*, 44 Cal. 182; *Hillier v. Collins*, 63 Cal. 237; *High, Inj.* §§ 1574, 1577, 1587, 1604; *Howard v. Eddy* (Kan. Sup.) 43 Pac. 1133, 1134.

It is further objected that the complaint does not state the quantity of water owned by the plaintiffs; that it does not appear that the defendants' alleged claims are not rightful; that the relative rights of the parties in the subject-matter cannot be determined from the complaint; that there are no facts stated which confine the right of the defendants to levy assessments to the cost of operating the canal, and it does not appear that plaintiffs would suffer irreparable damages; that it is conceded that part of the assessments are correct; and that there is a misjoinder of parties plaintiff. But these objections are all manifestly untenable. The plaintiffs were tenants in common of the ditch, and as such were entitled to sue together. Code Civ. Proc. § 381. It is sufficiently alleged that the damages from the threatened injury would be irreparable. The other objections do not touch the grounds on which the injunction was granted, which were simply that the plaintiffs were part owners of the canal, and that defendant threatened to deprive them of the use of it, etc. It was therefore unnecessary to specify the quantity of water owned by the plaintiffs. We therefore advise that the order appealed from be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

129 Cal. 63

L. W. BLINN LUMBER CO. v. WALKER
et al. (L. A. 707.)

(Supreme Court of California. June 25, 1900.)

MECHANICS' LIENS—CONTRACT—RECORDING—
FILING VERBATIM COPY.

The recording of a verbatim copy of a building contract, with sun-print copies of the plans and drawings, entitled, "Memorandum of a Contract," and consisting of three parts, namely, the covenants of the parties, the specifications, and the drawings or plans, the first of which shows the signatures of the parties, but not the last two, as in the original, and by which, without the aid of oral evidence, the building and the ground on which it is situated, can be identified and the general character of the work ascertained, and which contains everything else required by the statute, is a sufficient compliance with Code Civ. Proc. § 1183, requiring that contracts for the erection of a building, or a "memorandum thereof," be filed in the office of the county recorder, and that in default of such filing the labor done or material furnished shall be deemed to have been done and furnished at the instance of the owner.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by the L. W. Blinn Lumber Company against James W. Walker and others for the foreclosure of a mechanic's lien. From a judgment for defendant Walker, plaintiff appeals. Affirmed.

Graves, O'Melveny & Shankland, for appellant. Anderson & Anderson and R. Holtby Myers, for respondents.

GRAY, C. This is a mechanic's lien foreclosure case. The defendant Walker, the owner of the building, had judgment on the theory that his contract with the contractors, his co-defendants, was valid under the statute, and that a memorandum thereof had been duly recorded, and that nothing remained due thereunder to the contractors. The plaintiff appeals from the judgment, and from an order denying it a new trial.

The defendant Walker, as the owner, entered into a builder's contract with the defendants V. Wankowski & Co., builders. Said contract was dated October 26, 1895, and was executed in three parts. Part first contained the agreements and covenants of the parties, and was duly signed by them. Part second consisted of specifications, referred to in the first part as signed by the parties, and which were in fact so signed. Part third consisted of the plans and drawings also referred to in the first part, and bore on its face an inscription as follows: "These plans, from one to six, are the plans referred to in our contract dated Oct. 26, A. D. 1895." This inscription was duly signed by the parties. After the signing of the contract as stated, a verbatim copy of the first part, including the signatures, with a copy of the second part, exclusive of the signatures, and a sun-print copy bearing a photographic representation of the third part, except the signatures, were attached

together; and this copy of the several parts of the contract was marked, "Memorandum of a Contract," and on the 29th day of October, 1895, filed with the county recorder. The originals were retained in the office of the architect. The foregoing facts appeared at the trial. The document marked, "Memorandum of a Contract," was introduced in evidence by the plaintiff, marked, "Exhibit A," and the defendant Walker put the said originals in evidence, also. The property on which the building was to be erected was described in the first part of the contract as "on the corner of Hope and Adams street, in the city of Los Angeles, state of California; said building to be erected on the north side of Adams street." The drawings and plans, which were a part of the contract, represented the house as facing the longer way on Adams street, with a veranda the entire length of the Adams street front. One end of the house is shown to front on Hope street, and in the drawing of the Hope street front, standing in Hope street, facing the house, the veranda appears to the left of the drawing, which establishes that the house, being on the north side of Adams street, must be on the northwest corner of Hope and Adams streets. The drawings also show just where the house is located with reference to the streets, property lines, etc. It was stipulated in open court by counsel for both parties that if the court determines from the evidence that plaintiff's Exhibit A is a valid contract, or memorandum thereof, or a compliance with the statute with reference to either filing a contract or a memorandum thereof, judgment shall be entered for defendant; and, on the contrary, if the court determines from such examination and from the evidence that said plaintiff's Exhibit A is not a valid contract, or memorandum of a contract, and is not in compliance with the law, then judgment shall be entered for the plaintiff.

Section 1183, Code Civ. Proc., provides that "the said contract, or a memorandum thereof, setting forth the names of all the parties to the contract, a description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated." We think the provisions above quoted were substantially complied with in the filing of the document above referred to, entitled, "Memorandum of a Contract." Nor is there anything in any previous decision of this court in conflict with this position. In *Lumber Co. v. O'Neil*, 120 Cal. 455, 52 Pac. 728, the question of whether a copy of the contract might be treated as a memorandum, under section

1183, Code Civ. Proc., was not involved, and was not decided. The document shown in the case at bar to have been filed in the recorder's office was not treated either as an original or as a copy, but was filed as a memorandum, and was so entitled. We can hardly conceive of a more complete memorandum of a contract than is to be found in a verbatim copy of it. The description contained in it was such that by the instrument itself, and without the aid of oral evidence, the building, and property on which it was situated and necessary for the convenient use of said building, could have been located on the ground. It also contained an ample statement of the general character of the work to be done, as well as everything else required by the statute. The statute does not require the memorandum to be signed. *Joost v. Sullivan*, 111 Cal. 286, 43 Pac. 806. Nor was it necessary that the signatures to the plans, specifications, and drawings should have been copied into the memorandum, to make it sufficient. That the drawings and specifications had been signed by the parties appeared by a recital in the copy of the articles of agreement which constituted a part of the memorandum filed.

The objection that the enlarged detailed drawings, prepared during the course of constructing the building for the instruction of the workmen, were not attached to or made part of the original contract, is without merit. Complete drawings in detail were made part of the original contract, and it is doubtless to these drawings that the references are made in the specifications. We advise that the judgment and order be affirmed.

We concur: HAYNES, C.; COOPER, C.

McFARLAND, J. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

TEMPLE, J. (concurring). The document filed in the recorder's office was entitled, "Memorandum of a Contract." There was nothing, except the style of the writing, to indicate that it was a copy of anything. The first part reads like a contract, but its language must be deemed that of a memorandum or statement of the substance of a contract. It states that the contractors agreed to build in conformity to drawings "signed by the parties and hereunto annexed." "Hereunto" refers, of course, to the memorandum. It cannot possibly be construed to refer to the original contract, of which this document is a memorandum. To hold that it does so refer would be to say that the document is not a memorandum of the contract, but a copy thereof. The drawings and specifications referred to are not signed by the parties. Is this false reference fatal? The case is not directly within *Donnelly v. Adams*, 115 Cal. 129, 46 Pac. 916, or the

case of *Lumber Co. v. Knapp*, 122 Cal. 79, 54 Pac. 533. These cases hold, substantially, that the contract is not wholly in writing, as required by the statute, unless the plans and specifications referred to are identified in writing as part of the contract. The memorandum here asserts nothing as to the mode in which this was done in the making of the contract. If a defect, it is one in the memorandum only; and, so considered, I think it is a case where the maxim "*Falsa demonstratio non nocet*" applies. The specifications are otherwise sufficiently identified. They are attached to the memorandum as a part thereof. The reference in the leading opinion to the "detail drawings," as probably meaning the drawings which were filed, is plainly an oversight. The statement shows that it was admitted at the trial that none of these detail drawings were filed. They must therefore refer to something other than the drawings which were filed. It was proven at the trial that these drawings were all made after the work was commenced, and did not add to or change the contracts, specifications, or drawings on file. They merely showed to the eye of the workman how that which was called for in the contract was to be done. Reference to them in the contract was not necessary, and putting them in worked no change. The real objection urged to this is that the whole contract was not in writing, and parol testimony was not admissible to show that the reference to detail drawings added nothing to the contract as written. As illustrated in *Lumber Co. v. Knapp*, 122 Cal. 79, 54 Pac. 533, a reference might be so material as to demonstrate that a most important part of the contract was not in writing, within the meaning of the mechanic's lien law. When we get the explanation made by the architect, we see plainly that the word "detail" may be properly held to refer to just such an amplification and enlargement as was done. The architect, without the detail drawings, could have stood over the workmen and given directions to the same end. I think the phrase sufficiently ambiguous to allow the oral evidence, and that, without the explanation so made, the original contract was sufficient for the purposes of the law. In other matters I agree with the leading opinion.

I concur: HENSHAW, J.

129 Cal. 44

FIELD v. BURR, Sheriff (KOSTER, Intervener. L. A. 650).

(Supreme Court of California. June 25, 1900.)
APPEAL—REVERSAL—CLERICAL ERROR IN FINDINGS.

The use of the word "plaintiff" inadvertently for the word "intervener," in the conclusions of law in the findings of the trial court, is not ground for the reversal of a judgment on appeal.

Commissioners' decision. Department 2.

Appeal from superior court, Los Angeles county.

Action by D. W. Field against John Burr, sheriff, defendant, and Caroline Koster, intervener, for the recovery of certain personal property. From a judgment for intervener, plaintiff appeals. **Affirmed.**

Mulford & Pollard, for appellant. W. J. Variel, for defendant. E. E. Powers, for respondent.

SMITH, C. Appeal from a judgment for intervener in a suit for the recovery of personal property levied upon by defendant, as sheriff, under attachment in favor of plaintiff against third party. The findings are unusually full and explicit, but in the conclusions of law the word "plaintiff" is inadvertently used for "intervener," which is the ground urged for reversal. *Dougherty v. Ward*, 89 Cal. 81, 26 Pac. 638. We recommend that the judgment be affirmed.

We concur: **GRAY, C.; HAYNES, C.**

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(128 Cal. 549)

SEATON v. FISKE et al. (S. F. 1,937.)

(Supreme Court of California. May 7, 1900.)

MORTGAGES—ACTION TO FORECLOSE—PREMATURE—EXTENSION—EVIDENCE.

1. Where a mortgagee, in consideration of part payment of the mortgage debt and of an agreement to pay interest monthly in advance on the balance, signs and acknowledges a written agreement with the grantee of the mortgage, after the maturity of the mortgage, granting an extension of time for the payment of the balance of the mortgage debt to two years after its maturity, and the interest is regularly paid according to the terms of such agreement, and the same retained by the mortgagee, together with the partial payment, an action to foreclose the mortgage before the expiration of the period of extension will be dismissed.

2. In action for the foreclosure of a mortgage, a written agreement, signed and acknowledged by the mortgagee, agreeing, for a valid consideration, to extend the time for the payment of the mortgage debt, is admissible in evidence against the mortgagee for the purpose of showing that the action is prematurely brought.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Mary E. Seaton against Henry G. Fiske and others for the foreclosure of a mortgage. From a judgment dismissing the action without prejudice, plaintiff appeals. **Affirmed.**

W. F. Fitzgerald and W. H. Anderson, for appellant. Henry M. & Jabish Clement, for respondents.

COOPER, C. Action to foreclose a mortgage. After trial, judgment was entered dismissing the action without prejudice, up-

on the ground that it was prematurely brought. This appeal is from the judgment, and from an order denying plaintiff's motion for a new trial.

On the 23d day of April, 1892, the defendant Henry G. Fiske executed and delivered to plaintiff his promissory note for \$8,500, due two years after date, and at the same time executed, acknowledged, and delivered to plaintiff a mortgage upon the lands described in the complaint, as security for the said note. Some time prior to June 25, 1896, after the note and mortgage had become due, the defendant Henry G. Fiske sold and conveyed the mortgaged premises to his co-defendant Mary E. Dewing, and she thereupon became, and ever since has been, the owner thereof. After the defendant Dewing became the owner of the said premises, and on the 25th day of June, 1896, the plaintiff, in consideration of the payment to her of the sum of \$3,500 by defendant Dewing, and in consideration that defendant Dewing would pay the interest monthly in advance upon the balance due upon the note after applying the payment of \$3,500, agreed in writing that the balance then due upon said note, to wit, \$3,400, should not become due or payable until June 23, 1898, and that the time for the payment of the said balance should be extended to said last-named date. This agreement was signed by plaintiff and properly acknowledged. After the agreement was so made, the defendant Dewing at all times paid the interest upon the balance due monthly in advance, as she had agreed to do. The plaintiff received and kept the \$3,500 and the interest monthly in advance from defendant Dewing, and, regardless of said written extension, on the 22d day of April, 1898, this action was commenced,—more than two months before the written extension had expired. We think, upon the facts, the court properly ordered judgment dismissing the action. To allow the plaintiff, in the face of her agreement, and after receiving the consideration therein named, without any excuse, to foreclose the mortgage upon the property of defendant Dewing, would shock the moral sense of any fair-minded person. It would be to allow her to come into a court of equity, and use the machinery of the court for the purpose of doing a great injustice, in violation of her contract. It is not necessary to enter into a discussion as to whether there was any privity of contract between plaintiff and defendant Fiske. The defendant Dewing, being the owner of the property, had the right to make, and did make, a contract with the plaintiff whereby the plaintiff received the \$3,500, and agreed to extend the time of the payment of the note and mortgage. Plaintiff, having kept the \$3,500 paid to her under the agreement, will be compelled to perform the agreement. She cannot keep the consideration paid to her, and refuse to perform the covenant by which she obtained the consideration. The agree-

ment so made by plaintiff with defendant Dewing was virtually a renewal of the note and mortgage for the new principal of \$3,400, dated June 25, 1896, and due June 23, 1898. Civ. Code, § 2022; *Society v. Hutchinson*, 68 Cal. 53, 8 Pac. 627. It follows from the views herein expressed that the court did not err in the admission of the written agreement signed by plaintiff. The judgment and order should be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(129 Cal. 68)

WESTERFIELD et al. v. NEW YORK LIFE INS. CO. (S. F. 1,573).¹

(Supreme Court of California. June 25, 1900.)

INSURANCE — MODIFICATION OF CONTRACT — AUTHORITY OF AGENTS — SETTLEMENT — RESCISSION — ACTION — RELIEF — APPEAL AND ERROR.

1. Plaintiffs were induced to surrender two policies of insurance on the life of their testator, and to accept a sum of money in settlement thereof, through the representations of defendant that one of said policies had become void by reason of the failure of the testator to pay the fifth annual premium thereon, and that the other never had been in force, having been delivered to the deceased for examination only, and that he never accepted it, nor paid any premium thereon. In an action for damages for the difference between the face of the second policy and the sum received from defendant, plaintiffs averred in their complaint that they had "repudiated said settlement upon the ground that it was procured by fraud on the part of defendant." Held that, since said averment alleged a rescission of the settlement, an action for damages for the fraud and deceit practiced by defendant in securing it could not be maintained.

2. Plaintiffs having tried their case as an action on the policy, claiming the compromise to be void, and given credit for the amount received as so much paid on account, when they should have affirmed the settlement, and sued for damages, are not entitled to the affirmance of the judgment in their favor, on the ground that the result would have been the same if the action had been for damages, where objections and exceptions were taken by defendant at every step in the progress of the case, and a motion for nonsuit was made on that ground, and the ruling denying same was assigned as error.

3. Plaintiffs' testator, being dissatisfied with a policy issued to him by defendant, was induced by defendant's general manager for the state to take out a new policy, on consideration that he would be allowed a surrender value on the first policy, on which he had paid four annual premiums, which would about pay the first premium on the second policy; and, when such policy was handed to deceased, he was told by defendant's soliciting agent that there was nothing further to do with reference to the delivery except applying the surrender value of the first policy, which was to be determined by the home office. When he received the policy, deceased said, "I am not to settle for this until I submit this to my friend." Held, that the evidence did not show a delivery of the policy.

4. The first policy issued to deceased provided

ed that no agent, other than the president, vice president, or actuary of the company, had power to modify its provisions, and that surplus would be apportioned on said policy "only at the expiration of each period of five years." Held, that defendant was not bound by the promise of its state manager to allow a surrender value on such policy at the end of four years, and apply the same in payment of the first premium on a new policy to be issued to deceased.

5. Since the deceased had notice of the agent's want of authority to make the agreement to apply the surrender value of the first policy in payment of the first premium on the second, and the agent did not claim such authority, and the defendant was not paid for carrying the risk, defendant was not estopped to deny the agent's authority to make such agreement.

6. The title "general manager" for specified territory is not sufficient to show such agent's authority to modify the contract contained in a policy of insurance, which expressly provides that such authority is vested only in the president, vice president, and actuary.

7. Modification of a contract of insurance not being within the usual powers of a state agent, the company was not bound by the agent's agreement to apply the surrender value of his first policy to the payment of the premium on his second policy, contrary to the terms of the policy, because of its failure to give notice of its disapproval of the agreement.

On rehearing. Opinion of trial court reversed, and opinion in department (58 Pac. 92) affirmed.

TEMPLE, J. This case was decided in department, the opinion being written by Mr. Commissioner Britt. A rehearing was granted solely because it was thought by some members of the court that the complaint stated a cause of action for damages for deceit, it having been held in the department opinion that it did not. Upon mature consideration, we think the decision rendered in department is right, and the opinion is adopted as the opinion of the court in bank, except as it may be deemed to have been qualified by this opinion.

Counsel for respondents contend that the court in department took too narrow a view in its construction of the allegation that the plaintiffs "repudiated said settlement upon the ground that it was procured by fraud on the part of defendant." They say the allegation is but the statement of one of the facts constituting their cause of action. If this be so, evidently they have no action for damages. An action for damages will not lie because of such repudiation. The action for deceit is based upon the proposition that they were induced by fraud to release and surrender their original demand. If they repudiate such release, they cannot claim that they were damaged by being induced by fraud to release, for they have not released. We do not agree that by bringing a suit for damages by a proper complaint plaintiffs would thereby repudiate the settlement which they were by deceit induced to make. They would affirm the settlement, and aver, in effect, that it was not as good a settlement as they were entitled to, and that they were deceived into making it by

¹ Rehearing denied July 25, 1900.

the fraud of defendant, and their damage would be what they lost through such deceit. If the settlement does not stand, they have not been damaged. It was through making the unfortunate settlement that they suffered damage.

One who has been so defrauded has his choice of two remedies: He may rescind, and recover that which he was induced to part with. If he does this, evidently the wrong done him has been righted, or usually would be. It may chance, however, that when he discovers the fraud he cannot rescind, or that rescission would not fully compensate his loss. He may therefore decline to restore what he received in the settlement or other contract he was induced by fraud to enter into, and, affirming the contract, sue for damages. But he cannot retain what he received and recover what he parted with. If he wishes to recover that, he must promptly offer to restore what he received, and demand a rescission. This is the requirement of the Code.

Counsel further contend that, if this allegation is thought inconsistent with the view that the action is for damages, then it might be regarded as surplusage. They say they attempted to state in the complaint "all the facts, and expected to recover upon those facts upon any theory permissible. But we insist that even although the intention had been to sue upon the policy, treating the release as void because of the fraud, we can still recover in an action for damages, if, upon the facts stated, the law permits a recovery of damages." The allegation under criticism is a very imperfect averment of a statutory rescission, yet it clearly implies that such rescission has been made. Conceding that the other facts stated would justify and sustain a judgment for damages, yet if there has been a rescission the action for damages cannot be sustained.

But if the plaintiffs are entirely wrong in their legal theory, and have brought and tried their case, not as an action for damages, but upon the policy, claiming that the compromise is void, giving credit for the amount received in the compromise as so much paid on account, as plaintiffs have, when they should have affirmed the contract and sued for damages, has the defendant been injured by the mistaken form of the action? It is contended that the case of the plaintiffs, so far as concerns the important matters of the controversy, is the same as it would have been. It is so, except that some further matters in regard to a rescission would have been brought in. The defense, except as to what might have been said about rescission, is the same. The rule as to the recovery is the same as if we accept the rule of damages contended for by the respondents. Their contention is that in cases of this character, where a creditor has been induced by fraud to accept less than was due, even when the

whole demand is disputed, the damage is the difference between what he was induced to accept as full payment and what was really due.

I think, however, the rule is correctly stated in the department opinion. It applies to other contracts than those of this character as well. In some possible cases, to recover what one has been induced to part with by fraud would not be full compensation, and, at all events, such a plaintiff is only entitled to be indemnified, unless for special reasons exemplary damages may be awarded. But if it were permissible to allow a judgment to stand because we can see that substantial justice has been done, when it appears that the plaintiff did not establish the case stated in his complaint, but some other which he might have stated, it cannot be done here; for objection was made and exception taken at every step in the progress of the case, and a motion for a nonsuit was submitted upon this very ground, and the ruling is assigned as error.

But I think the judgment and order must be reversed for another reason. The facts proven do not show fraud, and plaintiffs could not recover in any form of action. The alleged fraud consisted in an affirmative representation that the policy had never been delivered to Westerfield, but was merely submitted to him for examination, to be finally delivered if he approved of it and paid the first premium, and that he never signified his approval, and did not pay the first annual premium; and also in concealing the fact that it was agreed between Westerfield and the corporation that Westerfield should be allowed a surrender value upon his first policy, which should be applied and received in payment of the first premium upon the second policy; and, further, that Westerfield was given time in which to pay such first annual premium until such surrender value had been fixed by the defendant, and that no surrender value had been fixed up to the time of Westerfield's death. If the facts which it was alleged defendant concealed had any existence, then the affirmative representations charged upon defendant were false. Plaintiffs proved the falsity of the representations by the uncorroborated evidence of Todhunter, a former employé of defendant. He testified, in effect, that Westerfield was dissatisfied with his first policy, and threatened to make trouble for the company, which he charged had cheated him. Thereupon Westerfield was induced by Hawes, general manager of the defendant, acting through Todhunter, to take out a new policy, upon the consideration that he would be allowed a surrender value upon the first policy which would about pay the first premium. It is, in effect, so stated in the complaint, although, in accordance with the admitted design to have such pleadings as could support any legal theory, it is not expressly stated that the acceptance of the new policy was so conditioned. The evi-

dence of Todhunter plainly shows that only upon this promise did Westerfield consent to accept the new policy. All the negotiations were through Todhunter, and he testified that he reported to Col. Hawes that Westerfield would be satisfied with the new policy "if he could determine the cash surrender value of the first," and that Hawes promised to refer that matter to the home office. Further, that Westerfield wanted to know what the cash surrender value would be, and was told by Todhunter that it would be about \$800. At the time he received the application he says: "It was understood that, if the cash surrender value of the first contract fell short of the premium required to pay the second, he would have to pay the difference, and if there was any overplus the company would give him the difference. I told him that. I do not recall exactly what he said, except that he gave me the application." And when the policy was delivered he told Westerfield that there was nothing further to do with reference to the delivery except applying the surrender value of the first. And afterwards, when Todhunter received a note from the manager calling his attention to the outstanding policy, and saying it must receive immediate attention, he, as he testified, called upon Hawes, and reminded him of the arrangement, and that "Westerfield was not called upon to pay the premium until the surrender value of the first contract was obtained from New York." The only other testimony in regard to delivery was given by Mr. More, who testified that at the request of Todhunter he handed the policy to Westerfield, who remarked, "I am not to settle for this until I submit this to my friend." According to this testimony, Westerfield did not accept the policy as delivered, and there is no evidence which tends to prove that after this Westerfield ever indicated that he was satisfied with it. This certainly does not show a delivery which would bind any one. It counts for nothing if in fact, as respondents contend, the policy was such as Westerfield contracted for. He refused to accept it until he was satisfied upon this subject. Upon this point, therefore, there was no evidence to sustain the verdict except that of Todhunter, from which it clearly appears that Westerfield took the new policy, if he did accept it, upon the representation that a surrender value would be paid upon the first policy, and, of course, had the company refused to allow such value, he could not by the corporation be held for the annual premium.

The policy as issued to Westerfield in 1890, called the first policy, contained these provisions: "No agent has power in behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to waive any forfeiture, to issue a permit for residence, travel, or occupation, or to bind the company by making any promise or receiving any representation or information. This

power can be exercised only by the president, vice president, or actuary of the company, and will not be delegated. * * * Surplus will be apportioned to this policy only at the expiration of each period of five years from the date of the commencement of the insurance, and then if this policy is in force. * * * This policy may be surrendered to the company at the expiration of the first or of any subsequent five-year period, upon thirty days' previous written notice. At the expiration of the first period, eighty per cent. of its reserve (computed as hereinbefore specified), and in addition thereto the surplus then apportioned, will be allowed as a surrender value. At the end of any subsequent period the entire reserve (computed as hereinbefore specified), and in addition thereto the surplus then apportioned, will be allowed. The above cash values will not be allowed for a surrender at any other time."

Before taking the second policy, as alleged, Westerfield had most persistently refused to pay "another single cent" upon the first policy. He was not, therefore, prevented from paying by the negotiations in regard to the second. He was presumed to know the conditions of the policy, and, in fact, had given it a careful examination, as is shown by his complaints. He knew, therefore, that the first policy had no surrender value whatever, and that its terms could not be modified by any officer of the corporation except the president, the vice president, or actuary. Hawes was not one of the officers mentioned. Indeed, it is not shown even by Todhunter's testimony that such modification was agreed to by Hawes, but only that he promised to apply to the home office to have them do it, if possible, and nothing further was done in the matter, either by the home office or by Hawes.

But granting that Hawes promised that such modification would be made, and that the policy was delivered upon such promise, is the defendant bound by it? Respondents argue that it was not a modification of the first policy, but only an agreement as to the mode of paying a premium on the second. But that is not the case. The second policy was accepted in consideration of a promise to modify the terms of the first policy, and allow a surrender value therefor, contrary to the stipulations contained in it.

But it is contended that the company is estopped to deny the authority of Hawes; that, having delivered the policy without express condition, it is bound thereby. Upon the uncontradicted testimony, the court should have found that the policy was not delivered as an executed contract. But there was no estoppel, upon any view. Westerfield had notice of the want of authority, and also that Hawes made no claim to such authority. It is not a case where the corporation has been paid to carry a risk, and is now attempting to escape liability. Westerfield did not pay the first premium,

and could not have been compelled to do so. Cases holding that when an agent gives credit in violation of his authority, and delivers the policy, the company is bound, do not go far enough for plaintiffs. They do not hold that the company shall be bound, though the premium is not to be paid, and there is no liability on account of it. *Harnickell v. Insurance Co.*, 111 N. Y. 390, 18 N. E. 632, 2 L. R. A. 150; *Insurance Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610; *Giddings v. Insurance Co.*, 102 U. S. 108, 26 L. Ed. 92. *Farnum v. Insurance Co.*, 83 Cal. 246, 23 Pac. 869, is much relied upon by respondents. It was there held that the promise to pay on the part of the insured was a sufficient consideration for the contract, and that a local agent having authority to solicit business and make contracts of insurance, to countersign and deliver policies, binds his principal within the general scope of his apparent authority, notwithstanding an actual excess of authority. Any fact known to such agent which could constitute a breach of a condition, and make the contract void, at the option of the company, from its inception, will be considered waived. The company cannot, in general, receive through its agents pay for carrying a risk, and be able, when loss occurs, to avoid liability by taking advantage of a limitation upon the authority of the agent. Here this state of things did not exist. It had not been paid to carry the risk, and could not have enforced payment. In the *Farnum* Case the difference in the construction of limitations upon the power of agents in entering into contracts of insurance, and in modifying them afterwards, is recognized.

It is also said that whether a particular agent has power to waive conditions is a question of fact. Plaintiffs offered no evidence as to the authority of Hawes except the policy, which expressly denied to him the authority to modify the contract. The burden was upon plaintiffs. The title "general manager" for a specified territory does not establish the particular authority required, especially after this express limitation, which was known to the insured.

Respondent also relies upon a class of cases like *Kahn v. Insurance Co.* (Wyo.) 34 Pac. 1059. In that case it was held that consent to additional insurance given by an authorized agent, upon which the insured acts, will bind the company, although not indorsed upon the policy as required, although the authority of the agent was expressly limited to that mode. The reasons given are that the company had notice of the additional insurance,—notice to the agent being notice to the company,—and should have promptly notified the insured, if it did not consent, and also that it could not so tie its hands or that of its agents. The transaction was one which the agent was fully authorized to make, and the insured had done everything which ordinarily he would be required to do. But the company

required in addition that for its protection he should see that the agent executed his undoubted authority in a certain mode. There are numerous authorities upon the subject, and the matter is extensively discussed in the text-books. The majority of cases seems to be against the position taken in that case, but it is said that the present trend is in favor of the rule there declared. It is also said in that case, and numerous other cases with like conflict, that an adjuster can bind the company for whom he acts by his declaration that proofs furnished are sufficient, notwithstanding provision in the policy to the contrary. If this means that the company is bound unless it promptly gives notice that it is not satisfied, and in time to enable the insured to make his proof, it is clearly right and in accord with rules applicable alike to other transactions. But I see nothing in these decisions applicable to this case. Knowledge of the agent is not knowledge of the principal in matters not within the scope of the agent's authority. I see nothing unfair in such a limitation upon the authority of an agent as to matters involved here. To make such modifications of the contract is not usually expected of an agent, and the power to do so is not implied in what may be called his usual ostensible authority.

It may be remarked that, as the correctness of the order refusing a nonsuit is involved on this appeal, we are not hampered by anything the court found or failed to find. Plaintiffs' case was not strengthened by evidence after the ruling on the motion for a nonsuit was made. The judgment and order are reversed.

We concur: MCFARLAND, J.; HARRISON, J.; VAN DYKE, J.; HENSHAW, J.

(128 Cal. 553)

WOOLSEY v. WILLIAMS et al. (S. F. 1,584.)

(Supreme Court of California. May 7, 1900.)

WILLS—IDENTITY—EVIDENCE—BURDEN OF PROOF—PEDIGREE—RELATIONSHIP—DEATH OF DEVISEE—PROOF—DECLARATIONS OF DECEASED PERSON.

1. Where testator devised his property to his two brothers, G. W. and F. W., and plaintiff introduced a marriage certificate showing that she was married to F. W., and the record of the baptism of her two sons, in which the name of the father appeared as F. W., the identity of the names was prima facie evidence that the plaintiff's husband and the person named in the will were the same, and shifted the burden of proof on defendant to show the contrary.

2. The marriage certificate and the record of the baptism of her two sons were sufficient evidence of the relationship between testator and plaintiff's husband to admit in evidence the declarations of the latter that he was the brother of the testator.

3. Where testator devised property to his two brothers, evidence of the declarations of one of the devisees that the other enlisted in the army and was believed by the family to have been killed, and that he was never married, was sufficient to support a finding that such devisee was dead, and to entitle the heirs of the declarant to the entire devise.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco.

Action by Arvilla S. Williams and others against Mark H. Woolsey, executor of James Williams, deceased, for distribution of the estate. From an order directing a distribution, defendant appeals. Affirmed.

A. Boyer, for appellant. O. P. Evans, for respondents.

HAYNES, C. Appeal from an order of distribution. James Williams died testate at the city and county of San Francisco March 1, 1897, and his will was admitted to probate March 15, 1897, and letters testamentary were granted to appellant. Said will was made at San Francisco February 28, 1897, in which, after some special bequests, the testator's brothers, George Williams and William Frederick Williams, were made residuary legatees. The final account of the executor having been filed and settled, Clifford Oswin Williams and Frederick Percy Williams, a minor, by his guardian, Arvilla S. Williams, filed their petition for final distribution on January 31, 1898, alleging that George Williams, one of said residuary legatees, died before said testator, unmarried, and without any lineal descendants, and that the other residuary legatee, William Frederick Williams, also died before the testator, leaving surviving him his widow, said Arvilla S. Williams, and said petitioners, Clifford Oswin and Frederick Percy, but no other lineal descendants; that the testator was never married, and at the time of his death left no kin except said petitioners. The executor answered said petition, and put in issue all its material allegations. The questions of fact to be determined were whether William Frederick Williams, the husband of Arvilla, and the father of the petitioners, Clifford Oswin Williams and Frederick Percy Williams, was the brother of the testator, and one of the residuary legatees named in the will, and whether George Williams, the other residuary legatee, was dead. The will recited that the testator, James Williams, was born in Norwich, Chenango county, N. Y.; that his father's name was James Williams; and that his mother's name was Harriet Luddington. Clifford Oswin Williams, one of the petitioners, testified, without objection, that he was born in New Haven, Conn., and is 22 years of age, and that his brother, Frederick Percy Williams, was 19; that his father, William Frederick Williams, died in January, 1893, at New Haven; that witness had one sister, who died about 10 years ago, and had no other brothers or sisters; that he never saw the testator, James Williams; that he had four uncles on his father's side, named Edward, James, Daniel, and George; that when his father died James was living, but no other brother, and that there were no others next of kin to

James than his brother and himself; that Edward came West at the time of the California gold fever, and the family supposed he was dead, because nothing was heard from him; that Daniel died before he was of age; that George enlisted on the Federal side in the Civil War, and had not been heard from since; that, as his father told him, he was supposed to have been killed in the war; that George was never married; that his father had twin sisters, who died at their birth; that his father was born at Norwich, Chenango county, N. Y.; that he (the witness) never was there; that he learned of the death of his uncle, the testator, from his mother, who was informed of it by Mr. Newton, an attorney of Norwich, who had traced witness' father from New York state to New Haven. Dr. Woolsey was then called by the petitioners, and testified that he was the executor of the will of James Williams; that he attended him at his last illness, and knew him for about a year before his death, and was quite intimate with him; that deceased told him he had not heard of his brothers for 20 years; that he had a brother who died in Oregon or Washington in 1888, whose name witness thought was Edward; that deceased stated to him that he had no relatives except his two brothers, William Frederick Williams and George Williams. Arvilla S. Williams testified that she was married to William Frederick Williams at New Haven in 1875, and produced the certificate thereof, in which her husband was named William F. Williams, and also produced the record of the baptism of her sons, in which the father's name was stated as William F. Williams. She further testified that she learned from her husband that he was born in Norwich, Chenango county, N. Y.; that his father's name was James Williams; that his mother's name was Harriet Luddington; and that he had four brothers and twin sisters. At this point the attorney for the executor "objected to any testimony by witness as to what William F. Williams said to Arvilla S. Williams or her sons, as hearsay and incompetent testimony to prove heirship." The objection was overruled, and an exception taken.

Appellant, in his brief, contends that before the declarations of a deceased person can be admitted, in cases of pedigree, the relation of the declarant to the family must be established by other testimony; citing *Blackburn v. Crawfords*, 3 Wall. 187, 18 L. Ed. 186; *Thompson v. Woolf*, 8 Or. 463, and several English cases. That such is the rule at common law is not doubted; nor is it necessary to consider whether sections 1852 and 1870 of the Code of Civil Procedure, or either of them, have changed the common law in that regard, since there was sufficient evidence to connect William Frederick Williams with the family to which the testator belonged to justify the admission of his declarations made long before the execution of the will. The will itself was sufficient evidence

that James Williams, the testator, was born in Norwich, Chenango county, N. Y.; that his father's name was James Williams, and his mother's Harriet Luddington; and that he had at least two brothers, named respectively William Frederick Williams and George Williams, who were made his residuary legatees. There was record evidence of the marriage of the witness Arvilla to William F. Williams, and it was entirely competent for her to testify that her husband so wrote his name, but that his full name was William Frederick Williams. The identity of the name of the petitioners' father with that named in the will was prima facie proof that he was the William Frederick Williams named in it. Identity of person is presumed from identity of name. Code Civ. Proc. § 1963, subd. 25; *Douglas v. Dakin*, 46 Cal. 49; 16 Am. & Eng. Enc. Law, p. 119, tit. "Name," "Identity," and cases cited. The presumption arising from identity of name is, of course, rebuttable, but it is sufficient to shift the burden of proof to the other side. The question was one of fact, and there was certainly sufficient evidence to justify the court in finding that the petitioners were the nephews of the testator, and entitled to the whole of the residuary estate, if George Williams died before the testator leaving no issue. Upon this point the declarations of William Frederick Williams, deceased, as to the family understanding and belief, to the effect that he enlisted in the army, when a boy, on the Federal side of the Civil War, and was believed to have been killed, and that he never married, was competent evidence, and sufficient to sustain the finding of the court. *Banning v. Griffin*, 15 East, 293. I quite agree with the learned counsel for appellant that evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion; but this objection goes to the weight that should be given it, not to its competency. That there was some testimony tending to contradict the testimony of the witnesses for the petitioner is conceded. Much of it, however, was incompetent, though not objected to; but it was for the trial court to determine the weight to be given to each and every particular statement, and I am satisfied with the correctness of its conclusions. The executor himself testified that he had exerted himself every way to ascertain who the relatives of the deceased were, and said: "I feel satisfied these two boys are the nephews of James Williams, but I should like to have it proven. I believe, from my investigations, George Williams to be dead, and left no family." I advise that the order appealed from be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

(10 Kan. App. 1)

MISSOURI PAC. RY. CO. v. PHELPS.

(Court of Appeals of Kansas, Northern Department, E. D. June 15, 1900.)

CARRIERS OF FREIGHT—CONNECTING LINES—CONTRACT—DELAY—EVIDENCE.

1. A petition which avers that the defendant is a railway corporation and common carrier, with power to make contracts for the transportation of freight; that a car load of bananas was forwarded to plaintiff from New Orleans, La., to Leavenworth, Kan., over a line of common carriers, among which was the defendant company; that the defendant in its turn received the car at Kansas City, Mo., on a certain day, but, disregarding its contract and duties as a common carrier, neglected and refused to transport and deliver the same with care and prudence; and that it was bound and obligated to carry said car of bananas, and exercise due diligence in the same, but, in violation of its said contract and of its duties as a common carrier, it failed to do and perform its contract, and suffered and permitted the car to remain standing on its tracks in Kansas City, Mo., until the fruit became damaged, etc.,—states a cause of action arising upon contract.

2. A conversation had with an agent of a railway or other corporation, otherwise competent, may be proven, notwithstanding the de-
cease of such agent.

(Syllabus by the Court.)

Error from district court, Leavenworth county; Louis A. Myers, Judge.

Action by Eliza J. Phelps, executrix of B. F. Phelps, against the Missouri Pacific Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Edward D. Osborn and Waggener, Horton & Orr, for plaintiff in error. Atwood & Hooper, for defendant in error.

MAHAN, P. J. This was an action against the plaintiff in error railway company for damages alleged to have been occasioned to a car load of bananas consigned to plaintiff's assignor, by reason of the failure of the railway company to diligently perform its duties and obligations under its contract as carrier, in not promptly delivering or carrying the car from Kansas City, Mo., to Leavenworth, Kan. The delay occasioned by this failure resulted in the loss of the fruit. The petition further alleges that upon the arrival of the car at Kansas City, and its delivery to the railway company by another line, the plaintiff's assignor called upon the freight agent of the plaintiff in error at Kansas City, and sought to obtain from him information, and a promise that the car should be forwarded that evening to Leavenworth, explaining that the fruit was in danger of being spoiled by delay, and, failing to get any assurance thereof, he endeavored to obtain from the agent a transfer of the car to another line of road, which would take it up that day, which was refused. It is further alleged that upon the arrival of the car the next evening at Leavenworth the fruit was found to be what is

termed by banana men "cooked"; that the consignee refused to receive the goods, and that the agent at Leavenworth, after consulting with the general office at St. Louis by telegram, agreed with the consignee and assignor of the plaintiff that he should take the car of bananas, pay the freight, sell them to the best advantage on account of the road, and it would make up to him the difference; that he did so, rendered an account thereof to the company, and the company's refusal to pay the same. The answer admits that the plaintiff in error is a railway corporation and common carrier, and admits and alleges that the written contract or bill of lading, made at New Orleans, dated June 16, 1890, between Phipps & Co., consignors, and the Illinois Central Railroad Company, was duly executed and delivered; that a freight car containing bananas was shipped from New Orleans to Leavenworth under the contract; that the bananas were perishable goods; and denies the other allegations of the petition. It denies the authority of the agent at Leavenworth to make a contract with the consignee respecting the bananas as alleged in the petition. The defendant's answer further alleges that after the car of bananas was delivered to it at Kansas City, on the afternoon of June 20, 1890, it exercised due diligence in transporting the car to Leavenworth, but, owing to excessive rains washing out part of its track, its regular freight trains between Kansas City and Atchison were necessarily abandoned, and extra freight trains used locally for a time, and that the car was forwarded to Leavenworth on the first freight train going in that direction, which was an extra train, and that the transportation of the car, although not accomplished within as short a time as usual when nothing interposed to prevent or impede the regular running of trains, was completed within a reasonable time, under the circumstances, and that there was no delay by reason of any fault or negligence on its part. There was a trial to the court and a jury, which resulted in a verdict and judgment for the plaintiff.

The assignments of error are numerous. The first contention is that the action was one sounding in tort, and was, in fact, an action *ex delicto*, and not *ex contractu*, and therefore was not assignable; hence the plaintiff could not maintain an action thereon. If the action is, in fact, *ex delicto*, the rule laid down in *Railway Co. v. Brehm*, 54 Kan. 751, 39 Pac. 690, applies. It is contended that whether it is or not must be determined by the pleadings, as was announced in *Railway Co. v. Shook*, 3 Kan. App. 710, 44 Pac. 685; *Railway Co. v. Long*, 5 Kan. App. 644, 47 Pac. 993. We are of the opinion that, if the allegations of the petition are allowed to govern, it is clearly an action *ex contractu*. Applying the doctrine of the *Shook* Case, *supra*, it undoubtedly is *ex contractu*. It was so treated by the de-

fendant, both in his answer and in the progress of the trial.

The next contention is that the evidence did not prove a cause of action. A careful examination and analysis of the evidence leads us to the conclusion that the case in every feature is abundantly sustained by the evidence.

The next contention is that incompetent evidence was received. This contention is based upon the assumption that it was not shown preliminarily that the conversations at Kansas City were had with the agent of the Missouri Pacific Railway Company; that it was incumbent upon the plaintiff to establish the name of the agent, and that he was, in fact, an authorized agent of the company. The evidence clearly establishes that the person with whom the conversation was had was and had been in charge of the company's freight business at Kansas City for years. The name was an immaterial matter. The agency was not proved by the acts or declarations of the agent himself. It is further claimed that the agent with whom the conversations occurred had died before the trial took place, and that no conversation between him and the plaintiff's assignor was therefore competent. This contention is not sound. The statutory provision invoked is not applicable.

The next contention is that the evidence disclosed that the delay in the carriage of the car from Kansas City to Leavenworth did not cause the damage. We are of the opinion that the evidence clearly established the contrary; that it was the delay that did cause the damage, and that the company was fully apprised in advance of the effect of such delay. It not only neglected to transport the car from Kansas City to Leavenworth, but refused to let it be taken by another road, which was ready and willing to take it.

It is next contended that the contributory negligence of the Memphis road, by which the car was delivered to the plaintiff in error, barred a recovery by the plaintiff. There is no evidence supporting this contention. There are other assignments of error formally made which are not mentioned in the argument, and which we assume are abandoned. The judgment is affirmed.

(10 Kan.App. 6)

BINGLER v. MUTUAL BENEFIT LIFE
INS. CO.

(Court of Appeals of Kansas, Northern Department, E. D. June 15, 1900.)

INSURANCE—DEFAULT IN PREMIUMS—WAIVER
OF FORFEITURE.

1. A forfeiture of the two contracts of insurance sued on could have been claimed by reason of a failure to pay premiums. Instead of claiming a forfeiture, the company's general agent wrote the assured twice, within 15 days after he had defaulted, calling his attention thereto, and requesting payment, which was promptly made. This was sufficient evi-

dence in support of a replication of waiver to take the case to the jury.

2. After assured had complied with the request for payment, the general agent sent health certificates to the assured, and advised him that payment would be recognized as such when he signed and returned them, but retained the money, and deposited it with other moneys of the company. The failure of the assured to comply with this request (there being no provision therefor in the contract) did not relieve the company from the consequences of its waiver, if it did waive the forfeiture, or justify the court in withdrawing the issue thereon from the jury.

3. The assured was, at the time he received the request for payment and complied therewith, prostrated with a sickness from which he subsequently died. It was not necessary that plaintiff prove notice of this fact to the company, to sustain her reply of a waiver of the forfeiture.

(Syllabus by the Court.)

Error from district court, Douglas county; Samuel A. Riggs, Judge.

Action by Dora E. Bingler against the Mutual Benefit Life Insurance Company. Demurrer to plaintiff's evidence sustained, and she brings error. Reversed.

Bishop & Mitchell, for plaintiff in error.
Alford & Clingman, for defendant in error.

MAHAN, P. J. This was an action by the plaintiff in error against the defendant in error to recover upon two policies of insurance issued by the defendant in error upon the life of the plaintiff's husband. The defense made by the answer is that there was a forfeiture of the policy, occasioned by the nonpayment of a premium due September 30, 1896. To this there was a reply of waiver of the forfeiture by requesting and receiving payment of premium after the forfeiture occurred. There was a trial to a jury, and upon the introduction of plaintiff's evidence the court sustained a demurrer thereto. Upon this action of the court the plaintiff in error rests, principally, her case.

Was there sufficient evidence of waiver to go to the jury? This is the question to be decided, and we must answer it in the affirmative. It therefore follows that the court erred in sustaining the demurrer and in denying the plaintiff a new trial. Payment of the premium was due September 30th. On the 14th of October the general agent (for the state of Kansas and other territory) of the company wrote a letter to the assured, calling his attention to the fact that he had failed to make payment of the premium, and requesting that he give his attention thereto. Upon receipt of this letter the assured caused the premium to be forwarded to the general agent, at Kansas City, who retained the same until after the death of the assured, when he attempted to return it. The company's agent wrote twice after the default, requesting payment. In the first letter he suggested that he would like to have the premium by the 10th of October, as he must at that time make his report of collections on premiums to the

company, at its home office. The general agent, in acknowledging the receipt of the money, said that it would be accepted as payment when the assured should return to him, signed by himself, two health certificates. These were never sent, nor was there anything in the policy requiring them as a condition to reinstatement. It was argued that there was such a custom; that is, a custom requiring health certificates to be sent by the assured, under the circumstances. Of this there is no evidence in the record, nor is there any evidence in the record that the assured or plaintiff had any knowledge thereof. It is said by the supreme court of the United States in *Insurance Co. v. Eggleston*, 98 U. S. 572, 24 L. Ed. 841, "Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture, though it might be claimed under the expressed letter of the contract."

The evidence can be construed as showing or proving a request for payment of the premium after the occurrence of the fact upon which the forfeiture is claimed. The assured promptly caused payment to be made in response thereto. But it is argued that because, at the time these premiums were paid, the assured was sick of a disease which subsequently caused his death, and because the company's agent was not notified of that fact, therefore the company was not in possession of all the facts upon which to act and bind itself by the waiver of the forfeiture; that the sickness was a material fact, the knowledge of which was essential to enable the company to act respecting the forfeiture. In support of this contention, among other cases, we are cited to *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387. In that case there were two grounds of forfeiture relied upon, to wit, nonpayment of premium, and residence within a prohibited territory. At the time of the alleged waiver by receipt of the premium the assured was sick of yellow fever in New Orleans,—in the prohibited district. The court holds that the receipt of the premium was a waiver as to the first ground of forfeiture, but not as to the second,—not that it was essential for the company to know of the sickness of the assured, in order to estop themselves as to the first ground of forfeiture, but that, as to the second, it was essential that they be advised of the sickness, in order to constitute a valid waiver of the forfeiture by reason of the residence within the prohibited district.

Something is said in counsel's brief in regard to the failure of the plaintiff to show any authority on behalf of the general agent to waive the forfeiture in the face of the conditions of the policy in regard to waiver, and the power of the agents in relation

thereto. We take it that, under the evidence, counsel are not serious in this contention, especially in view of the decisions of our supreme court. *Insurance Co. v. Gray*, 43 Kan. 498, 23 Pac. 637; *Insurance Co. v. Munger*, 49 Kan. 178, 30 Pac. 120. It necessarily follows that the judgment must be reversed, and the case remanded to the district court, with directions to award a new trial.

WELLS, J. I concur in the judgment awarding a new trial, but do not agree to all that is said in the opinion.

(10 Kan.App. 10)

SEYMOUR v. ARMSTRONG et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 15, 1900.)

SALE—ACCEPTANCE.

Where negotiations are entered into for the sale of goods, there must be an unconditional acceptance of the offer or no contract is consummated.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by T. F. Seymour against T. E. Armstrong and J. B. Kassebaum. Judgment for defendants, and plaintiff brings error. Affirmed.

David Martin and J. A. Rosen, for plaintiff in error. Isenhardt & Alexander, for defendants in error.

MAHAN, P. J. The substance of plaintiff's petition is that he entered into a contract with the defendants, by which defendants agreed to buy, and he agreed to sell and deliver to them, 450 cases of eggs, to be delivered not later than February 22, 1900; that he tendered performance by an offer to deliver the eggs, which was refused; that he was compelled thereby to sell the eggs upon the market at a reduced price, to his damage in the sum of \$301.83, for which he asked judgment. There was a trial to the jury, and judgment for defendants for costs, from which the plaintiff prosecutes this petition in error. There are 84 assignments of error. We do not deem it necessary to notice them in detail.

The pivotal question in this case is, was there a contract? Defendants inserted a bid in a grocer's publication for eggs at 10½ cents per dozen net, to be delivered in Topeka not later than February 22d. Persons desirous of accepting this offer were required to give notice of such acceptance, and the number of cases they proposed to furnish, not later than February 20th. The notice of acceptance is in the following language: "I accept your offer in the Merchants' Journal, 10½ cents net, Topeka, for fresh eggs, and will ship to you on C., R. I. & P. R. R. 450 cases fresh eggs, to arrive on or before February 22d. The eggs are

all packed in No. 2 whitewood cases, and I will accept 15 cents for them, or you can return them, or new ones in place of them. I am yours, truly, T. F. Seymour, by G. O. B." The advertisement and this acceptance were offered as evidencing the contract. Mr. Benjamin, in his first edition on Sales of Personal Property (section 39), says: "But the assent must, in order to constitute a valid contract, be mutual, and intended to bind both sides. It must also co-exist at the same moment of time. A mere proposal by one man obviously constitutes no bargain of itself. It must be accepted by another, and this acceptance must be unconditional. If a condition be affixed by a party by whom an offer is made, or any modification or change in the offer be requested, this constitutes in law a rejection of the offer, clearly ineffectual to complete the contract until assented to by the first proposer." The supreme court of this state in *Seed Co. v. Hall*, 14 Kan. 553, says: "Where negotiations are entered into for a sale of goods, there must be an unconditional acceptance of the offer, or no contract is consummated." It is clear in this case that the offer advertised in the Merchants' Journal was not accepted unconditionally. It left matters to be determined by further negotiations. It appeared in evidence on behalf of the plaintiff as well as the defendants that immediately on receipt of this notice the defendants communicated to the plaintiff the fact that they declined to entertain the proposition. It was the duty of the court, under the circumstances, to have told the jury at the close of the plaintiff's evidence that no contract had been proven. In support of this position, we further refer to *Ellason v. Henshaw*, 4 Wheat. 225, 4 L. Ed. 556; *Carr v. Duvall*, 14 Pet. 77, 10 L. Ed. 361; *Potts v. Whitehead*, 23 N. J. Eq. 512; *Bell v. Keepers*, 37 Kan. 64, 14 Pac. 542. This point is conclusive upon the right of the plaintiff to recover, and renders it unnecessary to notice any errors that may have occurred in the course of the trial, for the reason that they become thereby immaterial, if committed at all, not affecting in any manner the substantial rights of the plaintiff. The judgment is affirmed.

(10 Kan.App. 12)

JOHN S. BRITTAIN DRY-GOODS CO. v. MERKEL et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 15, 1900.)

SALE—ELECTION TO RESCIND—NOTICE—PURCHASER FOR VALUE—REPLEVIN—PLEADING—TENDER.

1. A vendor of goods, seeking to recover their possession from his fraudulent vendee, who obtained possession with an intent not to pay therefor, or from his vendee's mortgagee, not being a bona fide purchaser for value, is not required to give a prior notice of his intention so to do. Bringing replevin therefor is a sufficient election to rescind.

2. A mortgagee of such fraudulent vendee;

who takes the mortgage to secure a pre-existing debt, is not a purchaser for value. *Schulein v. Hainer*, 29 Pac. 171, 48 Kan. 249.

3. An allegation of general ownership, in a petition in replevin in such a case, is sufficient upon which to base a judgment for the recovery of the possession of the goods.

4. If the fraudulent intent not to pay for the goods exists at the time possession is obtained, it is not essential that the vendor be apprised thereof before parting with his possession.

5. Such vendor is not required to pay or tender to the fraudulent vendee's mortgagee the fees paid for recording his mortgage, and expenses in taking possession, as a prerequisite to maintaining his replevin suit.

(Syllabus by the Court.)

Error from district court, Jackson county; Louis A. Myers, Judge.

Action by the John S. Brittain Dry-Goods Company against Julius Merkel and others. Judgment for defendants, and plaintiff brings error. Reversed.

Jackson & Jackson, for plaintiff in error. Hayden & Hayden, for defendants in error.

MAHAN, P. J. This was an action in replevin by the plaintiff in error to recover certain articles of merchandise. The answer was a general denial. It appears by the uncontradicted evidence that the plaintiff in error shipped the goods to Julius Merkel upon his order; that, for the purpose of procuring the goods, he made false statements, which he must have known to be false, and immediately upon receipt of the goods mortgaged them to friends of his for the purpose of securing pre-existing debts, one of which had been paid. From the evidence of the plaintiff, which is undisputed, the only reasonable conclusion that can be arrived at is that Merkel, at the time he ordered the goods, did not intend to pay for them, and in fact was insolvent; assuming that he owed the debts, and, in addition, the debts to the defendants to whom he had given chattel mortgages upon the goods. Immediately upon giving the mortgages he left the state, and did not return. The trial resulted in a judgment for the defendants.

The errors assigned are:

First, in excluding a copy of a telegram sent by plaintiff to defendant Merkel, that it had elected to rescind the sale. We do not deem it essential to determine whether the telegram was properly excluded or not. If it was erroneously excluded under the rules of evidence, it was immaterial.

The second assignment of error is in excluding the original telegram from Merkel in reply thereto, and to this the same conclusion is applicable.

The third assignment of error is that the court erred in holding the sale was not induced by the fraudulent representations and statements of the defendant Merkel. As heretofore indicated, the only conclusion that can be reasonably deduced from the facts proven is that Merkel did procure the goods from the plaintiff by fraudulent mis-

representations, and with a preconceived intention not to pay for them.

The fourth assignment of error is that the court erred in holding that the defendant mortgagees were bona fide purchasers, within the meaning of the law, and were protected as such, notwithstanding Merkel had obtained actual possession with the fraudulent intent above indicated. This was error. *Schulein v. Hainer*, 48 Kan. 249, 29 Pac. 171.

The fifth assignment of error is in overruling plaintiff's motion for a new trial. It is contended in behalf of the defendants that the judgment of the district court ought to be sustained because the plaintiff could not prevail under the allegations of its petition of a general ownership. Under the decisions of the courts of this country, the vendee acquired neither the right of possession nor the right of property. *Benj. Sales* (Bennett's 4th Am. Ed.) § 451; also, section 440, note "b," and cases therein referred to. Again, it is contended that the judgment should not be disturbed because the evidence clearly and conclusively shows that the goods were sold and shipped before the representations were made. It is sufficient answer to this that the representations were made at the time the goods were shipped, though a part of them had been billed before the statement. The fraudulent intent not to pay for the goods existed. A fraud was contemplated in the beginning, and it is immaterial that the plaintiff was not aware of it at the time it billed out the first lot of goods. It is, again, contended that the evidence fails to show that the representations made by defendant Merkel were untrue. If the defendants had any claim whatever against Merkel, as they contend, to support their chattel-mortgage liens, the statements were necessarily untrue. It is, again, contended that the prerequisites necessary to affect a rescission were not complied with before the commencement of the action, because no notice of rescission had been given. The beginning of a replevin suit was sufficient election and notice thereof. Again, it is said that the necessary prerequisite of putting defendant Merkel in statu quo had not been complied with. He had not paid for the goods, in whole or in part, nor had he given any security therefor, of any character. The plaintiff was in possession of nothing to return to him. But it is said that the mortgagees had been to expense in getting their mortgages and having them recorded, etc. For this they would have to look to Mr. Merkel, and the remainder of the stock covered by the mortgage. With this the plaintiff had nothing to do. It was not necessary that the mortgages themselves should be proven to be fraudulent; nor was it necessary that the mortgagees, under the circumstances of the case, should have had knowledge of the fraudulent intent of Merkel in obtaining possession of the goods. It is urged in the

fifth place that the goods were not sufficiently identified by evidence to authorize judgment for their recovery. The goods were found by the sheriff, identified, taken under the writ, redelivered to the defendants upon the execution of a bond as required by the statute, and were identified by the employees of the plaintiff at their examination at the trial with sufficient certainty to authorize a recovery. The judgment is reversed, and the case remanded, with directions to sustain the plaintiff's motion for a new trial.

(10 Kan. A. 19)

TESSENDORF et al. v. LASATER et al.

(Court of Appeals of Kansas. Northern Department, E. D. June 15, 1900.)

NOTE—CONSIDERATION.

T. held a conveyance of land from the Union Pacific Railway Company; the same being a part of its grant, but for which no patent had been issued. L. and R. made entry of the land, in separate tracts, under the act of congress of 1862-64 providing for homesteads on the public domain, and certificates for the entries were given them therefor. They then entered upon the land and began making improvements. After negotiations and an examination of the records of the land office, T. gave his note to them for \$600, and paid them \$400, in consideration of their relinquishing possession of the land and surrendering and having canceled their entries, and thereupon T. and his son made like entries; the entire transaction being in good faith. *Held*, that the settlement of the disputed claim, and the relinquishment of the entries and possession thereunder, were a sufficient consideration for the promise to pay money, notwithstanding the fact that the entries and possession thereunder were invalid for the reason that the land passed by the grant, and was not subject to entry.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thomson, Judge.

Suit by August Tessorndorf and others against J. B. Lasater and others. Judgment for defendants, and plaintiffs bring error. Affirmed.

Coddling & Challis, for plaintiffs in error. James J. Hitt, for defendants in error.

MAHAN, P. J. The plaintiffs in error sought to enjoin the negotiation or transfer of a promissory note given by them to Lasater and Post, which had been deposited with the defendant bank, as collateral security to an antecedent debt, without indorsement. The petition charges deceit and fraud, by a misrepresentation of the facts concerning the transaction out of which the note grew. August Tessorndorf held the deed of the Union Pacific Railway Company for a tract of land assumed to be a part of its grant, but for which it had never obtained a patent. Lasater and Post made their several homestead entries upon this land, which were received by the officers of the government in charge of the land office, and certificates were issued to them. They thereupon went upon

the respective tracts of land covered by their entries under the act of congress of 1862-64. After an examination of the records of the land office at Topeka, and after considerable negotiation, the Tessorndorfs gave their promissory note and \$400 in money to Lasater and Post in consideration of their abandoning possession of the land and relinquishing their entries, whereupon the Tessorndorfs made similar homestead entries thereof. The suit for an injunction proceeded upon the theory that, inasmuch as the right of the railway company to the land was established, that fact rendered the promise nugatory,—left the note and the payment of the money without consideration. The charges of fraud and misrepresentation were not sustained. The court trying the case found that the defendants acted in good faith, believing that they had valid homestead entries. Upon these facts the trial court rendered judgment for the defendants, dissolving the injunction, and for costs.

The principal contention is that the note is wholly without consideration,—based on the eighth, ninth, and twelfth findings of the court. The eighth relates entirely to the claim of the bank to be a bona fide purchaser, without notice of the invalidity of the note. The ninth finding is to the effect that the only consideration for the payment of the \$400 and giving of the note was the abandoning of the possession of the land, and the relinquishment of their homestead entries thereof. And the twelfth finding is that the land was in fact a part of the grant to the railway company; that is, in effect, that the homestead entries of the defendants were invalid, and that they, therefore, at the time of the promise, in fact had no claim to the land. The answer to this position is that the defendants did believe that they had homestead rights, and that the plaintiffs were so far in doubt at the time that they preferred to compromise on the terms they did, than contest the validity of their claim, and thereby induced the defendants to surrender their claims, and assume a different position towards the property than they had before. The settlement of the disputed claim, and the relinquishment of the possession and the entry, although invalid, constituted a sufficient consideration to sustain the promise. It is not open to the plaintiffs in this suit to investigate the question whether those entries were valid or not. The validity of the contract does not depend upon the validity of these entries, or upon the rightfulness of the defendants' possession of the land thereunder. *Bank v. Geary*, 5 Pet. 114, 8 L. Ed. 60; *Keefe v. Vogel*, 36 Iowa, 87; *McClure v. McClure*, 100 Cal. 339, 84 Pac. 822; *Lapham v. Head*, 21 Kan. 332; *Hardesty v. Service*, 45 Kan. 614, 26 Pac. 29. The fact that the contract is an improvident one, if such it be, does not justify the court in ignoring it. The transaction was in entire good faith. The plaintiffs had legal capacity therefor, and the consideration is a valid

one. See, also, 6 Am. & Eng. Enc. Law (2d Ed.) 711, 731, 732; *Honeyman v. Jarvis*, 79 Ill. 318. The findings of fact sustain the judgment of the court, and it is therefore affirmed.

STATE v. LASHELL.

(Court of Appeals of Kansas, Northern Department, W. D. July 29, 1890.)

CRIMINAL LAW—INTOXICATING LIQUOR—UNLAWFUL SALE—TRIAL—BAILIFF—OATH—SUFFICIENCY—EVIDENCE.

1. In a prosecution for violation of the prohibitory liquor law, a police judge testified "that a complaint was filed in his office charging the defendant with selling intoxicating liquors on two counts, in violation of a city ordinance," and read that part of his appearance docket showing the filing of the complaint, the entry of the fine, the payment, and the disbursement of the proceeds. *Held*, that the evidence was irrelevant, and erroneously admitted.

2. In a prosecution for violation of the prohibitory liquor law, a constable's testimony that he had a warrant for defendant's arrest, issued by a justice of the peace, and that he went to defendant's residence, followed him into the country, ran after him, and came back to town with him, was incompetent; it nowhere appearing what the warrant contained, nor that defendant knew its contents.

3. Code Cr. Proc. (Gen. St. 1889) § 237, provides that after hearing the charge the jury may retire under the charge of an officer, sworn to keep them together in some private or convenient place, without food, except such as the court shall order, and not to permit any person to speak or communicate with them, nor to do so himself, unless by order of the court, or to ask them whether they have agreed on their verdict, and return them into court, or when ordered by the court, and that the officer shall not communicate the state of their deliberations to any person. In a prosecution for a violation of the prohibitory liquor law the bailiff having charge of the jury took the following oath: "You do solemnly swear that you will take this jury in charge, and keep them together in some convenient place, until they have agreed upon the verdict or are discharged by the court, unless otherwise directed by the court; that you will not suffer any communication to be made to them, or make any yourself, except to ask them if they have agreed upon their verdict; and that you will not, before their verdict is rendered, communicate to any person the state of their deliberations on the verdict agreed upon." *Held*, that the oath administered was not sufficient, since it did not follow substantially the language of the statute; that it could not be cured by a showing that the bailiff did all that a proper oath would have required him to do; and that, therefore, defendant's conviction was invalid.

Appeal from district court, Russell county; Lee Monroe, Judge.

William Lashell was convicted of violating the prohibitory liquor law, and he appeals. Reversed.

Geo. W. Holland, L. B. Beardsley, and B. H. Tracy, for appellant. N. A. Gernou, H. L. Pestana, and J. C. Ruppenthal, for the State.

PER CURIAM. This action was originally commenced in the district court of Russell county by an information filed on the 29th

day of May, 1890. The information charged William Lashell and one Rene Dutt, a co-defendant, in two counts with the violation of what is commonly known as the "Prohibitory Liquor Law," and in the third count with maintaining a nuisance in a certain room in a building situated on lots 17 and 18, in block 68, in said city of Russell. On that date a warrant was issued, the parties were arrested, and certain goods, denominated as "liquors," were seized. Afterwards, on the 6th day of June, appellant and Dutt made their motions—First, to discharge the goods seized by the sheriff; second, to require the state to be limited to a certain number of witnesses on its part; third, to quash each count of the information. These motions were heard in order, and overruled. The defendants pleaded not guilty, and separate trials were allowed. The defendant was tried before the court and a jury. The jury returned a verdict finding defendant guilty as charged in the first and third counts of the information. The defendant's motion for a new trial and motion in arrest of judgment were overruled. The court adjudged that the defendant, upon the first count, pay a fine of \$100, and be confined in the jail of Russell county for a period of 30 days; on the third count, that he pay a fine of \$150, be confined in the jail for a period of 90 days, and that he pay the costs of the prosecution, and stand committed to the jail until the fine and costs are fully paid. To the several rulings, orders, and judgments of the trial court the defendant duly excepted. The defendant made his bill of exceptions, and now presents the record to this court for review, alleging error in the proceedings of the trial court.

1. That the trial court erred in the admission of incompetent testimony. Herein complaint is made as to the testimony of one William Richards, police judge of the city of Russell. This party was called, and permitted to testify "that a complaint was filed in his office charging the defendant with selling intoxicating liquors upon two counts, in violation of a city ordinance." The witness was permitted to read from his appearance docket as to the filing of the complaint, the entry by him of the fine, the payment of the same, and the disbursement of the proceeds. Complaint is also made that one William Kirchoff, a constable, was permitted to testify that he had a warrant issued by a justice of the peace for the arrest of the defendant; that he went to defendant's residence, followed him into the country, ran after him, and came back to town with him. There is no evidence as to what the warrant contained, nor that defendant was informed of the contents thereof. We cannot see what bearing, if any, such testimony had upon the charge under consideration. All of this testimony was incompetent, and ought not to have been admitted.

2. It is contended that the court erred in allowing the jury to be placed in charge of

a bailiff not legally sworn. Walter Vanderbur was deputy sheriff, and acted as bailiff. He took the usual oath of office as deputy sheriff. As bailiff he took the following oath: "You do solemnly swear that you will take this jury in charge, and keep them together in some convenient place, until they have agreed upon their verdict or are discharged by the court, unless otherwise directed by the court; that you will not suffer any communication to be made to them, or make any yourself, except to ask them if they have agreed upon their verdict; and that you will not, before their verdict is rendered, communicate to any person the state of their deliberations on the verdict agreed upon." Section 237, Code Cr. Proc. (Gen. St. 1889), concerning the oath to be administered to bailiffs, reads: " * * * After hearing the charge the jury may * * * retire under the charge of an officer, sworn to keep them together in some private or convenient place, without food, except such as the court shall order, and not permit any person to speak or communicate with them, nor do so himself, unless by order of the court, or to ask them whether they have agreed upon their verdict, and return them into court or when ordered by the court. The officer shall not communicate to any person the state of their deliberations." It appears that the oath administered was not that prescribed by the statute. The oath to be administered to the bailiff taking charge of the jury should substantially follow the language of the statute. The state insists that no harm was done, for the reason that the bailiff did all that the proper oath requires of him to do. Suppose the oath is entirely omitted; would the state be permitted to show that the bailiff had complied in every respect the same as though the oath had been administered? We think not. A party is entitled to a trial, when accused of a crime, under the forms of law. The state has no right to ask for the conviction of a defendant until he has been tried under the forms of law. *State v. McCormick*, 57 Kan. 441, 46 Pac. 777.

The other assignments of error are without merit. From what we have said, it follows that the court erred in overruling the defendant's motion for a new trial. The judgment is reversed, and a new trial awarded. All the judges concurring.

(10 Kan. A. 16)

KELLEY v. FORD et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 15, 1900.)

TRIAL—SUBMISSION OF INTERROGATORIES.

In an action to recover damages for a personal injury occasioned by the defendant carelessly, negligently, and improperly adjusting a planing machine, in consequence of which the plaintiff's hand was injured, it is not error for the court to refuse to submit to the jury, and require them to answer, at the defendant's request, the question, "If you find that the defendant was guilty of negligence in adjust-

ing the machine, state specifically wherein he was so negligent."

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; William G. Holt, Judge.

Action by J. H. Ford against John R. Kelley and another. Judgment for plaintiff against John R. Kelley, and he brings error. Affirmed.

Edwin S. McAnany and Samuel Maher, for plaintiff in error. Cowden & Snell and Morse & Morse, for defendants in error.

MAHAN, P. J. This is an action by Ford against Kelley & Kelley to recover damages occasioned by the negligence of the defendants in operating a planing machine in the factory of the Kelleys. The charge of negligence is that John R. Kelley carelessly, negligently, and improperly adjusted said machine, by reason of which negligent act the plaintiff was injured. The answer was a general denial, and a plea of contributory negligence. There was a trial by a jury, and a judgment for the plaintiff against John R. Kelley only.

There are two assignments of error. The first is that the court refused to submit to the jury, and require them to answer, the following interrogatory: "If you find that the defendant was guilty of negligence in adjusting the machine, state specifically wherein he was so negligent." The second assignment of error is that the court overruled the motion for a new trial, and under this assignment it is contended that the evidence is sufficient to sustain the verdict and judgment. While this question might have been submitted to the jury for their consideration, it was not error to refuse it; nor would it have been error to have refused to require the jury to answer the question had they failed therein.

There was no issue raised upon the pleadings or upon the trial as to wherein John R. Kelley was negligent in adjusting the machine. The question is more in the character of a cross-examination of the jury. It was not necessary that the plaintiff show in the first instance, or at all, in what specific particular the machine was not properly adjusted. And, again, it was requiring the jury to state upon what evidence they determined a particular fact which was in issue. This cannot be exacted of a jury through special findings; nor can a jury be cross-examined by aid of special findings, under the provisions of the Code in relation thereto. It is alleged, and the evidence disclosed the fact, that the planing machine was adjusted by the use of wheels at the sides of the table on which the planing knives operated, so that the tables on which the lumber rested when being planed were raised and lowered to suit the requirements of the occasion. Whether it was the raising of one table or the raising of another, or the lowering of one or the lowering of another,

was immaterial. The question was, did the defendant improperly and negligently adjust the machine? and not how he did it. How he did it was not an issue, direct or collateral; and it is only upon issues raised by the pleadings, or upon the trial collaterally under the issues made by the pleadings, that a party has a right to require special interrogatories put to the jury. This position is illustrated and supported by the following decisions: *Railroad Co. v. Lannigan*, 56 Kan. 109, 42 Pac. 343; *Railway Co. v. Reynolds*, 31 Kan. 138, 1 Pac. 150; *Same v. Holley*, 30 Kan. 465, 1 Pac. 130; *Bank v. Peck*, 8 Kan. 668; *City of Wyandotte v. White*, 13 Kan. 191; *Bickford v. Champlin*, 3 Kan. App. 681, 44 Pac. 901.

There is sufficient evidence to sustain the verdict, and the motion for a new trial was properly overruled. The judgment is affirmed.

(10 Kan. App. 286)

STATE v. GOFF.

(Court of Appeals of Kansas, Northern Department, W. D. June 5, 1899.)

CRIMINAL LAW—DEFECTIVE INFORMATION—WAIVER—REFUSAL TO TESTIFY—INSTRUCTIONS—INTOXICATING LIQUOR—ILLEGAL SALE.

1. Where a defendant in a misdemeanor voluntarily enters into a recognizance for his appearance at a subsequent term, without making any objection to the sufficiency of the warrant, the sufficiency of the information, or the verification thereof, he waives any supposed defects in the verification, or irregularity, if any, in the issuance of the warrant.

2. Where the defendant neglects or refuses to testify, it is not error for the court to refuse to instruct the jury: "The fact that the defendant did not testify in this cause should not be considered by the jury to affect his innocence or guilt."

3. It is not error for the court to refuse to give an instruction, at the request of the defendant, which correctly states the law, where such instruction is not applicable to the testimony offered upon the trial.

4. In a prosecution under the prohibitory liquor law, it is not necessary that the prosecution in the first instance prove that defendant did not have a permit to sell intoxicating liquors for the excepted purposes.

5. It is error for a court to give an instruction which correctly states the law applicable to a nuisance, where such instruction permits the jury to find the defendant guilty of maintaining a nuisance by means other than those embodied in the complaint.

(Syllabus by the Court.)

Appeal from district court, Graham county; C. W. Smith, Judge.

Thomas F. Goff, Jr., was convicted of unlawful sale of intoxicating liquors, and he appeals. Affirmed in part.

H. J. Harwi and W. M. Roberts, for appellant. G. W. Jones, for the State.

McELROY, J. George W. Jones, county attorney of Graham county, on March 14, 1899, filed in the office of the clerk of the district court of that county an information charging Thomas F. Goff, Jr., in seven counts, with the unlawful sale of intoxicat-

ing liquors, and in one count with the maintaining a common nuisance under the prohibitory liquor law. The first count reads: "I, the undersigned, county attorney of said county, in the name, by the authority, and on behalf of the state of Kansas, give information that Thomas F. Goff, Jr., at the county of Graham, in the state of Kansas, on the 3d day of November, A. D. 1898, without having procured from the probate judge of said county any permit to sell intoxicating liquors, did then and there unlawfully sell and barter spirituous, malt, vinous, fermented, and other intoxicating liquors, contrary to the statutes in such cases made and provided, and against the peace and dignity of the state of Kansas." The other six counts of the information were the same, except the date of the sale. The eighth count reads: "And I do further give the court to understand and be informed that the said Thomas F. Goff, Jr., at and in a certain two-story frame building situated on the south side of Main street, in the city of Hill City, Kan., on the east twenty-one feet of lot 19, in block 18, in the original town, now city, of Hill City, in said Graham county, in the state of Kansas, did, at the respective dates of the several offenses hereinafter charged, then and there have and keep in his possession there, and then and there used and employed the same, in and about and for the commission of the said offenses, and then and there did at said dates and still does there keep and have in his possession for the purpose of being and employing, and uses and employs the same, in and about and for the purpose of keeping there an unlawful place for the unlawful sale and keeping for unlawful sale of intoxicating liquors to be used as beverages, and not for medical, scientific, nor mechanical purposes, certain property, intoxicating liquors, and vessels in his possession kept, to wit, certain barrels, boxes, kegs, jugs, and bottles."

The information was verified before the clerk of the district court as follows:

"State of Kansas, Graham County—ss.: I do solemnly swear that the allegations set forth in counts numbered first, second, third, and eighth in the within information are true; so help me God. T. J. Garnett."

"State of Kansas, Graham County—ss.: I do solemnly swear that the allegations set forth in the within information are true, to the best of my information and belief; so help me God. George W. Jones, County Attorney."

A warrant was duly issued, and placed in the hands of the sheriff. The defendant was arrested, and afterwards, on the 15th day of March, 1899, entered into a recognizance for his appearance at the next term of court, and was released from custody under the warrant of arrest. The defendant, on May 15th thereafter, filed his motion to quash the warrant of arrest for the reason (1) that the warrant of arrest was not

issued upon probable cause, supported by the oath or affirmation of any person; (2) the warrant of arrest, so far as it relates to the search and seizure of property, is void, for the reason that it does not particularly describe the property to be seized. The motion to quash was overruled. The defendant thereafter moved the court to quash the information for the reasons (1) that the facts stated do not constitute a public offense; (2) misjoinder of offenses; (3) that the information is bad for duplicity; (4) that the eighth count does not particularly describe the property to be seized; (5) that the fourth, fifth, sixth, and seventh counts are not supported by the oath or affirmation of any person. This motion was overruled. The defendant was arraigned, refused to plead, and the court ordered a plea of "Not guilty" to be entered. A trial was had at the May term, 1899, which resulted in the conviction of defendant upon the first, second, third, fourth, seventh, and eighth counts of the information. The defendant filed motions for new trial and in arrest of judgment, which were overruled. The court sentenced the defendant to pay a fine of \$100, that he be confined in the county jail of Graham county for 30 days under each count of the information upon which conviction was had, that he pay the costs of the prosecution, and that he stand committed to the jail until the fine and costs were paid. The defendant prosecutes an appeal. The appellant insists that the proceedings in the trial were erroneous, as follows:

1. The first, second, and third assignments of error present but one question; that is, upon the sufficiency of the verification to the complaint. The defendant was arrested on March 15, 1899, at which time he voluntarily entered into a recognizance for his appearance at the next regular term of the district court for Graham county, and was released. The motion to quash the warrant was filed on May 15, 1899. The defendant was not under arrest at the time he made his motion to quash the warrant. The warrant had spent its force, and had been returned by the sheriff. He was no longer held by reason of the warrant. The defendant was under recognizance to appear at court, but he entered into that voluntarily. When he entered into a recognizance for his appearance, without making any objection to the sufficiency of the warrant, the sufficiency of the information, or the verification thereof, he waived the supposed defects in the verification, and the irregularity, if any, in the issuance of the warrant. *State v. Longton*, 35 Kan. 375, 11 Pac. 163; *Same v. Stredder*, 3 Kan. App. 631, 44 Pac. 34.

2. It is contended that the court erred in refusing to give instructions requested by the defendant. The instructions requested by the defendant of which complaint is made are as follows:

(1) "The fact that the defendant did not testify in this cause should not be construed by the jury to affect his innocence or guilt." This instruction presents a question which has been largely considered by the courts of various states. Edward Thompson, in his *Encyclopedia of Pleading and Practice* (volume 11, p. 351), says: "In some jurisdictions it is made the duty of the court to instruct the jury that no inference of the defendant's guilt is to be drawn from his failure to testify, and it would seem that no request for such an instruction is necessary; in others, the giving of such an instruction is proper, but not necessary, in the absence of a request therefor. In some jurisdictions, because of the peculiar wording of the statutes, it has been held erroneous to refuse an instruction that no presumption of guilt should be indulged against the defendant on account of his failure to testify, and in others it has been held proper to instruct that such failure raises no presumption against the accused. On the other hand, the statutes of some states have been so construed as to prohibit the court from charging that a neglect or refusal of the accused to testify does not create any presumption against him. These courts take the view that the trial judge should say nothing whatever in regard to the matter." Section 218, Code Cr. Proc. (Gen. St. 1897), reads: "The neglect or refusal of the person on trial to testify, or of a wife to testify in behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place." This statute is very similar to that of Missouri, which reads (section 4219, art. 7, c. 48, Rev. St. Mo.): "If the accused shall not avail himself or herself of his or her right to testify, or of the testimony of the wife or husband, on the trial in the case, it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, nor be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place." Under this Missouri statute, it has been held that the trial court properly refused to give a similar instruction. *State v. Robinson*, 117 Mo. 663, 23 S. W. 1066. We are inclined to think that our statute is substantially like that of Missouri, and that the court properly refused to give this instruction. The neglect or refusal of a person on trial to testify shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place. This is plain: The court shall not consider the matter; the jury shall not consider the same. How can the court instruct upon a matter which it cannot consider? Why instruct the jury upon

a question which it cannot take into consideration? The instruction was properly refused.

(2) "The court instructs the jury that you are not authorized by law to arbitrarily reject, without cause or reason, the testimony of any witness, but it is your duty to carefully examine, and, so far as possible, harmonize, all the testimony in the case upon the basis of truth, but, if you are unable to do this, then you are authorized to, and it is your duty to, reject such of it as you think not entitled to credit. And in considering the testimony you should not draw any unfair inference or unjust conclusions against the defendant because of any failure or omission on his part to offer any particular kind of evidence, but he should be tried alone upon the facts proved. You are to found your verdict on the testimony delivered by the witnesses upon the witness stand, and are not to supplement it with some other fact that you may think exists, but which has not been proven." It is apparent that this instruction would be very proper under some circumstances. For instance, in a case where, from conflicting testimony, a party should apprehend that for some reason portions of his testimony might be arbitrarily rejected by the jury without sufficient excuse. In the case at bar, the defendant introduced no testimony; he had no witnesses nor testimony to be protected from arbitrary rejection by the jury; there was no conflict in the testimony; there was no just ground for the defendant to apprehend that testimony would be arbitrarily rejected; he had offered none; there was no conflict in the testimony to be harmonized by the jury; hence there was no necessity for an instruction as to how to harmonize conflicting testimony. The instruction was not applicable to the testimony, and was properly refused.

3. That the court erred in instructing the jury:

(1) "The necessary elements constituting the crime charged in the first, second, third, fourth, fifth, sixth, and seventh counts of the information, and which must be proven by the evidence beyond a reasonable doubt to justify a conviction under any of them, are—First, that the defendant unlawfully sold some kind of intoxicating liquors; second, that he sold it within Graham county, Kansas; third, that such sale or sales were made some time within two years just prior to the 14th day of March, 1899." The contention here made is that the instruction is erroneous, for the reason that it eliminates entirely the necessity of the state proving that the defendant did not have a permit from the probate judge to sell intoxicating liquors. The court committed no error in giving this instruction. It is not necessary that the prosecution in the first instance prove that the defendant did not have a permit to sell intoxicating liquors for the excepted purposes. Section 47, c. 101, Gen. St. 1897, reads: " * * * It shall not be nec-

essary in the first instance for the state to prove that the party charged did not have a permit to sell intoxicating liquors for the excepted purposes. * * * " State v. Crow, 53 Kan. 662, 37 Pac. 170.

(2) "If one keeps a place where the public generally is permitted to resort for the purpose of obtaining intoxicating liquors to be used as a beverage, and the public generally do resort to such place for such purpose, and the liquors are delivered by the keeper thereof to such persons as do resort to the place for that purpose, and such liquors are drank in the premises with the knowledge and consent of the keeper, such facts are evidence from which a jury would be justified in inferring that such place is a common nuisance, under the prohibitory liquor law." Section 39, c. 101, Gen. St. 1897, reads: "All places where intoxicating liquors are manufactured, sold, bartered or given away in violation of any of the provisions of this act, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter or delivery in violation of this act, are hereby declared to be common nuisances.

* * * " The eighth count of the information charges only under the first and third subdivisions of the statute, defining a nuisance. There is no attempt to charge under the second subdivision, "or where such persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage." This instruction was therefore erroneous. State v. Nye, 32 Kan. 201, 4 Pac. 134; Same v. Burkett, 51 Kan. 175, 32 Pac. 925.

4. The next contention is that the verdict of the jury is contrary to the law and evidence. It is here contended that there is no evidence as to what county the several offenses were committed in, and that there is no evidence as to whether or not the defendant had a permit to sell intoxicating liquors. We have already noted sufficiently the latter contention. We have examined the evidence very carefully tending to show in what county the several sales of liquors were made. We think that there was an abundance of testimony from which the jury might properly find that the offenses were committed in Graham county. As to the conviction upon the eighth count, however, there is a total lack of evidence to show that the sales were made in a two-story frame building situated upon the south side of Main street, in Hill City, Kan., on the east 21 feet of lot 19, in block 18, in the original town, now city, of Hill City, in Graham county, state of Kansas. There is therefore a lack of evidence to support the conviction of the defendant on the eighth count of the information. From what we have said, it follows that the court properly overruled the motion for a new trial as to the first, second, third, fourth, fifth, and seventh counts of the information. The

court erred in overruling the motion for a new trial upon the eighth count of the information, for the reasons hereinbefore stated. The judgment of conviction will be affirmed as to the first, second, third, fourth, fifth, and seventh counts of the information, and a new trial awarded upon the eighth. The costs in this court are taxed, one-seventh to the state, and six-sevenths to the appellant. All the judges concurring.

(62 Kan. 104)

STATE v. GOFF.

(Supreme Court of Kansas. June 9, 1900.)

CRIMINAL LAW—INSTRUCTIONS—FAILURE OF ACCUSED TO TESTIFY.

In the trial of a criminal case in which the defendant fails to testify, it is error for the court to refuse to instruct, if requested by him, that "the fact that the defendant did not testify in this cause should not be construed to affect his innocence or guilt."

(Syllabus by the Court.)

Commissioners' decision. Appeal from court of appeals, Northern department, Western division.

Thomas F. Goff was convicted of a misdemeanor. From a judgment of the court of appeals (61 Pac. 680) affirming the same, defendant appeals. Reversed.

W. M. Roberts and H. J. Harwi, for appellant. A. A. Godard, Atty. Gen., and G. W. Jones, Co. Atty., for the State.

DOSTER, C. J. This is an appeal from a judgment of conviction of a misdemeanor. We ordered a certification of the case from the court of appeals in order to give consideration to the question whether it was the duty of the trial court, upon defendant's request, to give to the jury the following instruction: "The fact that the defendant did not testify in this cause should not be construed to affect his innocence or guilt." In this case the court of appeals for the Northern department held that a refusal to give this instruction was not error. The court of appeals for the Southern department, in *State v. Evans* (Kan. App.) 58 Pac. 240, made a contrary holding. *Crim. Code* (Gen. St. 1889) § 215, after declaring the competency of defendants in criminal cases and their wives to testify, further provides "that the neglect or refusal of the person on trial to testify, or of a wife to testify in behalf of her husband, shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place." Section 215a also declares: "If the accused shall not avail himself of his right to testify in any case, it shall not be construed to affect his innocence or guilt." Is it the duty of the court, upon the defendant's request, to instruct the jury in accord with the above-quoted statutory provisions? We

think it is. Is section 215, above quoted, in the nature of a limitation upon the power of the judge in the matter of instructions, or does it require of him the performance of a duty as to instructions when requested by the defendant? We think it does the latter. It is a fact that it is always within the power of a defendant accused of crime to give exculpatory evidence in his behalf. It is a fact that his failure to do so will be noticed, commented upon, and considered by others, unless they are under a legal or sworn duty to not do so. The very object of the statute was to guard as well as could be against the consequences of these well-known facts; hence it was provided that they should not be commented upon by the prosecuting attorney, nor considered by the court or jury,—that is, not considered to the prejudice of the defendant. But how shall the right of the defendant be guarded against that natural suspicion of the jury aroused by his failure to testify, unless the law governing the jury's duty be explained to them by the court? The statute does not say that the defendant's failure to testify shall not be commented on by the court, but it says that it shall not be considered by it,—that is, it shall not be taken into account against the defendant,—not that the court shall not guard the defendant's rights against adverse criticism and consideration by others. If the statute were to be construed in accordance with the theory of the state, it would utterly fail in at least one, if not all, of its provisions. Suppose the county attorney, in disregard of the prohibition upon him, should refer to the circumstance of the defendant's failure to testify, and suppose the court, as in duty bound, should interfere to check him, and should order him to desist, and should instruct the jury to give no heed to his remarks in that respect, the court would be, of necessity, considering the defendant's failure to testify. It would be, however, considering it with a view to the protection of his legal rights; but, under the theory of the state, the very duty thus performed would involve an error of law. The decisions of the courts are not all uniform upon the question. In *State v. Robinson*, 117 Mo. 663, 23 S. W. 1066, and *State v. Pearce*, 56 Minn. 220, 57 N. W. 652, 1065, the refusal to give the instruction upon defendant's request was held not to be error. A contrary holding was made in *Farrell v. People*, 133 Ill. 244, 24 N. E. 423. In *Matthews v. People*, 6 Colo. App. 456, 41 Pac. 839; *People v. Flynn*, 73 Cal. 513, 15 Pac. 102; *Foxwell v. State*, 63 Ind. 539; and *Metz v. State*, 46 Neb. 547, 65 N. W. 190,—it was held to not be error for the court, in the lack of a request by defendant, to fail to give the instruction. The logic of these decisions and the language of the opinions are to the effect that the court's failure to instruct, if requested by the defendant, would have been error. Some other claims of error are made by the appellant, but they are not well taken. However, for the reasons above given, the judg-

ment of both the court of appeals and the district court are reversed, and a new trial ordered. All the justices concurring.

(62 Kan. 163)

FITZWATER et al. v. NATIONAL BANK OF SENECA et al.

(Supreme Court of Kansas. July 7, 1900.)

ACTION AGAINST CORPORATION—INTERVENTION BY STOCKHOLDERS.

The stockholders of a corporation who allege that their company has a valid defense to a suit brought against it, but which its managing officers wrongfully or fraudulently refuse to make, are entitled to intervene in the suit and defend for the company, upon their tender of an answer stating valid matters of defense to the action, and the making of a showing, by evidence, of reasonable grounds to believe that such defense can be finally proved upon a trial of the case, and that the officers whose duty is to make it are wrongfully or fraudulently refusing to do so.

(Syllabus by the Court.)

Error from district court, Nemaha county; William I. Stuart, Judge.

Action by the National Bank of Seneca against the State Bank of Seneca and others. E. C. Fitzwater and others, stockholders of the state bank, petitioned to intervene. From an order refusing the same, they bring error. Reversed.

S. K. Woodworth, for plaintiffs in error. Wells & Wells and R. M. Emery, for defendants in error.

DOSTER, C. J. In this case proceedings in error have been instituted to reverse an order of the court below overruling the motion of certain stockholders in a banking corporation to intervene in a suit brought against their company, and to defend the action against it. The grounds of the motion to intervene were that the company was not liable to the action brought against it, and that its directors and managing officers wrongfully and fraudulently refused to defend. The facts were that the State Bank of Seneca, a banking institution organized under the laws of this state, undertook to reorganize as a national bank in accordance with the provisions of the national bank act. That act provides that banking institutions organized under state laws may reorganize as national banks upon a vote of two-thirds of the stockholders, upon the taking of which vote the board of directors are required to certify the action taken to the comptroller of the currency, who thereupon issues a certificate of authority to do business as a national bank. The decisions of the courts are that upon effecting the reorganization in the prescribed way the old corporation becomes merged in the new, or, more accurately speaking, the new corporation is held and treated to be a mere continuation of the old one. The change effected, therefore, merely consists in passing from one form of organization to another, and in amenability to national regulation and con-

trol instead of that of the state. The requisite number of the stockholders of the State Bank of Seneca voted to make the change. Whether the board of directors certified the resolution of reorganization to the comptroller of the currency does not appear from the record before us. However, it does appear that in due time the comptroller issued a certificate of authority to a bank entitled the National Bank of Seneca, which institution commenced, and since then has continued, to do business by such title. In the main its stockholders were the stockholders of the old State Bank of Seneca, its directors were the same with one or two additional persons, and its executive officers were the same. It commenced, and has continued, to do business at the place where the State Bank of Seneca was located. The officers of the old state bank, who, as just remarked, were also the officers of the new national bank, continued to do business for the old bank and in its name. This business, however, consisted in liquidating and winding up its affairs. It pursued the work of collecting its securities and paying its obligations, and among other things made reports to the bank commissioner of the state. It was unable to discharge all of its indebtedness, and to enable it to do so it borrowed \$20,000 or more of money from the new national bank. It did not pay the money so borrowed, and suit was thereupon brought against it. It made default in the suit, whereupon certain of its stockholders, who had not gone into the new or supposedly reorganized bank, filed a motion to be allowed to defend in place of the corporation, alleging the lack of power of the old corporation officers to incur the obligations for which the suit was brought, and alleging that such obligations were given without consideration, and in fraud of the old corporation and its stockholders, and that the officers of the old corporation, being the same as those of the new one, and being the ones guilty of the wrongful acts charged, had neglected to defend, as they should have done. In connection with the motion of intervention, the stockholders tendered a verified answer, setting up all the matters herein briefly mentioned, and asked that they be allowed to file it, and under it to be allowed to defend for their company. The case was heard upon the motion for leave to intervene and to file the answer. Considerable evidence was taken, much of which tended quite strongly to support the contention of the stockholders, especially to support their claim that the old state bank had by process of reorganization become changed into the new one. This claim was denied, it being asserted that, notwithstanding the resolution of the stockholders to reorganize, a reorganization was not in fact accomplished, but instead thereof the new bank was an original institution, organized without reference to the existence of the old bank. If such were the case, the old bank

did not become merged into the new one, or changed to a new one, but retained its existence under the laws of this state, and was competent to contract the obligations sued upon. Seemingly the only missing link in the chain of evidence necessary to show that the new bank was a reorganized, and not an original, institution, was a showing that the board of directors of the old bank had forwarded the resolution of reorganization to the comptroller, and that the comptroller's certificate of authority had been issued in pursuance to such resolution, and not in pursuance to a scheme of original incorporation. The inference, however, is strong, from all the evidence in the case, that the national bank was a reorganized, and not a newly-organized, institution. However, if the record before us was the record of a final trial of the case, we would be compelled, under the well-settled rule, to allow the judgment of the court below to remain undisturbed; but the trial that was had was not a final trial, but only a trial of the motion for leave to intervene and have a trial. In other words, the trial that was had was not the trial proper, but was a trial of the preliminary question as to whether a trial should be had.

There can be no question but that stockholders are entitled to defend legal proceedings in behalf of their corporation in case its directors or managing agents are willfully or fraudulently neglectful of its interests. *Mining Co. v. McKibben*, 60 Kan. 387, 56 Pac. 756. In that case it was said: "If the directors be derelict in their duties, and through willful neglect, or for a fraudulent purpose, fail to protect the corporate interests, the stockholders may do so in their stead; but, to entitle them to do so, it must be made to appear that the corporate officers who are primarily charged with the duty are willfully or fraudulently neglectful of it." A proper practice in such cases is for the stockholders to move the court for leave to intervene in the suit they wish to defend, and to allege and show that the authorized and managing agents of the company are derelict in their duties. Before allowing this privilege to the stockholders, the court should require of them a prima facie showing, at least; but that showing need not be more than a prima facie one—enough to enable the court to conclude that there are reasonable grounds to believe that the corporation defendant has a meritorious defense to the action against it, and that its officers are fraudulently or improvidently neglectful of its interests. This showing was made in the case we are considering. Irrespective of the matters of fraud charged in the motion and answer, and to support which there was some showing of testimony, it would seem that, if the National Bank of Seneca was the State Bank of Seneca reorganized, such last-named bank had no authority to contract the obligations sued upon. Rather, it had no existence, and, having no exist-

ence, the contracting of a debt cannot be predicated of it. *Smith, Dig. Nat. Bank Dec. 215*. However, we do not wish to be understood as making such decisions at this time. We only remark, as we did before, that such seems to be the rule of the cases upon the subject. If such be the law, there can be no question, unless some exceptional facts exist, that the old corporation had no power to contract the obligations sued upon, and the stockholders, therefore, would be justified in asking leave to defend. Hence we are of the opinion, upon the showing made, that the court should have sustained the motion of intervention, should have allowed the filing of the answer and the making of an issue thereon, and should have allowed a full trial of the case. To enable such to be done, the judgment of the court below is therefore reversed. All the justices concurring.

KING v. MOLLOHAN et al.

(Supreme Court of Kansas. July 7, 1900.)

On rehearing. Affirmed.

For former opinion, see 60 Pac. 731.

PER CURIAM. A rehearing in this case was ordered because we assumed that a certain finding copied in the record was part of the same. It now appears that after the finding had been filed a motion to strike out the fourteenth finding was made and sustained. That finding was to the effect that the conduct of John Bartel towards his wife was such as to render a separation necessary for the health and happiness of the wife. Although the motion was sustained, the finding was allowed to remain in the record, and the fact that it was printed there, as well as the further fact that counsel in their printed brief and argument assumed it to be a part of the record, led us to the same assumption, and to overlook the correction made in the manuscript brief filed after the oral argument. The absence of the finding, however, does not invalidate the post nuptial contract, nor warrant a change in the ultimate decision of the case. The specific finding that the husband and wife were incompatible, and that a separation was necessary to the health and happiness of the wife, was cited to show that the separation was not collusive or fraudulent, or violative of public policy. We did not hinge the decision, however, on this finding, as a reading of the testimony sufficiently shows the absence of collusion and fraud in the separation, as well as in the agreement for the division of property, and this is sufficient to sustain the general finding. A separation between the parties had been fully decided upon, and the agreement which was made contemplated and was followed by an immediate separation. The facts show and the court finds

that the adjustment of the property rights under the agreement was fair, reasonable, and just; and it is held in *Randall v. Randall*, 37 Mich. 563, and other cases cited in the former opinion, that when a separation "has been fully decided upon, and the articles contemplate a suitable provision for the wife and children, or an equitable and suitable division of the property the benefits of which both have enjoyed during coverture, no principle of public policy is disturbed by them." We are satisfied with the views taken and already expressed as to the stipulation that the husband should stay away from his wife's place, and not molest her or trespass on her premises, and as to the understanding had between them with reference to a divorce. In our view, the separation agreement does not violate public policy; but, if for some reason it did, the fact that the husband had accepted the benefits of an agreement which fairly and equitably divided the property, and which was fully executed, would preclude him from setting it aside, or recovering property disposed of under its provisions. The judgment of affirmance will not be disturbed.

DOSTER, C. J., not sitting, having been of counsel in the case.

McMANUS v. WALTERS et al.

(Supreme Court of Kansas. July 7, 1900.)

CONDITIONAL SALES—RESERVATION OF TITLE—REFLEVIN—PLEADING—AMENDMENT.

1. In cases of conditional sales of personal property, a reservation of title in the seller until the performance of the conditions by the buyer may be implied from the conduct of the parties and the facts and circumstances of the case, and need not be made in the form of an express agreement.

2. The facts of this case, as testified to by the seller of a stock of merchandise, tended to show an intention upon his part to reserve, and upon the part of the buyer to allow a reservation of, title in the seller. *Held*, therefore, that it was error for the court to refuse to instruct the jury upon the theory of a claim by the seller of an implied reservation of title.

3. A plaintiff in replevin, who, in ignorance of the real value of property sought to be recovered, alleges its value at an excessive sum, is entitled, upon motion therefor, to amend his petition in such respect, notwithstanding he failed to amend when (as before answer) he could have done so without leave, and also failed to apply for leave as early as he might have done, if the amendment, when applied for, can be made without prejudice to the rights of the defendant, and if a denial of leave to make it will increase the liability of the plaintiff to the extent of \$1,000, or a fifth of the value of the property in dispute.

(Syllabus by the Court.)

Error from district court, Marion county; O. L. Moore, Judge.

Action by T. H. McManus against Jacob Walters and Conrad Sell. Judgment for defendants, and plaintiff brings error. Reversed.

W. H. Carpenter and Bowman & Bucher, for plaintiff in error. King & Kelley, for defendants in error.

DOSTER, C. J. This was an action of replevin of a stock of goods, brought by the plaintiff in error, T. H. McManus, as plaintiff, against the defendants in error, Jacob Walters and Conrad Sell, as defendants. The most material claim of error is that the court, in its instructions to the jury, misstated the theory upon which the plaintiff based his right to recover the property, and also refused a request for instructions which correctly stated the theory of the claim made by him, and to the establishment of which claim his evidence was directed. The plaintiff claimed to be the owner of the goods, but admitted that he had made a conditional sale of them to the defendants, which conditions, as he claimed, had not been complied with by the defendants. The instructions of the court attributed to the plaintiff a claim of sale of the goods, with an express reservation of title until compliance should be made with certain conditions. The plaintiff did not ask that the jury be instructed upon the theory of an express reservation of title, but did ask for instructions upon the theory of a reservation of title inferable from the facts and circumstances of the case. To determine the character of the plaintiff's claim, a brief statement of the evidence upon his part will be necessary. The plaintiff lived and did business at Newton, Harvey county. He owned the stock of goods in question, which were at Marion, Marion county, and were in charge of Jacob Walters, one of the defendants, as his agent. Walters and Conrad Sell, the other defendant, desired to purchase the goods at Marion. A part of their plan was for Sell to remove a stock of goods owned by him at a neighboring town, and unite it with the one at Marion. The parties met at the last-named town and agreed upon terms. These terms were reduced to writing, and stated in a provisional memorandum agreement, which recited, in substance, that an invoice of the stock of goods should be taken; that the plaintiff should sell to the defendants for 90 per cent. of the invoice price, payable \$1,000 in cash, the balance in weekly payments thereafter, which payments were to be evidenced by promissory notes signed by the defendants; that upon the completion of the invoice the plaintiff should execute a bill of sale of the goods to defendants, who in turn were to pay the \$1,000 and deliver the notes. The bill of sale and the notes were signed preparatory to delivery, and the parties met in a law office to complete the transaction. The plaintiff delivered the bill of sale, and the defendant Walters handed the plaintiff \$300 of the cash payment. The plaintiff objected that the amount was not what had been agreed upon. Walters said that it was all he had at that

time, but that he would pay the remainder to plaintiff at his home, in Newton, in a very few days. The plaintiff declined to accede to this change of agreement, and demanded the return of the bill of sale. Walters at first objected to returning the bill of sale, but handed it back upon being advised by the attorney present that it should be done. The parties then separated, with the statement by Walters that his inability to pay the full amount agreed upon would be temporary, and that he would presently pay it all; the plaintiff thereupon stating that he would deliver the bill of sale and complete the transaction when the \$1,000 was paid. The plaintiff returned to Newton, and found one of his children suffering a serious injury, from the effects of which it died in about a week thereafter. During this time Walters remitted \$200 more to the plaintiff, and also called upon him for the purpose of a conference concerning the payment of the balance and the closing up of the transaction. The plaintiff informed him that on account of the misfortune in his family he was not in a condition to attend to the business, but stated that as soon as he could do so he would go to Marion and close the matter out. Shortly thereafter he did go there, but the parties were unable to agree upon terms for the completion of the transaction. In one of his conversations there, Walters admitted that the goods still belonged to the plaintiff. During all this time the defendant Walters was in possession of the stock of goods, and engaged in the sale of it, as he had been before he opened negotiations for its purchase. The above summary of facts was, in substance, the testimony of the plaintiff. It was contradicted in many particulars by the defendants. We, however, are not concerned with the truthfulness of the statements of either party or their witnesses. The plaintiff was entitled to an instruction to the jury presenting his theory of the case, and the question therefore is, do the facts, as testified to by the plaintiff, present a claim of implied reservation of title, or a reservation of title by express agreement? We are entirely clear that it presents a case of the former, and not of the latter. Indeed, the counsel for the defendants in error, in their opposition to the theory of implied reservation, only array a portion of the circumstances above detailed, and one or two additional matters derived from the testimony of their own witnesses and the cross-examination of the plaintiff, which, giving to them all the weight to which in reason they may be entitled, in no manner controvert the theory of the plaintiff in error. They say in their printed argument: "When the plaintiff had accepted a part payment of the cash payment, when he knew the residue was not to be paid at that time, on the promise of defendants to pay within a short time, and then surrender possession of the stock of goods, knowing same were to

be sold in the usual retail trade, and that new goods were to be put in the stock, and the Sell goods were to be moved from Lehigh and placed in the same general stock, by which the identity of the goods sold would be lost, and the means of determining the particular article sold would be made well-nigh impossible, and furnished advertisements for the parties to whom he had sold, and had gone away without receiving the payment, and then advertised in his home papers that he had sold out to Walters, it would take an express agreement to reserve a title in the plaintiff under these facts."

The above is but the statement of circumstances proper to be taken into account in considering the nature of plaintiff's claim, but none of them or all of them together possessed a character which would make his claim into one of express reservation of title, instead of an implied one. Indeed, the contention of the defendants in error is not so much that the facts show an express reservation (if any at all), and not an implied one, as it is that the law does not countenance conditional sales by implied reservations of title. The authorities cited by them are summarized in 21 Am. & Eng. Enc. Law (1st Ed.) 482: "When there has been no manifestation of intention, the presumption of the law is that the contract is an actual sale, and that the transfer of title takes place at once, if the specified thing is agreed on and is ready for immediate delivery. This is universally true where the price has been paid, or the sale has been expressly made upon credit; but, where the sale is for cash, payment, it has been said, must precede the transfer of title. The better doctrine, however, appears to be that the transfer of title takes place immediately upon the conclusion of the contract, notwithstanding the fact that the transaction is for cash, and the seller having a lien for the price, which entitles him to retain the possession of the chattel until the price is paid; and in those jurisdictions in which, when the sale is for cash, payment is held a condition precedent, it has been universally held that the seller waives the condition when he makes complete delivery without expressly reserving title to himself." There can be no question as to the correctness of the above statement of the law. It will be, however, observed that its application to any particular case is hinged upon the fact of the delivery by the seller to the buyer of the thing sold. Counsel for defendants in error therefore beg the question in the case. There was no delivery of the stock of goods by the plaintiff to the defendants in error. The defendant in error Walters simply retained the possession of the goods as he had for many months before, when he was holding them as the agent of the plaintiff in error, or, to state it in a way to which the defendants in error can take no possible exception, the facts of the case, as testified to by witnesses on both sides, raised nothing more than a question

as to whether the possession of Walters was a continuance of his former possession as agent, or a new possession by him as owner. It would be impossible for defendants in error to reduce the question to one of more favorable terms than as above stated; and, thus stated, the inapplicability of the law quoted in their behalf becomes apparent. On the other hand, the law is well settled that a reservation of title, as one of the terms of a conditional sale, may be implied from the circumstances of the transaction. In *Fishback v. Van Dusen*, 33 Minn. 111, 22 N. W. 244, it was ruled that: "When payment of the purchase money and delivery of the goods are expressly or impliedly agreed to be simultaneous, and the payment is omitted or refused by the purchaser upon getting possession of the goods, the vendor may reclaim them; the delivery being merely conditional. To constitute a conditional delivery, it is not necessary that the vendor should declare the condition in express terms at the time of delivery. It is sufficient if it can be inferred from the acts of the parties and the circumstances of the case that it was intended to be conditional." In *Tied. Sales*, § 201, it is said: "No particular words or forms of expression are really necessary for the creation of a conditional sale. Any words which indicate an intention to annex a condition to the sale will be sufficient. Such phrases, however, as 'on condition,' 'provided,' 'If it shall so happen,' etc., are found in constant use, in making conditional sales, and, if employed, will usually remove any doubt as to the sale or transfer being conditional. But, whether these expressions are used or not, if the intention of the parties to make the sale dependent upon the happening of some event or the performance of some collateral obligation can be ascertained from the expressions of the parties, it will be a conditional sale, it matters not what may be the language used." Authorities to the same effect could be multiplied. We doubt, indeed, whether a single one to the contrary can be found. The court therefore erred in stating the theory of the plaintiff's case, and confining his right of recovery to an express reservation of title.

The court also erred in another particular. It refused leave to plaintiff to amend his petition, under circumstances which constituted an erroneous view of judicial discretion. The plaintiff, in his petition and affidavit for replevin, alleged the value of the goods to be \$5,110. Immediately upon securing possession he took an inventory, which showed them to be only of the value of \$4,144. The petition was filed on the 7th of February, and the inventory taken a few days thereafter. The case was set for trial April 13th following. When it was called for hearing the plaintiff asked leave to amend his petition by alleging the value of the goods at what he had discovered it to be. The court denied him leave to make the amendment, but upon the trial allowed

him to prove the real value of the goods. After making proof of such value, the plaintiff again asked leave to amend his petition by alleging the value to correspond with the proof. This request was denied, and the court thereupon instructed the jury that, if it found against the plaintiff, to find the value of the goods to be the sum stated by him in his pleadings, to wit, \$5,110. Unless there was such conduct upon the part of the plaintiff as to disentitle him to make the amendment he asked to make, or unless the making of it would have been to the material prejudice of the defendants, the court should have allowed it to be made. The opposition to the making of the amendment was stated to us by counsel for defendants in error, and, we suppose, was likewise stated by them to the court below, to be that the plaintiff had the time intermediate the discovery of the real value of the goods and the answer day (a period of about one month) within which, under the authority of the statute, to amend his petition without leave, and also had from the beginning of the term of court at which the case was tried until the calling of the case for trial (a period of ten days) within which to apply to the court for leave to make the amendment, and that when, upon the calling of the case for trial, he did ask for leave to make the amendment, he made no showing of reasons why it had not been applied for at an earlier date. These, it must be admitted, constituted proper objections to the making of the amendment; but, in our judgment, they did not constitute sufficient objections to making it. The defendants urge no reasons why the amendment would have been prejudicial to them, other than to deprive them of the opportunity of holding the plaintiff to an inadvertently made allegation of value. They do not say that they desired to contest the plaintiff's claim of lesser value, and were not then prepared to do it. They rely, not upon merit in themselves, but upon the laches and consequent demerit of the plaintiff. Now, while the making of amendments is very largely in the discretion of the trial court, it should nevertheless allow amendments in furtherance of justice to a party, if the making of them will work no injustice to the other party; and, where the effect of an amendment will be to save to a party \$1,000 (a fifth of the value of the thing in dispute), we think it should be allowed, notwithstanding a lack of diligence in applying for leave to make it. The laches of the one party is only of concern to the opposing party in the event that he has suffered some loss or been put to some disadvantage because of it. It is proper to refuse leave to amend pleadings when asked for by negligent suitors, if the acts of negligence and the amendments in correction of them will be to the material disadvantage of the one who is without fault; but unless such is the case a party should not suffer so serious a punishment

for his laches as the deprivation of a very large portion of the value of the thing in controversy.

Some other claims of error are made,—one, that the court ruled that it was necessary for the plaintiff to make a demand upon the defendants for the surrender of the goods before instituting the action for their recovery. This was one of the class of actions in which a demand was not a prerequisite to the institution of the suit, and the court therefore erred. The other claims of error raise questions subsidiary to the one first and principally discussed herein, and do not require special mention. The judgment of the court below will be reversed, with directions for a new trial. All the justices concurring.

(62 Kan. 138)

DE TARR v. FERD. HEIM BREWING CO.

(Supreme Court of Kansas. July 7, 1900.)

NEGLIGENCE — EXCAVATIONS ON PRIVATE PROPERTY—LIABILITY OF TENANT.

1. Where the public has passed over private property for a long time with the implied permission of the owner or those in control of the same, and where it may be said that a portion of the property is temporarily devoted to a public use, persons using the way are not deemed to be trespassers, nor mere licensees; and the owner or those in control cannot without liability make excavations, nor leave unprotected openings, so close to the line of such way as to render travel thereon unsafe.

2. A tenant who has possession and control of premises is ordinarily bound to keep them in such condition that they will be safe for the public, and such tenant is prima facie liable to third persons for damages arising from negligent defects.

3. In such case, testimony as to the relations between the landlord and tenant may be received to establish who was in actual control of the premises, and who was liable for an injury sustained by a traveler from an opening in the path over the property.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; W. G. Holt, Judge.

Action by Mazie A. De Tarr against the Ferd. Heim Brewing Company. Judgment for defendant, and plaintiff brings error. Affirmed.

T. P. Anderson and J. D. Wendorff, for plaintiff in error. Moore & Berger, for defendant in error.

JOHNSTON, J. Near the Riverview station, and between the Grandview and Park branches of the elevated street railway in Kansas City, Kan., is a lot owned by the Ferd. Heim Brewing Company. On the east end of the lot was a house occupied by the Hicks family, and on the west end was a small business house occupied by a cobbler. The lot being immediately south of the Riverview station, persons transferred from the Grandview to the Park line, as well as those living west and south of the station, generally passed over the lot when intending to

take passage on the Park line of the street railway, and those going west or south from the Park line station, or to take passage on the Grandview line, passed over the lot. A path had thus been made between the houses mentioned, and cinders had been placed thereon. A water-closet was erected on the lot, near the cobbler's house, which was used by the Hicks family. About July 1, 1897, the owner of the lot, intending to erect a new building thereon, tried to gain possession of the same, and to induce the tenant, Hicks, to remove therefrom. It was claimed that consent was given, and a contractor removed the water-closet and other structures and began grading the lot. After some plowing and grading had been done, Hicks objected to the continuance of the work, and on July 2d instituted an action, and caused a restraining order to be served upon the owner and the contractor. The vault of the water-closet had been partially filled when the restraining order was served, and the contractor nailed boards over the vault and left the premises. The public continued to pass along the path which it had made, and near the covered vault. The restraining order was set aside and vacated by the court granting it on August 27, 1897, and, while some proceedings for review were taken, it is not shown by the record that the injunction was continued in force. There was litigation between the owner and Hicks as to the possession of the lot, but Hicks remained in possession until March, 1898, when he was removed under a writ of restitution issued in an action of forcible detainer. On the night of December 25, 1897, and before the removal of Hicks, Mazie A. De Tarr, while walking across the lot with a view of taking a Park line car, fell into the vault, and was injured. She and her family had passed over the lot in the morning, but she did not observe that a board had been removed from over the vault, or that there was an opening there. On returning at night she noticed a car coming, and increased her speed so as to reach the station in time, and while walking rapidly she diverged her course from the path, and fell into the hole. She brought this action, claiming that, there being a path across the lot which was habitually used by the public, the owner was guilty of negligence in not filling up the vault, and in leaving it without a secure cover. The defendant denied that it was guilty of negligence, claiming that it was not in possession of the property when the injury was sustained, and, not being in legal control of the lot, was in no wise responsible for the repairs on the premises, or for the removal of the cover, which was originally secure. The verdict of the jury was in favor of the defendant, and in answer to special questions the jury found that when the injunction order was served the hole was covered with boards; that the Heim Brewing Company did not get possession of the premises occupied by Hicks until March, 1898, and that it was then placed in

possession by the sheriff; that Hicks lived on the premises at the time of the accident; and that the Helm Brewing Company had no notice that the hole was open on the night of and before the accident.

Apart from the special findings, it must be assumed that all other controverted facts which had support in the testimony were determined in favor of the defendant. It must be taken as established that the hole was securely covered with boards when the defendant and its employes were compelled to quit the premises by the injunction proceeding, and that before the accident the defendant had no notice that any part of the cover had been removed or that the hole was open. It likewise must be assumed that the defendant was not in possession or control of the premises when the accident happened, nor for more than two months afterwards. The path across the lots had been used by the public for a long time,—so long that permission by the occupant and owner must be presumed. The plaintiff, therefore, was not to be regarded as a trespasser, or as a mere licensee, as she used the way with the implied permission of those in control of the premises. If the defendant had the possession and control of the lot, it owed a duty to the public to cover or fill up the hole near the path, or to exercise care accordingly, proportioned to the probable danger to persons using the path; and the jury was properly instructed that if the defendant was in control and possession of the premises, and knew, or by the exercise of diligence could have known, that the vault was open, in time to have filled or covered it, and the plaintiff fell therein without her fault, the defendant was liable to respond in damages to her for the injury sustained. Under the instructions, we think the jury was warranted in finding that the defendant had not the possession or control of the lot at the time of the injury; and not being in control, and having no notice of the existence of the dangerous opening, it cannot be held liable for the negligence of the tenant, nor for the injury sustained by plaintiff. It is a rule of the common law applicable here that "the occupier, and not the landlord, is bound, as between himself and the public, so far to keep the premises in repair that they may be safe for the public, and such occupier is prima facie liable to third persons for damages arising from any defect." 1 Thomp. Neg. 317. See, also, *Fisher v. Thirkell*, 21 Mich. 1.

The objection to the admission in evidence of the injunction proceedings is not well founded. It tended to show who was in possession and control of the premises, and to some extent who was responsible for the casualty. It was some explanation why the defendant did not completely fill up the vault, and why a cover was nailed over it. The papers in the proceeding in error attempted to be taken from the order dissolving the injunction, although first received in evidence, were subsequently withdrawn from

the jury, and no error can be predicated on that. The testimony as to the notices to quit possession and the proceedings in the forcible entry and detainer suit went to the question of control of the property, and was properly received, and there is nothing substantial in the objections to the testimony of the officers and other persons as to the efforts which were made to procure the removal of the Hicks family from the property. Some of the language of the instructions given to the jury is criticised, but we fail to see any just ground for complaint in them, or any error in the refusal of those which were requested. The case seems to have been fairly presented to the jury by the charge that was given, and there appears to be sufficient testimony to sustain the findings and verdict that were returned. The judgment will therefore be affirmed. All the justices concurring.

(62 Kan. 209)

STATE v. ASBELL.

(Supreme Court of Kansas. July 7, 1900.)

ERROR CORAM NOBIS—OFFICE OF WRIT—WHEN GRANTED.

1. The office of the writ of error coram nobis is to bring to the attention of the court, for correction, an error of fact,—one not appearing on the face of the record, unknown to the court or the party affected, and which, if known in season, would have prevented the rendition of the judgment challenged.

2. The writ supplements, but does not supersede, the remedy provided in the Code for the granting of new trials or the correction of errors. It is not available where the facts complained of were known before the trial, and where advantage could have been taken of the alleged error at the trial. Neither does it lie to correct an adjudicated issue of fact.

3. The remedy cannot be invoked upon the ground that an important witness testified falsely about a material issue in the case nor can newly-discovered evidence going to the merits of the case be used as a basis for the writ.

(Syllabus by the Court.)

Error from district court, Labette county; A. H. Skidmore, Judge.

Marion Asbell was convicted of murder, and applies for a writ of error coram nobis. Affirmed.

Nelson Case, for appellant. A. A. Godard, Atty. Gen., and F. M. Brady, for the State.

JOHNSTON, J. This was an application for a writ of error coram nobis. The applicant, Marion Asbell, was charged with the felonious killing of his wife, and convicted of murder in the first degree. He appealed to this court, where, after a full examination of numerous assignments of error, the judgment of conviction was affirmed. *State v. Asbell*, 57 Kan. 398, 46 Pac. 770. Afterwards he attempted to bring a proceeding in the district court against the state to obtain a new trial, but it was held that the state, being a sovereign power, could not be subjected to suits by its citizens without an express statutory waiver of its right of

exemption; and, there being no waiver, the proceeding was therefore dismissed. That ruling was brought to this court for review, and affirmed. *Asbell v. State*, 60 Kan. 51, 55 Pac. 338. Still later the present proceeding was begun, and the grounds alleged for the writ of error coram nobis, briefly stated, are: (1) That, from the filing of the information against Asbell until he was convicted, the belief existed among the people of the county that he was guilty of the charge; that such intense feeling existed against him, and so much prejudice, as to render it impossible to have a fair and impartial trial in the county. (2) That during the trial mob violence against him was threatened, and combinations of persons made to take him from the officers of the law and kill him, causing a suppression of feeling which might have existed in his behalf; and the petitioner states that he is informed and believes that these things affected the jury, and caused them to render a verdict against him. (3) That, by reason of the intense feeling and of threats, a witness gave false testimony against the defendant, upon which he was convicted, and without which he might have been acquitted. (4) That the bailiff in charge of the jury during the time of their deliberations was guilty of misconduct, by entering the jury room and conversing with the jurors; and a belief is expressed that he conveyed to the jury information of the intense feeling existing against the defendant, and that nothing but a verdict of guilty would be received. (5) That during the progress of the trial, and without the knowledge of the defendant, the body of his deceased wife was exhumed, and a post mortem examination made by a number of physicians and surgeons residing in the county, a part of whom testified in reference to the wound found upon the body, and gave opinions as to the manner in which the wound was inflicted and death caused (that is, whether it could have been done by the defendant, or resulted from suicide); that a witness who assisted in the post mortem examination had since made a careful microscopic examination of the scalp, where the wound was inflicted, and of the brain, through which the bullet passed, and developed facts inconsistent with the theory of the state (that such firing could not have been done by the defendant, but that death must have resulted from suicide); that such evidence could not have been produced at the trial of the cause, and was not known until long after the judgment of conviction. And the petitioner avers that he is informed and believes that this evidence is material, and sufficient to justify a verdict of acquittal. There is a further averment that the new evidence and matters referred to in the fourth and fifth grounds were without his knowledge and beyond his reach until after his conviction and confinement in the penitentiary. On a motion to dismiss, the

district court held, in a written opinion, that the facts stated in the application did not warrant the granting of the relief sought, and the proceeding was thereupon dismissed. The petitioner alleges error, and brings the case here upon a transcript of the record.

If the common-law remedy invoked can be obtained upon the grounds alleged here, there is little certainty in judicial proceedings, and little finality in the judgment of courts. The petitioner asks for a consideration of matters which were, or should have been, known to him,—matters involved in the issues that were adjudicated in the district and supreme courts. It has been held that our courts have power to issue writs in the nature of coram nobis. *State v. Calhoun*, 50 Kan. 523, 32 Pac. 38, 18 L. R. A. 838. But to give this remedy the scope claimed in behalf of the petitioner would be to substitute a somewhat obsolete writ for a simple and summary procedure specifically provided by statute. Our Code provides how errors may be corrected in the courts in which they occur, and, to the extent that provision is so made, it is necessarily exclusive of common-law writs and procedure. This writ, instead of superseding the statutory provisions, is only employed in aid of them, or where the statute fails to afford a remedy. *State v. Calhoun*, supra. In *Sanders v. State*, 85 Ind. 318, after holding that there was power in the courts to issue such writs, it was remarked "that the writ cannot be so comprehensive as at common law, for remedies are given by our statute which did not exist at common law,—the motion for a new trial and the right of appeal,—and these very materially abridge the office and functions of the old writ. These afford the accused ample opportunity to present for review questions of fact arising upon or prior to the trial, as well as questions of law, while at common law the writ of error allowed him to present to the appellate court only questions of law. Under our statute all matters of fact reviewable by appeal or upon motion must be presented by motion for a new trial, and cannot be made the grounds of an application for the writ of coram nobis. Within this rule must fall the defense of insanity, as well as all other defenses existing at the time of the commission of the crime. Within this rule, too, must fall all cases of accident and surprise, of verdicts against evidence, of newly-discovered evidence, and all like matters." The function of the common-law writ is to bring to the attention of the court, for correction, an error of fact,—one not appearing on the face of the record, unknown to the court or party affected, and which, if known in season, would have prevented the judgment which is challenged. The death of a party pending the suit and before judgment; infancy, where the party was not properly represented by guardian; coverture, where the common-law disability still exists; insanity at the time of the trial; and where a

person claiming innocence is compelled, by fear of a mob, to enter a plea of guilty to a charge made against him,—are instances where the writ has been employed. 5 Enc. Pl. & Prac. 27, and cases cited. As stated in the written opinion of the learned trial judge: "It cannot reach any matter of fact known to the court; for such would be error of law, and might be remedied by writ of error. Nor can the writ reach matters of fact known, or which by the exercise of reasonable diligence could have been known, to or by the party making the application, at the time of the court's error. Nor can the writ give a new trial on the grounds of evidence going to the merits, but undiscovered in time for use on the original trial, or newly-discovered evidence."

The first ground upon which it is sought is, in brief, that such intense excitement and popular prejudice existed at the time as to prevent a fair trial. It is not alleged in the application for the writ that this was an unknown fact at the time of the trial, nor that it was not known in time to have been taken advantage of by an application for a change of venue or a continuance of the cause. Waiving the insufficiency of averment in the application for the writ, it appears from the record that the defendant was aware of the condition of the public mind towards him before the trial was had; and the claim that there was such popular passion and prejudice against him as to prevent a fair trial was brought to the attention of the court before the trial was begun. In an application for a continuance it is alleged that there was great indignation in the community towards the defendant, and that there were such excitement and passion as to prevent a fair trial. On the showing made, the trial court refused the continuance, and reviewed the matter again on the motion for a new trial; and this refusal was assigned for error in this court, where the subject was again examined, and a decision made against the claim of error. Thus, we see that the matter was not only brought to the attention of the court, but that it was considered and adjudicated by the trial court, as well as by the supreme court. As we have seen, the remedy is not available where the facts complained of were known before the trial, and where advantage could have been taken of the alleged error at the trial. Neither does it lie to correct an adjudicated issue of fact. *Howard v. State*, 58 Ark. 229, 24 S. W. 8; *Marble v. Vanhorn*, 53 Mo. App. 361; *Milam Co. v. Robertson*, 47 Tex. 222; *Bank v. Upman*, 14 Wis. 596; *Hillman v. Chester*, 12 Heisk. 34; *Holford v. Alexander*, 46 Am. Dec. 253, and note; *Jackson v. Milson*, 6 Lea, 515; 3 Bac. Abr. "Error," 375; 5 Enc. Pl. & Prac. 29.

The second ground alleged in the application for the writ differs but little from the first, and that it is insufficient is apparent from the rules already stated, and the authorities that have been cited.

The third ground is that, under duress, an important witness for the state gave false testimony, without which, it is alleged, the verdict of guilty could not have been had or upheld. The credibility of this witness, and the truth or falsity of her testimony, were issues of fact in the original trial; and, having been once passed upon, the remedy of a writ of error coram nobis cannot be used. *Howard v. State*, supra; *State v. Superior Court of Pierce Co.* (Wash.) 46 Pac. 399; *Bigham v. Brewer*, 4 Sneed, 432.

The fourth ground relates to the state of public feeling against the defendant, and the effect of the same upon the verdict of the jury. In effect, it is only a statement of how the public feeling was communicated to the jury, and the matter of popular prejudice was an issue involved in the original action. Presumably, the bailiff, being a sworn officer of the court, did his duty; and, if he was guilty of misconduct, it is not alleged, nor does it appear, that it could not have been taken advantage of either at the trial or on the motion for a new trial.

The basis of the fifth and final ground is no more than newly-discovered evidence of a cumulative character on the most prominent issue involved in the original trial. The theory of the defense was that Mrs. Asbell, in a fit of despondency, committed suicide, and testimony as to the position of the body and the character and condition of the wound was given. It is now claimed that a microscopic examination of the scalp, where the wound was inflicted, and of the brain, through which the bullet passed, was inconsistent with the testimony offered in behalf of the state, and indicated that her death must have resulted from suicide. As will be observed from the opinion in *State v. Asbell*, 57 Kan. 408, 46 Pac. 770, medical experts examined the wound, and testified as to its appearance and character. Other expert testimony as to the effect of a gunshot when the weapon is held near the head or flesh was offered, and opinions were given as to whether the pistol which made the wound was fired close to the head, or from a considerable distance. It therefore appears that the newly-discovered evidence relates to one of the adjudicated questions of fact in the case, and that it is merely cumulative in character. It is well settled by the authorities that an error of fact which may be used as a basis for a writ of error coram nobis does not consist of new evidence going to the merits of the case, and which was undiscovered in time for use at the original trial. In *Howard v. State*, supra, it was expressly held that the writ "does not lie on behalf of one convicted of murder, after the time for obtaining a new trial has expired, on the ground of newly-discovered evidence proving that another person committed the crime." See, also, *Marble v. Vanhorn*, supra; *Bigham v. Brewer*, supra; *Tibbs v. Anderson*, *Thomp. Tenn. Cas.* 264; 5 Enc. Pl. & Prac. 29. If judgments rendered and reconsidered on a mo-

tion for a new trial in the district court, and which were affirmed in the appellate courts, might be set aside because of new evidence alleged to have been discovered since the trial was had, it would indefinitely protract litigation, destroy the stability and certainty of judicial proceedings, and open wide the door to perjury and fraud. If the new testimony and recent developments show that the petitioner was wrongly convicted, it furnishes a basis for an application to the pardoning power, but does not warrant the granting of a writ of error coram nobis. The judgment of the district court will be affirmed.

(62 Kan. 168)

**BOARD OF COM'RS OF GEARY COUNTY
et al. v. MISSOURI, K. & T. RY. CO.**

(Supreme Court of Kansas. July 7, 1900.)

**TAXATION—VALUATION—CHANGE BY BOARD
OF EQUALIZATION—CONSTITUTIONAL LAW.**

1. Whenever the valuation of taxable property in any county is changed by the state board of equalization, the board of county commissioners of such county are authorized to use the valuation so fixed by the state board as a basis for making their levies for all purposes, but are not bound so to do.

2. Section 1 of article 11 of the constitution is not violated by the action of the local taxing authorities refusing to adopt the valuations fixed by the state board in making their levy for the current expenses of the county, or for any other purpose except state taxes.

(Syllabus by the Court.)

Error from court of appeals, Northern department, Central division.

Action by the Missouri, Kansas & Texas Railway Company against the board of county commissioners of the county of Geary and others. Judgment for defendants was reversed by the court of appeals (58 Pac. 121), and defendants bring error. Judgment of court of appeals reversed, and of district court affirmed.

W. S. Roark, for plaintiffs in error. T. N. Sedgwick, for defendant in error.

SMITH, J. In July, 1896, the state board of equalization made an order increasing the value of all property in Geary county for that year, except railroad property, 10 per cent. of the amount returned by the city and township assessors; and at the same time the board apportioned to said county, as its proper proportion of state taxes, the sum of \$9,755.98, which order was transmitted by the state auditor to the county clerk. The board of county commissioners of Geary county did not, however, obey the order of the said board of equalization, by raising the valuation of all property in the county, except railroad property, 10 per cent., but simply raised the rate of taxation for state purposes upon all property in that county, except railroad property, 10 per cent., and made no change whatever in the returns made by the assessors of all the property in their county other than railroad property, so that the rate

for state purposes in Geary county upon all property except that of railroads for that year was 50 cents on each \$100 in valuation, and upon railroad property the rate for state purposes was 42½ cents on each \$100 of valuation. The railway company makes no claim that it is required to pay an unjust proportion of state taxes. The gravamen of its complaint is that the county board, in making its levies for local purposes, did not adopt the valuation fixed by the state board of equalization. The allegation in the petition concerning the action of the board of county commissioners is that it "neglected and refused to obey said order of the state board of equalization, and instead of increasing the valuation of all said property except railroad property 10 per cent., as ordered by the state board of equalization, increased the rate of levy for state purposes upon all property 10 per cent., thereby making the rate for state purposes upon all property except railroad property 50 cents on each \$100, and upon railroad property the rate for state purposes was by the county clerk of said county extended at 42½ cents on each \$100, and the valuation of railroad property as fixed by the state board of assessors remained unchanged, and the valuation of all other property in the county, as returned by the township and city assessors, remained unchanged, notwithstanding the order of the state board of equalization to increase the same 10 per cent., so that as to all taxes the plaintiff is assessed upon all its property at its true value in money, thereby making this plaintiff pay taxes upon a valuation of 10 per cent. higher than any other property is assessed for taxable purposes in said county, and thereby making it pay for school-district, township, city, and county purposes 10 per cent. more taxes, in proportion to the value of its property, than is paid upon any other property in said county, which is an unjust discrimination."

It is urged by the railway company that section 135 of chapter 158 of the General Statutes of 1897 requires a board of county commissioners to extend their levies upon the valuation as raised or lowered by the state board of equalization, and that there cannot be two different valuations for state purposes, and that there must be an equalization of values for all purposes, both state and local, and that the equalization of railroad property with other property by the state board of equalization is controlling for local as well as for state purposes. Said section reads: "Whenever the valuation of any county is changed by the state board of equalization, the board of commissioners of such county are authorized to use the valuation so fixed by the said board as a basis in making their levies for all purposes." This language does not impose an obligation upon the board of commissioners to adopt the valuation of the state board, but merely confers a permissive right so to do. To hold otherwise would be ruling contrary to the plain reading of the statute. In 1883 this

question was submitted to Mr. Justice Johnston, then attorney general of the state, whose opinion is found in Pub. Doc. Kan. 1883-84, Rep. Atty. Gen. pp. 76, 77, as follows: "The action of the state board of equalization in increasing or decreasing the valuation of property assessed for taxation in the several counties of the state, affects only the taxes required to be raised for state purposes. The main object of the state board is to adjust the valuation so that each county will bear its fair and equitable proportion of the state tax. The valuation as fixed by the state board is not controlling with the county commissioners. They are not required to use the valuation adopted by the state board as a basis in making their levy for the current expenses of the county, or for any purpose except state taxes. Section 159, c. 107, Comp. Laws. As I understand it, the prevailing practice throughout the state is that, if the state board increases the valuation of property in a county, the valuation is used merely as a basis for apportioning the state tax required to be paid by such county, and the auditor of the state thereupon reports and certifies to the county clerk the amount charged against his county, and required to be raised for state purposes. The county clerk upon receiving the report determines the rate per cent, necessary on the valuation fixed by the county board to raise the amount of state tax as fixed by the state board. If, for instance, in a county having a valuation returned at \$5,000,000, and the levy for state taxes being four mills, there would be produced for state purposes the sum of \$20,000. The state board, however, determines that the county, in right and justice, ought to contribute \$25,000 for state purposes, and therefore it increases the valuation returned by such county such a per cent, as will afford the additional \$5,000. To that end, the county clerk, upon receiving the report from the auditor, simply increases the rate one mill, and extends a five-mill rate on the valuation fixed by the county board. This practice seems to be warranted by section 81 of the chapter on taxation. At any rate, the restriction upon the county commissioners that you mention relates only to the levy for current expenses. The basis upon which that levy is made is uniformly the valuation fixed by the county board, and not the one fixed by the state board. The county commissioners have the option of taking the valuation fixed by the state board as a basis for making their levies for local purposes, but it is seldom, if ever, done. I would therefore hold that the valuation in your county as fixed by the county board being less than \$5,000,000 (and the board adopted that valuation for the purpose of making a levy of current expenses), you may legally levy for such purpose one per cent. on the dollar of such valuation, notwithstanding the state board may, for the purpose of apportioning the state tax, have increased the valuation of the property beyond \$5,000,000." The same con-

struction was given this statute by Atty. Gen. Ives in 1891. See 2 Pub. Doc. Kan. 1891-92, Rep. Atty. Gen. p. 42. Before the expression of these views by the attorneys general, this court, in *Francis v. Railroad Co.*, 19 Kan. 303-315, said: "Such a tribunal [i. e. the state board of equalization] doubtless subserves a wise purpose, in that it prevents any county from shirking its just proportion of the burdens of state government by grossly inadequate assessments." In *Chicago, B. & Q. R. Co. v. Atchison County Com'rs*, 54 Kan. 781-790, 39 Pac. 1041, this language is used: "The action of the state board of equalization does not result in a change in the amount of taxes any one would pay under levies for local purposes."

We have been unable to find any express statutory authority which gives the state board of equalization power to control the valuation of county property for purposes other than state taxation. Section 132 of chapter 158 of the General Statutes of 1897 seems to lean against the authority of the state board to interfere with the valuation fixed by the local board of equalization. In said section the county clerk, when he receives the report of the auditor, is directed to determine the rate per cent, necessary to raise the taxes required for state purposes as determined by the state board of equalization, and there is no provision making it the duty of the county clerk to determine any rate per cent, necessary to raise the taxes required for county purposes. The court of appeals based its opinion upon the force of section 1 of article 11 of the constitution, which prescribes that "the legislature shall provide for a uniform and equal rate of assessment and taxation." The existence of two boards of equalization created by law, one endowed with power to equalize with reference to state taxes, and the other clothed with like authority concerning local taxation, has not heretofore been considered as violative of this constitutional provision. In *Railroad Co. v. Morris*, 7 Kan. 210-221, in treating of this subject, it is said: "There is no provision allowing the county board of equalization to equalize the valuation of the real estate of a railroad company within each county, while there is a provision of law allowing the county board of equalization to equalize the valuation of other real estate. * * * It will be seen that the counsel for the plaintiff misconstrues the constitution. The constitution does not require that the manner or mode of assessing and taxing property, or the manner or mode of collecting the taxes, shall be equal and uniform, but it simply requires that all property shall be assessed and taxed at an equal and uniform rate. * * * This the legislature have provided for. All taxable property, real and personal, within this state, must, under the statutes, be assessed at its true value in money, and the taxes levied upon such assessment must be at an equal and uniform rate. The state taxes, under the statutes, are equal and uniform

throughout the state; being levied on a uniform valuation, and fixed at a uniform rate on each dollar of valuation throughout the state. Each county tax is equal and uniform in the same manner throughout the country, and the same may be said of the taxes of each township, district, city, and village; and this is all that is required by the constitution." In *Elevator Co. v. Stewart*, 50 Kan. 378-383, 32 Pac. 33, it was held that that section of the constitution quoted from requires merely that there shall be a uniform and equal rate of assessment and taxation only in each separate taxing district. And for the purposes of this case we may regard the state as one taxing district, and Geary county as another.

The railway company has attempted, in drawing its petition in the court below, to bring its complaint within the case of *Chicago, B. & Q. R. Co. v. Atchison County Com'rs* 54 Kan. 781, 39 Pac. 1039. But the facts here do not come up to the circumstances upon which the decision in that case is based. Upon the subject under consideration we have been furnished with copies of opinions rendered by Hon. L. Stilwell, judge of the Seventh district, and Hon. O. L. Moore, of the Eighth district, in which they ably discuss the questions before us, and arrive at the same conclusion. We have adopted much of their reasoning in the above opinion. The judgment of the court of appeals will be reversed, and the judgment of the district court affirmed. All the justices concurring.

(7 Idaho, 196)

SMITH v. ELLIS.

(Supreme Court of Idaho. June 20, 1900.)

INFORMATION—REMOVAL OF PUBLIC OFFICER
—ILLEGAL FEES—APPEAL—HARMLESS
ERROR—TITLE OF ACTION.

1. An information or accusation by which an action is commenced to remove a public officer from office, under the provisions of Pen. Code, tit. 2, c. 2, should state the specific acts of commission or omission for which such removal is sought with clearness and certainty.

2. A judgment removing a constable from office, and assessing the statutory penalty against him in favor of the informant, upon the ground that such constable presented a claim against his county for mileage for conveying certain prisoners to the county jail, when such prisoners were conveyed to the county jail by the sheriff, and not by such constable, and such claim was allowed in favor of such constable, who received a warrant therefor, affirmed upon appeal.

3. Neither the law nor good morals will permit a sheriff to throw off his cloak of office, and become the mere private agent of a constable, for the purpose of enabling the latter to collect fees for a public service never performed by him, and the attempt to do so being contrary to public policy, and subversive of good government, cannot be tolerated.

4. A judgment will not be reversed on the ground of error which does not affect the substantial rights of the parties, especially when such judgment is sustained by facts alleged and admitted by the pleadings of the respective parties.

5. An action to remove a public officer, under the provisions of Pen. Code, tit. 2, c. 2, is a

penal action, and is properly commenced in the name of the state as plaintiff.

(Syllabus by the Court.)

Appeal from district court, Bingham county; J. O. Rich, Judge.

Action by J. Ed. Smith against W. G. Ellis to remove defendant from office of constable. Judgment of removal. Defendant appeals. Affirmed.

Dietrich, Chalmers & Stevens, for appellant. S. H. Hays, Atty. Gen., and N. H. Clark, Co. Atty., for respondent.

QUARLES, J. This action was commenced by information or accusation verified by one J. Ed. Smith, accusing the appellant, W. G. Ellis, with presenting and collecting, as constable of Idaho Falls precinct, Bingham county, claims for illegal fees against said county. There are a number of general allegations in the information to the effect that the appellant, as such constable, had at different times knowingly, willfully, and corruptly charged illegal fees. But as this action, which was commenced to remove appellant from office under chapter 2, tit. 2, Pen. Code, is strictly penal, such general allegations are not sufficient. It is necessary to charge with certainty the specific acts of commission or omission for which the removal is sought. The said accusation is in words and figures as follows, to wit:

"J. Ed. Smith, being duly sworn, on his oath says: That the defendant, W. G. Ellis, has been since the 10th day of January, 1899, the constable of Idaho Falls precinct, Bingham county, Idaho, duly elected, qualified, and acting as such. That the defendant has at various times since the 10th day of January, 1899, acting as such constable, knowingly, willfully, and corruptly charged illegal fees for services rendered, and pretended to have been rendered, while so acting; and that on the 11th day of October, 1899, the defendant presented to the board of county commissioners of said Bingham county for allowance his bill for services rendered from and including the time between the 12th day of July, 1899, and the 3d day of October, 1899, to the amount of \$648.95, which said amount was by said board allowed for the sum of \$449.50, and was by said defendant thereupon collected and appropriated to his own use. This affiant is informed and believes, and thereupon alleges, a large number of the items contained in said bill so rendered, to wit, taking prisoners to the county jail at Blackfoot, were never rendered, nor was said services performed, by defendant, but were performed by D. H. Clyne, sheriff of Bingham county. That one J. B. Hamilton and one J. Doe, county prisoners in said county of Bingham, were taken to said jail at said Blackfoot by said sheriff, but were mentioned in said items as taken to said place by defendant, and said services were charged for by defendant. That said bill was

allowed by said board, and was collected and appropriated by said Ellis for his use and benefit. That this information is made under the provisions of section 7459, Rev. St. 1887. J. Ed. Smith.

"Subscribed and sworn to before me this 8th day of November, 1899. George L. Wall, Notary Public."

No demurrer was filed to this information, but appellant answered as follows: "Comes now the defendant in the above-entitled proceeding, and for answer to the complaint, information, or accusation herein admits, denies, and alleges as follows: (1) Denies that at various times since the 10th day of January, 1899, or at any other time, or ever or at all, acting as constable of said precinct, or otherwise or at all, knowingly or willfully or corruptly, or otherwise than as hereinafter stated, charged any illegal fees whatever for services rendered or pretended to have been rendered. (2) Denies that he charged or collected or received the sum of \$449.50, or any other sum whatever, in money or cash, but alleges the fact to be that he received for said sum a county warrant, duly ordered issued and delivered by the clerk of said board of county commissioners, under and by authority of an order of said board duly made and entered allowing his bill for said sum, which said warrant has not been paid by said county or the treasurer thereof. (3) And, further answering said so-called accusation, the defendant denies that a large number of the items contained in said bill for taking prisoners to the county jail at Blackfoot were never rendered, and denies that said services were not performed by said defendant, and denies said services were performed by D. H. Clyne as sheriff of Bingham county aforesaid, or otherwise than personally as a private agent of the defendant. (4) Denies that J. B. Hamilton and J. Doe, as county prisoners or otherwise, as alleged, or otherwise at all, were taken to the county jail of Bingham county, Idaho, at Blackfoot therein, by the sheriff of said county as sheriff, or otherwise or at all, except as a private agent of this defendant. Denies that said bill was collected in money or cash or appropriated by said defendant for his own use or benefit. And, further answering said accusation, the defendant alleges the fact to be that, as constable of Idaho Falls precinct, in said county and state, and as town marshal of Idaho Falls, aforesaid, it devolves upon said defendant, and has devolved upon him, since he became the incumbent of said office, to arrest and take into custody a large number of persons charged with crimes and violations of the statutes of Idaho, and the ordinances of said town of Idaho Falls, the same being an incorporated town or village under the laws of Idaho, and that and during said times, and for a long time prior thereto, it has been the custom for such prisoners, especially after conviction, to be confined in the

county jail of said county, situated at Blackfoot therein; that it has at all of said times been the habit and custom of this defendant, as constable and as town marshal of Idaho Falls, to take and convey such prisoners, particularly after conviction, from Idaho Falls, aforesaid, to said county jail at Blackfoot; that the defendant has almost invariably conveyed said prisoners in person to said county jail; that such prisoners were conveyed or transported upon the regular trains of the Oregon Short Line Railroad Company, the distance being 26 or 27 miles; that the defendant has at all times and upon all occasions purchased tickets or transportations for such prisoners; that upon the particular occasion referred to in the accusation herein there were confined in the building at Idaho Falls aforesaid, used as a jail, a number of prisoners; that said prisoners had friends or associates outside of said jail who were or who had been attempting to aid or assist said prisoners to escape; that said prisoners had made various attempts to escape on that and preceding days, and it became necessary for a guard to be placed over the jail on the night referred to; that it was the purpose of said defendant, according to his custom, to bring the prisoners Hamilton and Doe to Blackfoot in person, but owing to the said fact that trouble existed and was expected about said jail, and that D. H. Clyne was present in Idaho Falls upon the evening referred to, and was coming to Blackfoot, the defendant, in order to avoid leaving said prisoners and jail, asked and requested said Clyne to bring said prisoners Hamilton and Doe to Blackfoot, and place them in the county jail aforesaid, the defendant remaining to look after the other prisoners aforesaid, and to preserve the peace and quietude of said town of Idaho Falls; that he did turn said two prisoners Hamilton and Doe over to said Clyne in the manner aforesaid, after having purchased and procured their tickets or transportation from Idaho Falls to Blackfoot aforesaid, and having paid therefor the regular price for first-class fare over such portion of said railroad, and not otherwise; that no commitment of the said prisoners Hamilton and Doe had theretofore been issued or delivered to his defendant or the said Clyne as sheriff or otherwise, and no commitment or commitments for said two prisoners was or were issued or delivered to any officer until the following day, to wit, the 30th day of August, 1899, upon which date the commitment was issued for each of the said two prisoners, and directed and delivered to D. H. Clyne, as sheriff of said county of Bingham, by mail, and not otherwise; and the defendant alleges the facts to be that said two prisoners were never in the charge or care or custody of said D. H. Clyne as sheriff of Bingham county aforesaid at all, until the afternoon of the 30th day of August, 1899 or otherwise than as a private agent of this defendant,

as hereinbefore set out. The defendant further alleges that at all times between the receipt of said two prisoners and the afternoon of the 30th day of August, 1899, he was, as constable aforesaid, liable and responsible for the custody and safe-keeping of said two prisoners, and that during said time the sheriff of said Bingham county had not the power, authority, or right to take the custody of said two prisoners, or either their two persons, from this defendant. Wherefore this defendant prays that he be dismissed hence, and that he have judgment for his costs incurred herein. Dietrich, Chalmers & Stevens, Attorneys for Defendant."

A trial by jury was waived, and the action tried before the court, which found against the appellant, and rendered judgment removing him from office, and awarding the informant the statutory penalty of \$500.

The specific charge in the information against the appellant is that he charged mileage against the county for taking the county prisoners J. B. Hamilton and J. Doe to the county jail at Blackfoot, when he had not rendered such service, and presented a claim therefor against the county, which was allowed and paid. The allegations in the information are not sufficiently clear, specific, and certain; but no objection was raised thereto, and, in our opinion, the defects in the information are cured by the allegations of the answer. The answer is in fact tantamount to a plea of guilty. It admits that said prisoners, Hamilton and Doe, were conveyed from Idaho Falls to the county jail at Blackfoot, about 2 miles, by D. H. Clyne, sheriff of Bingham county, and that appellant, as constable, claimed mileage for conveying said prisoners from Idaho Falls to the county jail, presented a claim against the county therefor, which was allowed, and that he received a county warrant covering such charge. The answer then seeks to justify this unwarranted act on the ground that in performing this public service the sheriff of the county was acting as the private agent for the appellant, and not as a public officer. For performing this service the sheriff was not entitled to any mileage, but only to actual expenses. In performing like services, the constable is entitled to mileage. From these considerations the iniquity of appellant's contention is apparent. We know of no rule of law, or of good morals, which permits the sheriff of the county to throw off his cloak of office, and become the mere private agent of a constable, for the purpose of enabling the latter to collect fees for services performed by the sheriff, and not by the constable, and such conduct is certainly contrary to public policy, and subversive of an honest administration of public affairs.

It is contended by the appellant that the judgment should be reversed because the lower court did not find upon all of the issues. The trial court did find as follows: "That W. G. Ellis charged and collected mileage at the rate of twenty cents per mile

for services pretended to have been rendered in returning one J. B. Hamilton and J. Doe from the justice court of Idaho Falls precinct to the county jail at Blackfoot, Idaho, upon commitment, when in fact no such services were ever rendered by the said Ellis, and said prisoners or persons were never returned to said jail by said Ellis; and the court further finds that all the material allegations of the complaint herein are true, as shown by the evidence." This finds the only specific acts upon which the judgment could rest against the appellant, and was sufficient.

A number of errors are urged by appellant upon the ground that the court admitted improper and incompetent evidence; but it is unnecessary to notice these alleged errors, inasmuch as the admissions of the defendant's answer confessed the material facts to be established. It follows that the appellant was not prejudiced by the admission of such evidence; hence the judgment should not be reversed upon this ground.

Appellant also contends that the judgment should be reversed upon the ground that this action was first entitled "State of Idaho, Plaintiff, vs. W. G. Ellis, Defendant," and that after the cause was submitted to the court the court, on its own motion, changed the style of the action to "J. Ed. Smith, Plaintiff, vs. W. G. Ellis, Defendant." Such action on the part of the court was error. But how has the appellant been prejudiced thereby? The judgment of removal was for proper cause admitted by appellant in his answer. The court had jurisdiction of the person of the defendant and of the subject-matter of the action. Changing the title of the action did not divest the court of jurisdiction, nor did it change the issues, or require the introduction of any additional evidence by either of the parties. It did not result in any judgment different from the one which was, and which should have been, entered. Hence no substantial right of the defendant was affected by changing the title. Yet we say it was error to do so. The action being of a public nature, for the public good, and strictly a penal action, might be commenced either in the name of the state as plaintiff or in the name of the informant. It has been the practice in this state, unquestioned so far as we are informed, to commence an action of this kind in the name of the informant as plaintiff.

We think that when a public officer presents a claim against the county for a public service which he admits that he has not performed, procures its allowance, and receives a county warrant covering such charge, that he should, in a proper action in the proper court, the fact of such charge being established, be removed from office, and the penalty provided by section 7459, Rev. St., adjudged against him, and in favor of the informant. There is no doubt that the illegal fees were claimed and collected knowingly, willfully, and corruptly. Having

violated an express statute, he cannot be heard to say that he did it innocently. There appearing no error prejudicial to any substantial rights of the appellant, the judgment appealed from is affirmed. Costs awarded to respondent.

HUSTON, C. J., and SULLIVAN, J., concur.

VAN WAGENEN v. CARPENTER.

(Supreme Court of Colorado. June 30, 1900.)

TRUSTS—MINING CLAIM—CO-TENANTS—RELOCATION—INUREMENT—NEW TRIAL—ATTACHMENT—GENERAL JURISDICTION.

1. Where an action to enforce a trust against certain property proceeded to trial, without any fault of plaintiff, on the theory that title to the property was in a vendee from the original trustee, whereas such title was really in the trustee, by virtue of a reconveyance by an unrecorded deed, and plaintiff was beaten, it was proper to grant a new trial, since the erroneous theory on which the former trial proceeded placed plaintiff at a distinct disadvantage, in obliging him to prove that such vendee took title with notice of the trust, etc.

2. Though power to act in attachment proceedings is conferred by special statute, the better view is that courts, in enforcing remedies provided by attachment acts, exercise a general jurisdiction; and hence, where a judgment rendered against a nonresident is collaterally attacked on the ground that the necessary levy on his property to give jurisdiction was not made, it will be conclusively presumed that all acts necessary to constitute a valid levy were performed, unless the contrary appears from the record.

3. G. owned a four-eighteenths interest in a mining claim, as a tenant in common with others. In 1881, the claim not being then subject to forfeiture, his co-tenants relocated and renamed the lode; it being understood that each was to retain the same interest in the new location that he had in the old. Patent issued to G.'s co-tenants, and, by a conveyance from them, title vested in defendant, who gave no consideration therefor. Held, that the relocation made by a part of the co-tenants inured to the benefit of all, and that defendant, having paid no consideration, took subject to a trust in favor of G. for four-eighteenths of the claim.

Appeal from district court, Arapahoe county.

Action by Mason B. Carpenter against Anna R. Van Wagenen to enforce a constructive trust. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action to enforce a trust. The facts upon which the right to relief is predicated are, in substance, as follows: On August 10, 1878, Andrew W. Gill purchased from the original locators a certain mining claim, known as the "Paris Lode Claim," situate in Lake county, Colo. During the years 1878 and 1879, by sundry conveyances, he parted with all his interest in the claim, except six-eighteenths. On December 15, 1879, Theo. F. Van Wagenen, for himself and as attorney in fact for the other owners, including Mr. Gill, entered into a bond and contract to convey to the Energetic Mining & Prospecting Company six-eighteenths, or

one-third, of the claim, in consideration of the sinking of a drill hole upon the property. The company performed the work according to the terms of the contract. Shortly thereafter, and on April 9, 1880, Van Wagenen conveyed to the company, for himself and his co-owners, the six-eighteenths agreed upon, which included two-eighteenths of Gill's interest. On February 1, 1881, Gilbert L. Havens, agent of the Energetic Mining & Prospecting Company, and Alexander C. Millsbaugh, at the request of Van Wagenen, in order to get rid of some conflict, relocated the Paris ground, and named it the "Pyrenees," with the understanding that all the owners in the Paris should retain like interests in the new location. On February 12, 1881, the Pyrenees was conveyed by the locators to Theo. F. Van Wagenen, without consideration, to enable him to apply for patent. On the next day he conveyed to Gilbert L. Havens, who had acquired all the interests of the Energetic Mining & Prospecting Company, an undivided six-eighteenths interest in the Pyrenees, covering the company's former interest in the Paris. On February 19, 1881, Havens and Van Wagenen, by their joint deed, conveyed the title to the Pyrenees to M. B. Carpenter, without consideration, and without his knowledge, for the purpose of getting a patent in his name. On October 29, 1881, the receiver's receipt to the Pyrenees having been obtained in Carpenter's name, he conveyed seven-eighteenths, which included the six-eighteenths formerly belonging to the Energetic Mining & Prospecting Company in the Paris, to Havens, without consideration; and on the same day, at Van Wagenen's suggestion, and without any consideration, he conveyed to Anna R. Van Wagenen the title to the remaining eleven-eighteenths of the Pyrenees, covering the remaining interests in the Paris. At the time of the relocation of the ground as the Pyrenees, and during the patent proceedings, Gill was a non-resident of Colorado, and had no notice of these proceedings. On March 3, 1886, Carpenter commenced suit in the county court of Arapahoe county against Andrew W. Gill and others, including Mrs. Van Wagenen, to recover \$1,731 for services rendered defendants, as attorney, in prosecuting and defending certain suits between January 11, 1881, and January 12, 1886. In this action a writ of attachment was issued to the sheriff of Lake county, who indorsed thereon the following certificate of levy: "I do hereby certify that by virtue of a certain writ of attachment to me, as sheriff, directed, dated the 3d day of March, A. D. 1886, and issued out of the county court of the Second judicial district of the state of Colorado, in and for the county of Arapahoe, in favor of Mason B. Carpenter, and against Chas. M. Stead, Vanderbilt Allen, Edward L. Oppenheim, Andrew W. Gill, Frederick Prentice, Anna R. Van Wagenen, Theodore F. Van Wagenen, and Gilbert L. Havens, I have lev-

led upon the following described property, to wit: All the right, title, and interest of the above-named defendants in and to the Paris lode mining claim, situate in California mining district; the Pyrenees lode mining claim, situate in California mining district. All of the above-described property being situate in the county of Lake, and state of Colorado. Dated at Leadville, March 4, 1886. J. A. Lamping, Sheriff, by W. G. Milner, Under-Sheriff." And the following return: "I do hereby certify that I have duly executed the within writ on this 4th day of March, 1886, by levying on all the right, title, and interest of the within-named defendants in and to the real property as shown in certificate of levy hereto attached. None of the within-named defendants found in my county of Lake. J. A. Lamping, Sheriff, by W. G. Milner, Under-Sheriff." On May 17, 1886, the case was dismissed as to all but Gill, and, service having been made by publication, judgment was entered against him, and special execution issued thereon; and on June 22, 1886, all his legal and equitable interests in the Paris and Pyrenees was sold to Mason B. Carpenter in satisfaction of his judgment, and on May 14, 1887, the sheriff executed his deed to him, conveying "all the right, title, and interest, both legal and equitable, of the above-named defendant, in and to the Paris * * * and the Pyrenees lode mining claims." On February 28, 1890, he instituted this suit in the district court of Arapahoe county against Anna R. Van Wagenen and Lewis M. Gregory, and, for cause of action, stated, in substance, the foregoing facts, and alleged that on the 3d day of March, 1886, Anna R. Van Wagenen held the legal title to the undivided four-eightieths interest in the Pyrenees lode mining claim in trust for the sole benefit and use of Andrew W. Gill, and that she had on or about the 1st day of January, 1889, conveyed by deed the whole of the legal title to said four-eightieths interest to said Gregory, who accepted and received the title thereto charged with said trust, with full, actual, and constructive notice and knowledge of the equitable interest of plaintiff therein. The defendants appeared and filed their answer, denying the material allegations of the complaint. On February 4, 1890, the cause was tried to the court, and resulted in a general finding for the defendants. Thereafter plaintiff filed his motion for a new trial upon the ground, among others, of newly-discovered evidence, and surprise which ordinary prudence could not have guarded against, which was sustained, and a new trial granted. Thereafter, by leave of court, plaintiff filed an amended and supplemental complaint, which on motion was stricken from the record on the ground that it stated a new and different cause of action from that declared on in the original complaint. (On November 6, 1896, plaintiff filed his second amended and supplemental complaint against Anna R.

Van Wagenen, as sole defendant, to which she filed her answer, specifically denying all the material allegations therein contained. A replication was filed thereto, whereupon the cause was again tried to the court, which found the issues of fact joined in favor of plaintiff, and adjudged him to be the owner of an undivided four-eightieths interest in and to said Pyrenees lode mining claim, and that defendant held the legal title to said interest in trust, and ordered her to convey the same to him. To reverse this decree, Mrs. Van Wagenen brings the case here on appeal.

Charles H. Toll, D. V. Burns, and Joseph C. Helm, for appellant. W. N. McBird and Charles J. Hughes, Jr., for appellee.

GODDARD, J. (after stating the facts).

1. The first error relied on is the action of the court granting the appellee a new trial. At the time of the commencement of the action, on February 28, 1890, there was of record in Lake county a deed of Mrs. Van Wagenen's, dated October —, 1887, conveying the four-eightieths interest in question to Lewis M. Gregory; and the complaint averred that the title to this interest was vested in him. This was not denied in the answer, and on the trial, which occurred on February 4, 1890, the court and counsel, supposing that Gregory still held the title, tried the case upon that theory. It appears from the showing made upon the motion for a new trial that on October 21, 1887, Gregory reconveyed this title to Mrs. Van Wagenen. This deed was not placed on record until 1892, during the pendency of the action. The appellee first learned of the existence and record of this deed in April, 1896. Upon these facts being brought to the attention of the judge who tried the cause, he sustained the motion and granted a new trial, as he expressly states, upon the principal ground that he supposed at the time the case was decided that Gregory still held title to said interest in said mine, which had been theretofore conveyed to him by the defendant, Anna R. Van Wagenen. The case was therefore tried under a misapprehension as to the actual status of the title to the interest in question. That this mistake seriously embarrassed plaintiff in establishing his claim, and imposed upon him a burden that he ought not to have been obliged to assume, is obvious. It made it incumbent upon him to show that Gregory obtained the title with notice or knowledge of the trust contended for; and, failing in this, he could not recover, no matter how clearly he may have been able to establish his right to relief against Mrs. Van Wagenen had the true condition of the title been known. Upon this assumption, testimony was offered and witnesses cross-examined, and special objections were interposed to certain testimony, clearly admissible as against Mrs. Van Wagenen, upon the ground

that it was inadmissible to affect Gregory's title. It is apparent from the statement of its reason for granting the new trial that the conclusion of the court was largely influenced, if not entirely controlled, by the supposition that Gregory held the title, and was presumably a purchaser without notice. It is therefore manifest that the cause was tried and determined upon a false issue, and that the appellee was thereby prevented from having his right to the property in question fairly considered and determined. Nor do we think that his failure to discover the true state of the title, under the circumstances, constituted such a want of diligence as should deprive him of the right to have such issue fairly tried. He had a right to rely upon the title as recorded at the commencement of the action, especially as he was in no way advised by the answer that an unrecorded reconveyance was in existence, and was led to believe by the conduct of defendants that no change of title had taken place. We think the court below properly exercised its discretion in granting the motion for a new trial, and we can see no good reason for interfering with its action.

2. The next objection is that the judgment rendered in the case of Carpenter against Gill, and all proceedings had thereunder, were null and void, for the reason that it does not affirmatively appear on the return of the sheriff that the writ of attachment was levied as required by subdivision 2, § 98, Code Civ. Proc. 1877, which was then in force, and which reads as follows: "Second. Real property, or any interest therein, belonging to the defendant, and held by any other person, or standing upon the records of the county in the name of any other person (but belonging to the defendant), shall be attached by leaving such person or his agent a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached, pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county." It will be observed that the return of the sheriff, as above set forth, does not state that he left with Mrs. Van Wagenen, in whose name the legal title to the Pyrenees then stood, a copy of such writ and notice, or that he filed the same with the recorder of Lake county. It is insisted that as the action was against a non-resident, and the only service of summons had was by publication, and the levy of the writ of attachment being an essential prerequisite to the acquirement of jurisdiction, it must be made in strict conformity with the requirements of the statute, and the return of the sheriff must show affirmatively that this was done. On the other hand, it is not denied that, to initiate jurisdiction against a nonresident, a seizure of property belonging to him within the state must be made, and, to constitute a valid seizure, the

levy of the writ of attachment must be made in conformity with all the requirements of the statute; but it is contended that when a judgment rendered by a court of general jurisdiction is collaterally attacked, as in this case, it will be conclusively presumed that all the acts necessary to constitute a valid levy were done, unless the contrary appears from the record. There exists an irreconcilable conflict in the authorities upon this question. This conflict arises from the view the different courts entertain as to the nature of the jurisdiction that the courts exercise in enforcing remedies provided by the attachment acts; some holding that the power to take cognizance of attachment proceedings is a special jurisdiction conferred by the statute, which was not within the general jurisdiction of the courts, and that everything necessary to show that such jurisdiction has been rightfully exercised must appear upon the face of the record, while by others it is held that attachment proceedings are within the general jurisdiction conferred by the constitution, and that the statute has only prescribed a new mode or process for bringing the persons or property within their control, and that the same presumption in favor of jurisdiction of such actions will be indulged as in other cases. Among the cases announcing the latter view are *Harvey v. Tyler*, 2 Wall. 328, 17 L. Ed. 871; *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959; *Voorhees v. Bank*, 10 Pet. 449, 9 L. Ed. 490; *Willis v. Mooring*, 63 Tex. 340; *Thompson v. Eastburn*, 16 N. J. Law, 100; *Diehl v. Page*, 3 N. J. Eq. 143; *Stewart v. Anderson*, 70 Tex. 588, 8 S. W. 205; *Works, Courts*, p. 547; *Bank v. Richardson* (Or.) 54 Pac. 359. In *Voorhees v. Bank*, Justice Baldwin, speaking to this point, said: "The several courts of common pleas of Ohio at the time of these proceedings were courts of general civil jurisdiction, to which was added, by the act of 1805, power to issue writs of attachment, and order a sale of the property attached, on certain conditions. No objection, therefore, can be made to their jurisdiction over the case, the cause of action, or the property attached." In *Willis v. Mooring* it is said: "The generally accepted doctrine now seems to be that the jurisdiction over attachment proceedings is part of the general jurisdiction conferred upon the courts in which they are cognizable, and the same presumption in favor of that jurisdiction must be indulged as in other cases, and the same intendments in favor of the officer executing process." In *Stewart v. Anderson*, Stayton, C. J., uses the following language: "There has been much difference of opinion, in courts for whose decisions we have the highest respect, as to whether the same presumptions will be indulged in favor of jurisdiction when reliance is placed on citation by publication and seizure of property as will be when personal service made within the territory over which the court has jurisdiction is relied upon.

* * * Whether the jurisdiction of a court be general or special, it cannot be made to depend upon the character of the process through which it acquires power over the person or thing to be affected by its final adjudication. The constitution confers jurisdiction, but the legislature prescribes the process through which persons and things may be brought within its reach and made subject to its exercise." We think the rule announced in these cases is supported by the better reason, and that when action of a court of general jurisdiction is invoked in attachment proceedings, although its power to so act is conferred by a special statute, it nevertheless, in exercising such special powers, acts judicially, and is none the less a court of general jurisdiction because it proceeds according to rules and practice prescribed by the statute. The same considerations of public policy and reasons exist why the record, if silent, should be aided by the same presumptions which obtain in cases of personal service. Whether a writ of attachment is issued as an auxiliary to the main action, or to initiate jurisdiction against a nonresident, to constitute a valid levy of the writ the acts required by the statute must be done, which are the same in both instances, and the purpose to be accomplished the same, to wit, to bring the property under the dominion of the court for the purpose of subjecting it to the satisfaction of any judgment that may be obtained. The rule requiring the seizure of property within the state, belonging to a nonresident defendant, as a condition precedent to the exercise of jurisdiction, is a judicial, and not a statutory, requirement. *Bank v. Richardson*, supra. As *Bean, J.*, who delivered the opinion in that case, in speaking of this rule, says: "Its requirements are satisfied, and the court acquires sufficient jurisdiction of the rem to protect its proceeding from collateral attack, when the property of the defendant has been actually brought within the power and control of the court by a seizure under a lawful writ of attachment issued in the action, although there may be irregularities, even errors, in the attachment proceedings." Our conclusion upon this question does not militate against the rule announced in *Thompson v. White*, 25 Colo. 226, 54 Pac. 718, and other decisions of this court in regard to the strictness with which the requirements of the attachment act must be observed, but only recognizes, as applicable to judgments in this class of cases, the same presumption of jurisdiction upon collateral attack that obtains in other cases, to wit, that everything necessary to be done was done, unless the contrary appears from the record. The plaintiff introduced in evidence, among other things, a certified copy of the final judgment rendered by the county court of Arapahoe county in the case of *Carpenter against Gill*, which recited that the defendant, Gill, having been regularly served with

process, and having failed to appear and answer the complaint, his default was entered according to law. A special execution issued thereon, and a sheriff's deed, conveying to him, as purchaser at a sale duly made thereunder, all the right, title, and interest of Gill in and to the Paris and Pyrenees mining claims. This was sufficient to establish his ownership of the Gill interest, and to entitle him to maintain his right there-to against appellant.

3. This brings us to the vital question in the case, and that is whether the appellant acquired and holds title to the four-eighteenths interest in controversy in her own right, or burdened with the alleged trust. The solution of this question is not embarrassed by any controversy touching the facts, but depends upon the effect to be given to the facts, as established by undisputed testimony, which appear in the foregoing statement, and, in brief, are that Gill in 1878 owned the Paris lode claim, and from time to time during that year and the year following he conveyed away all of his title except six-eighteenths, two-eighteenths of which Theo. F. Van Wagenen, acting as his attorney in fact, conveyed to the Energetic Mining & Prospecting Company in pursuance of the contract entered into with that company. There is nothing to show that he ever parted with, and was not still the owner of, the remaining four-eighteenths on February 1, 1881, when the ground included in the Paris claim was relocated and named the "Pyrenees." This relocation was made, at the suggestion of Theo. F. Van Wagenen, by Gilbert L. Havens, the then owner of one-third of the Paris, and one Millspaugh, acting for Van Wagenen. At this time the Paris was not subject to forfeiture, but was relocated and renamed for the purpose of getting rid of some adverse claim made to a portion of the ground, and to procure patent, and with the understanding that all parties interested in the Paris claim should retain the same interest in the Pyrenees. At this time Gill was a nonresident of Colorado, and it does not appear whether he had knowledge of this relocation, or in any way consented thereto, except through Van Wagenen, who was his attorney in fact, and had charge and management of this proceeding. While appellant attempts, in her answer, to deny that the location of the Pyrenees was made with the knowledge or for the benefit of Gill, or for the purpose of removing any apparent cloud upon the title of the Paris claim, she admits that such relocation was made for the benefit of all the other owners. After such relocation, and on February 12, 1881, the locators conveyed the Pyrenees lode to Theo. F. Van Wagenen, who thereupon conveyed to Gilbert L. Havens an undivided one-third of said claim. On February 19, 1881, Van Wagenen and Havens conveyed the legal title to the Pyrenees lode to appellee for the purpose of procuring patent. A patent was procured in his name, and he, by

direction of Van Wagenen, conveyed seven-eighths to Havens, and eleven-eightieths to appellant, who afterwards conveyed to Oppenheim, Stead, and Allen two-eighths respectively, being the same amount they owned in the Paris lode, retaining in her name the remaining five-eighths, which represented the one-eighteenth owned by Theo. F. Van Wagenen, and the four-eighths owned by Gill in the Paris claim. There is no pretense that she paid any consideration for the conveyance to her by appellee of the five-eighths interest which she retains, but she avers that she acquired it from her husband, and that the same was conveyed to her by his direction. It seems to us too clear to admit of dispute that a relocation of a mining claim by one tenant in common, under the circumstances attending the relocation of the Paris, would inure to the benefit of his co-tenants, whether the relocation was made with their knowledge and consent or not; that such a result would necessarily follow from the fiduciary relation that exists between tenants in common, which prevents one of them from acquiring title to the common property in violation of the trust and confidence that such relation imposes. *Hunt v. Patchin* (C. C.) 35 Fed. 816; *Mining Co. v. O'Brien*, 22 Colo. 129, 43 Pac. 1016; *Turner v. Sawyer*, 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189; *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680; *Freem. Co-Ten.* §§ 151-154; *Lockhart v. Rollins*, 2 Idaho, 503, 21 Pac. 413; *Lindl. Mines*, § 407; *Brundy v. Mayfield*, 15 Mont. 201, 38 Pac. 1067. As was said in *Turner v. Sawyer*, supra: "It is well settled that co-tenants stand in a certain relation to each other of mutual trust and confidence, that neither will be permitted to act in hostility to the other in reference to the joint estate, and that a distinct title acquired by one will inure to the benefit of all." Whether such result would follow if it was true, as assumed by counsel for appellant, that the Paris was subject to relocation at the time, and was relocated with the intention and for the purpose of excluding some of the original owners of the Paris, it is unnecessary to determine, since it is clear that those conditions did not exist. It sufficiently appears that the Paris was not at that time open to relocation,—most of the work by the Energetic Mining & Prospecting Company having been done in the year 1880,—and that the relocation was made for the benefit of all owning interests in the Paris. But counsel for appellant also contend that, notwithstanding the fact that Gill's title to the four-eighths interest still remained of record, by reason of his silence and failure to assert his right to the interest it is to be presumed that he had abandoned or disposed of it prior to the relocation of the Paris. We do not think there is any merit in this claim. It certainly is not to be presumed, in the face of the fact that his title to this interest then stood of record in his name, that he

had transferred it to any one else; nor is abandonment to be presumed from mere silence. A title to realty is not lost by the failure of the owner to assert his claim to it. Other circumstances must concur that would in equity estop him from asserting it to the prejudice of one who had been misled by his silence. No such conditions are present in this case. In the circumstances of this case, it is clear that the title acquired by the locators of the Pyrenees was impressed with a trust in favor of the owners in the Paris, to the extent of their respective interests in that claim, and that Gill, as the owner of four-eighths interest, remained the equitable owner of that interest in the new location, only the naked legal title thereto vesting in the locators in trust for him; and nothing occurred in the subsequent proceedings that in any way affected his right to that interest. The conveyance of this title by Van Wagenen and Havens to appellee was concededly for the purpose of enabling him to procure a patent to the Pyrenees in his name, for the joint benefit of all interested; and it goes without saying that the patent he obtained inured to their benefit, and vested him with the legal title solely as their trustee. While his deed to appellant recites a consideration of \$11,000, it appears by undisputed testimony that, as a matter of fact, it was a voluntary conveyance, and without any consideration whatever. Hence it transferred to her only the legal title to the eleven-eightieths interest, impressed with the trust that existed in favor of the original beneficiaries. *Pomeroy*, in his work on Equity Jurisprudence (section 1048), states the rule upon this subject as follows: "Wherever property, real or personal, which is already impressed with or subject to a trust of any kind, express or by operation of law, is conveyed or transferred by the trustee, not in the course of executing and carrying into effect the terms of an express trust, or devolves from a trustee to a third person, who is a mere volunteer, or who is a purchaser with actual or constructive notice of the trust, then the rule is universal that such heir, devisee, successor, or other voluntary transferee, or such purchaser with notice, acquires and holds the property subject to the same trust which before existed, and becomes himself a trustee for the original beneficiary. * * * It is not necessary that such transferee or purchaser should be guilty of positive fraud, or should actually intend a violation of the trust obligation. It is sufficient that he acquires property upon which a trust is in fact impressed, and that he is not a bona fide purchaser for a valuable consideration and without notice." Counsel for appellant, however, contend that appellee is estopped by this deed from asserting the interest that he subsequently acquired, by virtue of section 430, *Mills' Ann. St.*, which provides, *inter alia*, that "If any person shall * * * convey * * * land * * * not being possessed of the legal estate or interest therein at the time * * * and

after such sale * * * shall become possessed of, and confirmed in, the legal estate of the land or real estate so sold and conveyed, it shall be taken and held to be in trust, for the use of the * * * vendee," etc. We do not think that the conveyance given by appellee comes either within the letter or the spirit of this statute. Its obvious purpose is to confirm in the grantee any legal estate or interest subsequently acquired by the grantor which was intended to be conveyed. As we have seen, appellee was trustee of the naked legal title. He had no beneficial interest or estate in the land, nor did he attempt to convey such an interest. Neither, therefore, by this statute nor by any principle of equity is he estopped from subsequently acquiring a beneficial interest in the property, and of availing himself of such remedies to enforce his right thereto as his predecessor in interest might have invoked. The final contention of counsel is that the evidence introduced was not of the character and probative force requisite to establish a trust of this character. Aside from the parol testimony, which we think was admissible to show the intent and purpose with which certain acts were done, to aid the presumption which the law implied from the acts themselves, the record evidence was sufficient in itself to clearly and conclusively establish the trust as alleged; and the finding of the court below upon this issue, as well as its finding that the appellee was the owner of the Gill interest and entitled to the relief demanded, was supported by adequate testimony.

Upon a careful consideration of all the questions presented, and the able arguments of counsel, we are satisfied that the trial court committed no error that will justify a reversal. Its judgment is therefore affirmed. Affirmed.

NORTHERN PAC. RY. CO. v. NELSON et al.

(Supreme Court of Washington. May 31, 1900.)

PUBLIC LANDS—RAILROAD GRANT—OCCUPATION WITH INTENT TO ENTER HOMESTEAD—WITHDRAWAL FROM SALE OR ENTRY.

1. Act Cong. July 2, 1864 (13 Stat. 365) § 3, provided that every alternate odd-numbered section of land lying within certain limits along a proposed railroad route, and to which the United States should have full title, free from pre-emptions and other claims, when a plat showing its definite route should be filed, should be granted to the railroad company, to aid in the construction of its road. Section 6 declared that, after the general route of the road should be determined, the land granted should not be liable to sale, entry, or pre-emption, except by the company. In 1873 the railroad company filed a plat showing its general route, and thereupon the commissioner of the general land office issued an order withdrawing the land covered by the act from sale or entry. The plat showing the definite line of the road was not filed until 1884. In 1881 one of the defendants, having qualified to enter public lands, located on a section of land

covered by the act, and in 1893, immediately after its survey, offered to file a homestead claim. His offer was refused because it conflicted with the grant to the railroad company. *Held*, that the successor of the railroad company was entitled to recover the land, since at the time of defendant's entry the land was not subject to homestead claims; having been withdrawn therefrom on the filing of the plat showing the general route of the road.

2. A withdrawal of public lands from sale or entry by the commissioners of the general land office included a withdrawal from homestead claims.

3. Under Act Cong. May 14, 1880 (21 Stat. 140), providing that the rights of homestead settlers should relate back to the time of settlement, a mere occupation of public lands for the purpose of subsequently entering them as a homestead, without actually making such entry until after the lands were withdrawn therefrom, gave the occupant no rights as against a railroad company to which the land had been granted.

Appeal from superior court, Kittitas county; John B. Davidson, Judge.

Action by the Northern Pacific Railway Company against Peter Nelson and another. From a judgment for defendants, plaintiff appeals. Reversed.

Stoll, Stephens, Bunn & Macdonald, for appellant. Kauffman & Frost, for respondents.

ANDERS, J. This action was brought by the Northern Pacific Railway Company to recover from the defendants a certain described portion of an odd-numbered section of land situated in Kittitas county, and lying within the place limits of the grant made to the Northern Pacific Railroad Company by the act of congress of July 2, 1864 (13 Stat. 365). The complaint is in the ordinary form, and alleges the incorporation of the plaintiff, that it is the owner in fee and entitled to the possession of the land described in the complaint, and that the defendants are now unlawfully in possession of the said premises, and unlawfully withholding possession thereof from the plaintiff, and praying judgment against the defendants for the recovery of the possession of said premises, and for costs incurred in this action. The answer of the defendants denies the allegations contained in the complaint, and avers affirmatively that in May, 1881, the defendant Henry Nelson went upon the lands described in plaintiff's complaint, which were at that time unoccupied lands of the United States; that he has ever since said date held, and still holds and occupies, the said lands under and by virtue of the homestead laws of the United States, and is entitled to continue in the peaceable possession thereof. The reply is a general denial of the affirmative matter set up in the answer. The cause was submitted to the superior court upon an agreed statement of facts, and after consideration of the facts agreed upon, and the law applicable thereto, judgment was rendered in favor of the defendants, and the plaintiff thereupon appealed to this court.

It appears from the agreed statement of facts that the Northern Pacific Railway Company, appellant here, is a corporation organized and existing under and by virtue of the laws of the state of Wisconsin, and that said company, prior to the commencement of this action, succeeded to whatever right, title, claim, or demand the Northern Pacific Railroad Company had, if any, in or to the land described in the complaint herein; that the Northern Pacific Railroad Company is a corporation organized and existing under and by virtue of an act of congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound, on the Pacific Coast, by the northern route," and the acts and joint resolutions of congress supplemental thereto and amendatory thereof; that the Northern Pacific Railroad Company accepted the terms, conditions, and impositions of said act within two years after the passage thereof, and signified such acceptance in writing, under the corporate seal of said company, executed pursuant to the direction of its board of directors first had and obtained, and on December 29, 1864, served such acceptance on the president of the United States; that the Northern Pacific Railroad Company fixed the general route of its road, extending coterminous with said land, and within 40 miles thereof, by filing a plat of such general route in the office of the commissioner of the general land office on August 20, 1873; that thereafter, and on November 1, 1873, the commissioner of the general land office transmitted to the register and receiver of the United States district land office at Walla Walla, Wash. T. (that being the district land office for the district in which said land was situated), a letter of instructions, which, omitting dates and address, is as follows: "The Northern Pacific Railroad Company having filed in this department a map showing the general route of their branch line from Puget Sound to a connection with their main line, near Lake Pend d'Oreille, in Idaho territory, I have caused to be prepared a diagram, which is herewith transmitted, showing the forty-mile limits of the land grant along said line, extending through your district; and you are hereby directed to withhold from sale or entry all the odd-numbered sections falling within these limits not already included in the withdrawal for the main line. The even sections are increased in price to \$2.50 per acre, subject to pre-emption and homestead entry only. This withdrawal takes effect from August 15, 1873, the date when the map was filed by the company with the secretary of the interior, as required by the sixth section of the act of July 2, 1864, organizing said company;" that the said diagram and letter were received and filed in the said United States district land office at Walla Walla, Wash. T., on November 17, 1873; that the

land described in the complaint herein was within the 40-mile limits of the land grant as designated in said diagram; that on December 8, 1884, the said Northern Pacific Railroad Company fixed the line of definite location of its railroad by filing a plat thereof, duly approved by the secretary of the interior, in the office of the commissioner of the general land office, and that prior to November 18, 1886, the said Northern Pacific Railroad Company constructed and completed a section of 40 miles of the line of its said railroad and telegraph, extending over the said line of definite location, and coterminous with the said land here in controversy; that the president of the United States having appointed three commissioners to examine the same, and said commissioners having examined said railroad and telegraph line, they reported on the 18th day of November, 1886, to the honorable secretary of the interior, that said lines were completed in all respects as required by the said act of congress relating thereto; that on November 20, 1886, the secretary of the interior transmitted said report to the president of the United States, with recommendation that such railroad and telegraph line be accepted, and on the 7th day of December, 1886, the president of the United States approved such recommendation; that on May 10, 1895, the United States executed and delivered to the Northern Pacific Railroad Company its patent, wherein and whereby it purported to convey to said company the lands in controversy in this action, under the terms and provisions of the said act of congress of July 2, 1864, and various acts and joint resolutions of congress supplemental thereto and amendatory thereof; that the defendant Henry Nelson was in the year 1881 qualified to enter public lands under the act of congress approved May 20, 1862, entitled "An act to secure homesteads to actual settlers on the public domain," and various acts supplemental thereto and amendatory thereof; that in the year 1881 said Henry Nelson went upon the lands in controversy (being the S. E. $\frac{1}{4}$ of section 27, in township 20 N., of range 14 E., W. M.), and occupied the same, and has since continually resided thereon; that the said land was not surveyed by the United States until 1893; that as soon as the said land was surveyed the defendant Henry Nelson attempted to enter the same, under the homestead laws of the United States, in the United States district land office at North Yakima, Wash.; that his proffered filing for said land was rejected by the register and receiver of said land office on the ground that said application conflicted with the grant to said Northern Pacific Railroad Company; that thereafter the decision of the register and receiver was by the commissioner of the general land office confirmed.

It is conceded that the United States issued its patent to the Northern Pacific Railroad

Company for the lands here in controversy, and it therefore follows that the legal title to the land was thereby conveyed to the company. The only question presented in this case for determination is whether the land department erred in its construction of the law, in issuing the patent to the railroad company; and it must be conceded that the department did err in so doing, if the land in question was open to homestead entry at the time it was settled upon and occupied by the respondent. It is shown by the agreed statement of facts, as we have seen, that the respondent went upon the land in 1881, and has ever since occupied the same, and that he offered to file a homestead application thereon immediately after the land was surveyed, and the plat thereof filed in the local land office. But it is contended by the appellant that at that time the premises were not subject to homestead entry, for the reason that the land had previously been withdrawn from sale or entry by virtue of the act of July 2, 1864 (13 Stat. 305), and the executive order of November 1, 1873; and after a careful consideration of the cases cited, and all other cases we have been able to discover bearing upon the question at issue, we are constrained to conclude that the contention of the appellant must be sustained. Section 3 of the said act of July 2, 1864, provides as follows: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said alternate sections." By section 6 of said act it was enacted "that the president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company

as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twentieth, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

These provisions of this granting act to the Northern Pacific Railroad Company have been construed by the supreme court of the United States in numerous cases, and it seems to us that the question now under consideration has been settled by that tribunal. In *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100, 30 L. Ed. 330, a settler entered upon land on October 5, 1871, with the intent of securing the same under the pre-emption laws of the United States. The land was at that time within the limits of an Indian reservation, the Indian title to which was not extinguished until June 19, 1873. On February 21, 1872, the railroad company filed its map showing the general route of the road, and on March 30, 1873, the land was withdrawn in favor of the company. On the 11th day of August, 1873, and within three months after the government survey of the land, the pre-emption claimant presented his declaratory statement to the register and receiver of the local land office. The court in that case, referring to the act of July 2, 1864, said: "The act of congress not only contemplates the filing by the company, in the office of the commissioner of the general land office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not at that time been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or rights, but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within forty miles on each side, until the definite location is made. The third [sixth] section declares that, after the general route shall be fixed, the president shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road, and that the odd sections granted shall not be liable to sale, entry, or pre-emption before or after they are surveyed, except by the company." The court, after stating when the general route of the road may be considered as fixed, proceeded, on page 72, 119 U. S., page 107, 7 Sup. Ct., and page 336, 30 L. Ed., as follows: "When the general route of the road is thus fixed in good faith, and information thereof given to the land department

by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain. It is to preserve the lands for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the land department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands, and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless. Nor is there anything inconsistent with this view of the sixth section as to the general route in the clause in the third section making the grant operative only upon such odd sections as have not been reserved, sold, granted, or otherwise appropriated, and to which pre-emption and other rights and claims have not attached, when a map of the definite location has been filed. The third section does not embrace sales and pre-emptions in cases where the sixth section declares that the land shall not be subject to sale or pre-emption. The two sections must be so construed as to give effect to both, if that be practicable." In *St. Paul & P. R. Co. v. Northern Pac. R. Co.*, 139 U. S. 1, 11 Sup. Ct. 380, 35 L. Ed. 77, both parties to the controversy claimed certain land by virtue of a congressional grant. It appeared that the land in controversy had been withdrawn by an order made by the secretary of the interior for the benefit of the Northern Pacific Railroad Company, and upon the subject of withdrawal the court said: "Besides, the withdrawal made by the secretary of the interior of lands within the forty-mile limit on the 13th of August, 1870, preserved the lands, for the benefit of the Northern Pacific Railroad, from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the president should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be fixed, and as fast as might be required for the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry, or pre-emption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the secretary of the interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to pre-

serve the land unincumbered until the completion and acceptance of the road." Then, after quoting from the opinion in the case of *Buttz v. Railroad Co.*, supra, the court further observed: "After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration; nor, indeed, in the absence of its announcement, after the general route is fixed." The same doctrine was announced in the subsequent case of *U. S. v. Southern Pac. R. Co.*, 140 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091. The court in that case expressly approved the language we have quoted from the case of *Buttz v. Railroad Co.* In *Wood v. Beach*, 156 U. S. 548, 15 Sup. Ct. 410, 39 L. Ed. 528, two orders of withdrawal were made by the department of the interior,—one in favor of the Leavenworth, Lawrence & Galveston Railroad Company; the other in favor of the Missouri, Kansas & Texas Railway Company. After these orders of withdrawal were received at the local land office, one Wood made application to enter the land as a homestead; and the court, in considering the effect of those withdrawals, used the following language: "It was said in *Wolsey v. Chapman*, 101 U. S. 755, 768, 25 L. Ed. 920: 'The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the state above the Raccoon Fork until the differences were settled, either by congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in *Riley v. Welles*, 19 L. Ed. 648, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law by reason of which this action was taken did not contemplate such a withdrawal.' This has been and is the settled rule of the courts and the land department. It is only a recognition of the limitations prescribed in the statutes; for by Rev. St. § 2258, 'lands included in any reservation by any treaty, law or proclamation of the president, for any purpose,' are expressly declared to be not subject to the rights of pre-emption, and section 2289, the one giving the right to enter for a homestead, limits that right to 'unappropriated public lands.' The fact that the withdrawals were made by order of the interior department, and not by proclamation of the president, is immaterial." In *Railroad Co. v. Colburn*, 164 U. S. 383, 17 Sup. Ct. 98, 41 L. Ed. 479, the court held that mere occupation or cultivation of premises at the time of the filing of the map of definite location, unaccompanied by any filing of a claim in the land office then or thereafter, did not exclude the tract from the operation of the land grant, and in its opinion said that "frequent decisions of this court have been to the ef-

fect that no pre-emption or homestead claim attaches to a tract until an entry in the local land office." And again it is said by the court, in *Menotti v. Dillon*, 167 U. S. 703, 721, 17 Sup. Ct. 951, 42 L. Ed. 339, in speaking of the effect of a withdrawal order made by the secretary of the interior: "That order took these lands out of the public domain, as between the railroad company and individuals, but they remained public lands, under the full control of congress, to be disposed of by it, in its discretion, at any time before they became the property of the company, under an accepted, definite location of its road." In *Northern Pac. R. Co. v. Musser-Sauntry Land, Logging & Mfg. Co.*, 168 U. S. 604, 18 Sup. Ct. 205, 42 L. Ed. 596, the same question was presented to the court. In that case certain lands had been granted to the state of Wisconsin to aid in the construction of a railroad, and the same were claimed by the Northern Pacific Railroad Company as part of the grant to it, and in that case the court said: "But a single question is presented in this case, and that is whether the withdrawal from sale by the land department in March, 1866, of lands within the indemnity limits of the grant of 1856 and 1864, exempted such lands from the operation of the grant to plaintiff. It will be perceived that the grant in aid of the defendant railway company was prior in date to that to the plaintiff, and that before the time of the filing of plaintiff's maps of general route and definite location the lands were withdrawn for the benefit of the defendant. The grant to the plaintiff was only of lands to which the United States had 'full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed.' The withdrawal by the secretary in aid of the grant to the state of Wisconsin was valid, and operated to withdraw the odd-numbered sections within its limits from disposal by the land officers of the government under the general land laws. The act of the secretary was in effect a reservation. *Wolcott v. Navigation Co.*, 5 Wall. 681, 18 L. Ed. 689; *Wolsey v. Chapman*, 101 U. S. 753, 25 L. Ed. 915, and cases cited in the opinion; *Hamblin v. Land Co.*, 147 U. S. 531, 13 Sup. Ct. 353, 37 L. Ed. 267, and cases cited in the opinion. It has also been held that such a withdrawal is effective against claims arising under subsequent land grants."

The rule announced in the foregoing cases was adhered to in the late case of *Railroad Co. v. Amacker*, 20 Sup. Ct. 236, Adv. S. U. S. 236, 44 L. Ed. —. It was there held that homestead entries made prior to the time when notice of withdrawal of the lands is received by the local land office, although after the time when the map of the general route of the railroad was filed in the office of the secretary of the interior, were made valid by the act of congress of April 21, 1876, if the entries were made in good faith by actual settlers upon tracts of not

more than 160 acres each, and that they were therefore subject to the provisions of the act of June 15, 1880, authorizing the purchase of such lands by persons who have entered them, or their transferees by bona fide instruments in writing. The contest in that case, as stated by the court, was between one claiming under homestead entry and a company claiming under a grant in aid of a railroad; and in the course of the opinion it is said: "They [meaning a majority of the court] are of the opinion that the effect of the act of 1876 was to validate all otherwise regular pre-emption and homestead entries made prior to the time when the notice of the withdrawal was received at the local land office, although such entries were made after the time the map of general route was filed in the office of the secretary of the interior, and the order of withdrawal made; that the withdrawal authorized by the sixth section of the act making the land grant to the Northern Pacific Railway Company did not vest in the company any title to the lands within the withdrawal limits, but only operated, by legislative declaration and subsequent executive action, to withdraw those lands from homestead or pre-emption entries." This decision contains the latest expression we have seen of the supreme court of the United States upon the question in controversy here, and it will be perceived that it is a virtual reaffirmance of the previous rulings of the court. It is claimed, however, by the learned counsel for the respondent, that a different rule was announced in *Railroad Co. v. Sanders*, 106 U. S. 620, 17 Sup. Ct. 671, 41 L. Ed. 1139, but we do not so understand the decision in that case. The Northern Pacific Railroad Company claimed the lands involved in that action under the grant of July 2, 1864. The company filed its map designating the general route of the road in 1872, and in 1882 filed its map indicating the definite location of its line of railroad; and prior to this latter date certain persons had made application to purchase the land, as mineral land, under the laws of the United States. At the time of the filing of the map of definite location these applications were pending and undetermined, and the court held that these applications constituted a "claim," in contemplation of the act of July 2, 1864, and that the lands so claimed as mineral lands were not included in the grant. It may be said in this connection that the said act of July 2, 1864 especially excluded all mineral land from the grant made to the railroad company; and, of course, the executive orders withdrawing the land from sale or entry did not affect lands not included in the grant. Moreover, the attention of the court in that case was especially directed to the case of *Buttz v. Railroad Co.*, supra; and in reference to that case the court, at page 636, 106 U. S., page 677, 17 Sup. Ct., and page 1145, 41 L.

Ed., observed: "On one side, it is said that that case construes the sixth section of the act of 1864 as excluding the possibility of any right being acquired adversely to the railroad company to an odd-numbered section embraced by the exterior lines of the general route after that route had been established. On the other side, it is contended that the only point necessary to be determined, and the only one judicially determined, in that case, was that the defendant could not initiate a pre-emption right to the land there in dispute so long as the Indian title referred to in the opinion was unextinguished. Without stopping to examine these contentions, it is sufficient to say that the Buttz Case involved no inquiry as to the respective rights of the railroad company under the act of 1864, and of parties making applications in due form, prior to the definite location of its road, to purchase lands as mineral lands that were within the exterior lines of its general route." We therefore conclude, from the language above quoted, that it was not the intention of the court in that case to overrule the decision in the Buttz Case, or subsequent cases announcing the same doctrine.

It is also contended by the respondent that the withdrawal order above set forth did not, in any event, exclude the lands attempted to be withdrawn from the operation of the homestead law, for the reason that the local land officers were directed to withhold all the odd-numbered sections from sale or entry simply; but we think the word "entry" covers homestead applications, as well as what is generally known as a private entry of lands after the close of public sales. The word "entry" means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim in the appropriate land office. See *Denny v. Dodson* (C. C.) 32 Fed. 899, 910; *Chotard v. Pope*, 12 Wheat. 596, 6 L. Ed. 737.

It is also claimed by the respondent that he had a right to enter the land in controversy, under the homestead laws, by virtue of the act of congress of May 14, 1880 (21 Stat. 140), which provides that the rights of homestead settlers, like those of pre-emptioners, relate back to the time of settlement. That statute was invoked in *Maddox v. Burnham*, 156 U. S. 544, 15 Sup. Ct. 448, 39 L. Ed. 527; but the court there held that mere occupation of the public land for the purpose of subsequently entering the same as a homestead, but without actually making such entry until after the lands were withdrawn by order of the secretary of the interior, gave the occupant no right thereafter to obtain the title to the land under the homestead laws. For the reasons indicated, the judgment of the court below is reversed, and the cause remanded, with directions to enter judgment for the appel-

lant for the possession of the lands described in the complaint.

GORDON, C. J., and REAVIS and DUNBAR, JJ., concur.

GRIFFITH et al. v. MAXWELL.

(Supreme Court of Washington. June 30, 1900.)

APPEAL—TRANSMITTING DOCKET FEES.

Appellant having failed to transmit the docket fee with the transcript, so that the case was not docketed for the first term, the court may dismiss the appeal, or direct compensation to be paid respondent for the delay.

Appeal from superior court, Spokane county.

Action by John H. Griffith and others, copartners as Griffith Heating & Plumbing Company, against James Maxwell. Judgment for defendant, and plaintiffs appeal. Defendant moves to dismiss appeal. Denied conditionally.

Lewis & Lewis, for appellants. Crow & Williams, for respondent.

PER CURIAM. Respondent moves to dismiss the appeal on several grounds: That the appellants' briefs were not served and filed within time, that the transcript was not certified and transmitted to this court within time, and that the cause was not docketed for the May session. It appears that the transcript, together with the briefs of appellants and respondent, were transmitted to the clerk of this court within time for assignment of the cause on the docket for the May session, but no docket fee accompanied the record, and, pursuant to the rules, the cause was not docketed for hearing. It was the duty of the appellants to transmit the docket fee. The court may, under the statute, dismiss the appeal, or direct compensation to the respondent for any delay which has been occasioned by the negligence of the appellant in the prosecution of an appeal. After the motion to dismiss was made the docket fee was forwarded to the clerk, and the cause entered on the calendar for hearing at the next session. We think it reasonable to impose a penalty of \$50, which shall be paid to counsel for respondent within 30 days. If, therefore, the appellants shall pay the sum of \$50, and file the receipt for such payment with the clerk of this court, within 30 days from the entry of this order, the motion to dismiss the cause is denied; but otherwise granted.

Respondent further urges that an appeal does not lie from the order discharging the attachment issued in the cause because there has been a prior appeal from the order discharging the attachment, in which there was an adjudication upon the order. The case referred to is *Griffith v. Maxwell*, 19 Wash. 614, 54 Pac. 35. A reference to the decision there shows that the appeal from the order

discharging the attachment was not determined. It was there observed: "The only question we deem it proper to consider is the vacation of the judgment upon the motion for a new trial, and the entering of judgment subsequently without a trial."

O'ROURKE v. JONES et al.

(Supreme Court of Washington. June 30, 1900.)

NEW TRIAL—CONFLICTING EVIDENCE—DISCRETION—APPEAL.

Where there was a substantial conflict in the evidence, it was within the discretion of the trial court to grant a new trial, and such decision will not be disturbed.

Appeal from superior court, Spokane county; Leander H. Prather, Judge.

Action by James O'Rourke against Arthur D. Jones and another. There was a judgment in favor of the plaintiff, and from an order granting a new trial he appeals. Affirmed.

Lewis & Lewis for appellant. Adolph Munter and W. J. Thayer, for respondents.

WHITE, J. This was an action to recover from respondents the sum of \$383 and interest, on a contract in writing between the appellant and Arthur D. Jones & Co. for the purchase and lease of certain real estate. On the making of the agreement, appellant was to pay \$300 on the contract, and to assume a certain mortgage, and to pay the balance in certain annual installments. The contract was made on the 21st day of September, 1898, and by the terms thereof the lease of the land adjoining the land contracted to be sold was to be obtained and possession given within a few days; otherwise, the \$383 hereinafter mentioned was to be returned to the appellant within a reasonable time. On the execution of the contract the appellant indorsed to respondents a draft for \$383, which respondents were to collect, and apply \$300 on the purchase and lease; the remainder to be returned to appellant. The defense was that after the making of the contract, and on the same day, the appellant, without any excuse, refused to further proceed with his contract, and that within a reasonable time after the making of the contract respondents tendered the deed and lease of said land and \$83, the balance collected on said draft, to appellant, but he refused to receive and accept the same and complete said contract. The case was tried before a jury, and a verdict for \$398.64 in favor of appellant was rendered. A motion was made by respondents to set aside the verdict and grant a new trial on the grounds of excessive damages given under the influence of passion and prejudice, error in the assessment of the amount of recovery (the same being too large), insufficiency of the evidence to justify the verdict, and that the verdict was against the law, and errors in law occurring at the trial

and excepted to. On the 10th day of July, 1899, the motion was heard, and the court below granted the same, set aside the verdict, and ordered a new trial. From this order this appeal is taken.

The evidence on the matters at issue was very conflicting. If anything, the weight thereof seems to be in favor of the contention of the respondents. The granting of a new trial under such circumstances is within the discretion of the trial court; and, as the appellant has well said in his brief: "Where there is a substantial conflict in evidence, the supreme court will not disturb the decision of the court below. This rule has been announced more frequently than any other rule of practice. It applies equally where the court below granted as where it denied the motion." *Rinehart v. Watson*, 11 Wash. 526, 40 Pac. 127; *Corbitt v. Harrington*, 14 Wash. 191, 44 Pac. 132; *State v. Symes*, 17 Wash. 596, 50 Pac. 487; *McBroom & Wilson Co. v. Gandy*, 18 Wash. 79, 50 Pac. 572. Under the view we take of the evidence as disclosed in the record, there was a substantial conflict therein, and there was no abuse of discretion by the lower court in granting a new trial. The order setting aside the verdict and granting a new trial is therefore affirmed.

DUNBAR, C. J., and ANDERS, REAVIS, and FULLERTON, JJ., concur.

DOWLING et al. v. CITY OF SEATTLE et al.

(Supreme Court of Washington. June 28, 1900.)

CONTRACTS—INSTALLMENTS DUE—EQUITABLE ASSIGNMENTS—VALIDITY—CONTRACTOR—BONDSMEN—ESTOPPEL.

1. Orders drawn by a contractor on sums to become due under a contract with defendant city constituted an equitable assignment of so much of the fund on which they were drawn as was necessary for their payment, and, being valid when made, they were not invalidated by the subsequent default of the contractor.

2. The bondsmen of an absconding contractor with defendant city, who have assumed and performed the contract, are estopped from disputing the validity of assignments by such contractor of money to become due under the contract.

Appeal from superior court, King county; William Hickman Moore, Judge.

Action by John Dowling and others, bondsmen of one James Forest, against the city of Seattle and others, for money claimed to be due under the terms of a contract between defendant city and the said James Forest. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

William Martin, for appellants. J. R. & R. M. Kinnear, for respondent Crouley.

ANDERS, J. On February 17, 1896, one James Forest entered into a contract with the city of Seattle to improve, to the estab-

lished grade, Harvard avenue North, from the north end of the existing improved section to the north margin of East Highland Drive, upon certain terms set forth in the contract. Afterwards, and on September 3, 1896, a supplementary and amendatory agreement to said contract for said improvement was made between the city and James Forest, in accordance with Ordinance No. 4279 of said city, providing for the payment for said improvement in local improvement bonds and warrants at the same rate specified in the original contract. It was provided in said supplementary agreement that said bonds and warrants were to be issued as said work progressed, upon an estimate being made thereof by the city engineer as follows: On or about the 20th day of each month during the progress of said work, bonds and warrants were to be issued for 70 per cent. of the contract price of the estimated amount of said work returned by the city engineer as having been done during the preceding calendar month, and the balance of said contract price (being 30 per cent. thereof) to be retained to secure the payment of laborers who shall have performed work thereon, and material men who may have furnished materials therefor. The said contract further provided that "the said contractor agrees to pay the wages of all persons and for assistance of every kind employed upon or about said work, and for all materials purchased therefor; and the said city of Seattle may withhold any and all payments under this contract until satisfied that such wages, assistance, and materials have been fully paid for." On the said 3d day of September, 1896, the said James Forest executed a bond to the city of Seattle, with John Dowling, Rosa A. Dowling, George Halsch, and Charles H. Tracy as sureties, in the penal sum of \$7,000, conditioned for the faithful performance of said improvement, and for the payment for labor done and materials furnished upon and for said improvement, in accordance with the terms of said contract and supplementary agreement. Immediately after executing the supplementary agreement and the bond above mentioned, Forest began work under his contract, and continued the same, by himself and employes, until October 24, 1896, upon which date he abandoned the work and absconded from the city, leaving his employes and those who had furnished materials for the improvement unpaid. At the time he quit work, Forest had earned, according to the finding of the trial court, the sum of \$1,895.70. On October 20, 1896, said Forest demanded of the city a bond in the sum of \$500 in part payment for the work then done under said contract, and said bond was accordingly executed and delivered to him on said day. After deducting the amount of the bond and \$518.70 (being 30 per cent. of the amount earned by Forest), to secure the payment of the laborers and material men who furnished labor and ma-

terial on said improvement, from the entire amount earned, there still remained the sum of \$827, held by the city. On October 20, 1896, one T. L. Crouley loaned to the contractor, Forest, the sum of \$384, on the latter's statement that he needed money to pay for work and materials furnished for said improvement, and took Forest's note therefor for \$400, including one month's interest on the amount received by Forest, together with a commission for procuring \$200 of the amount loaned from a third party, payable on November 20, 1896. At the same time, and as part of the same transaction, Forest, to secure said loan, gave the said Crouley an order on the comptroller of the city of Seattle for the first local improvement bond, due in November, 1896, on account of his contract for grading Harvard avenue; the said bond to be in the sum of \$500. And on the same day, and before the money so borrowed was paid to said Forest, said Crouley and Forest went to the comptroller's office and presented the said order or request; and the said comptroller indorsed thereon the words, "Bond No. 2," and filed the same in his office. On October 22, 1896, the said Forest represented to one Fred S. Twitchell that he required money for the purpose of paying for labor and materials, and pursuant to said representation, and in accordance with the request of said Forest, the said Twitchell then loaned to said Forest the sum of \$500; and in consideration of said loan the said Forest assigned to said Twitchell \$515 of the money then due or to become due to him on October estimates for labor on Harvard avenue, as per contract, and at the same time gave said Twitchell an order for said sum on the comptroller of the city, which order was on said day duly presented by said Twitchell to said comptroller, and by him duly filed in his office. On September 5, 1896, the said Forest gave to the Holloway Harness Company two orders on the city comptroller, aggregating \$30, and payable out of the amount due upon his contract with the city, which orders were received by the comptroller, and duly filed in his office. The bond No. 1, for \$500, issued and delivered to said Forest, was by him hypothecated to one F. M. Spinning as security for the payment of a loan by said Spinning to said Forest, of the sum of \$368, with interest thereon from October 20, 1896, at the rate of 1 per cent. per month. And the trial court found that said Spinning offers to deposit said bond, with the other assets or proceeds, and to be disposed of as said proceeds, after deducting the amount due him. On September 4, 1896, the said James Forest assigned to F. M. Spinning \$56.50 of the money due him on the Harvard avenue contract, and signed and delivered to said Spinning an order for the same on the comptroller of the city of Seattle, which order was on the same day filed with the said comptroller. After Forest abandoned the

work, his bondsmen were notified by the board of public works of the city that, if they did not complete it, the city would finish it at their expense. Thereupon the bondsmen began work on October 27, 1896, in accordance with the terms and conditions of said contract with Forest, under the direction and supervision of the city engineer, and continued the same in accordance with said contract until completed and accepted by the city, on February 27, 1897. The city engineer estimated the value of the whole work at \$4,258.51. After the completion of the work, bonds and warrants were issued in the name of Forest, to the amount of \$3,459.10, in payment for the work, in accordance with the requirements of the contract. A question having arisen between the city and the bondsmen of Forest as to the proper disposition of this fund, this action was instituted by the bondsmen and a large number of laborers to obtain an order or decree that the whole of the bonds and warrants be turned over and paid to the laborers and material men, to the exclusion of the assignees of Forest. The trial court, after considering the evidence in the case, and making and filing its findings of fact and conclusions of law, entered a judgment and decree ordering George M. Holloway, clerk of the court, to sell the bonds and collect the warrants deposited in court by the defendant city, in the sum of \$3,378.55, and to turn the bond in the sum of \$20.59, for extra work performed by Dowling, over to plaintiff John Dowling, or his assigns, and to pay from the funds derived from the sale of said bonds and the collection of said warrants, amounting to \$3,378.55, upon the following claims, and in the following order: That the proceeds derived from the \$500 bond held by F. M. Spinning, after the payment to said Spinning of the amount secured by said bond, with interest, and the sum of \$56.50 upon an order of James Forest, be added to the fund derived from the sale of bonds in the sum of \$827 (being a part of the 70 per cent. earned by Forest up to the time he abandoned his contract), and applied in payment of (1) the claim of the defendant Holloway Harness Company; (2) the claim of the defendant T. L. Crouley; and (3) the claim of Fred S. Twitchell, upon his order from James Forest, bearing date October 22, 1896. It was further adjudged that the proceeds derived from the sale of the remaining bonds and warrants, representing 30 per cent. of the amount earned by the contractor, Forest, and retained by the city, and the whole amount earned by the bondsmen in carrying out the contract, be applied, pro rata, to the payment of the claims of the laborers, who are plaintiffs, in the amounts found to be due them, respectively, by the court, and to the claim of Fred S. Twitchell, upon his assignment from J. L. Taylor of the latter's claim for lumber furnished by him for said improvement, and that the plaintiffs (laborers) and the defendant Fred S.

Twitchell have judgment over against the bondsmen, John Dowling, Rosa A. Dowling, George Haisch, and Charles H. Tracy, for any deficiency after the application of the proceeds from the sale of the said bonds and collection of said warrants upon their respective claims as adjudged to be due them. The court ordered the costs of the suit to be paid out of the fund in court, and no costs were allowed either to the plaintiffs or defendants. From this judgment and decree, the plaintiffs have appealed.

It is contended by the appellants that the contract between the city and Forest was an entire contract, and that Forest, having abandoned it before it was completed, had no legal claim thereunder against the city, and that his assignees have no right to any part of the fund in controversy by virtue of his pretended assignments. In other words, it is claimed that the trial court erred in holding that the claims of the several assignees of Forest, above mentioned, were valid, and payable out of the fund then due under the contract, according to their priority. Several authorities are cited by appellants in support of their contention, and it may be conceded that a party to an entire contract, who has performed it in part only, cannot ordinarily recover compensation for such part performance from the other party, provided such other party is himself without fault. If Forest, after he quit work, had sued the city to recover the value of the labor and material furnished under his contract, the city could probably have successfully defended upon the ground that the contract was entire and had not been performed, and that the city was not to blame for his dereliction. But this is not such a case. Here the city bond itself by its contract to withhold 30 per cent. of the contract price of the improvement for the benefit of laborers and material men, and it is conceded that it performed that part of its obligation. It also agreed to pay the contractor the remaining 70 per cent. monthly, as the work progressed, upon estimates made by its engineer. This, in effect, it also did, in part, at least, by delivering a bond to the contractor, and accepting his orders in favor of the various parties from whom he obtained money under the pretense that he needed it to pay for labor and materials. Up to the time these transactions occurred, it does not appear that the city or its officers had the faintest suspicion that Forest did not intend to fulfill all the obligations of his contract. At the time it did so, the city had a perfect right, under the provisions of the contract, to deliver the bond, and to accept the orders drawn on the fund then in its custody. These orders constituted an equitable assignment of so much of the fund upon which they were drawn as was necessary for their payment. *City of Seattle v. Liberman*, 9 Wash. 276, 37 Pac. 433; *Spain v. Hamilton's Adm'r*, 1 Wall. 604, 17 L. Ed. 619. And these assignments, being valid when made and assented to by the city,

were not invalidated by the subsequent default of Forest. It is true that the city, by virtue of a provision of the agreement which we have hereinbefore noted, might have withheld all payments from the contractor until it was satisfied that all just claims for labor and materials had been fully paid; but it does not follow from that fact, as contended by the learned counsel for appellants, that it was obliged to do so, and that, having done otherwise, it should now be held to be a trustee of the laborers and material men, and, as such, liable to them directly for the amount of the fund assigned, and of the bond delivered to the contractor. If these appellants had had a lien upon this fund, as they had upon the 30 per cent. of the amount of the monthly estimates, which was withheld by the city, there would be at least some ground for the claim that the city is their trustee. But in the absence of such lien this contention cannot be sustained.

It is further claimed that the bondsmen, having completed the improvement, thereby became subrogated to all the rights the city had or could enforce against their principal, Forest, and consequently have the right to demand that the moneys which might have been withheld during the progress of the work be paid to the laborers and material men, to the entire exclusion of the assignees of the contractor and holder of the bond delivered to him. But what we have already said in effect disposes of that contention. The city, as we have seen, claimed no right in or to the fund earned and assigned by Forest; and therefore, so far as that fund is concerned, there is no right to which the appellant's could be subrogated. Certainly Forest could not justly claim that his assignments were invalid, and his bondsmen, having assumed and performed his contract, cannot claim anything which he could not. After the contractor quit work, and while his bondsmen were in charge of it, the city withheld all payments until the improvement contracted for was completed; and after this action was commenced it deposited the bonds and warrants which were due under the contract in court, to be distributed as the court might be advised. This, we think, was all that it could reasonably be required to do in the premises. It appears to us that the judgment of the superior court was right, and it is therefore affirmed.

DUNBAR, C. J., and REAVIS, J., concur.

WASHINGTON NAT. BANK v. MOYER,
Sheriff, et al.

(Supreme Court of Washington. June 30, 1900.)

EXECUTION—CLAIMANT—TITLE TO PROPERTY
—DIRECTING VERDICT.

A dealer in hops, on being refused a loan by a bank, made arrangements with it where-

by he should buy hops for it as its agent, the bank to furnish the money, and credit the net proceeds on the agent's indebtedness to it. The books of the bank exhibited the account with the agent as ordinary advancements and loans to the agent, which the bank explained was done merely for convenience. A memorandum of sale showed the note to have been to the agent, but evidence showed the sale was to be effective only on payment which was made directly by the bank. Hops so purchased were levied on as the property of the agent, for which the bank filed a claim. Held, that any inference which might arise from the bank account or from the memorandum of sale could not make doubtful the bank's title to the hops, and the court properly directed a verdict for the bank.

Appeal from superior court, King county; William Hickman Moore, Judge.

Claim by the Washington National Bank against W. H. Moyer as sheriff and another for property levied on as the property of another. Judgment for claimant, and defendants appeal. Affirmed.

Allen & Allen, for appellants. Piles, Donworth & Howe, for respondent.

REAVIS, J. The appellant Allen was the owner of a judgment against Robert and George Livesley, and a co-partnership existing between them known as the "Pacific Hop Company." In November, 1898, an execution was issued upon the judgment, and delivered to appellant Moyer, then sheriff of King county, who levied upon 70 bales of hops, and took the same into his possession. Thereupon the respondent bank claimed the property by filing its affidavit of claim and executing the bond required by statute, and the cause was thereafter tried upon the affidavit which constituted the pleadings in the case. The undisputed evidence at the trial showed that the Pacific Hop Company had been doing its banking business at the respondent bank prior to August 23, 1898, and at that date the hop company was indebted to the bank in about the sum of \$6,000; that Livesley, who was managing the hop company, applied to the bank for further loans, which were declined; that Livesley thereupon entered into an arrangement with the bank whereby he, as agent for the bank, should buy hops for the bank; that the hops should be sold, and, after the bank had deducted from the amount received for the hops the original cost of the hops and a sum equivalent to the interest on the money of the bank while it held the hops, and expenses incident to the purchase and sale thereof, it should credit the surplus proceeds upon the old indebtedness of the hop company or Livesley to the bank. In pursuance of the agreement, the hops in controversy were bought by the bank through the agency of Livesley. The bank furnished the money to pay for the hops, and paid to the owners of the hops the purchase price. The undisputed evidence of all the witnesses shows that by the agreement Livesley

was not to acquire any title to the hops; that the purchases were made for and on account of the bank; but the books of the bank exhibited the account of the hop company or Livesley as one of ordinary advancements and loans to Livesley, and credits to his account of all profits on the sale of hops, and a contract with one of the owners of hops introduced in evidence was a memorandum of sale from the owner to the Pacific Hop Company. At the conclusion of the trial appellants moved for a nonsuit, which motion was overruled, and the court thereupon directed a verdict for respondent. Motion for a new trial by appellants was thereafter overruled.

The vital question presented here is the direction of the verdict for respondent. In *Sires v. Newton*, 1 Wash. T. 356, it was held that where A. in his own name, but as the agent of B., purchased chattels for B., such chattels are the property of B., and a seizure of the same under an execution against the property of A. is wrongful, and no interest passes by virtue of a sale under such execution. In *Stinson v. Sachs*, 8 Wash. 301, 36 Pac. 287, it was held that a principal could recover on a promissory note made payable to his agent, and that no indorsement of the note to the principal was necessary. In *Mechem*, Ag. p. 623, note 1, it is stated: "In case of a purchase or exchange of goods of an agent, even if the principal be not disclosed, or the bill of sale be made to the agent himself, the property, immediately upon the execution of the contract, rests in the principal." The same principle is again stated in *Medcalf v. Bush*, 4 Wash. 386, 30 Pac. 325.

Counsel for appellants maintain that it should have been submitted to the jury whether the inferences to be drawn from the face of the bank books and the memorandum of sale of a portion of the hops to the hop company overcame the undisputed testimony of all the witnesses as to the title to the hops; that is, that the question of the bank's title should have been submitted to the jury. But the explanation of the books was that for convenience the account was kept in the form in which it appeared, and in the hop sale, though the memorandum upon its face was with the hop company, the purchaser was paid directly by the bank, and he understood that the sale was effective only upon the payment, and all orders on the bank were signed by Livesley as agent. Any inferences that might be raised upon the face of the bank books and the memorandum are not sufficient to make doubtful the evidence of respondent's title to the hops, and are not sufficiently substantial, standing alone, to require the case to be submitted to the jury. The court, therefore, properly directed the verdict, and the judgment is affirmed.

DUNBAR, C. J., and FULLERTON, J., concur.

MCGOWAN v. SMITH et al.

(Supreme Court of Washington. June 30, 1900.)

PARTITION BY DEVISEES—ORDER OF DISTRIBUTION—NOTICE—CONSENT—ALIENATION OF INTEREST—STATUS IN PARTITION—LACHES.

1. Under Ballinger's Ann. Codes & St. § 6357, requiring notice as on application for sale of land by an executor or administrator, before a decree of partition and distribution of an estate, a decree of distribution to devisees of undivided moieties therein, without notice to or consent of a grantee of one of such devisees, was void as to him, though made on written partition of such devisees, as authorized by the will, and with their consent.

2. Where a devisee conveyed his undivided moiety in lands, a partition of such lands afterwards made by him with the owner of the other moiety, without knowledge of his grantee, though authorized by the will, was void as to such grantee, since all the estate of the devisee had been alienated, and he was not a proper party to the partition.

3. Since a grantee of a devisee who held the lands conveyed in common with another devisee is entitled to partition thereof at any time as a matter of right, a suit therefor is not barred by laches because of an attempted void partition nine years prior to the institution of a subsequent suit.

Appeal from superior court, Pacific county; H. S. Elliott, Judge.

Partition by P. J. McGowan against Isaac Smith and another. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Fred L. Rice and A. E. Rice, for appellants. Fulton Bros. and Hewen & Stratton, for respondent.

REAVIS, J. Action for partition of real property in Pacific county. Plaintiff (respondent) and appellants deraigned title from a common source. Almorán Smith, in March, 1875, devised his real estate, the property in controversy here, to his two sons, Amos and Isaac. After giving his daughter one cow, his will proceeded: "The remainder of my property, both real and personal, I bequeath to my sons, Amos and Isaac, in equal quantities, one of which shall divide the said real and personal property, and the other shall take his choice of the two parts so divided, and the remaining part shall be taken by the one dividing the same." The will further names the executor, and provides that letters of administration should not be required. No partition having yet been made between Amos and Isaac Smith, in July, 1887, Amos Smith duly conveyed, by a proper deed of warranty, an undivided one-half interest in the real property devised to him and to his brother to respondent, which deed was duly placed of record at that time. On December 13th following, Amos Smith and his brother, the defendant, made a partition of the real property by a written instrument, describing themselves as devisees of the will, and reciting: "Amos Smith divides as follows: By drawing a line east and west through the center of the south half of the aforementioned premises, and

thereupon Isaac Smith selects the north half thereof; and also divides lot 5, section 26, township 15, containing 28.47 acres, by drawing a line north and south, and Isaac Smith selects the east half thereof." This instrument was presented to the probate court, with a petition that the court dispense with the publication of notice to show cause why a decree of distribution should not be made, so as to obviate unnecessary expense, and that distribution be made. The instrument was executed by Isaac and Amos Smith. The probate court thereupon, on the 4th day of January, 1888, and without notice, entered a decree of distribution under the provisions of the will, and in accordance with the partition of the real property made by Amos and Isaac Smith, and the administration of the estate was closed. The real estate in controversy was unimproved, uncultivated, "wild" land. It was found by the court that respondent had no knowledge of the alleged partition by Amos and Isaac Smith, or the order entered in the probate court, until 1892 or 1893. Defendant was fully advised of the conveyance from Amos Smith to respondent.

Upon examination of the evidence, the findings of fact of the superior court are approved. The decree of distribution of the probate court was void. Partition and distribution of real estate in the probate court is made on the application of the executor or administrator, or any person interested in the estate, and only upon notice as required upon an application for the sale of land by an executor or administrator. Section 6357, Ballinger's Ann. Codes & St. Section 6361, Id., declares: "Partition of the real estate may be made as provided in this chapter, although some of the original heirs or devisees may have conveyed their shares to other persons, and such shares shall be assigned to the person holding the same, in the same manner as they otherwise would have been to such heirs or devisees." It will be observed that Amos Smith, as devisee, having conveyed his undivided one-half interest in the real property to the respondent, respondent, within the purview of the statute, was a proper party to the distribution. But, as observed, as against respondent, the order of the probate court was void. It is maintained, however, by counsel for appellants, that, under the terms of the will, Amos and Isaac Smith were appointed by the testator to make partition of the real property between themselves. It is true a method of division between them was provided in the will, but it is apparent that the estate devised to them by their father vested immediately in undivided moieties to each of the devisees. Therefore Amos had full power to convey such moiety to respondent, and, when the interest owned by him was thus alienated, he was no longer a proper or interested person in the partition, and the attempted division of the premises by the two brothers could not affect the rights of respondent.

Such division was not brought to the attention of respondent for some years afterwards, and the nature of the uncultivated and unoccupied real estate was not such as to suggest to respondent any inquiry until the attempted division was made known to him.

We do not think there is any force in the argument that the suit for partition is stale. The case is presented of owners in common of undivided realty, and the respondent, as one of such owners, is entitled, as a matter of right, to the partition of the estate. The judgment of the superior court is affirmed.

DUNBAR, C. J., and FULLERTON, J., concur.

(22 Wash. 631)

TRUMBULL v. SCHOOL DIST. NO. 7,
CLALLAM COUNTY.

(Supreme Court of Washington. June 30, 1900.)

APPEAL—JURISDICTIONAL AMOUNT—DIRECTING VERDICT—NOMINAL DAMAGES.

1. Appeal by defendant will lie to the supreme court for a judgment for plaintiff for less than \$200, where more than that was sued for.

2. The court having instructed the jury to find a verdict for plaintiff for nominal damages, and told them that by "nominal damages" is meant an unsubstantial sum, as \$1, a verdict for \$26 cannot stand.

Appeal from superior court, Clallam county; James G. McClinton, Judge.

Action by R. G. Trumbull against school district No. 7, Clallam county. Judgment for plaintiff. Defendant appeals. Modified.

Geo. C. Hatch, for appellant. Harry Ballinger and Trumbull & Trumbull, for respondent.

WHITE, J. Respondent commenced this cause in the court below to recover from appellant damages in the sum of \$1,305 for breach of contract to teach the schools for school years 1896-97 and 1897-98. Appellant's defense consisted of two affirmative defenses, to wit: First, that respondent had during the life of the contract sought and obtained other like employment; second, that when the contract was made and broken, and during its entire life, appellant had reached its limit of indebtedness. The case was tried before a jury. At the close of the testimony appellant moved the court to withdraw the case from the jury, and to direct a judgment for the appellant. This motion was overruled. The court then, on its own motion, instructed the jury to find a verdict for the respondent for nominal damages, stating that by "nominal damages" was meant any unsubstantial sum, as \$1. The jury returned a verdict for \$26. Appellant objected to receiving the verdict, on the ground that the amount found was not nominal damages. The court overruled the objection, and received the verdict. Appellant moved for a new trial. The motion

was overruled, and judgment was entered for respondent for \$26. Respondent acquiesced in the decision of the court, and instituted no cross appeal.

There can be no question but that there was a breach of the contract of employment, entitling the respondent to nominal damages, at least. To defeat a recovery, the second defense must be made good by appellant. The respondent moves to dismiss the appeal for want of jurisdiction in this court to hear the same, inasmuch as the amount now in controversy is less than \$200. The amount originally in controversy was \$1,305. This case falls squarely within the rule laid down by this court in *Bleecker v. Railroad Co.*, 3 Wash. St. 77, 27 Pac. 1073. The motion to dismiss the appeal is not well taken, and will be overruled.

The appellant claims that \$26 is not nominal damages. We think that \$26 is compensatory, and not nominal, damages. Whether it is or not, it was the duty of the jury to obey the instructions of the court in finding their verdict. The court instructed the jury as follows: "You are instructed to find a verdict for plaintiff for nominal damages. By 'nominal damages' the court means any unsubstantial sum, as one dollar." Under this instruction, it was the duty of the jury to return a verdict in favor of the respondent for one dollar or less.

The court was very liberal in allowing the appellant to amend its answer while the case was on trial, two amended answers having been filed. When the last answer was filed, the respondent announced that he stood on the reply already filed, and the court must have treated the second amended answer as if a reply had been interposed thereto; for it allowed the appellant to introduce testimony in support of the second defense, and the respondent to cross-examine the witness giving such testimony. We are not satisfied that the evidence supported the appellant's second affirmative defense, and the court below must have taken this view when it instructed the jury to return a verdict for nominal damages. The judgment entered by the court in this case is so modified that it shall be for one dollar and no more, and as so modified it is affirmed, the appellant to recover its costs in this court.

DUNBAR, C. J., and ANDERS, REAVIS,
and FULLERTON, JJ., concur.

WHEELER v. COMMERCIAL INV. CO. et al.

(Supreme Court of Washington. June 16,
1900.)

APPEAL—MOTION TO DISMISS—DAMAGES.

1. Where it appears from the record of a case on appeal that the time for filing briefs and serving a statement of facts has long since ex-

pired, and that no notice of settling such statement of facts has been given, nor briefs served, the appeal will be dismissed on motion, and the judgment affirmed.

2. Where the judgment appealed from is a money judgment, on which interest is recoverable, no damages for delay will be allowed on the granting of a motion dismissing the appeal.

Appeal from superior court, Pierce county; Thomas Carroll, Judge.

Action by L. H. Wheeler against the Commercial Investment Company, a corporation, and others. From a judgment in favor of plaintiff, defendant National Bank of Commerce appeals. Appeal dismissed.

Sullivan & Christian, for respondent.

PER CURIAM. This is a motion to dismiss the appeal, affirm the judgment, and for damages for taking the appeal for delay only. It appearing from the record that the time for filing briefs and serving statement of facts has long since expired, and that no notice of settling statement of facts has been given, and no briefs served, the motion to dismiss and affirm the judgment will be sustained. There being no showing, however, of any special damages, and the judgment being a money judgment, and one on which, according to its terms, the respondent will obtain interest, and as the respondent will be reimbursed for costs and attorney's fees incurred in prosecuting this motion to dismiss, we think no case for damages under the statute is made out. The order of the court is that the appeal be dismissed, and the judgment affirmed.

GOTTSTEIN et al. v. WIST et al.

(Supreme Court of Washington. June 26,
1900.)

TRUSTS—PAROL AGREEMENT—RIGHTS OF CREDITORS—EXECUTED TRUSTS—EXISTENCE —PAROL EVIDENCE—ADMISSIBILITY.

1. Where defendant and his co-heirs, under a parol agreement that his co-defendant should convey to him the property in controversy when all the co-heirs should become of age, deeded their rights to other property to a grantee of the co-defendant, in order to clear the title under the co-defendant's warranty, a deed executed in pursuance of such trust agreement will not be set aside in a subsequent creditors' suit, as in fraud of judgments obtained against the co-defendant, since the co-defendant, having executed it in satisfaction of a legal obligation, could not question its validity, and her creditors can occupy no better position.

2. In a creditors' suit to set aside a deed executed prior to the suit in pursuance of a parol trust agreement in favor of the grantee, parol evidence is admissible to show the existence of the trust.

Appeal from superior court, King county; William Hickman Moore, Judge.

Action by M. Gottstein and another against Katherine Wist and another. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Ballinger, Ronald & Battle, for appellants. Preston & Bell and Allen & Allen, for respondents.

WHITE, J. This was an action brought by the respondents, as creditors of Katherine Wist, to set aside a deed made by her to George Wist, the appellant, conveying to him certain real estate, on the grounds that the same was made by Katherine Wist with intent to hinder, delay, and defraud the respondents, and was accepted by George Wist with knowledge of such fraudulent intent. The undisputed facts in the case, as shown by the evidence, are as follows: Appellant George Wist and a sister and brother were children of Philip Wist and Mariana Wist. During the coverture of Philip and Mariana, and prior to the year 1876, Philip and Mariana acquired lot 2 in block 84, and lot 11 in block 81, of Central addition to the city of Seattle, and lots 6, 7, and 8 in block 27 of the plan of North Seattle, as laid out by D. T. Denny and John Denny. In the month of July, 1876, Mariana Wist died intestate, and no administration was ever had upon her estate, and no claims were ever made against her estate, or the community composed of her and Philip Wist. In the month of December, 1876, Philip Wist and the defendant Katherine Wist intermarried. Subsequently Philip and Katherine sold to and conveyed to Martin Paup, by warranty deed, said lots 7 and 8, block 27. Some time in the year 1870 Philip and Katherine Wist conveyed, by deed absolute, lot 2 in block 84, and lot 11 in block 81, said Central addition, and lot 6, block 27, North Seattle, of the above-described property, to a man named Kimball, to secure an existing indebtedness of several hundred dollars; and in the year 1884, the indebtedness having been paid, Kimball reconveyed the same property to Philip Wist. Between 1889 and 1892 Philip Wist, who was then engaged in business, became indebted to the respondents, upon which indebtedness the respondents afterwards recovered the judgments which they are endeavoring to collect in this case. On May 21, 1890, Philip Wist conveyed the said real property to the defendant Katherine Wist, to be her absolute property; and the title thereto stood of record in her name from that date until the 8th day of September, 1897, when she conveyed it to the appellant George Wist, reciting in the deed a consideration of \$2,500. At the time of the execution and delivery of said deed, George Wist knew of the indebtedness to the respondents, and knew that the respondents were pressing Katherine Wist for the payment of the same, and was apprehensive that they would attempt to seize the property in controversy for satisfaction of the claims. The respondents levied upon said property under their judgments against Katherine Wist. In 1894 the children of Mariana commenced an action against Philip and Katherine and Martin Paup to establish their interest in the property above described, under their mother,

including the two lots sold to Paup. A settlement was made under which it was agreed that if the children would dismiss said suit, and deed to Paup their interest in the two lots previously deeded by Philip and Katherine to Paup, they (the children) should have in lieu thereof the property involved in this suit (being the balance of the community property of Philip and Mariana, and being less than a moiety thereof in value), and, one of the children being then a minor, and the sister being about to marry, that said Katherine, who then held the legal title, would hold the same until said minor became of age, or until the conveyance should be required of her by said children. Accordingly the children dismissed their suit and executed conveyances to Paup, and Katherine agreed to execute a deed when and to whom the children should require the same to be executed. This agreement above recited was never reduced to writing, and no declaration of said trust was ever made in writing. In September, 1897, the minor children being then 21 years of age, Katherine, at the request of the children, deeded the property to George, who holds it for himself and brother and sister. At the time of the settlement between Philip and Katherine and the children, Philip was solvent, owing less than \$300 over and above his indebtedness to these plaintiffs (respondents), who held notes signed by Philip and Katherine, secured by mortgage on real estate; the real estate being of little or no value. Besides, Philip and Katherine owned considerable other real estate, unincumbered. Philip died in 1895, and plaintiffs, having failed to present their claims to his administrator, brought actions at law on notes against Katherine alone. These actions were commenced more than a month subsequent to her deed to George. Judgments were recovered against Katherine on the notes. On these facts the court below found that as to one-half of said lot 2, block 84, and as to one-half of said lot 11, block 81, in said Central addition, and as to one-half of said lot 6, block 27, North Seattle, said Katherine Wist was the owner, and that the conveyance from Katherine Wist to George Wist, the appellant, as to said half interest, was fraudulent and void; and it was decreed that said one-half interest be subjected to execution upon the judgments of the respondents against Katherine Wist. To reverse this decree, this appeal is prosecuted by the appellant.

It may be conceded that in 1890, when Philip Wist conveyed lot 2 in block 84, and lot 11 in block 81, Central addition, and lot 6, block 27, North Seattle, to Katherine Wist, he intended to, and did, vest in her as her absolute estate, and not in trust for any one, said property. If any trust as to such property was created, it was a direct trust, and was created in 1894, when a settlement was had of the suit brought by the appellant and other children of Philip and Mariana Wist against their father and Katherine Wist and

Martin Paup. The agreement was then made to the effect that if the children would make good Martin Paup's title, by conveying their interest in lots 7 and 8, block 27, North Seattle, to Martin Paup, she (Katherine Wist) would convey to the respondents and the two other children, or to whom they might select, all of her interest in the property in controversy in this suit, so as to vest the full title to the same in said children. Under this agreement the children, by conveyance, made good Martin Paup's title, which Philip and Katherine Wist, in equity and good conscience, if not under the warranty in their deed to Paup, were required to make good. The deed of the children to Paup was a good, valuable, and sufficient consideration to have upheld the deed, if it had then been made by Katherine Wist to the appellant. The court below found: Thirteenth Finding. "That prior to the year 1894 the said Philip Wist and the defendant Katherine Wist made, executed, and delivered to one Martin Paup their warranty deed to lots 7 and 8 in block 27 of the plan of North Seattle, as laid out by D. T. and John Denny, and thereafter, in the year 1894, the defendant George Wist and the said Laura Rippett and Charles O. Wist (being the children of the said Philip Wist and Mariana Wist, his first wife) instituted a suit in the superior court of King county, state of Washington, for the purpose of having an undivided one-half interest in and to said lots 7 and 8 established and declared to be in them, as the heirs at law of the said Mariana Wist, deceased; the same being her community interest in said property." Fourteenth Finding. "That thereafter the said Philip Wist and Katherine Wist agreed with the defendant George Wist and the said Laura Rippett and Charles O. Wist that in consideration of them, the said children, executing a conveyance in the said lots 7 and 8 in block 27 to the said Martin Paup, the said Katherine Wist should hold the title to lot 2 in block 84 and lot 11 in block 81 of Central addition to the city of Seattle, and lot 6 in block 27 of the plan of North Seattle, as laid out by D. T. Denny and John Denny, in trust for the benefit of said three children last mentioned." Having made these findings, we are at a loss to understand how the court below came to the conclusion it did in this case, unless upon the theory that because the agreement was not in writing, or was not made when Philip Wist, in 1890, conveyed to Katherine Wist, the children could not enjoy the benefits arising under the executed trust, inasmuch as parol trusts cannot be enforced, under the statute of frauds. This theory has been strenuously insisted upon by the respondents in their brief and in their oral argument before this court, and it becomes necessary to carefully weigh these objections. It must be remembered that this is not an action by the cestui que trust against the trustee to establish the trust. If there was a trust, it was an express trust, and it had been executed before the respond-

ents instituted this action. This property, under the agreement found by the court, and above quoted, equitably belonged to these three children. This court, in *Samuel v. Klittenger*, 6 Wash. 261, 33 Pac. 509, said: "Only those transfers which are inhibited by law are void. And a conveyance of property in trust for those to whom it equitably belongs can in no event be void as to creditors, for the reason that their equities cannot be paramount to those of the cestui que trust." Correctly speaking, the agreement referred to did not constitute a resulting trust, but was the creation of an equity acting on the conscience of the parties to the agreement; and an express trust existed after said agreement was made, so long as the title was retained by Katherine Wist. Acting on the obligation expressly entered into between Katherine Wist and the children, Katherine Wist conveyed the property to George Wist, in trust for himself and brother and sister, some time before this suit was instituted. As between Katherine Wist and George Wist, it is clear that Katherine Wist could not set up that the trust was within the statute of frauds, and was void, because not in writing, for the purpose of annulling the deed to George Wist, because she had already executed the trust. *Robbins v. Robbins*, 89 N. Y. 251. The respondents are the creditors of Katherine Wist. Can they be said to be in a better position than Katherine, as regards this property already conveyed to George Wist in the satisfaction of a just and legal obligation? It has been held that the trustee may execute a parol trust, if he chooses to do so, and that the court will protect him in so doing. *Karr v. Washburn*, 56 Wis. 508, 14 N. W. 189. A creditor has the right to have the debtor's property applied to the payment of his debts, but not the property of another. In order to support the contention of the appellant, it is necessary by parol to prove the trust, if we may call the agreement such, which is a link in the chain of the transaction leading to Katherine Wist's conveyance to the respondents. Can this be done without contravening the statute of frauds?

The case of *Richmond v. Bloch*, reported in 60 Pac. 385, decided by the supreme court of Oregon March 12, 1900, is a similar case to the one under consideration, and many of the authorities on this proposition are there collated. That court says: "The case is different, upon authority, from one where the trust is yet executory, and the attempt is to enforce it. The parol trust has now become an incident in the history of its consummation, while, as in the other event, it stands as an obligation of the trustee, not susceptible of legal establishment, and the question is whether the trust can be proved for the purpose of showing that the same has been executed. This question has been explicitly answered in the affirmative in *Moore v. Cottingham*, 90 Ind. 239. That was a case where the husband had, through mesne conveyances, deeded certain lands to

his wife, pursuant to a parol agreement that the title should be held by her in trust for him, in order to preserve the property and prevent him from squandering it. In the execution of the trust, the wife, without joining with her husband, conveyed to their son, and he to the husband. The husband afterwards conveyed to the appellants, who sued to enjoin the sale of an undivided interest in the land under an execution issued upon a judgment against one of the heirs of the wife; it being claimed that the wife's deed was void because her husband had not joined with her in its execution. It was said in the course of the opinion that 'such trust, as before remarked, cannot be enforced, but, if it has been executed, the same will be upheld and sustained; and for this purpose proof of the facts will be allowed, though the trust rests in parol.' The same question arose in a later case,—that of *Hays v. Reger*, 102 Ind. 524, 1 N. E. 386. In that case William Reger conveyed by absolute deed, without consideration, to John Stump, upon a parol trust that the title should be held for the benefit of Reger. Subsequently Stump and wife, by direction of Reger, conveyed to Reger's wife. While the legal title was in Stump, Hays and Wiles recovered a judgment against him, and they sought to have the proceeds of the premises applied to the satisfaction of their judgment. Mitchell, C. J., speaking for the court, said: 'The question is not whether the parol trust may be enforced, but, the parties having voluntarily executed it, is it competent to aver and prove that it existed, in order to defeat the apparent lien of Hays' and Wiles' judgment? * * * This statute [referring to the Indiana statute], as also the statute of frauds, was enacted, not that parties might avoid trusts which were executed, but, rather, to enable them, in case of an attempt to enforce such trusts while they remain executory, to insist on certain modes of proof in order to establish them. The trust having been executed, we need not determine whether it was one arising by implication of law, or whether it was an express trust. Whether it was one or the other, the parties having voluntarily executed it, the authorities are that it may be proved by parol for the purpose of showing that the apparent owner had no interest which was subject to the lien of a judgment against him.' * * * In the case of *Sleman v. Austin* [33 Barb. 9], supra, the court said: 'A debtor will not be permitted to convey away his property, either real or personal, and relieve it from the incumbrances occasioned by his debts; but there is nothing to prevent his restoring to others their property, if it has been placed in his hands. Nor is there any reason why the property of others should be subjected to the payment of his debts, if he is honest enough to refuse to avail himself of an opportunity to use it for that purpose.' In further support of this doctrine, see *Borst v. Nalle*, 28 Grat. 423. It is

manifest, under these authorities, that the defendant Adelaide Bloch could, as against the claim of the plaintiffs, lawfully convey the property in question, in so far and to the extent that she held the same in trust, to the cestuis que trustent, according to her verbal promise, if she chose to do so, and thereby discharge her moral obligation to them, and that, having executed the trust in accordance with the verbal undertaking, even though executed subsequent to the time the claim of plaintiff accrued, the law will not only uphold the transaction upon her part, but will protect the cestuis que trustent in the enjoyment of the property thus conveyed to them."

In *Perry, Trusts* (4th Ed.) § 76, the author says: "A parol trust is not, however, an absolute nullity in any case, but rests in the election of the trustee in those cases where the cestui cannot enforce it. The courts will protect the trustee in the execution of the trust if he chooses so to do, and, as far as possible, will protect the beneficiaries in the enjoyment of the fruits of its execution." "Resulting trusts are trusts that the courts presume to arise out of the transaction of parties, as if one man pays the purchase money for an estate, and the deed is taken in the name of another. Courts presume that a trust is intended for the person who pays the money." Id. § 26. In this class of cases, on suits brought to establish and enforce them, the rule is that "the trust must result, if at all, at the instant the deed is taken and the legal title vests in the grantee. No oral agreement and no payments before or after title is taken will create a resulting trust, unless the transaction is such at the moment the title passes that a trust will result from the transaction." The long list of authorities cited by respondents in their brief are on this proposition, and have no applicability to the case now under consideration. Trusts are divided into four classes: Express trusts (sometimes called "direct trusts"), implied trusts, resulting trusts, and constructive trusts. Id. §§ 25-27. The trust created by Katherine Wist with these children was an express or direct trust, created in 1894,—four years after Katherine Wist had acquired the property,—and it has been executed. In effect, the children then purchased the property from Katherine Wist,—gave to her a full consideration therefor; for Ronald, a witness for appellant, testifies that the property exchanged for this property was worth \$2,500, and she agreed to convey this property to the children, held it in trust for that purpose for some time, and before this suit was instituted she carried out her agreement and executed her trust. A case similar in some respects to that at bar is *Davis v. Kennedy*, 105 Ill. 300, cited by appellant. The facts were these: A man, when solvent, gave and conveyed to his daughters some land, but no deed was recorded. Afterwards he sold the land, and agreed with them that

he would give them other lands. Subsequently, and after becoming insolvent, he deeded to his daughters the other lands promised. This conveyance was attacked by his creditors as fraudulent. The supreme court says: "When, therefore, they [the daughters] consented to its [the first land] being sold by their father, and he to receive the consideration, and they to take money or other real estate in exchange, that formed a consideration for the conveyance of the * * * tract in controversy." So in the case at bar. The conveyance by the children to Martin Paup, at the express request of Katherine Wist, of their interest in the lots conveyed to him by Katherine and Phillip Wist, to discharge the obligation resting on Katherine and Phillip Wist to make good the title of Martin Paup, under an agreement with Katherine Wist that, if they would make good Paup's title, she would convey to them the property in controversy, formed a good consideration for the conveyance to George Wist as trustee for himself and brother and sister; and it should not be set aside at the instance of the creditors of Katherine Wist whose equities are not superior to the equities and rights of these children. The final judgment and decree of the court below, entered in this cause on the 13th day of December, 1899, should be reversed and set aside, and this action dismissed, with costs to the defendants in the court below, and with costs to the appellant in this court, and it is so ordered and adjudged.

DUNBAR, C. J., and ANDERS, REAVIS,
and FULLERTON, JJ., concur.

STATE v. HYDE.

(Supreme Court of Washington. June 22,
1900.)

CRIMINAL LAW—APPEAL—RECORD—ARREST
OF JUDGMENT—GROUNDS—TRIAL—JOINT DEF-
ENDANT—PRESENCE IN COURT—ADMISSION
OF EVIDENCE—DIRECTION OF VERDICT—
ROBBERY—INDICTMENT—NEW TRIAL—NEW-
LY-DISCOVERED EVIDENCE.

1. Affidavits and written statements will not be stricken from a transcript on motion of a respondent, in a criminal case on appeal, where the court certifies that same were presented to the court, passed on, and examined on the hearing, on a motion for a new trial and in arrest of judgment.

2. Under 2 Ballinger's Ann. Codes & St. § 6967, providing that arrest of judgment in a criminal case may be had on the ground that the grand jury had no authority to inquire into the offense charged, by reason of its not being within the jurisdiction of the court, or that the facts stated did not constitute a crime or misdemeanor, judgment will not be arrested on the ground that defendant was examined before the grand jury, and not informed that his evidence would be used against him, where the court had jurisdiction, and the indictment sufficiently stated a crime.

3. There was no error in allowing one jointly indicted with defendant to be present in the court room during the trial of defendant, where he was brought into court for the purpose of identifying him as the one connected

with defendant in the crime, which was made relevant by the subsequent admission of testimony that they were seen together at about the time the crime was committed.

4. Assignments of error that two witnesses were permitted to testify to other robberies committed by defendant are not sustained by testimony of one that he met defendant and another at about the time and place of the alleged robbery, and that they had guns in their hands, and of the other that he saw the same two about the same time with guns in their hands; the only evidence that the latter was also robbed being brought out on cross-examination by defendant's counsel that the defendant told witness to throw up his hands.

5. There can be no nonsuit in a criminal, as in a civil, case.

6. A motion in a criminal case "that the defendant be discharged from the charge set out in the indictment" is, in effect, a motion to direct the acquittal of the defendant; and where the ground is that there was not sufficient evidence connecting defendant with the crime, and no specific objection to the evidence is urged, it should not be sustained, where there is some evidence tending to show defendant guilty.

7. In a prosecution for robbery, charging the taking of money of the United States, it is not necessary to allege in the indictment nor prove on the trial the kind of money taken, nor the specific value, since the word "money" imports value.

8. After the conviction of H. of robbery, his co-defendant made affidavit that H. was not guilty of the crime charged, and was not present at the commission of the crime; that the co-defendant refused to testify on behalf of H. on the trial, because by so doing, in his judgment, he would prejudice his own interest; and also filed a statement, signed by himself, on the day of the conviction of H., stating that the co-defendant and another committed the robbery. *Held*, that the affidavit and statement of the co-defendant were not such newly-discovered evidence as would be ground for new trial of H., as there was nothing to show that he would testify to the matters stated therein on a new trial.

Appeal from superior court, Pierce county;
W. H. H. Kean, Judge.

Edgar Hyde was convicted of robbery, and he appeals. Affirmed.

Frank S. Carroll, for appellant. Fremont Campbell, for the State.

WHITE, J. The indictment in this case charges the appellant and one John Hildebrand with the crime of robbery, alleging that said appellant and Hildebrand, in Pierce county, "on the 3d day of July, 1899, then and there being, unlawfully and feloniously and forcibly did make an assault upon one George Hyde, and then and there four dollars and twenty-five cents, lawful money of the United States, of the value of four dollars and twenty-five cents, then and there being the personal property of him, the said George Hyde, from the person and against the will of the said George Hyde, feloniously, unlawfully, forcibly, by violence, and by putting the said George Hyde in fear, did take, steal, and carry away, with intent then and there the said property aforesaid feloniously to steal, contrary," etc.

The respondent's motion to strike certain affidavits and a written statement from the transcript must be denied, because the court

certifies that the same were presented to the court and passed upon and examined on the hearing of the motion for a new trial and in arrest of judgment.

At the close of the testimony for the state, appellant moved the discharge of the appellant. Further on in this opinion we will discuss the points raised by this motion.

The appellant, after trial and verdict, filed a motion in arrest of judgment. One reason urged was "illegal proceedings of the grand jury in procuring evidence upon which to base grounds for the indictment." To sustain this motion, the appellant filed his own affidavit, to the effect that on two occasions he was brought before the grand jury who found the indictment, and examined in relation to the crime charged against him, and that he was not informed that the evidence he might give before the grand jury would be used against him, and that the indictment was found on the evidence thus given by him. Under our law, but two grounds can be assigned for arrest of judgment: (1) No legal authority in the grand jury to inquire into the offense charged, by reason of its not being within the jurisdiction of the court; (2) that the facts stated do not constitute a crime or misdemeanor. Section 6967, 2 Ballinger's Ann. Codes & St. This crime was committed in Pierce county, and was within the jurisdiction of the court. An inspection of the indictment shows that the facts stated constituted the crime of robbery. If the affidavit of the appellant concerning his presence and testimony before the grand jury is true, he should have presented his objections to the indictment at the earliest opportunity, and before the trial. It is too late to raise this question after verdict. Bish. New Cr. Proc. § 887. Although such an objection does not fall strictly within the language of section 6800, 2 Ballinger's Ann. Codes & St., prescribing the grounds of a motion to set aside an indictment, it does appear from an inspection of the indictment that the name of the appellant is not indorsed thereon as a witness; and for this reason, if he had been before the grand jury as a witness, under the section last cited he could have moved to set aside the indictment, and possibly he could have done so on the further grounds that the indictment was not presented as prescribed by law. *People v. Southwell*, 46 Cal. 154.

Again, the presumption of law is that the grand jury discharged its duties in a lawful manner, and this presumption should not be overthrown by the unsupported affidavit of the accused. Besides, this affidavit is flatly contradicted by the affidavit of J. L. Murray, deputy prosecuting attorney. No evidence whatever of anything that took place, or any statement of appellant before the grand jury, was introduced at the trial. The motion in arrest of judgment was therefore properly overruled.

The facts as disclosed by the testimony in this case are as follows:

Between 9 and 10 o'clock p. m., or 10 and 11 o'clock p. m., the evidence in this respect being indefinite, of July 3, 1890, George Hyde, the prosecuting witness, while traveling on foot between Lake View and Edson, in Pierce county, in this state, on his way to Tacoma, was passed by two men on bicycles. Just as they passed him, they threw their wheels down, came at the prosecuting witness with drawn revolvers, both being armed, and demanded his money. He refused to give up his money, and answered he would fight for it. One of the men shot, and missed him. One, that he positively identified as Hildebrand, shot, and hit him in the hip, the shot knocking him down. When he was down Hildebrand's companion came around, and went through the witness' hind pocket, and took the witness' money, while Hildebrand held a revolver (called by the witness a "gun") on his head, threatening to blow the witness' brains out. Afterwards, how long the testimony fails to disclose, but while the witness was in the hospital, Hildebrand and the appellant were brought before him for identification. On the trial the witness was asked whether or not the appellant was one of the men who held him up, and he answered, "Well, he has that general appearance, but I am not positive that he is the man." But he was positive as to the other man. Hildebrand, on motion of the prosecuting attorney and by leave of the court, was brought into court, and the prosecuting witness identified him as the man who shot him.

On the same evening, July 3, 1890, Henry Mills Germaine, a witness called by the state, left Lake View 20 minutes after 9 o'clock on his bicycle, to go to the asylum, and about a mile from Lake View, at about 9:30 o'clock p. m., on a road between Lake View and a refreshment stand kept by a man by the name of Shousey, he met the appellant and Hildebrand, and they had two "guns" (revolvers) apiece. They came right up in front of him, and they both had revolvers in their hands,—in each hand,—and when they came up the witness stopped. The two men were going towards Lake View, walking. The testimony shows that it is between 9 and 10 miles from Tacoma to Lake View, and from Shousey's to Tacoma about the same distance.

John Henry Kelley, a witness for the state, testified that between 12 m. of July 3d and 1 o'clock a. m. July 4, 1890, he saw the appellant and Hildebrand in the Yellowstone Saloon in Tacoma; that the witness left this saloon five minutes after he saw the appellant and Hildebrand there, to go to his home, and on Ninth and I streets he again saw the appellant and Hildebrand, and each had a gun in his hand. On cross-examination the following questions were asked by the appellant's attorney, and answered by the witness: "Q. How long did it take you to walk from the Yellowstone Saloon up to I street? A. Three or four

minutes; probably five. Q. That would be half past twelve or twelve thirty-five or forty? A. Yes, sir. Q. What did they say to you, Mr. Kelley, did you say? A. They told me to throw up my hands. Q. And you did? A. I certainly did. Q. How many guns did they have? A. They had one gun each; that is all I seen."

Henry McKency, a witness on behalf of the state, testified that on Monday afternoon, the 3d of July, 1899, he loaned the appellant his bicycle; that the appellant said something about going out to American Lake; that he next heard of his wheel at the city hall; and that a brother of the appellant about a week afterwards returned the wheel. This witness further testified that on the evening of July 3d, between 11:30 and 12 o'clock, at the Germania Hall bar room, in Tacoma, he saw the appellant and Hildebrand together; that Hildebrand had on guards that "you put around your legs to keep your pants from catching in the sprocket wheel"; that appellant and Hildebrand left the dance hall together, and remained away some 15 or 20 minutes, and then came back together.

J. E. Sipes, a police officer, testified on behalf of the state that on the night of the 3d and 4th of July, 1899, in Tacoma, about the hour of 3:15 and 3:30 a. m. he saw the appellant and Hildebrand together on Thirteenth street, in Tacoma, and that each of them had a bicycle, and he and another officer named Wiley, after questioning them, arrested them on suspicion, and searched them, taking from the appellant two guns (revolvers), and that Wiley took from Hildebrand two other guns (revolvers); that they were asked before their arrest where they had been; that Hildebrand did most of the talking; that they seemed to be ignorant in regard to locality, and that they were asked if they had been out to the lakes; that in this conversation Hildebrand asked appellant, "What lake was that we were at?" that Hildebrand then acknowledged they had been out towards Spanaway Lake, and that the appellant made no denial of Hildebrand's statement; that appellant also stated that he had been at Germania Hall that night.

Mr. Wiley, a police officer called by the state, testified, in substance, to the same effect as Sipes; and, further, that when he came on duty after 11 o'clock it was reported to him that a gentleman had been held up, and from the description of the offenders he stopped and arrested Hildebrand and the appellant; that three cartridges had been fired off; otherwise the revolvers were loaded with ball cartridges; and that each of the defendants named in the indictment had a small sum of money. There was no testimony whatever of any other robberies, further than might be inferred from the answer on cross-examination of the witness Kelley, heretofore quoted.

The appellant testified in his own behalf that he had lived in Tacoma 14 years; that on July 3d, about half past 1 or 2 o'clock in

the afternoon he got Hildebrand, and went out to Wapato Lake on a bicycle, and stayed there until half past 7, when he and Hildebrand came back to Tacoma, and together went to the Owl Theater, and to the Lexington Saloon, where Hildebrand left him about 9 o'clock or a quarter thereafter; that appellant stayed at the Lexington Saloon until half past 11; then went to the Standard Theater; from there to the Manhattan Theater, where he remained until about fifteen minutes after 12, when he went to Germania Hall, and that Hildebrand met him about half past 11 or 12 o'clock, when he was leaving the Standard Theater; that Hildebrand "had come back into town again"; that he stayed around Germania Hall until about 2 o'clock, when he and Hildebrand went down to the Lexington Saloon, and left their bicycles there; then went to an oyster house together; came back after their bicycles, and started for Germania Hall again, when they were arrested; that he never carried guns before in his life; that one of the guns he was taking up to have fixed; that with the other gun he intended to have some fun on the Fourth of July morning, and that he fired the exploded cartridges off in front of the Germania Saloon.

The appellant called several witnesses to prove an alibi. One Fetterly testified to having seen the appellant between 9 and 10 o'clock of the evening of July 3d in the Standard Dance Hall. The cross-examination of this witness shows that from 8 o'clock of that evening the witness was visiting saloons and dance halls, drinking frequently. From his evidence the jury had a right to conclude that the witness was drunk on the night of the 3d of July, and his memory from that cause was befuddled. George Higgs, another witness for appellant, who had charge of the boxes for the Owl Theater, testified that about a quarter to 9 or 9 o'clock of the evening of July 3d the appellant came to the theater, and asked for one Gertie Felix, a box woman. One other witness testified that he saw appellant at Palace Hotel Dance Hall between 11 and 12 o'clock. Four others testified to seeing him at the Germania Dance Hall between 12 and 1 o'clock on the evening of July 3d. One other witness, Richard Burnett, called by the appellant, saw the appellant with Hildebrand at the Palace Hotel Dance Hall between half past 11 and 12 o'clock of the same evening.

The first error complained of is that the court erred in permitting Hildebrand, indicted jointly with the appellant, to be present in the court room during the trial of the appellant, and thereby, in effect, he became a witness for the state. The record shows that Hildebrand was brought into court that the prosecuting witness might identify him as the person who acted jointly with the appellant in the robbery. The old rule that a defendant jointly indicted with the one on trial cannot be a witness until the case as to himself is disposed of has

been abrogated in this state. *Edwards v. State*, 2 Wash. St. 291, 26 Pac. 258. But Hildebrand did not testify. His presence was not testimony as to any fact in issue any more than the presence of any other man. No error was committed by the court in this respect.

The second error assigned is that the court erred in allowing the evidence of George Hyde to the effect that Hildebrand was the man who shot him, and refusing to instruct the jury to disregard such testimony. The prosecuting witness, in detailing the circumstances of the robbery, testified that one of the robbers, whom he identified as Hildebrand, in the perpetration of the robbery shot him. The matter was properly before the jury, and the court did not err in refusing to instruct the jury to disregard such testimony. It is true, as shown by the record, that when Hildebrand was brought into court for identification the prosecuting witness, who was on the stand testifying, voluntarily, and without being asked, said: "There is the man that shot me down. There is the man that held the gun over my face, and said he would blow my brains out." This remark was, on motion of the appellant, stricken out. Subsequently, without objection further than to the presence of Hildebrand in court, the prosecuting witness testified that Hildebrand was the man who shot him. This evidence was a part of the *res gestæ*. "When a declaration, act, or omission forms part of a transaction which is a fact in issue relevant to the issue, such declaration, act, or omission is relevant if it tends to explain or to show the purpose or character of the transaction." 3 Rice, Ev. p. 128.

The third assigned error is that the court directed, in the presence of the jury, that Hildebrand be brought back for the purpose of assisting to identify the appellant. We find nothing of the kind in the record, and Hildebrand was not used as a witness for such purpose. It was, as we have said, proper and relevant testimony for the prosecuting witness to identify and point out on the trial Hildebrand as the person who assisted in the robbery; for this was followed up with testimony showing that appellant and Hildebrand were together on the evening of the robbery, in the vicinity of the place where the robbery occurred, armed with revolvers, near the time it occurred, and were seen together in Tacoma from about half past 11 o'clock of that evening till 3 o'clock the next morning, when they were taken in custody, each armed with revolvers, and traveling with bicycles.

The fourth assignment of error, that the court permitted H. M. Germaine, and the fifth assignment, that the court permitted J. H. Kelley, to testify concerning other robberies by appellant and Hildebrand on the same night, we will consider together. It will not be denied that the general rule is that it is not competent to show the com-

mission of another distinct crime by the defendant for the purpose of proving that he is guilty of the crime charged. But there are exceptions to this rule. There is nothing in the testimony of Germaine that shows, or tends to show, that a robbery was attempted on Germaine, or that he was robbed. His testimony was simply to the effect that about 9:20 o'clock of the evening of July 3, 1890, about a mile from Lake View, he saw appellant and Hildebrand together, and that they had with them two "guns" apiece in their hands; that he (witness) was riding a bicycle, and saw them as they came up, and that the witness stopped. No objection to this witness' testimony was made except to one question, and that was how he knew they had "guns." The court overruled that objection, to which ruling an exception was allowed, and the witness answered: "Why, I was riding along towards them, and they came right up in front of me, and they both had them in their hands, —in each hand." There was no error committed in permitting an answer to the question objected to, and it was certainly competent to show that the appellant and Hildebrand were seen together with "guns" in their hands, in the vicinity of where the robbery of Hyde took place, a short time before that robbery. And that is all that this witness' testimony proves or tends to prove. J. H. Kelley testified, on his examination in chief, that he saw the appellant and Hildebrand together on the night of July 3d, a little after 12 o'clock, in the Yellowstone Saloon, in Tacoma, and that he next saw them a few minutes after on Ninth and I streets, in Tacoma, with guns in their hands. No objection to this testimony was saved. The only objection interposed was to the question, "Did you have any talk with Mr. Hyde, the defendant?" And this question was not answered. It was certainly competent to trace the whereabouts of the appellant and Hildebrand on the night of the robbery, both before and after, and to show that they had guns and were in each other's company. That is all that this evidence, as brought out by the state, tended to prove. On the cross-examination appellant's counsel asked the question: "What did they say to you, Mr. Kelley, did you say?" Answer: "They told me to throw up my hands." From this one might infer that a robbery was intended, but this was shown, not by the respondent, but by the appellant, and the error, if any, cannot be charged to the respondent.

The sixth error assigned is: "The court erred in refusing to grant defendant's motion for a nonsuit and discharge the defendant, there being no evidence properly admitted connecting this defendant with the crime charged, and there being no evidence of a robbery having been committed." There can be no nonsuit in a criminal, as in a civil, case. *Bish. New Cr. Proc.* § 962. The proper practice is to ask the court to direct an acquittal. *State v. Tamler*, 19 Or.

531, 25 Pac. 71. The motion made here, as shown by the record, was "that the defendant be discharged from the charge set out in this indictment." This was, in effect, a motion to direct the acquittal of the defendant, and we shall so consider it. But four grounds were urged in the motion. Two objections—the presence of Hildebrand in court on the trial of defendant, and that the testimony of Germaine and Kelley was admitted to show other robberies—we have already disposed of. Besides, they could not be urged on a motion to acquit. The third objection was that there were two other indictments against the defendant and Hildebrand for robbery,—one for robbing Kelley, and one for robbing Germaine. There is nothing in the testimony of the state or in this record showing these facts, and, if there are such indictments, they are not grounds for appellant's acquittal on this charge. The fourth ground was that there was no sufficient identification of the defendant connecting him with Hildebrand in the robbery. This was, in effect, a challenge to the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence. There was no objection to the sufficiency of the evidence in any particular; for instance, that there was a failure to prove the specific kind of money as laid in the indictment, or the quantity or value thereof as laid in the indictment, which under this assignment of error appellant now asks us to consider. The appellant contends that the state failed to prove, as alleged in the indictment, that appellant took "four dollars and twenty-five cents, lawful money of the United States, of the value of four dollars and twenty-five cents," from the prosecuting witness. The proof in this respect, as the prosecuting witness detailed the circumstances, was that Hildebrand's partner, after the prosecuting witness was shot down, went through the pocket of the prosecuting witness and took his money, while Hildebrand held the revolver on his head, and threatened to blow his brains out. The direct question as to who took his money was also put to the prosecuting witness, "Who took your money?" He answered, "Hildebrand's partner, whether it was this man or not." The court knows that money is a thing of value. The word "money" imports value. The essence of the crime of robbery is forcibly and feloniously taking from the person of another, or from his immediate presence, any article of value, by violence or putting in fear. This motion is a general one, and only challenges the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence. Upon a motion of this kind, the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence falls in some particular matters. The record fails to disclose that the objection to the evidence in the particular matter, as to the

kind, amount, and value of money, was called to the attention of the court, and in a case of this kind the motion should direct the attention of the court and opposite counsel to the precise point made and the grounds therefor. We quote with approval, and as decisive of this objection, from the decision of the supreme court of Oregon in the case of *State v. Tamler*, 19 Or. 531, 25 Pac. 71. The defendants in that case were indicted for selling spirituous liquor without a license. The evidence was to the effect that Polly sold to one Maloy a drink of liquor which the witness supposed to be whisky, and that Maloy paid for the same. A witness by the name of Timothy Maloy testified that he had purchased liquor at different times in the saloon of the defendants, and had paid for the same. The contention on appeal was that there was no sufficient evidence of the value of the liquor alleged to have been sold; no sufficient evidence that the sale was made to Timothy Maloy, named in the indictment; and that there was no sufficient evidence that the liquor sold was spirituous liquor. The court says: "A cursory examination of this testimony would naturally lead a court to think there was sufficient evidence to be submitted to a jury, and, while there may be a failure in some particular, unless the particular instance in which the failure occurs is pointed out it would probably escape attention." In the opinion the court says: "As this is an appellate tribunal, constituted to revise and correct the errors committed by the trial court, it is only when that court has acted, and the act is claimed to be error and disclosed by the record, that such error becomes the subject of our power and duties. The motion in this case [a motion to direct an acquittal] is a general one, and only challenges the general sufficiency of the evidence; that is, says, in effect, there is a total failure of evidence. Upon a motion of this kind the only question raised is whether there is any evidence tending to prove the crime charged, not whether the evidence falls in some particular matters. In a motion asking the court to direct an acquittal, where it is claimed that the evidence is insufficient to prove the crime charged, it ought to specify the particulars in which it is claimed the evidence is insufficient, unless there is a total failure of proof; otherwise, the attention of the trial court will be directed to the evidence as a whole,—that is, whether there is any evidence upon which a verdict may be founded,—and wholly omit to consider the particular matter in which the alleged insufficiency consists, and which is relied upon in this court, and perhaps subsequent research may have suggested. It is true, unless there is some evidence upon which a jury can found a verdict for the party producing it, such verdict ought not to stand. * * * But where there is some evidence tending in a general way to prove the offense charged, but its al-

leged insufficiency lies in some particular matter or specific objection which requires to be designated or specified to make apparent in what particular that insufficiency consists, and to attract the attention of the court to it, it ought, as a general rule, at least, to be specified in the motion, to be entitled to consideration in this court." In *Edwards v. Carr*, 13 Gray, 238, Shaw, C. J., says: "It is very important that no objection to a verdict be brought before this court by an exception which was not in some form taken at the trial, especially in a case where there is ground to believe that if it had been brought to the attention of the judge and adverse counsel it might have been avoided by an amendment, or by a more specific direction by the judge sustaining or overruling it. The party objecting would have the full benefit of his objection in matters of law if well founded, either by a ruling in his favor, or by an allowance of the exception, and the right of both parties be secure." Quoting further from the Oregon case, that court says: "The law should not permit a party to make a general motion, as in this case, and lie by, without making the particular grounds of his motion known to the court, and take the chances of success on the grounds which the judge may think proper to put his ruling, and then, if he fails to succeed with either court or jury, avail himself of an objection which, if it had been stated, might have been removed. This works no injustice to a party, for if there be merit in his motion or objection he has the full benefit of it, and if there be no merit he certainly ought not to succeed. In the midst of a trial *ad nisi prius*, the judge is necessarily compelled to rule upon many questions of law without the opportunity for deliberation the importance of the questions demands, and it is but an act of justice to him that such rulings be not reversed unless his mind was specifically drawn to the point upon which the reversal was asked, and acted upon as deliberately as time and circumstances would admit. In this case, how can we say that the court below committed an error in overruling the motion unless we know upon what grounds he was asked to allow it? His attention was not called to the points upon which we are asked to reverse the judgment, nor was there any suggestion as to what counsel would have him hold. Had the court below been asked to sustain this motion upon the grounds argued before us, we cannot say how it would have ruled, and certainly, before we can be asked to reverse this judgment, it must sufficiently appear that the court committed some error justifying such reversal."

It is also urged as an error that the jury did not follow the instructions of the trial judge, and our attention is called to instruction No. 5 of the trial court. That instruction is as follows: "Before you can convict the defendant, Edgar Hyde, of the crime

charged, the prosecution must show, and you must be convinced beyond a reasonable doubt, that the defendant, Edgar Hyde, acting in conjunction with John Hildebrand, on the 3d of July, 1899, in the county of Pierce, Washington, did forcibly, feloniously, and by violence, and by putting the said George Hyde in fear, take from the person and against the will of said George Hyde money of the United States of the value of four dollars and twenty-five cents." Just preceding this instruction, as instruction No. 4, the court read to the jury, as a part of his instructions, the statute defining "robbery," as follows: "Every person who shall forcibly and feloniously take from the person of another or from his immediate presence any article of value by violence or putting in fear, shall be deemed guilty of robbery." The word "money" imports value. It is unnecessary to prove that the thing taken had a specific pecuniary value. If the value was merely nominal, that is enough. The prosecuting witness said, "He took my money." That means, in itself, that he took from him something of value. This court has decided (*State v. Johnson*, 19 Wash. 410, 53 Pac. 667) that in an information for robbery it is not necessary to allege the kind of money. In the motion to acquit the defendant, no complaint was made that the kind and amount of money was not shown. We have ruled that then was the time to make such an objection. From the evidence, and considering these two instructions together, the jury, as they did by their verdict, had the right to find that a thing of value, to wit, money, was taken from the prosecuting witness forcibly and feloniously, by violence or putting in fear, and this is sufficient, in view of what we have said in passing on the motion to acquit defendant. At most, the instruction of the court as to the amount and kind of money was a harmless error, and on authority of *State v. Johnson*, supra, cannot now be considered.

The appellant undertook to set up an alibi, and offered some testimony tending to show that he was in Tacoma at the time of the robbery. It must be remembered that the robbers were traveling about on bicycles, and could move rapidly. The statement fails to disclose the distance between the place where the robbery was committed and Tacoma. It was, however, near Edson. The jury was acquainted with the locality, and had a right to form an opinion as to the time it would take the robbers to reach Tacoma. There was a conflict of evidence as to the whereabouts of the appellant at the time of the robbery, and it was for the jury to decide, on all the evidence, where the truth lay. We have examined the evidence, and it justifies the verdict.

The appellant filed a motion for a new trial, assigning errors of law occurring at the trial and excepted to, and that the verdict was contrary to the evidence. In this opinion we have held that the evidence was

sufficient to sustain the verdict, and have passed adversely to appellant on all the assigned errors of law occurring at the trial.

The further ground urged in the motion for a new trial was newly-discovered evidence that could not be had at the trial, and which was sufficient to establish appellant's innocence. After the conviction of the appellant, on October 4, 1899, Hildebrand, the accomplice, made an affidavit that on the 3d day of October, 1899, he (Hildebrand) pleaded guilty to the charge set out in the indictment: that defendant, Hyde, was not guilty of the crime charged, because he (Hyde) was not present at the commission of said crime; that Hildebrand refused to testify in behalf of said Hyde upon the trial because by so doing, in his judgment, he would prejudice his own interest. Hildebrand also filed with the clerk of the court, on October 4, 1899, a statement, signed by himself, in which he says the defendant, Hyde, was not implicated in the robbery, and that he (Hildebrand) and another man robbed Hyde. The filed statement was an improper paper to be considered on the motion for a new trial. The affidavit of Hildebrand affirmatively shows that it is not newly-discovered evidence. Impliedly it appears that appellant knew that Hildebrand would testify to his innocence, but that Hildebrand refused to do so because he would prejudice his own interest. There is no showing in the affidavit that Hildebrand on a new trial would testify to the matters he states in his affidavit and statement. New trials should not be granted on the uncorroborated statements of an accomplice. *State v. Anderson*, 14 Mont. 551, 37 Pac. 1. Under all the circumstances, and in view of the evidence in this case, we think the court properly denied the motion for a new trial. The judgment of the lower court should be affirmed.

DUNBAR, C. J., and ANDERS, FULLERTON, and REAVIS, JJ., concur.

STATE ex rel. CAPITAL NAT. BANK v. YOUNG, Treasurer.

(Supreme Court of Washington. June 18, 1900.)

CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT — STATUTORY PROVISIONS — STATE WARRANTS—INTEREST—PRESENTATION.

Since, under Laws 1899, p. 408, § 2, providing that warrants drawn against public funds shall bear interest from date of presentation for payment, interest on a state warrant only runs and becomes part of the obligation after presentation. Laws 1899, p. 128, § 3, reducing the rate of interest on state warrants from 8 per cent., as authorized by Laws 1895, p. 349, to 5 per cent., is not void as to such a warrant issued before, but presented after, it went into effect, as violating the obligation of a contract, but fixes the rate to be paid thereon.

Dunbar, C. J., dissenting.

Application for mandamus by the state of Washington, on the relation of the Capital

National Bank, against C. W. Young, treasurer of such state, to compel payment of interest. Denied.

G. C. Israel, for relator. T. M. Vance, for respondent.

FULLERTON, J. The act of the territorial legislature of December 2, 1869, provided:

"Section 1. That it shall not be lawful for the territorial treasurer to pay any money out of the territorial treasury except it be on a warrant drawn by the territorial auditor.

"Sec. 2. Upon the presentation of any territorial warrant or warrants to the territorial treasurer, it shall be his duty, if there be no funds in the territorial treasury, to indorse on said warrant or warrants, 'Not paid for want of funds,' with the day and date of said presentation, and said warrant or warrants shall from said date draw legal interest till paid." Sess. Laws 1869, p. 408.

Subsequent statutes required the territorial treasurer to pay warrants in the order of their issuance, and to publish a call for outstanding warrants whenever he had funds on hand, exceeding a fixed amount, applicable to the redemption of such warrants, and provided that warrants shall cease to draw interest at a fixed time after the publication of the call. Ballinger's Ann. Codes & St. §§ 155-164. These acts were carried forward and made a part of the state statutes by virtue of section 2 of article 27 of the constitution. In 1895 the legislature passed an act "to establish the legal rate of interest in the state of Washington, and to prevent usury," section 3 of which is as follows: "All state, county, city, town and school warrants, and all warrants or other evidences of indebtedness drawn upon or payable from any public funds, shall bear interest at a rate not greater than eight per centum per annum, unless a less rate be specified therein." Sess. Laws 1895, p. 349. In 1899 (Sess. Laws 1899, p. 128) another act relating to the same subject was passed, which contained the following section: "Sec. 3. All state warrants shall bear interest at a rate not greater than five (5) per centum per annum, unless a less rate be specified therein, and shall be paid by the treasurer in the order of their number, date and issue, and shall cease to draw interest at the expiration of 10 days from and after the date of the first publication of any call made by the treasurer for the payment of warrants." Prior to the time the last-named act went into effect, the state auditor drew a warrant upon the state treasurer, which was presented for payment after that act became operative. The treasurer, not having funds on hand applicable to its payment, indorsed the warrant, "Not paid for want of funds," with the date of the indorsement. The warrant was subsequently called, and on its presentation for payment the treasurer tendered to the holder its face value, with interest from the date

of the indorsement at the rate of 5 per cent. per annum. This sum the holder refused to accept, and brings mandamus in this court to compel the treasurer to pay interest upon the warrant at the rate of 8 per cent. per annum. The question presented is, what rate of interest does the warrant bear? The relator contends that the obligation of the state to pay interest is one of contract, and arises when the services are performed which authorize the issuance of the warrant, and that any subsequent act of the legislature changing the rate of interest is void as to warrants issued for such services, because it violates the obligation of a contract. We cannot think this contention sound. The obligation of the state to pay interest arises, not from contract, but from statute; and, unless a statute explicitly declares that a state warrant shall bear interest, there is no obligation on the part of the state to pay interest thereon. Reading the statutes above cited together, as we must, it is clear that the legislature intended that all state warrants should be presented to the state treasurer for payment before any obligation should arise for the payment of interest, and that they should bear interest only from the date of such presentation. In fact, this much is conceded by the relator. This being true, it seems to us to follow that the "legal rate" of interest, which the statute provides the warrant shall bear after its presentation for payment, must mean the legal rate prevailing at the time the warrant is presented. Up to that time, by the very terms of the statute, no obligation on the part of the state to pay interest exists; and it is not consistent with any rule of statutory construction to say that a statute creating an obligation to pay interest at the legal rate from a particular time, without further specification, means a rate other than the one prevailing at the time the obligation arises. The cases of *Trust Co. v. Gelbach*, 8 Wash. 497, 36 Pac. 467, and *State v. Bowen*, 11 Wash. 432, 36 Pac. 468, are cited as establishing a different doctrine. An examination of these cases, however, will show that the question presented here was not before the court in either of them. In the former it is held that a county warrant, after it becomes an interest-bearing obligation by presentment to the county treasurer for payment, is not affected by a subsequent statute reducing the rate of interest; and in the latter the court applied the same rule to state warrants. It is true that in the first case it was said that the provision of the statute in regard to interest "entered into and became a part of the contract," and that "the universal holding is that, where the right to interest is based on the contract, it is the legal rate at the date of the contract which must prevail"; but it must be remembered that in using the language quoted the court was speaking to the question presented in that case, viz. whether, after a warrant has become an interest-bearing obligation, "it

can [to quote from the opinion] be held that the rate is to vary as the legal rate is changed by statute from higher to lower, and vice versa," and not to the question presented by the record in the present case. That the case was not understood, either by the concurring or dissenting members of the court who took part in it, as deciding the question presented here, is emphasized by the opinion in the latter case cited. In that case, after stating that there was no real distinction between county warrants and state warrants, so far as the question of the power of the legislature to change the rate of interest after the warrant became an interest-bearing obligation is concerned, it was said: "As to one class, the statute provided that they should draw the legal rate of interest. As to the other class, the statute, or that which had the force of a statute, made a like provision. If, in the one class, the legal rate prevailing at the time payment was refused was so impressed that it would not be affected by a change in such rate, there is no reason why such rate should not be held to have been in like manner impressed upon the other class. * * * And, in our opinion, the same line of reasoning will compel us to hold that interest must be paid upon state warrants at the legal rate in force at the date of their presentation to the treasurer for indorsement." The writ will be denied.

ANDERS and REAVIS, JJ., concur.

DUNBAR, C. J. I dissent. It is the last act of the legislature that is to be construed. I am convinced that it was not the intention to make the law retroactive, by making it apply to warrants issued before the law went into effect, or to make its interest-bearing capacity depend upon the accident of its presentation, rather than the material fact of its issuance. The writ should issue.

STATE v. COATES.

(Supreme Court of Washington. June 28, 1900.)

BURGLARY—INSTRUCTIONS—CORROBORATION—HARMLESS ERROR—EXCEPTIONS—APPEAL—COMMENTS BY COURT—SCOPE OF CROSS-EXAMINATION—INCOMPETENT TESTIMONY—IMPEACHMENT—REBUTTAL.

1. In a prosecution for burglary, an instruction that, "while it is a rule of law that a person may be convicted on the uncorroborated testimony of an accomplice, still a jury should always act on such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case, and the jury ought not to convict on such testimony alone, unless satisfied beyond all reasonable doubt of its truth," was not erroneous, in that it implied that the jury might convict on the evidence of the accomplice alone.

2. Where defendant in a prosecution for burglary was erroneously denied the privilege of cross-examining prosecutor's witness, who was an accomplice, as to what the witness did with stolen money, and as to his connection with burglaries, the fact that he was thereafter per-

mitted to go into the matter fully rendered the error harmless.

3. Where defendant took no exception to a ruling of the court excluding cross-examination of prosecutor's witness, no error could be predicated thereon.

4. In a prosecution for burglary committed in a theater, defendant's counsel, without asking the court to send out the jury, moved to strike out all the testimony of a witness, which had been admitted without objection, whereupon the court said, "I think I will strike it out. * * * I think that part of it is material in which the witness offered testimony tending to show that the defendant here was interested in seeing that his friend Kauffman got counsel, and so forth, for an offense committed in the theater about this time. The court instructs the jury to disregard all of the last witness' testimony except that referred to by the court. I am not quoting the testimony, gentlemen of the jury. It is entirely your province. I am not indicating what the testimony is, at all. It is for you. The court has no opinion on the evidence." The defense claimed that there was no such testimony as that indicated by the court. *Held*, that the statements of the court did not amount to such comments as to be prejudicial error.

5. Where a witness for the prosecution confined his testimony to a conversation with defendant in which the latter made admissions of guilt, it was not error to restrict the cross-examination to matters bearing on such conversation.

6. Evidence as to the character of defendant's work when acting as a detective on a police force was incompetent on a prosecution for burglary, either as tending to show that he was present at the commission of the crime to ferret out criminals, or as showing his general reputation.

7. After defendant's witness had testified that he knew the reputation for truth and veracity of one of the state's witnesses in the community in which he lived, and defendant's counsel then asked the witness whether or not he would believe him under oath, it was not error to prevent the witness from answering, on an objection of incompetency and immateriality.

8. Where an accomplice testified, in behalf of the state, that defendant was implicated with him in the burglary, which testimony defendant impeached by showing that the day after the commission of the crime such accomplice confessed before several police officers that he alone committed the crime, it was competent for the state, on rebuttal, to show that after such confession such accomplice stated in the presence of other witnesses that defendant was implicated in the burglary, as tending to counteract the impeaching testimony.

9. A witness with a criminal career testified that defendant confessed to him that he had committed the burglary. Another witness testified that defendant had told him that he could prove that he was not in the burglary, but that he had received a sum of money therefrom. *Held*, that such testimony, taken with the positive evidence of an accomplice that defendant was implicated in the crime, was sufficient to warrant a jury in finding defendant guilty.

10. After a motion for a new trial has been overruled, and it appears from the record that there was evidence tending to prove every material element of the crime, as applied to defendant, a verdict will not be disturbed on appeal, though the evidence was not of the most satisfactory and convincing kind.

Appeal from superior court, Pierce county; W. H. H. Keen, Judge.

Herbert Coates was convicted of burglary, and, his motion for a new trial being overruled, he appeals. Affirmed.

Walter M. Harvey, for appellant. Fremont Campbell, for the State.

WHITE, J. The appellant was tried in the superior court of Pierce county and convicted of the crime of burglary, and on November 7, 1899, was sentenced by the court to imprisonment in the penitentiary for the term of five years. Before such sentence, motions for new trial and in arrest of judgment were overruled. Appellant prosecutes this appeal from the judgment and sentence of the lower court.

On the night of March 19, 1899, the safe in the office of the Tacoma Theater was broken open, and in the neighborhood of \$500 taken. The prosecution relied almost entirely upon the testimony of one Roy Kauffman to secure a conviction. This witness admitted on the stand that he was an accomplice in the crime for which the appellant was on trial, and that he had come from the Walla Walla state penitentiary to give his testimony in this case; having been sentenced upon the charge of burglarizing a store across the street from where the burglary in this case is alleged to have been committed. The story told by Kauffman upon the stand was substantially this: That previous to the alleged burglary he had met the appellant four times, when, so he states, it was proposed that they burglarize the Tacoma Theater. That he came downtown on the car Sunday evening, March 19, 1899, about half past 6 o'clock, and met the appellant at the corner of Ninth and C streets, near the theater building. That together they went through the C street entrance, and up three flights of stairs, gaining an entrance over the transom. From there they went down through the foyer and opened the box-office window. That appellant went through the window into the office, and then opened the door leading from the box office out into the foyer, and Kauffman remained outside the office on watch. That after turning on the light, and working a few minutes with a hammer and a punch which they had secured in the Standard House Furnishing Company's building, the appellant broke open the safe and took out its contents. Then the appellant came out and handed Kauffman a sack which contained about \$125, which the appellant said was all. Kauffman stated that two days after the burglary he met the appellant and told him that he had seen a statement in the paper that more than \$125 had been extracted from the safe, and that, if so, the appellant should not demand any further money from him, as he had his share. The witness Kauffman made a confession about the 30th of March, 1899, to W. W. Thompson, James Nevins, and George Ashby, policemen and detective officers, under circumstances hereinafter detailed. From the testimony of J. H. Read, chief of police of Tacoma, it would seem that the appellant was helping the detective force of Tacoma ferret out criminals; that

the appellant was a "stool pigeon," so called, and was put to work among the thieves. As the chief of police expressed it in his testimony, they used "people that can get in and associate themselves with thieves and hard characters, in order to find out what their business is in the city, and what they are going to do, and so forth." It was claimed by the appellant that he had furnished the information leading to the arrest and conviction of Kauffman, and that revenge for his so doing was the motive influencing Kauffman in testifying against him. The appellant was boarding at the city jail, and he undertook to show, by the cook at the jail, that, during the hours that Kauffman testified the burglary was being committed, he was spending the evening with the cook. The cook testified strongly in support of this contention. The other material facts in the case are alluded to in the opinion.

One of the court's instructions to the jury was as follows: "In regard to the testimony of the witness Roy Kauffman, the court instructs you that, while it is a rule of law that a person may be convicted upon the uncorroborated testimony of an accomplice, still a jury should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all other evidence in the case; and the jury ought not to convict upon such testimony alone, unless, after a careful examination of such testimony, you are satisfied beyond all reasonable doubt of its truth, and that you can safely rely upon it." The appellant complains of this instruction, and says: "Nowhere is anything said to the jury about corroboration. The word is nowhere used, and the inference from the language of the court is that evidence of the accomplice, standing alone, is all right and sufficient in itself." In effect, the court told the jury by this instruction that it could convict the appellant upon the uncorroborated testimony of an accomplice, at the same time giving the ordinary precautionary charge as to how the jury should act on such testimony. In the case of *Edwards v. State*, 2 Wash. St. 201, 26 Pac. 258, the court says: "There may occur other cases where, from all the circumstances, the honest judgment will be as thoroughly satisfied from the evidence of the accomplice of the guilt of the defendant as it is possible it could be satisfied from human testimony; and in such cases justice demands that the evidence be accepted, so far as the court is concerned." This being the case, it was not necessary to tell the jury that the evidence of the accomplice should be corroborated. In this instruction the court told the jury to act upon the testimony of the accomplice with great care and caution, and subject it to a careful examination in the light of all the evidence in the case, to be satisfied of its truth beyond a reasonable doubt, and to be so satisfied that they could

rely upon it. This was most favorable to the appellant. To single out the testimony of this witness, even though he was an accomplice, and to caution the jury as to how his testimony should be received, was all the court was required to do; and under our law it may be questioned whether the court was required to go to this extent, for we have a constitutional provision which forbids the court to comment upon the facts. The jury was told to view the testimony of Kauffman in the light of all the other evidence, and we will point out further on in this opinion other evidence sufficient to corroborate his testimony.

The appellant, as a second assignment of error, complains that the court erred in refusing to permit appellant's counsel, on cross-examination of witness Kauffman, to trace the money, the proceeds of the burglary, and to lay thereby the foundation to impeach the witness as to how he disposed of the money. As a rule, "a trial court should permit the defense, in the cross-examination of an accomplice, to go into every species of questioning that can affect or impair his credit as a witness. The extent of cross-examination under such circumstances and for such a purpose is largely within the discretion of the trial court, and, unless the evidence shows that discretion to have been grossly abused, the appellate court will not reverse." 3 Rice, Ev. p. 517, § 325. However, an examination of the statement of facts shows that, after the ruling of the court complained of under this assignment, the appellant was allowed to go fully into the question as to the disposition of the money, thereby obviating the objection; and, from an examination of the statement in this respect, we find no abuse of discretion by the trial court.

The appellant, as a third assignment of error, complains that he was not allowed, upon cross-examination of Kauffman, to show the large number of burglaries which he (Kauffman) had committed. What we have said under the second assignment of errors as to the latitude to be allowed in the cross-examination of an accomplice applies to this assignment. It is true that, on the cross-examination of Kauffman, he was asked how long he had been engaged in the business of burglarizing houses, and if he had not admitted to the detectives, Nevins and Ashby, that he had committed a number of burglaries in the city of Tacoma, to which he answered, "No," and the answer was allowed to stand. Objections to these questions were made by the prosecuting attorney, and the objections were sustained, and exceptions were duly noted. These questions were relevant for the purpose of discrediting the witness and for laying the foundation on which to impeach him, and, if the matter had been allowed to rest without further testimony, it might have been prejudicial to the appellant. But the detectives, Nevins and Ashby, were called by the defense, and, over the objection

of the prosecuting attorney, were allowed to testify that Kauffman made a confession to them shortly after he was arrested, in March, 1899, and that he confessed to burglarizing the traction company's safe on Railroad street, in Tacoma, twice, and confessed to the burglary for which appellant was on trial, and to a burglary of the Yellowstone Saloon, in Tacoma, and the Standard Furniture Company, in Tacoma, eight or nine times, in all which he acted alone. Notwithstanding the rulings of the court, the impeachment of the witness as to his confession was allowed, and his character as a professional burglar was pretty well shown. Under these circumstances, no harm was done the appellant by the court's ruling. This court has held that it will not reverse a case for harmless errors, where it is apparent that no injury has been done the party complaining of them.

The fourth error assigned is that the court limited the cross-examination of a witness named Bradley, and would not allow him to detail, over objections by the state, a certain conversation between Mr. Smalley, attorney for the appellant,—and who was also attorney for Bradley,—and Bradley, which occurred while Bradley was counseling with Mr. Smalley relative to another and distinct crime with which Bradley was charged, and in which conversation something was said about the appellant's admissions to Bradley about being connected with Kauffman in the burglary of the theater. The court ruled that the communication was privileged, and would not admit it. It must be remembered that Bradley was not an accomplice in the crime for which appellant was on trial. The rule is (and that is the extent of the authorities cited by the appellant) that "an accomplice who consents to become a witness for the people on the trial of his associates for the offense charged, must disclose all that he and his associates may have said or done in relation to such offense, and cannot be excused from testifying to statements made by him to his attorney on the ground of their being privileged communications." However, no exception was taken to the ruling of the court, and for that reason it is unnecessary to consider this alleged error further.

In the fifth assignment of error it is claimed that the court commented upon certain testimony. A witness by the name of Silbon, who appears to have been a professional receiver of stolen goods, was called by the state. His testimony takes up eight pages of the typewritten record. Most of it was irrelevant and was brought out by both the state and appellant, but no exceptions were saved in this respect. About the only portion of his testimony that was relevant was that he had a conversation with the appellant, when the appellant said: "I am raising money to help my friend. Can't you go to work and contribute some money and help?" And I [Silbon] said, 'Who is that fellow?' And he [appellant] said, 'That fellow named Kauffman, that was arrested for going into

the theater.' And I [Silbon] said: 'Excuse me. When I am in, nobody helps me, and I don't see why I should help him.'" On cross-examination the following took place: "Question. Well, are you not mistaken in the man,—if he didn't ask you to assist a man by the name of Billy King, who shot some one in the Klondike Saloon,—help him to get an attorney? Isn't that the man that he asked you to help, instead of Kauffman? Answer. No; I don't know. I think it was Kauffman. I don't take much stock in the business. He said, 'A friend of mine has been arrested and in jail.' And I said, 'Who?' And he said, 'That fellow in the theater.' And I don't know as he mentioned any name or not. And I said: 'My dear man, I am in trouble myself, and no one help me. You do the best you can, you and your partner.' And that is the last of it. Q. You are not sure, then, whether it was Kauffman or King? A. I think he mentioned the man that was arrested for the theater. It must be about the 25th of March, or something similar to that. I couldn't say for sure, but I think it was Kauffman." There was more testimony to the same effect as the above on redirect and recross examination. The appellant's counsel then made a motion, without asking the court to send out the jury, to strike out all the testimony of the witness. The record then shows: "The Court: I think we will strike it out. Mr. McMurray, Deputy Pros. Atty.: Do you strike out all the testimony? (And after argument [the record falls to show what this argument was]:) The Court: I think that part of it is material in which the witness offered testimony tending to show that the defendant here was interested in seeing that his friend Kauffman got counsel, and so forth, for an offense committed in the theater on or about this time. Mr. Smalley: There isn't any such testimony in the record. The Court: It is a question for the jury. Mr. Joab: Can the stenographer read it? The Court: No, sir; the court instructs the jury to disregard all of the last witness' testimony, except that referred to by the court,—such testimony tending to show or touching the matter of the defendant approaching the witness for the purpose of getting his aid, in some way or other, to assist his friend Kauffman, or his friend, in relation to some offense committed in the theater. Mr. Smalley: Now, if the court please, with all due respect to the court, we desire to take an exception to the statement of the court wherein he attempts to quote the testimony. The Court: I am not quoting the testimony. Mr. Smalley: You did not in the last statement, but the statement just before that. The Court: No. Mr. Smalley: You recollect, the testimony that I said was not in the evidence? The Court: No; I am not quoting any testimony, gentlemen of the jury. It is entirely your province. I am not indicating what the testimony is, at all. It is for you. The court has no opinion upon the evidence, and does

not desire to quote any evidence. You heard it. I am simply pointing out to you that part of the evidence tending to show, if in your opinion there had been any testimony offered of that character." In view of what occurred before the court, we cannot see that this colloquy falls within the rule laid down by this court in *State v. Crofts*, 60 Pac. 403. In that case the court says: "There are different ways by which a judge may comment upon the testimony, within the meaning of the constitution referred to above. The object of the constitutional provision, doubtless, is to prevent the jury from being influenced by knowledge, conveyed to it by the court, of what the court's opinion is on the testimony submitted." Here the court expressly tells the jury he has no opinion on the subject,—that it is for them entirely. Under the circumstances here developed, to hold that the court was commenting on the testimony would, in trials, prevent the court from pointing out any testimony, when passing on a motion as to its relevancy. In *Blue v. McCabe*, 5 Wash. St. 125, 31 Pac. 431, in passing upon a motion for a nonsuit, the court remarked, in the presence of the jury, "that the testimony showed that the transfer of the note sued on was made by the officers of the Kettle Falls Improvement Company." It was complained that that was commenting on the facts in the case. The court said: "We cannot assent to the proposition. When counsel make a motion for a nonsuit, they know that it is a challenge to the court to determine the sufficiency of the facts adduced by the plaintiff, and that in deciding the motion the judge may find it necessary to allude to the evidence. It would be going entirely too far to hold that the denial of the motion must be limited to the formal words, since it is in the highest degree proper that the judge should give his reasons for his action." So, too, in this case, the motion went to the exclusion of all the testimony of the witness. It was certainly proper for the court, in passing on such a motion, in a general way to indicate the testimony retained for the jury's consideration. In *Patchen v. Machinery Co.*, 6 Wash. 486, 33 Pac. 976, it is said: "An incidental allusion to the facts called to the court's attention in determining a motion for a nonsuit is not error." As we have said, there is no difference between a motion for a nonsuit and a motion of the kind under consideration. Here the motion was to strike all the testimony of the witness. He had testified on many subjects, and at great length, without exceptions being taken by the appellant; but a small part of the testimony was relevant, and it was necessary for the trial judge to indicate the part retained. This he did by general reference, expressly cautioning the jury that he was giving no opinion as to its truthfulness or falsity.

The sixth error complained of is that the court erred in restricting the cross-examination of the witness Turner. The direct ex-

amination of the witness was entirely in regard to a conversation with the defendant in front of the Owl Theater, on Pacific avenue, and he was not interrogated concerning anything else. The cross-examination of this witness, which the appellant claims was restricted, was neither relevant, material, nor proper cross-examination, but was all in regard to whether or not witness had ever met Roy Kauffman, and when he had met him, etc. Witness was allowed to answer everything asked concerning the conversation or relation he had with defendant, brought out on direct examination. The state objected, and the court sustained the objection to witness going into or testifying regarding any talk or relations he had with Kauffman not brought out on direct examination. This was proper, and the court did not err in so doing. The extent and character of cross-examination rest largely in the discretion of the court. It was not error to allow this testimony to remain in the record, because it was testimony of an admission of the defendant tending to connect him with the commission of the crime. Kauffman had testified that he had made a confession of his share in this crime, to the reporter of the News, on April 25th. Now, this witness says that it was at the time Kauffman made his confession in the News that he had a conversation with defendant. He testifies that the defendant showed him the clipping from the News concerning this robbery, and that defendant said that he could prove that he was not in it, but that he got \$125 of the money. This testimony tends to corroborate the testimony of Kauffman, and also tends to connect the defendant with the commission of the crime, and was properly submitted to the jury.

The seventh assignment of error is that the court erred in not permitting witness Read to answer the following question: "You may state the character of the defendant's work during the time that he worked for the force,—whether it was satisfactory." This question was objected to by the prosecuting attorney as being incompetent, irrelevant, and immaterial, and the objection was sustained and exception noted. We cannot see the materiality or relevancy of this question. This witness was the chief of police of Tacoma, and had testified that the defendant had been working for the police department for nearly two months. He also testified as to conversations he had with defendant in regard to the Roy Kauffman case; also, as to how he came to be employed by the police department, etc. Witness was allowed to testify fully as to his employment by the detectives and police force, the nature and extent of his employment, etc. This testimony might be relevant and material as tending to show that, if defendant was connected with the burglary in question, it was only as a detective, in order to detect the real criminal; but whether his work was satisfactory or not could be of no materiality whatever, nor have any bearing on the question of his guilt or in-

nocence. If the question was asked for the purpose of showing the good character of the defendant, it was improper, for the rule is that in direct examination the evidence must be confined to general reputation, and that no evidence is allowed of particular acts of good or bad conduct, either to sustain or impeach character. 3 Rice, Ev. §§ 376, 377, and cases there cited. The witness Read was called by the appellant, and the testimony sought to be elicited was in his direct examination, and was clearly inadmissible under the rule above stated. Nor can character be shown by evidence of particular acts. *Com. v. Ryan*, 134 Mass. 223. The evidence of character of a defendant in a criminal case, which is admissible, must be the evidence of his general reputation among the people with whom he lived. Neither evidence of particular acts which would tend to show his character, nor evidence of his real character, is admissible, but evidence of what his neighbors thought of his character. 3 Greenl. Ev. (15th Ed.) p. 34, note "A."

We fail to see any merit whatever in the eighth assignment of error. It is claimed as error that the court did not allow the appellant, when on the witness stand, to testify as to the statements made by witness Kauffman to him in direct contradiction of the statements previously made by Kauffman when on the witness stand, concerning the holding up of a man named Wurtele. By reference to the statement of facts, it appears that the defendant was allowed to relate the substance of what Kauffman told him concerning this Wurtele hold up. The only restriction whatever the court made as to this testimony was to witness going into details of the hold up, or "stick up," as the witness called it, but the court did allow him to testify generally as to what Kauffman told him in that connection.

The ninth error complained of by appellant is predicated on the refusal of the court to allow witness Read to answer whether he would believe the witness Kauffman under oath. The defense had called Mr. Read to impeach the witness Roy Kauffman, one of the state's witnesses, as to his truth and veracity; and after the witness had testified that he knew the reputation of Kauffman for truth and veracity in the community in which he lived, and that it was bad, he was asked the following question: "State whether or not you would believe him under oath." This was objected to by the state as immaterial, irrelevant, and incompetent. The objection was sustained, and defendant excepted to this ruling. The ruling of the court was correct, and the objection was properly sustained. *State v. Miles*, 15 Wash. 534, 46 Pac. 1047.

The tenth error complained of is that the court erred in admitting the testimony of the witness Hobart. This witness was called in rebuttal by the state at the close of the appellant's testimony. A witness named Ashby (a police officer and detective) had

testified on behalf of the appellant to the effect that Kauffman on the evening of the 30th of March, 1890, in the presence of Nevins, a police officer and detective, and a police officer named Thompson, and while he was confined in the jail, the night after his arrest, after being told by the police officer that he would be prosecuted on only one charge, and while there were spread before him articles, the fruits of other burglaries in which he was supposed to have been implicated,—in short, after he had been put through what is known in police parlance as "the sweating process,"—made a confession in which he said he (Kauffman) was the only one engaged in the burglary, and he in no way at that time implicated the appellant. Thompson, Nevins, and the two other officers testified to the same effect. The police officer, Mr. Thompson, describes the sweating process through which Kauffman was put in order to obtain a confession, as follows: "Q. He was arrested, then, something like sixteen or eighteen hours? A. Well, yes; something like that. Q. And who arranged this testimony that you had there on the table to confront him with when he was brought in? A. Well, I don't know. We came in from this Kauffman's place and set it up there on the desk. I had a bottle or two, and Ashby and Mr. Nevins— I think there were four bottles altogether. [The officers had been out and searched Kauffman's residence, and the bottles spoken of had been taken from the Yellowstone Saloon, which had been previously burglarized.] Q. You expected that, confronting him with that testimony in the presence of three or four of you, that he would break down and confess? A. We wanted to get the truth out of him. Q. That is what you were after? You wanted to get him to talk? A. Yes, sir; we wanted to get a confession from him. Q. You couldn't get him to talk before that? A. Not in regard to those safe burglaries; no, sir. Q. Now, you and Captain Nevins and George Ashby were present? A. Yes, sir. Q. And confronted him with all this testimony and this bolt and that burlap? Did you have the hammer? A. I don't remember that. Q. But you confronted him with the bolt and burlap? [The bolt was the instrument with which the safe was opened, and it had been wrapped in the burlap.] A. Yes; I went and got them out of the desk and asked him if he recognized them. Q. And put him through a proper sweat for about an hour? A. Yes; we asked him questions for about an hour." A confession obtained under such circumstances is of very little weight. There is an old saying of "honor among thieves," and such a confession, under the rule laid down in *State v. McCullum*, 18 Wash. 394, 51 Pac. 1044, would hardly be admissible against Kauffman if he was on trial for the crime confessed. Why, then, should he be bound by it when testifying as in this case? This

confession of Kauffman was reluctantly given. There was nothing to indicate to him that the officers had any knowledge of appellant's connection with the crime, and he, no doubt, thought it best to say nothing about his accomplice. Notwithstanding the alleged confession was of but little weight, yet the testimony of the officers tended to impeach the testimony of Kauffman given on the trial of this action. The witness Hobart was the stepfather of Kauffman, and the state called him as a witness to prove that after the alleged confession to the officers the witness made to the officer Ashby, and to Mr. McMurray, the deputy prosecuting attorney, and to the witness Hobart, the same statements concerning the burglary, and implicating the appellant, as he testified to on the trial. The appellant was not present, and the testimony was objected to as hearsay. The court ruled that, inasmuch as Kauffman's statements on the trial had been impeached by showing that he had made different statements before the trial, the prosecution had the right to introduce sustaining statements made before the trial. Was this error? We think not. "Where the credit of a witness is attacked upon the ground that he had made statements inconsistent with the statements he had made in court, testimony may be heard to show that at other times and on other occasions the witness had made statements consistent with his testimony given in court." *Dossett v. Miller*, 3 Sneed, 72; 3 Rice, Cr. Ev. 364. The rule as above stated has been denied in the case of *Com. v. Jenkins*, 10 Gray, 485, where the accomplice on the preliminary examination had given a different account of the transaction from that he had given on the trial. That court, in ruling on the question, however, says: "The decision of the point raised in this case is not to be understood as conflicting with a class of cases in which a witness is sought to be impeached by cross-examination or by independent evidence tending to show that at the time of giving his evidence he is under a strong bias, or in such a situation as to put him under a sort of moral duress to testify in a particular way. In such case it is competent to rebut this ground of impeachment, and to support the credit of the witnesses by showing that when he was under no such bias, or when he was free from any influence or pressure, he made statements similar to those which he has given at the trial." *Id.* 489. The rule laid down by the supreme court of Massachusetts is perhaps the correct rule, and under it the testimony of Hobart is proper; for it is evident that when the witness made his statements to the police officers, while undergoing the sweating process, he was not free from great influence and pressure, and his statements were not freely given. *State v. Manville*, 8 Wash. 523, 36 Pac. 470. Hence we conclude that there was no error

committed in receiving the testimony of Hobart.

There was corroborating testimony in this case. A witness named Bradley testified that the appellant confessed to him that he was with Kauffman in the burglary. It is true that this witness was a "jail bird," as he is called in the brief of appellant's counsel, but he was thoroughly cross-examined, and the jury passed upon his testimony, with the other evidence. A witness by the name of Turner also testified that appellant admitted to him that he got \$125 of the money taken at the time of the burglary. Appellant did not at the time deny that he committed the burglary. He did, however, say he could prove he was not in it. He might have had in mind the alibi which he had prepared in case he should be arrested for the crime, as his words would indicate that he feared he might be so arrested. The appellant, in his defense, relied upon his own denial of the charge, the breaking down of the testimony of Kauffman, and the proof of an alibi. But the jurors who tried the case heard all the testimony for the appellant. They were witnesses to his actions in the court room and on the witness stand. They were also observers of the demeanor and actions of the witness Marble, who attempted to prove an alibi for appellant, as well as the demeanor and actions of all the witnesses who testified at the trial of the case in the lower court. And it is evident from the verdict they rendered, after deliberating on the evidence, that the jurors, who are the sole judges of the facts, were not only satisfied that appellant's testimony was false and that the alibi testimony was untrue, but were unanimously convinced that the evidence of Kauffman and the corroboration thereof were true, and that the defendant was guilty beyond all reasonable doubt. The main testimony for the appellant was that of Nevins, Ashby, Read, and Thompson, who were all detectives or connected with the police force of the city of Tacoma, and their testimony was directed mainly to breaking down the testimony of the witness Kauffman. These detectives had been engaged on this case, and the jury undoubtedly found from all the testimony and circumstances that they were interested in showing that Kauffman alone had committed this robbery, and that the confession these detectives extorted from Kauffman while they had him in the sweat box was not true, but that Kauffman told the truth when upon the witness stand. The interest of these detectives is apparent. They had made up their minds that Kauffman committed this robbery, and, to show that their judgment was correct, they were interested in seeing the defendant acquitted. Courts recognize the fact that testimony of this kind is very unreliable, and the jury was perfectly justified in not believing it.

On the question as to whether there is suf-

sufficient evidence to sustain the verdict, the rule is that, although the evidence in a criminal case may not have been of the most satisfactory and convincing kind, the verdict of the jury should not be disturbed on appeal, where there was evidence tending to show every material fact necessary to show the guilt of the defendant, and particularly so when the court who tried the case has refused to interfere with the verdict. *State v. Manville*, supra; *State v. Murphy*, 15 Wash. 98, 45 Pac. 729; *State v. Kroenert*, 13 Wash. 644, 43 Pac. 876; *State v. Elswood*, 15 Wash. 453, 46 Pac. 727. This court, in a recent decision (*State v. Maldonado*, 59 Pac. 480), used the following language: "An examination of the evidence in the case impresses us with the fact that it was not very strong, and that the jury might reasonably, in the opinion of this court, have found the defendant not guilty; but there was sufficient evidence, if uncontradicted, to warrant the jury in bringing in a verdict of guilty, and the jury being the tribunal upon which, by our laws and constitution, is especially imposed the duty of weighing the testimony, and having so weighed the testimony, and found against the defendant, it is not the province of this court to disturb its verdict." We think the court below properly overruled the motion for a new trial. For the reasons given, the judgment of the lower court is affirmed.

DUNBAR, C. J., and ANDERS, REAVIS, and FULLERTON, JJ., concur.

(22 Utah 148)

DRIVER et al. v. SALT LAKE & OGDEN GAS & ELECTRIC LIGHT CO.

(Supreme Court of Utah. June 21, 1900.)

CONTRACT—PLEADING—COUNTERCLAIM—CAUSE OF ACTION.

The suing out and serving of an injunction prohibiting defendant from exercising a right under the contract sued on by plaintiff is a breach of the contract by plaintiff sufficient to form a basis for a counterclaim by defendant, and a counterclaim setting up such facts states a cause of action.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Suit by H. L. Driver and others against the Salt Lake & Ogden Gas & Electric Light Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Young & Moyle, for appellant. E. D. Hoge and Goodwin & Van Pelt, for respondents.

MINER, J. This action was brought by the plaintiffs to recover \$4,557.68 for natural gas furnished to defendant upon a written contract set out in the complaint. Thereafter a supplemental complaint was filed, claiming a further sum of \$979.61 as a balance due for natural gas furnished since the commencement of the suit, and for the sum of \$1,720.57 for gas furnished, but which, through fault

of the defendant, was lost by leakage. The defendant filed an answer and counterclaim, to which plaintiffs demurred. The demurrer was sustained. Defendant then amended its answer and counterclaim. Thereafter a second demurrer was interposed and sustained to the counterclaim, and the counterclaim was stricken out. No further amended counterclaim was filed. A supplemental answer was also filed, alleging payment, etc. The amended answer and counterclaim alleged that plaintiffs were, under their written contract set out in the complaint, to furnish defendant all the natural gas required for its use, not supplied by the New American Gas & Fuel Company; that said last-named company had failed to furnish it any gas whatever, and plaintiffs had failed to supply the deficiency, as required, to defendant's damage of \$4,200; that plaintiffs procured an injunction to be issued and served, restraining the defendant from exercising its right under said contract, and from removing and disposing of the pipe line constructed by defendant to plaintiffs' gas wells for the purpose of conducting gas to defendant's gas works, to its damage of \$4,200; that such contract provided that, should plaintiffs fail to furnish defendant with the gas called for, then the defendant might remove and dispose of said pipe line from plaintiffs' wells, and upon such failure the contract should terminate without liability on the part of the plaintiffs for such failure.

In sustaining the plaintiffs' demurrer, and in rejecting defendant's testimony offered to all that part of the counterclaim except that part which has reference to being restrained by injunction from removing defendant's pipe line, etc., the court decided correctly. As to the failure to furnish gas, no breach of the contract was set up or shown on the part of the plaintiffs under the contract. The New American Gas & Fuel Company merely bound itself to furnish gas that flowed from its wells. The plaintiffs agreed to furnish defendant an amount of gas equal to one-third of the gas which the former company agreed to furnish, and, in addition thereto, all the deficiency of gas that the New American Gas & Fuel Company could not furnish in accordance with its contract. The fuel company failed to furnish the gas. It only contracted to furnish such gas as flowed from its wells. If none flowed, it was not obliged to furnish it. It is not claimed that the fuel company failed to furnish whatever gas did flow from its wells. The plaintiffs did not contract to furnish all the gas defendant was able to sell. No such provision is found in the contract; but the contract does provide that, if the plaintiffs failed to furnish the gas called for by the contract, then, upon such failure, the contract should terminate without liability on the part of the plaintiffs for such failure. Therefore, the contract ceased to be operative upon the plaintiffs' failure to furnish gas. From that time they were without

liability. The contract was evidently drawn as it was because of the uncertainty of a continuous flow of the gas. A positive obligation was precarious, and hence the insertion of a clause relieving plaintiffs from liability in case of failure of the wells. But this contract also gave the defendant a right to pull up its pipe line conveying gas from plaintiffs' wells to defendant's works, if the plaintiffs failed to furnish gas called for, etc. This fact was counted upon in the amended answer and counterclaim with the allegation that the gas was not furnished, and defendant sought to remove the said pipe line, as provided in the contract, but was enjoined and restrained by the plaintiffs from so doing, to its damage. Evidence was offered to sustain this pleading and show damages. The evidence was rejected. The demurrer to this counterclaim was sustained, and, in effect, the counterclaim was stricken out, and the defendant was denied any rights thereunder. In this we think the court erred. The defendant had a right, under the contract, to pull up its pipe line when the plaintiffs failed to furnish gas as agreed. The plaintiffs, by means of the injunction, prevented the defendant from doing what it had a right to do under the very contract upon which plaintiffs sought to recover. Whether gas was being furnished or not, and therefore whether defendant had a right to remove its pipe line or not, and what the damages were, were questions that could properly be placed in issue by the pleadings, and the demurrer should not have been sustained to this part of the counterclaim. The testimony offered would have been admissible under the counterclaim in defendant's pleadings. The suing out and the serving of an injunction prohibiting the defendant from exercising its right, under the contract, to remove its pipe line when gas was not furnished thereunder, was a breach of the contract. As held in *Colorado*, "It is a familiar doctrine of the law of contracts that, when one party is prevented from fully performing its contract by the fault of the other party, the latter cannot be allowed to take advantage of his own wrong, and exempt himself from liability under the contract." *Smith v. Roe*, 7 Colo. 95, 1 Pac. 909; *Sullings v. Vulcanite Co.*, 36 Mich. 313; *Marshall v. Craig*, 4 Am. Dec. 653; *Jewell v. Blandford*, 7 Dana, 477; *Dill v. Pope*, 29 Kan. 289; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Lawson*, Cont. § 444; *Dobbins v. Edmonds*, 18 Mo. App. 314.

Many other errors are assigned, but the record comes to this court in such a questionable and unsatisfactory shape that we are not able to clearly understand what the disputed questions are, or how they arose. The judgment of the district court is reversed, and the cause is remanded to the court below with directions to grant a new trial. Appellant is entitled to costs.

BARTCH, C. J., and McCARTY, District Judge, concur.

(87 Or. 411)

NODINE et ux. v. WRIGHT et al.

(Supreme Court of Oregon. July 9, 1900.)

ASSIGNMENT FOR CREDITORS—ABUSE OF TRUST—ACTION FOR DAMAGES—ACCOUNTING.

Where a debtor conveyed his property to a trustee to convert into money and pay the debts, and the trustee fraudulently conveyed the property to his friends and business associates for much less than it was worth, such debtor could not maintain an action at law against the trustee and his grantees for damages, without first bringing a suit in equity for an accounting and closing of the trust.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Action by Fred Nodine and wife against W. T. Wright and others to recover damages for an abuse of a trust in favor of creditors. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

This is an action at law against W. T. Wright, F. A. B. Starr, W. J. Townley, F. L. Richmond, J. P. Marshall, the Ainsworth National Bank of Portland, and the First National Bank of Union, to recover \$150,000 damages. The complaint, in substance, is that in April, 1894, plaintiffs were the owners and in possession of a large amount of real and personal property in Union county, of the alleged aggregate value of \$168,100, and were in debt to divers and sundry persons, including the defendants First National Bank and Townley, in the sum of about \$40,000; that they were being harassed and annoyed by various creditors, including defendants, and feared that if their property was sold on execution they would suffer great loss; that by reason of certain false and fraudulent representations they were induced to and did convey by deed and bill of sale all of their real and personal property to the defendants Richmond and Wright, in trust, however, and upon the terms and conditions, that they would dispose of the same as soon as they might consider it for the best interest of the plaintiffs, at a price not less than \$27.50 per acre for the real estate, and out of the proceeds pay the plaintiffs' debts, taxes, interest, and such costs as might accrue upon or by reason of such indebtedness, and return to the plaintiffs four-fifths of the surplus, the defendant Starr to have one-fifth thereof as compensation for his services in advising and counseling the trustees; that, immediately upon securing possession of such property, Richmond and Wright, in violation of their trust, and with intent to cheat, wrong, and defraud the plaintiffs, sold the property to their friends and business associates for much less than its market value, and much less than they could have obtained by the exercise of ordinary diligence and common honesty; that all the property has been thus disposed of, and only about \$10,000 of plaintiff's debts have been paid; that these sales were made for and inured to the mutual benefit of de-

fendants, and to the great injury and damage of plaintiffs in the sum of \$150,000.

Smith & Hellner and L. Lomax, for appellants. Chamberlain, Thomas & Kraemar and T. H. Crawford, for respondents.

BEAN, C. J. (after stating the facts). It appears from the complaint that it will require an accounting before the liability of the trustees, if any, can possibly be ascertained. The trust has never been closed, but remains open, and, under such circumstances, it is manifest the plaintiffs' remedy is in equity, and not at law. A cestui que trust cannot maintain an action at law against a trustee while the trust is still open. The execution and enforcement of trusts, the adjustment of disputed rights thereunder, and the settlement of accounts between the cestui que trust and the trustee, are questions which naturally fall within the primary and exclusive jurisdiction of the equity courts. Mr. Perry, in speaking of the remedies of the cestui que trust, says: "Unless some legal debt has been created between the parties, or some engagement the nonperformance of which may be the subject of damages at law, a court of equity is the only tribunal to which he can have recourse for redress. An action at law for money had and received will not lie against a trustee while the trust is still open, but if a final account is settled, and a balance struck, an action may be maintained." 2 Perry, Trusts (5th Ed.) § 843. This rule has been announced and enforced in many cases, and, indeed, is elementary. *Jasper v. Hazen*, 1 N. D. 75, 44 N. W. 1018; *Johnson v. Johnson*, 120 Mass. 465; *Ames v. Ames*, 128 Mass. 277; *Norton v. Ray*, 139 Mass. 230, 29 N. E. 662. The judgment of the court below is therefore affirmed.

(37 Or. 404)

STATE et al. v. BLIZE et al.

(Supreme Court of Oregon. July 9, 1900.)

STATE—INSANE ASYLUM—PURCHASE OF LAND—FRAUD—CANCELLATION OF DEED—RESCISSI—CONSTITUTIONAL LAW—SUIT TO QUIET TITLE—DEFENDANT IN POSSESSION—WAIVER.

1. Where the state purchased land, paying full value therefor, the grantor was not entitled to have the deed set aside on the ground that the state officials falsely and fraudulently represented that the state would build an insane asylum thereon.

2. Laws 1893, p. 136, provides that a branch insane asylum shall be established in the eastern part of the state. In pursuance of this statute the state officers purchased land, paying full value therefor, and agreed with the grantor to erect buildings thereon for such asylum. *Held*, that the fact that the act of 1893 was held unconstitutional did not revest title in the grantor, as the state has power to hold title to real estate, and the deed being no more than voidable, it was incumbent on such grantor to rescind, and offer to return the purchase price to the state, before seeking a cancellation of the deed.

3. Where the state brought a suit to remove defendants' claim to land, as a cloud on the title, the fact that defendants were in pos-

session of the land at the time the suit was brought did not render a judgment in favor of plaintiff void for want of jurisdiction, where defendants did not raise the question of jurisdiction in the trial court, but themselves asked for equitable relief against plaintiff.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Action by the state of Oregon and another against John R. Blize and others to remove a cloud from the title to land. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

This is a suit to determine an adverse claim to real estate. The complaint alleges that the state is the owner in fee and in possession by its tenant, Oliver, of the land in controversy; that defendants, and each of them, claim an interest or estate therein adverse to the plaintiffs, whereupon it prays that each of them be required to set forth by answer the nature and character of his interest or estate, so that its validity may be adjudged. The defendants Hutchinson Bros., who alone answered, deny the state's title and possession, and, for an affirmative defense, aver that in 1893 the state, by its authorized agents, the governor, secretary of state, and treasurer, falsely and fraudulently agreed with the defendants that, if they would execute to it a good and sufficient deed to the land described in their answer, it would within 18 months thereafter erect thereon, and upon the other land mentioned and described in the complaint, buildings and improvements for public purposes at a cost and value of not less than \$165,000; that it was expressly agreed at the time that the whole of the land so described should be used and occupied for public purposes only, and that until the state fully performed its part of the contract the defendants were to remain in the exclusive possession of the premises as the owners thereof; that, if it should fail or refuse to use the land for the purposes indicated, the title thereto should remain in the defendants, and any deed executed by them should be void and of no effect; that the performance of such agreement and contract by the state was the only and sole consideration for the transfer; that it has wholly failed and refused to comply with its agreement or perform any part thereof, or pay defendants any consideration for the land; that, if the state had performed its agreement, the defendants would have been benefited, and the value of their other property increased and enhanced, in the sum of not less than \$10,000, and that they are damaged by its failure to perform its agreement in such sum; that it was further understood that, if the defendants would execute to the state a deed for the land, they would receive therefor, in addition to the performance of such contract and all other considerations, the sum of \$1,400, no part of which has ever been paid to these defendants, or either of them, and that they have never received any consideration from the state or

any one for such lands; that the market value thereof was at the time of making the contract, and ever since has been, \$60 per acre; and that the defendants would not have sold the same for any other purpose than to be used as a branch insane asylum, as represented by the agents of the state. For a further and separate defense they aver that the state should be estopped from asserting title or right of possession to any of the lands described in their answer, for the reason that they were purchased under and by virtue of an act of the legislature entitled "An act to provide for the location and construction of a branch insane asylum in the eastern portion of Oregon, and appropriating money therefor," filed in the office of the secretary of state February 21, 1893, which was subsequently held to be unconstitutional and void, whereupon the defendants demand that a decree be entered declaring that they are the owners in fee of the lands described in their answer, and that the state take nothing by the alleged deed from them; that it be forever barred from asserting any claim to such lands, or any part thereof, by virtue of such deed; and that they have and recover of and from the state the sum of \$10,000,—and for such other and further relief as in equity and good conscience may appear just and meet. The reply puts in issue the affirmative allegations of the answer, and pleads as an estoppel a conveyance by the defendants of the land in controversy to the state on the 17th day of November, 1894, for the consideration of \$5,600, which was then and there paid to and received by them, and which they have ever since retained. Upon the issues thus joined the suit went to trial before the court, and the defendants offered evidence tending to show that at the commencement of the suit the state was not in possession of the land in controversy. The court refused to permit the introduction of such evidence on the ground that the defendants, by their answer, had waived that issue. A decree was rendered in favor of the plaintiffs, from which the defendants appeal.

G. H. Finn, for appellants. T. H. Crawford, for respondents.

BEAN, C. J. (after stating the facts). It is uncontroverted that in 1894 the board of commissioners of public buildings purchased from the defendants Hutchinson Bros. 140 acres of land in Union county for a branch insane asylum, under an act of the legislature approved February 21, 1893 (Laws 1893, p. 136), and paid therefor the sum of \$5,600. The land was conveyed to the state by warranty deed, regularly executed and delivered, but by agreement the defendants were permitted to occupy it during the seasons of 1895 and 1896, and thereafter continued to so occupy and farm the same up to the time it was leased by the state to Oliver, in the spring of 1899, and for the purposes of this

suit it must be assumed that at the commencement thereof they were so in possession. Upon these facts the only questions presented for our determination are (1) whether the state had legal capacity to take title to the real estate in question at the time the deed from the defendants was executed and delivered to it; and (2) whether the court below had jurisdiction of the controversy between the parties.

The questions of fraud and misrepresentation, and of the alleged failure of the state to comply with its agreement to use the land for public purposes only, are wholly immaterial in this suit. An executed contract between competent parties, founded on a valuable consideration, not immoral or prohibited by statute or against public policy, is not void, as between the parties, however fraudulently obtained; nor will a conveyance of real estate be avoided by the subsequent failure of the grantee to pay the consideration as agreed upon. And, moreover, it is elementary law that a party cannot disaffirm a contract and retain the fruits thereof. If he desires to rescind, he must return or offer to return whatever he has received under it. 1 Beach, Mod. Eq. Jur. § 76; Frink v. Thomas, 20 Or. 265, 25 Pac. 717; Scott v. Walton, 32 Or. 460, 52 Pac. 180; Vaughn v. Smith, 34 Or. 54, 55 Pac. 99; Och v. Railway Co., 130 Mo. 27, 31 S. W. 962, 36 L. R. A. 412. No offer has ever been made by the defendants to return the money received by them from the state for the land in question; nor, so far as this record discloses, have they ever expressed a willingness to do so. Hence they are not entitled to relief in this suit, even if the deed be voidable. They are compelled to rely upon the naked legal proposition that the deed to the state is absolutely null and void because the state had no capacity to take the title,—in short, that there was no conveyance, because there was no grantee, and so the title never in fact passed out of them. But there is no merit in this contention. That the state can take and hold title to real estate is unquestioned, and if, in a given instance, a conveyance is made to it for an unauthorized purpose, it is not void, however it may be regarded in a proceeding instituted for the purpose of canceling and setting it aside. If the purchase of the land from the defendants was unauthorized, the deed is voidable only, and, before it can be rescinded at the suit of the grantors, they must return or offer to return the money paid them as a consideration therefor. Nor does the fact that the act of 1893 was declared unconstitutional and void, after the purchase made under it had been consummated and the title vested in the state, render the deed a nullity. King v. Philadelphia Co., 154 Pa. St. 160, 26 Atl. 308, 21 L. R. A. 141. The purchase was accomplished under color of lawful authority, and at a time when the law was presumptively valid, and therefore must be regarded as having been lawfully made. The deed, being regular in form and prop-

erly executed, vested the title to the land in the state as effectually as if purchased for some authorized purpose, even if it might be subject to cancellation in a proper proceeding.

It is further insisted that the court was without jurisdiction because the state was not in possession of the land at the time of the commencement of the suit. The defendants interposed no objection to the jurisdiction of the court below by plea or answer, but answered to the merits, and set up matter as a basis for affirmative relief, and prayed the court to order and decree that the deed made by them to the state is void on account of fraud and misrepresentation, and therefore that the state took nothing thereby. The relief prayed for is such as a court of equity alone could administer, and in thus submitting themselves to the jurisdiction of the court, and asking for affirmative relief, they waived their right to insist that the court was without jurisdiction because the state was not in possession at the time the suit was commenced. This question is fully discussed in *O'Hara v. Parker*, 27 Or. 156, 39 Pac. 1004, wherein Mr. Justice Wolverton, speaking for the court, says: "It is said that proof of possession and title is necessary to entitle a party to recover in a suit to remove a cloud from title; but where the parties say, in effect, by their pleadings and contentions before the court, that they want specific relief, which alone a court of equity can administer, without regard to the court's especial jurisdiction, there can exist no good reason why the court should not grant the prayer, if it has jurisdiction of the subject-matter. The objection to the jurisdiction not appearing upon the face of the complaint, it should have been taken by some appropriate plea challenging the right of the plaintiff to proceed in equity, failing in which, and by his demand for affirmative equitable relief, the defendant has waived his right to now insist that the court is without jurisdiction because the plaintiff is without possession." Counsel, in their argument, seem to have confused the fact of jurisdiction with its exercise. A court of equity unquestionably has jurisdiction to remove a cloud from title, but, as a condition to its exercise, the plaintiff is required to be in possession of the premises; for otherwise, if he is the owner of the legal title, the law affords him ample relief. But, as said in *O'Hara v. Parker*, supra, "this condition, however, can be waived by the parties, and, if the court proceeds with the exercise of jurisdiction, it can grant the equitable relief appropriate in such cases." It follows, therefore, that the defendants must be deemed to have waived the objection to the state's right to relief because it was not in possession of the land at the time of the commencement of the suit, by submitting themselves to the jurisdiction of the court in asking affirmative relief in their answer. The decree of the court below is affirmed.

(62 Kan. 137)

HUDSON et al. v. BARRATT.

(Supreme Court of Kansas, July 7, 1900.)

PARTIES — SUBSTITUTION — EXECUTOR — RESIGNATION — SETTLEMENT — ACTION ON BOND.

1. The real parties in interest may be substituted as plaintiffs in an action previously brought in the name of the state upon an executor's bond.

2. The probate court has the power, and it is its duty, to require a full and final accounting, and to make a settlement with an executor who has resigned, been removed, or whose letters have been revoked, and to order him to deliver the personal effects and assets of the estate to his successor.

3. Where the estate of a deceased person is in process of settlement in the probate court, and an accounting has not been had with a former executor therein, and there has been no refusal by such executor to make a full and final accounting, and where a full settlement may be required and an adequate remedy had in that court, no occasion exists to invoke the equitable jurisdiction of the district court, or for interference by that court with the settlement in the probate court; and in such a case an action cannot be maintained on the executor's bond until an accounting has been had in the proper tribunal, a liability ascertained, and an opportunity afforded the former executor to discharge it.

(Syllabus by the Court.)

Error from district court, Atchison county; W. T. Bland, Judge.

Action by the state against B. F. Hudson and others. Thereafter Norman Barratt, administrator, was substituted as plaintiff. Judgment for plaintiff. Defendants bring error. Reversed.

B. F. Hudson, C. D. Walker, and J. L. Berry, for plaintiffs in error. W. W. & W. F. Guthrie, for defendant in error.

JOHNSTON, J. Susan Grimes died testate February 6, 1890. The will was at once probated, and B. F. Hudson, who had been designated in the will as executor, was granted letters testamentary. He gave bond in the sum of \$120,000, and entered upon the discharge of his duties. On May 3, 1890, some of the heirs instituted an action to contest the will, and it was adjudged invalid by the district court, July 2, 1891. Proceedings in error were begun in this court by the executor on July 13, 1891, when an order was made staying the execution of the judgment of the district court and all proceedings in the case in that court, and later the order was modified so that the executor might proceed to preserve and protect the property of the estate, but forbidding any further distribution of the same until the decision of the merits in the supreme court. On December 7, 1895, the supreme court affirmed the judgment of the district court. *Hudson v. Hugan*, 56 Kan. 152, 42 Pac. 701. On January 18, 1896, the probate court made an order appointing Norman Barratt as administrator of the estate, and from this order an appeal was taken to the district court, where it remain-

ed pending until April 16, 1897, when the order of appointment was confirmed. He at once qualified, and entered upon the discharge of his duties as administrator de bonis non of the estate. The will, which was probated, and subsequently set aside, provided for the disposition of the property by private or public sale, and directed how the proceeds should be distributed. While the executor was in control he collected from the personal estate more than \$18,000, and also a considerable sum from the rentals of real estate. On February 11, 1891, he filed his *mis.* annual report in the probate court, and continued to administer the estate as executor, under the direction of the probate court, until the will was set aside. Under the order of the supreme court staying the judgment and proceedings in the district court he continued to act as executor of the estate, with no authority except to preserve and protect the property of the estate until the final decision of the cause in the supreme court. In September, 1891, after the judgment had been rendered setting aside the will, the executor divided the moneys in his hands belonging to the estate among the five noncontesting heirs, but gave nothing to those who were attacking the will. After the appointment of the administrator, Hudson presented to the probate court what was termed a final settlement of his executorship, and asked to have the same considered and approved by the probate court. He tendered in court and to his successor any balance of moneys that might be found due or any property in his possession belonging to the estate, and asked that compensation, expenses, and attorney's fees might be allowed. The non-contesting heirs protested against the acceptance of the report, and the probate court refused to accept the report of Hudson as acting executor of the estate, and decided that it would only recognize and deal with the newly-appointed administrator. Barratt, as administrator, made a demand upon Hudson to turn over the property and funds which had come into his hands as executor, and, no accounting having been had, Hudson refused the demand. An action was then brought in the name of the state against Hudson and his sureties upon the bond given by Hudson as executor, and judgment was claimed upon the bond for the sum of \$21,039. After the action was instituted, the court, upon the application of the administrator, allowed an amendment of the petition, and the substitution of the administrator as plaintiff. At the trial elaborate findings of fact were made by the court, and based thereon the court gave judgment against the defendants for \$6,758.05, and also directed the delivery to the administrator of a certain promissory note for \$1,000, which had been in the possession of the executor.

The defendants complain of the judgment, and the first error assigned is the ruling of

the court permitting the amendment of the petition and the substitution of a new plaintiff. The amendment did not change substantially the cause of action stated in the original petition. Both petitions counted upon the executor's bond, and asked for a recovery of the property and moneys of the estate which the executor had failed to account for or turn over to the administrator upon his demand. The amended petition was more elaborate, and set up some additional items and claims upon which there was an alleged liability. No limitation had run in the meantime upon the new matters or added claims of liability, and the defendants were given abundant time for answer and preparation. No error can be predicated on the substitution of the administrator for the state of Kansas as plaintiff. While the bond ran to the state, it was for the benefit of all parties interested in the estate, and, as the administrator was the real party in interest, it was not improper to substitute him as plaintiff. *City of Atchison v. Twine*, 9 Kan. 350; *Hanlin v. Baxter*, 20 Kan. 134; *Commissioners v. Munger*, 24 Kan. 205; *Paola Town Co. v. Krutz*, 22 Kan. 725; *Civ. Code*, § 139.

A more serious objection is the bringing of an action against the executor before the probate court wherein the settlement of the estate was pending had an accounting with the executor, or had determined that there was a liability upon the bond. The probate court has primary and complete jurisdiction over the estates of deceased persons. Jurisdiction had been acquired by the probate court of Atchison county over the Grimes estate, the settlement of which is still open and undetermined. That court had probated the will, and from it Hudson had received his credentials as executor. To it he had accounted, and his first annual report had been received and filed. Under the supervision of that court, the estate had been partially administered by Hudson, and his continuance in office and the rightfulness of his possession of the estate while the will case was pending was recognized by this court by the orders of stay. No final accounting had been had with Hudson in the probate court, and he had not refused to make such accounting. Why should the probate court surrender or be divested of its jurisdiction over the unsettled estate and of the accounting of the personal representatives which had been appointed? What reasons exist for the interference of the district court, or for the arrest of proceedings already commenced in a court of competent jurisdiction? The probate court, as we have seen, has at least primary and complete jurisdiction of the unsettled estate, and, even if the district court may be regarded as having concurrent jurisdiction in such matters, the universal rule is that where two courts have equal jurisdiction over a subject-matter of dispute, and the parties to it, the one which first obtained

jurisdiction is entitled to continue in its exercise to the end. In *Stratton v. McCandless*, 27 Kan. 296, it was said that "In cases of this kind, where the administrator is still acting and the estate is not settled, and the probate court has complete and ample jurisdiction over the administrator and over the estate, actions in other jurisdictions against the administrator and his sureties on the administrator's bond should not be encouraged." The present action, like the one in the case cited, "attempts to take a matter which properly and legitimately belongs to the jurisdiction of the probate court, and a matter which ought to be settled and determined in that court, and to place it within a jurisdiction which has no general control over the affairs of the estate." It is true that the jurisdiction of the probate court in respect to estates is not absolutely exclusive, but the cases which may be wrested from the jurisdiction of the probate court and tried in the district court are special and limited. "The jurisdiction of the district court in such matters is an equitable one, and in its exercise the court will be governed by the rules of equity, one of which is that as a general rule it will only take jurisdiction where the plaintiff has no other adequate remedy by ordinary legal proceedings in the tribunal especially provided by statute." *Carter v. Christie*, 57 Kan. 492, 46 Pac. 949. See, also, *Proctor v. Dicklow*, 57 Kan. 119, 45 Pac. 86. Is there no adequate remedy in the probate court? So far as an accounting and settlement with an executor or administrator is concerned, there appears to be no inadequacy of remedy, nor necessity for appealing to an exceptional jurisdiction. The statute provides for an accounting in the probate court annually, and at other times, and as often as that court may require, until the final settlement is made. Ex'rs' & Adm'rs' Act, § 147.

The obligation of the bond which the executor gave required an accounting in that tribunal, and the statute makes specific provisions as to how an executor or administrator may be compelled to render his account, and it also provides for a final discharge of the executor after the accounting and settlement, which shall exonerate him and his sureties from liability. Ex'rs' & Adm'rs' Act, §§ 149, 151, 175. It is argued that the court had no authority to require an accounting by Hudson because he was no longer an executor; and, further, that the statute does not provide for an accounting by a removed executor, or that the probate court may order him to turn over the assets of the estate to his successor. Hudson, we think, is to be treated as a removed executor. He held his position and administered the estate under the sanction and supervision of the probate court, but the final adjudication that the will was invalid necessarily terminated his authority, and removed him from the position of executor. The statute provides that in such cases the sales lawfully

made in good faith and other lawful acts done by the executor shall remain valid and effectual. Ex'rs' & Adm'rs' Act, § 27. The court had jurisdiction of the estate notwithstanding the removal, and we think it also had jurisdiction of a present or former executor until a final accounting and settlement of the estate was had with him. We find nothing in the statute or in the theory of the law excepting a removed executor from the general requirements of the act as to an accounting. The fact that he has been removed does not close his relations with the estate, nor take the estate or the property belonging to it out of the jurisdiction of the court. As indicating that the power of the court is not limited to executors or administrators, or persons holding quasi official relations with the estate, it may be noted that the statute gives the probate court authority to cite even strangers before it who have possession of the assets of the estate, or who are suspected of having concealed, embezzled, or conveyed away any money or assets of the estate, and to compel a delivery thereof to the executor or administrator entitled to receive the same. Ex'rs' & Adm'rs' Act, §§ 196-200. The general trend of the authorities is that the revocation of letters or the resignation or removal of an executor does not affect the authority of the probate court to require an accounting. So it has been held that where an executor or administrator resigns before the settlement of his accounts, and his resignation is accepted, the court does not thereby lose jurisdiction over his person nor the settlement of his accounts, and may proceed with the settlement in the same manner as if he had continued in the execution of his trust. *Siagle v. Entekin*, 44 Ohio St. 637, 10 N. E. 675. See, also, *Casoni v. Jerome*, 58 N. Y. 315; *Nevitt v. Woodburn*, 160 Ill. 203, 43 N. E. 385; *In re Hood*, 104 N. Y. 103, 10 N. E. 35; *In re Radovich*, 74 Cal. 536, 16 Pac. 321. In *1 Woerner, Adm'rs*, 589, it is said that, "after revocation, removal, or resignation, the former executor or administrator cannot complete a sale which he has been negotiating on behalf of the estate, nor collect assets, but the court has jurisdiction to settle his accounts as though he were still in office." In *Schoulder, Ex'rs & Adm'rs*, § 520, it is said that "the American rule of the present day is therefore, with few exceptions, that the court of chancery usually has neither jurisdiction nor occasion to interfere in the settlement of the estate, and to order an accounting by an executor or administrator; and, even as to one who has resigned or been discharged from his trust, our law inclines to treat him as one whose accounts should be closed under probate direction, as in the case of one who has died in office." It is true that some of the decisions cited are based on statutes which expressly authorize an accounting with a former executor or administrator, but the implication of our statute, as well as the

power intrusted to our probate court, justifies the view which we have taken.

Reference has been made in the argument to the cases of *Ingraham v. Maynard*, 6 Tex. 130, and *Francis v. Northcote*, Id. 185, which seem to hold to a contrary view, based apparently upon the provisions of the constitution and statutes of Texas, constituting the court as an inferior tribunal, with jurisdiction limited to certain enumerated subjects. In matters of probate our court is not an inferior tribunal, and we have no doubt that it is the duty and within the power of the probate court to settle the accounts of a former executor, determine what shall be allowed him as compensation for his services and for expenses, and then to direct the turning over and delivery of the residue of the estate to his successor. It is not for the successor to decide what allowance shall be made to Hudson for the partial execution of the trust, or for expenses incurred while he acted in that capacity. The orderly and legal course is that a full accounting and settlement shall be made by the former executor in the court having jurisdiction and control of the estate, and that the transfer of the assets and funds remaining in his possession shall be made to the successor, under the direction and supervision of that court. The taking of the matter from the jurisdiction of the probate court cannot be sustained on the ground of circumlocution or a multiplicity of suits.

There is full power in the probate court to determine whether the estate has been faithfully administered, whether moneys have been improperly paid out or an improper distribution made, and what amount of money and assets should be in Hudson's hands, and for which he is accountable, after allowance has been made for services and expenses. Section 26 of the executors' and administrators' act provides, it is true, that an administrator appointed in place of a removed executor is entitled to the possession of the estate, and may maintain an action against the former executor and his sureties on the bond, but nothing in the provision indicates that an accounting and settlement with the former executor may be dispensed with. No good reason can be seen why the sureties upon the executor's bond should be required to answer in court, and be harassed with litigation, until default has been made by the executor, or why there is any liability upon the bond by the tribunal specially provided to make such determination. If an accounting is had in the probate court, and the executor makes a complete and satisfactory settlement, and turns over to his successor all the property and assets of the estate in his hands and for which he is accountable, there will be no necessity for litigation with the sureties upon the bond, and hence there would be no ground for invoking the equitable jurisdiction of the district court. *Weihe v. Stathan*, 67 Cal. 84, 7 Pac. 143.

We conclude that there was no occasion to

interfere in the settlement of the estate in the probate court, and that until the settlement was had by the tribunal appointed for that purpose an action upon the executor's bond could not be maintained. The judgment of the district court will therefore be reversed, and cause remanded for further proceedings. All the justices concurring.

(62 Kan. 148.)

JOHNSTON v. BOWERSOCK.

(Supreme Court of Kansas. July 7, 1900.)

CONTRACT—VALIDITY—STATUTE OF FRAUDS—OPTION TO TERMINATE—GRANT OF WATER POWER.

1. An oral contract was entered into where-in defendant agreed that he would take and pay for 25 horse power of water owned by plaintiff, at the rate of \$3 per horse power per month, during the time that a certain written contract between the defendant and a gas company continued. The latter contract provided that defendant would furnish to the gas company 75 to 100 horse power of water for a term of 99 years, to be used in generating power for electric lights, and contained a clause permitting the gas company to terminate the contract on three months' notice, provided the business of electric lighting proved unprofitable. *Held*, that inasmuch as the contingency relative to the electric lighting business being unprofitable might occur within the space of one year, followed by notice terminating the written contract within that time, the enforcement of said verbal contract between plaintiff and defendant was not prohibited by the fifth subdivision of section 6 of the statute of frauds. *Held*, further, that, it being within the expressed purpose and intent of the parties to the written agreement that the same might be terminated in the manner above stated, the exercise of the option so to do by the gas company must be considered, in determining the application of said section of the statute of frauds, as a performance of the contract, rather than its destruction.

2. The right to use power created by an accumulation of water above a dam in the Kansas river may be granted by parol.

(Syllabus by the Court.)

Error from district court, Johnston county; John T. Burris, Judge.

Action by J. W. Johnston against J. D. Bowersock. Judgment for defendant, and plaintiff brings error. Reversed.

J. D. Bowersock, under the name of "Kansas Water-Power Company," executed and delivered to W. B. Cunningham a written contract, the material part of which is in the following words: "This indenture, made and entered into this 29th day of March, 1879, by and between the Kansas Water-Power Company, party of the first part, and W. B. Cunningham, party of the second part, witnesseth: That the party of the first part, for a good and sufficient consideration, has this day sold, conveyed, and transferred to the party of the second part, his heirs or assigns, water equal to twenty-five horse power created by the dam across the Kansas river at Lawrence, Kansas, said water to be taken from some wheel and penstock yet to be put in by said party of the second part, his heirs or assigns, at some

one of the openings in said dam flume, as now built, that may be mutually agreed upon hereafter by the parties, and the power is to be so used as not to interfere unnecessarily with the power now in use or the power which may hereafter be utilized." On February 9, 1880, Cunningham sold, conveyed, and assigned to J. W. Johnston, the plaintiff in error, his heirs and assigns, all his title, claim, and interest in and to the foregoing contract, and ever since that time Johnston has retained and enjoyed all rights granted to Cunningham under the original agreement. In March, 1888, defendant in error, J. D. Bowersock, entered into an agreement in writing with the Lawrence Gas, Coke & Coal Company, a corporation, wherein he granted to said company, for a period of 99 years from and after October, 1872, the use and enjoyment of power created by all or any part of the water, as required, that will flow through the two south arches in the east wall of the flume as then built and constructed on the south side of the Kansas river below the dam in the city of Lawrence, the water to be taken and furnished in such quantities, if required, as will flow through the two arches above mentioned, estimated by the parties to vent from 75 to 100 horse power at each opening, or a weight of water sufficient to create the same at full head, to be used for electric light purposes only. It was stipulated that Bowersock was to furnish and allow the use and enjoyment for the term of 99 years of sufficient ground adjoining said flume for the erection of one or more penstocks, in which to place turbine or other water wheels of such size and capacity as would utilize the water flowing through the arches referred to for the purpose of generating and distributing electric lights throughout the city of Lawrence for public and private use. It was further agreed that there should be no charge for water power to the said Lawrence Gas, Coke & Coal Company under the contract until January 1, 1889, but that on and after that date a charge was to be made at the rate of \$2 per horse power per month while actually employed, to be rated on a basis of one 2,000 candle-power arc light for one horse power, or its equivalent in lights of lesser power. The rate of \$2 per horse power was to be maintained as long as there is opposition in public lighting by electricity in the city of Lawrence; and, should any competing party or company enter that field for lighting purposes, other than the present waterworks company and Pierson Bros., their successors and assigns, Bowersock agreed to furnish water power at the rate of \$1 per horse power per month, if necessary to overcome such competition, until the same ceased. Upon such opposition being withdrawn, the rate and price of water power under the contract was to be \$3 per horse power per month for the number of horse power actually in use, and for the time it was actually in use. It was further

provided that said Lawrence Gas, Coke & Coal Company would furnish material and erect their own penstock racks in front of arches, furnish their own water wheel or wheels at their own expense, and risk both making and constructing such improvements as may be necessary for the power created by the water after it flows through the arches designated in the contract. The contract contains the following provisions: "It is also agreed and fully understood between the parties to this contract that if, from any cause, said first party should fail or be unable to furnish the water power hereinbefore contracted to be furnished by said J. D. Bowersock, his heirs or assigns, to said second parties and their successors, for the purposes aforesaid, or if said second party, from any cause whatsoever, at any time hereafter should be unable to generate, manufacture, and distribute electric lights for public and private use in the city of Lawrence and vicinity at a reasonable profit by the use of said water power, then in that case this contract shall cease and be terminated from and after said second party shall have given said first party three months' notice in writing of their intention to terminate the contract and abandon the use of said water for the purposes aforesaid."

The amended petition filed by the plaintiff below, plaintiff in error here, against J. D. Bowersock, sets out a copy of the contract between the latter and W. B. Cunningham, above referred to, and alleges the assignment of all rights thereunder to J. W. Johnston, plaintiff below, and that the latter became entitled thereunder to water equal to 25 horse power created by said dam. The petition also sets up the contract between Bowersock and the Lawrence Gas, Coke & Coal Company, above referred to and quoted from, and avers that Johnston, the plaintiff below, elected to take the 25 horse power called for by said contract between Bowersock and Cunningham, and assigned to plaintiff, out of the penstock placed in said flume by the Lawrence Gas, Coal & Coke Company on the 1st day of August, 1888. The petition further states that on or about the 1st day of May, 1888, the plaintiff, Johnston, entered into an oral contract with Bowersock, by the terms of which it was agreed that Johnston would take said 25 horse power to which he was entitled by reason of the contract between Bowersock and Cunningham, assigned to him, and that Bowersock agreed that he should have and enjoy the same out of the horse power which Bowersock was to furnish to the Lawrence Gas, Coke & Coal Company by the contract entered into between the latter and Bowersock on or about the 21st day of March, 1888, which agreement between Bowersock and Johnston was to exist and be in full force and effect as long as the contract between the defendant, Bowersock, and the Lawrence Gas, Coke & Coal Company continued; that on or about the 1st day of September, 1888, defendant, Bowersock, entered

upon the performance of his said contract with the Lawrence Gas, Coke & Coal Company, and furnished water power to the latter according to the terms and conditions of the agreement above mentioned; that on or about the 1st day of September, 1888, plaintiff, Johnston, and defendant, Bowersock, entered upon the performance of their said contract, and Johnston then furnished to Bowersock the 25 horse power in full compliance with his contract and agreement so to do, and that at said time it was orally agreed between Johnston and Bowersock that the former was to receive from the latter, for the 25 horse power to be so furnished by him, the sum of \$3 per horse power per month, payable monthly, and that Johnston was to furnish said 25 horse power from the 1st day of September, 1888, until the 1st day of January, 1889, free of charge, the payment of said \$3 per month to commence from and after the 1st day of January, 1889, being the same amount per horse power which Bowersock was to receive from the coal company for the horse power furnished it under his contract with that company. The petition further alleges that plaintiff below furnished Bowersock the said 25 horse power, which water power flows through the two south arches in the east wall of the flume into the penstock erected and constructed on the south side of the Kansas river, below the dam, in the city of Lawrence; that by reason thereof Bowersock became indebted to the plaintiff, and the plaintiff became entitled to receive from Bowersock, the sum of \$900 per year from the 1st day of January, 1889; that plaintiff, Johnston, has received from Bowersock, for the 25 horse power so as aforesaid furnished by him, the following sums, for which he gives credit, to wit:

November 19, 1890.....	\$ 150 00
December 27, 1891.....	100 00
July 22, 1893.....	250 00
February 26, 1894.....	166 33
January 13, 1896.....	60 00
April 10, 1896.....	100 00
February 22, 1897.....	300 00
	<hr/>
	\$1,126 33

—and that there is due and owing the plaintiff, Johnston, from the defendant below, the sum of \$7,873.67, for which he prays judgment.

A general demurrer was interposed by the defendant below to this petition, upon the ground that the same did not state facts sufficient to constitute a cause of action, which demurrer was sustained by the court. The plaintiff elected to stand on his petition, and has brought the action of the district court here for review.

Bishop & Mitchell and A. S. Devenney, for plaintiff in error. Geo. J. Barker, Ogg & Scott, and I. J. Pickering, for defendant in error.

SMITH, J. (after stating the facts). Counsel for defendant in error contend—First,

that the plaintiff below failed to perform a condition precedent necessary to a recovery under the contract between himself and Bowersock, in that under the written agreement between the latter and Cunningham, which was assigned to Johnston, it was provided that the 25 horse power to which he was entitled was "to be taken from some wheel and penstock yet to be put in by said party of the second part, his heirs or assigns, at some one of the openings in said dam flume, as now built, that may be mutually agreed upon hereafter by the parties." This condition, they assert, was not satisfied by an allegation in the petition that Johnston elected to take the said 25 horse power called for by the Cunningham contract out of the penstock placed in said flume by the Lawrence Gas, Coke & Coal Company. The petition, however, contains other averments pertinent to the question raised. It not only alleges that Johnston so elected to take the water to which he was entitled out of a penstock placed in the flume by the gas company, but it further avers that "Bowersock agreed that the said Johnston should have and enjoy the said twenty-five horse power to which he [Johnston] was entitled out of the horse power which he [Bowersock] was to furnish the said Lawrence Gas, Coke & Coal Company by the contract entered into between the said defendant, Bowersock, and said Lawrence Gas, Coke & Coal Company on or about the 21st day of March, 1888." It will thus be seen that the contract between Bowersock and the gas company was carried out to the extent of furnishing the amount of water contracted to be delivered to the latter; and the agreement on the part of Bowersock that Johnston was to have his 25 horse power out of the quantity of water to be furnished the gas company (the latter company being required to provide its own penstock) constituted an election on the part of Johnston, acquiesced in by defendant in error, which dispensed with the necessity of Johnston putting in a penstock, or any mutual agreement concerning the same, as provided in the Cunningham contract. When Bowersock agreed that Johnston should have and enjoy the 25 horse power to which he was entitled out of the power Bowersock was to furnish to the gas company, there could be no necessity for the putting in of a penstock for Johnston's use, when it had already been provided for by the gas company.

The next contention of defendant in error involves a more serious question, concerning which there is much conflict in the authorities and a divergence of opinion between writers upon the subject. It involves the application of the fifth paragraph of the statute of frauds, which reads: "No action shall be brought whereby to charge a party * * * (5) upon any agreement that is not to be performed within the space of one year from the making thereof, * * * un-

less the agreement upon which said action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized." Section 6, c. 112, Gen. St. 1897. It is insisted that the verbal contract between Bowersock and Johnston, having provided that the latter should let Bowersock have and enjoy the said 25 horse power of water as long as the contract continued between the defendant in error and the gas company (which was for the period of 99 years), was an agreement not to be performed within the space of 1 year from the making thereof, and hence no action could be brought thereon. It will be well to refer to the exact language of the petition having reference to the verbal contract between the parties. It reads: "That on or about the 1st day of May, 1888, the said plaintiff entered into an oral agreement with the said Bowersock, by the terms of which the said Johnston agreed with the said defendant, Bowersock, that he would take said twenty-five horse power which he was entitled to by reason of the contract entered into by the defendant, Bowersock, and the said W. B. Cunningham, by their contract on the 29th day of March, 1879; and the said Bowersock agreed that the said Johnston should have and enjoy the said twenty-five horse power to which he was entitled out of the horse power which he was to furnish the said Lawrence Gas, Coke & Coal Company, on or about the 21st day of March, 1888, which said contract aforesaid between the said plaintiff and the said defendant, Bowersock, was to exist and be in full force and effect as long as the contract between the said defendant, Bowersock, and the said Lawrence Gas, Coke & Coal Company continued." By reference to the statement it will be seen that, under the 99-year contract between Bowersock and the gas company, the latter reserved the right, if the generation of electricity and the distribution of electric light for use in the city of Lawrence should prove unprofitable, to have the contract cease and determine after giving three months' notice in writing. It is entirely possible that this contingency might have arisen within one year from the date of that contract. If the agreement might have been performed within the space of one year, its violation would support an action to charge the party guilty of its breach. The above section of the statute of frauds is not applicable to contracts which may be performed within the year. If the agreement might, consistently with its terms, be carried out within the year, although it may not be probable or expected that its performance will be accomplished within that time, it is not within the contemplation of the statute. In the case of Sutphen v. Sutphen, 30 Kan. 510-512, 2 Pac. 101, the plaintiff and defendant were father and son. The father was living on an 80-acre

tract of land. He owed his son \$250. By parol contract he sold his son the land for \$850. Two hundred dollars was paid in discharge of the debt, and the balance was agreed to be paid by the son as soon as he could earn it off the land, above what he needed for the support of his family. The son took possession of the land, and then refused to pay the balance of the purchase money. In an action brought by the father the above section of the statute of frauds was pleaded. Mr. Justice Brewer, in deciding the case, uses this language: "We remark again that a contract will not be adjudged void, by reason of the last prohibition in section 6 of the statute of frauds and perjuries, unless it affirmatively appears that, fairly and reasonably interpreted, it does not permit of performance within the year. The fact that very likely performance will require more than a year, or that performance is not completed within the year, does not invalidate it. Unless the court, looking at the contract in view of the surroundings, can say that in no reasonable probability can such agreement be performed within the year, it is its duty to uphold the contract. The presumptions are all in favor of validity. * * * For we think that it cannot be affirmed that performance within the year can be adjudged reasonably impossible. That many a farmer on less than 80 acres makes, over and above all family expenses, \$650 and more is a matter of common knowledge. Of course, many things affect the probable or possible earnings,—the number to be supported, the quality of the soil, the conveniences for farming, the proximity of the market, and many other matters." To the same effect, see *Railroad Co. v. English*, 38 Kan. 110, 16 Pac. 82; *Alken v. Nogle*, 47 Kan. 96, 27 Pac. 825.

We do not understand that counsel for defendant in error combat the doctrine confirmed in the cases referred to; but they contend that a verbal contract, to be valid, must be capable of entire performance within the year, and that a possible discontinuance or abrogation of the contract by the act of the parties would not be a performance, but a destruction, of the agreement. Their position is in accord with that taken by the supreme court of the United States in the case of *Packet Co. v. Sickles*, 5 Wall. 588, 18 L. Ed. 550. In that case the court had before it a verbal contract in which the plaintiffs agreed with a steam-packet company to attach to its boat, the *Columbia*, the *Sickles* "cut-off," a patented article which was designed to save fuel in the working of steam engines, and it was agreed that, if the "cut-off" should effect a saving in the consumption of fuel, the defendant would use the same on its boat "during the continuance of the said patent, if the said boat should last so long," and that they would, for the use of the "cut-off," pay the plaintiffs three-fourths of the value of the fuel saved. The patent had 12 years to run from the date of the contract. The experi-

ment was made, and proved successful, and plaintiffs sued to recover for the value of three-fourths of the fuel saved from November, 1844, to March, 1846. The defendant set up that the contract, being an oral one, was void, for the reason that it could not be performed within one year. It was held that the possibility of the determination of the contract by the loss or destruction of the boat, which might occur within the year, did not make the agreement any less a contract not to be performed within one year. In a later case of *Warner v. Railway Co.*, 164 U. S. 418, 17 Sup. Ct. 147, 41 L. Ed. 495, Mr. Justice Gray, speaking for the court, in an exhaustive opinion reviews a large number of English and American decisions since the enactment of the statute of frauds in 1677, and states that it may be well doubted whether the rule laid down in *Packet Co. v. Sickles* can be reconciled with the terms of the contract itself or with the general current of the authorities. In *Reed, St. Frauds*, § 201, it is said: "It has been a question whether a contract for a fixed period greater than one year is not within the statute of frauds, notwithstanding the fact that each party may terminate the agreement at any time. It is also a point of much doubt whether a contract for such a fixed time, but determinable by the death of either party, is or is not within the statute. To take up the former point it may be said that the weight of American authority is probably in favor of putting contracts for a fixed period in the same category as those in which no time is designated, if determinable upon any contingency *infra annum*. Thus, a contract for two years, or until \$500 profit is made, is not within the statute; so a license to cut trees at any time within ten years; so a contract to serve for five years, or as long as L., a certain person, was agent,—that is to say, to serve as long as L. was agent, but not longer than five years; so a promise to pay when a certain third person paid promisor, and this, though the latter debt was not due for more than a year, because the third person might pay before the debt was due. These cases show a contingency not under the control of the parties, and are therefore strictly not within the special class under consideration." Moreover, the performance of a contract can be nothing more than a carrying out of its terms,—an adherence to its provisions,—and, if a termination of it be authorized by the language employed by the parties, then, said termination being permitted, the exercise of the right so to do is certainly not a breach of the contract upon the part of the party asserting the right to abrogate it, and, if not a breach, it must be a performance. If the contract permits its destruction by the parties, that destruction is merely carrying out the terms of the agreement, and nothing more. *Blake v. Voigt*, 134 N. Y. 60, 31 N. E. 256; *Railway Co. v. Wood*, 88 Tex. 191, 30 S. W. 859, 28 L. R. A. 526. The contingency that the written contract before us might be terminated within the year was within the ex-

pressed contemplation of the parties to it at the time it was made, and hence was as much a part of the contract as any other portion of the same.

Counsel for defendant in error state the rule to be that if an event which may happen within the year, whereby the contract will be performed, is beyond the control of the parties, then the statute does not apply; otherwise, it bars the action. In this case it will be noticed that the event which would work a discontinuance of the written contract (which, as above stated, would, in our judgment, be a performance of its stipulation) is not within the control of either party to the verbal agreement now under consideration entered into between Bowersock and Johnston. Under the written contract between Bowersock and the gas company, the latter alone has the right to discontinue the same upon giving three months' notice. The termination of the verbal agreement sued on is not made dependent upon any act or option of either of the parties to it, but of a stranger, namely, the gas company.

The contention that the contract between the parties is without consideration is untenable. Mutual and concurrent agreements and promises are alleged to have been made between plaintiff and defendant. Johnston was the owner, under the Cunningham agreement, of 25 horse power of water, which he had the right to take from one of the openings in the dam flume built at the time the agreement was entered into. It is true that he agreed to use such power as not to interfere unnecessarily with the power then in use by Bowersock, or the power which might thereafter be utilized; but we do not interpret the agreement to mean that Bowersock was under no obligation under the Cunningham contract to furnish the 25 horse power if it interfered with the power then or thereafter to be utilized by the former. The conduct of Bowersock, also, in making payments to Johnston, indicated a different construction placed upon the agreement by him than that now contended for.

The claim that the water conveyed was an estate or interest in lands, and hence must be conveyed by deed, is without merit. In *Wood v. Fowler*, 26 Kan. 682, it was decided that title to the soil over which the Kansas river flows is not vested in the riparian owner, and that the stream is a highway, and its waters public. It was there held that the title to ice formed on the surface of that river did not belong to a riparian proprietor, and that he would have no more ownership in it than he would have to the fish which swam in the stream. The water in the river not being a part of Bowersock's real estate, his possessory right to a part of the same, accumulated by the dam built by him, was in a sense a reducing personal property to possession, much like the collection of a crop of ice; and the transfer of the water or ice so accumulated is not required to be by deed. The authorities cited to sustain the contention of defendant

in error relate to streams not navigable, flowing through and over lands where the title to the soil under the water is in the riparian owner, and where the public have no rights. In *Wood v. Fowler*, supra, the learned justice delivering the opinion said: "The title to the soil being in the state, and the stream being a public highway, obviously the ownership of the ice would rest in the general public, or in the state as the representative of that public. The riparian proprietor would have no more title to the ice than he would to the fish. It simply is this, that his land joins the land of the state. The fact that it so joins gives him no title to that land, or to anything formed or grown upon it, any more than it does to anything formed or grown upon the land of any individual neighbor." See, also, *Ice Co. v. Shortall*, and note, 21 Am. Law Reg. (N. S.) 313; Ang. Water Courses (5th Ed.) § 94.

The judgment of the court below will be reversed, with directions to overrule the demurrer to the petition. All the justices concurring.

(62 Kan. 193)

ANTHONY INVESTMENT CO. v. LAW et al.

(Supreme Court of Kansas. July 7, 1900.)

MORTGAGE NOTE — ENFORCEMENT — LIMITATIONS — DISMISSAL OF ACTION — NOTE — PAYMENT BY GUARANTOR.

1. The holder of a promissory note secured by mortgage upon real estate may ignore the mortgage, and bring his action on the note alone; and the fact that the mortgagor may have sold the mortgaged property to another, subject to the payment of the mortgage debt, will not affect the right of the holder of the note to pursue the personal remedy against the maker.

2. Before the statute of limitations had run upon notes, an action thereon was begun, which was thereafter, and before trial, dismissed without prejudice. During the pendency of the action the notes were transferred to another. An action thereon was brought more than five years after maturity, but within one year after the dismissal of the former suit. *Held*, that the right of action thereon was not barred, and that it is preserved to the transferee, under section 23 of the Code of Civil Procedure, the same as it would have been to the payee of the note.

3. Upon default of the makers, the guarantors of the notes advanced the money required for payment, and took them up uncanceled. *Held*, that such payment did not extinguish the debt of the makers, and that the guarantors were entitled to recover from them the money so advanced and paid.

(Syllabus by the Court.)

Error from court of appeals, Southern department, Central division.

Action by the Anthony Investment Company against Leroy Law and Dora Law. Judgment for defendants was affirmed by the court of appeals (58 Pac. 1116), and case certified. Reversed.

A. C. Richardson (S. W. Shattuck, Jr., of counsel), for plaintiff in error. W. S. Cade, for defendants in error.

JOHNSTON, J. This was an action to recover on four interest coupon notes, each for

the sum of \$42, executed by Leroy Law and Dora Law. On April 1, 1887, the Laws borrowed \$1,200 from the Farmers' Loan & Trust Company, and executed a promissory note for that amount, with 10 interest coupon notes, each for \$42, maturing semiannually. They also executed a mortgage upon a tract of land to secure the payment of these notes. At the same time they executed three additional notes, each for \$40, secured by a second mortgage on the same land, payable to an officer of the company. The \$1,200 note and coupons, as well as the mortgage, were sold and assigned to Henry Waitt. Shortly afterwards the Laws conveyed the mortgaged land to John G. Kensley, who assumed the payment of the indebtedness. When the first four interest coupon notes became due they were not paid by the Laws nor by Kensley, and the Farmers' Loan & Trust Company, which had guaranteed the payment, paid the same, and they were delivered to it by the holder, uncanceled. Afterwards, and in 1889, the second mortgage on the land was foreclosed, and a sale of the same ordered, subject to the first mortgage. Default was made in the payment of the taxes, and the land sold for taxes, and it was subsequently conveyed to Emma L. Waitt by tax deed. In 1890 the Farmers' Loan & Trust Company made a general assignment for the benefit of its creditors, and the assignees took possession of the assets of the company. In May, 1892, Henry Waitt commenced an action against the Laws, the Farmers' Loan & Trust Company, its assignees, and other parties, to recover upon the \$1,200 note, and to foreclose the mortgage given to secure its payment. The assignees of the Farmers' Loan & Trust Company set up and asked judgment on the four interest coupon notes for \$42 each which they had been required to pay. The action brought by Henry Waitt was dismissed by him on January 5, 1894, and the action of the assignees upon their answer and cross petition against the Laws was also dismissed, without prejudice. While that action was pending, the assignees, by authority of the district court, sold the assets of the Farmers' Loan & Trust Company, including the four interest coupon notes in controversy, to the Anthony Investment Company. On September 13, 1895, the company last named commenced an action against Leroy and Dora Law before a justice of the peace, to recover on the four interest coupons heretofore mentioned, and a judgment was obtained by the company for \$131.88. An appeal to the district court was taken by the defendants, and the case was there tried upon an agreed statement of facts, which resulted in a judgment in favor of the defendants. That judgment was affirmed by the court of appeals, and the case was certified to this court for review.

The grounds for the decision of the district court are not stated, and no reasons for the affirmance of the judgment were given by the court of appeals. The execution of the notes

was not denied, and no claim was made that they had been paid by the defendants, who were the makers of the same. One contention is that, the makers having sold the land subject to the mortgage debt, no action could be maintained against them for a personal judgment before the foreclosure of the mortgage securing the notes. The debt represented by the notes is the primary obligation, and the mortgage a mere security for its payment. The holder of a note may, at his option, ignore the security, and bring his action on the note alone, and the fact that the mortgagor has sold the mortgaged property to another, subject to the mortgage debt, does not affect the right of the holder to pursue the personal remedy. *Lichty v. McMartin*, 11 Kan. 565; *Jones, Mortg.* § 1220. The fact that the purchaser of the property assumed the mortgage debt does not affect the personal liability of the makers of the notes, unless there has been an agreement to release them; and no release is claimed.

Another contention was that the action was barred by the statute of limitations because it was commenced more than five years after the maturity of the notes. In the action, which was brought in 1892, to recover upon the \$1,200 note and to foreclose the first mortgage, the notes in controversy were set up and judgment claimed thereon by the assignees of the loan and trust company. They were not barred when judgment was asked upon them in that action, and, it being dismissed without prejudice, the notes were brought within the saving clause of section 23 of the Civil Code, wherein it is provided that if any action be commenced within due time, and the plaintiff fail in such action otherwise than upon its merits, and the time limited for the same shall have expired, the plaintiff may commence a new action within one year after such failure. The present action was begun within one year after the dismissal without prejudice, and is therefore in good time. The fact that there was an assignment of the notes, and that they were transferred during the pendency of the action, did not take them out of the saving clause referred to, and the right of action is preserved to the assignee for a year after the failure of the action, the same as it would have been to the payee of the notes. *McWhirt v. McKee*, 6 Kan. 412; *Shively v. Beeson*, 24 Kan. 352; *Thornburgh v. Cole*, 27 Kan. 490. Nor was their right affected by the fact that other parties were also defendants in the first action. The two actions, although not identical in form, were substantially alike, and in each case a personal judgment was sought upon the notes, and upon similar grounds of liability, so far as the defendants are concerned. *Hiatt v. Auld*, 11 Kan. 176.

The final contention is that the payment of the coupon notes by the Farmers' Loan & Trust Company to Waitt, the holder of the same, was an extinguishment of the debt, and released the defendants from liability. When

the coupon notes became due they were not paid by the defendants; the company, as guarantor, was liable for their payment; and to meet this requirement, and to protect its second mortgage, money for the payment of the same was advanced by it in accordance with its custom. It was not a mere intermeddling stranger, but, being a surety who had paid the debt of its principal, it was entitled to recover the amount paid from the principal. Having advanced the money and taken up the paper, the company was entitled to all the rights and remedies of the assignor against the defendants. Although there is a contention to the contrary, we think the petition in error sufficiently points out the errors complained of, and for these errors the judgments of the district court and of the court of appeals will be reversed, and the cause remanded, with directions to enter judgment in favor of the plaintiff for the amount claimed. All the justices concurring.

(62 Kan. 196)

CITY OF KANSAS CITY et al. v. GRAY et al.

(Supreme Court of Kansas. July 7, 1900.)

PUBLIC IMPROVEMENTS—PETITION—SUFFICIENCY—ASSESSMENT.

1. A petition for paving one of the avenues of a city of the first class was presented to the mayor and council under the provisions of section 171, c. 32, of the General Statutes of 1897. Property having a frontage on the avenue was signed for thus: "The City of Kansas City, Kansas, R. L. Marshman, Mayor, 400 feet." Said property was in fact public ground, known as "Huron Place," the fee title of which was in the county. Without this 400 feet, the petition would have been insufficient to confer jurisdiction upon the mayor and council to order the improvement. *Held*, that as the petition did not disclose that said property, having a frontage of 400 feet on the avenue to be paved, was not owned by the city, after the petition had been granted and spread upon the journal of the council, and after 30 days had elapsed from the time the amount of the assessment due on each lot for the cost of the paving had been ascertained, an action brought to enjoin the collection of the assessment was barred by the provisions of section 212, c. 32, of the General Statutes of 1897. *City of Kansas City v. Kimball*, 56 Pac. 78, 60 Kan. 224, followed.

2. An estimate of the city engineer of the cost of the paving, being one of the steps in the assessment proceedings following the granting of the petition, is not open to attack for want of detail after the period of limitation prescribed by statute above cited has elapsed.

Doster, C. J., dissenting.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; W. G. Holt, Judge.

Action by R. M. Gray and others against the city of Kansas City and others. Judgment for plaintiffs. Defendants bring error. Reversed.

This was an action commenced in the court of common pleas of Wyandotte county by R. M. Gray and 14 others, owners of property abutting on Ann avenue, in Kansas

City, Kan., against the city, the city clerk, county clerk, and county treasurer, to enjoin the collection of certain special assessments levied against their real estate for the purpose of paving Ann avenue from Sixth to Tenth street. The petition, when granted, spread upon the journal of the council, and acted upon, was as follows:

Petition for improvement: "To the Honorable Mayor and Councilmen of the City of Kansas City, Kansas: We, the undersigned resident property owners, owning real estate described opposite our names, would most respectfully petition your honorable body to curb with artificial stone, and pave with vitrified brick (Diamond brand), 30 feet wide, on a four-inch concrete foundation, with Portland cement grouting, Ann avenue, from Sixth to Tenth streets, said pavement not to cost to exceed \$1.30 per square yard, at the cost of the owners of the land liable for the cost thereof, as provided by law:

ed spread on the journal September 21st, 1897. Journal G, page 105."

Thereafter a declaratory resolution was adopted by the mayor and council, as follows:

"Be it resolved by the mayor and councilmen of the city of Kansas City: That it is hereby declared to be necessary to curb with artificial stone, and pave with vitrified brick, Diamond brand, thirty feet wide, on a four-inch concrete foundation, with Portland cement grouting, Ann avenue, from Sixth to Tenth streets in the city of Kansas City; said pavement not to exceed in cost \$1.30 per square yard; all at the cost of the owners of the land liable for the cost thereof, as provided by law. Adopted in council Sept. 21, 1897. Geo. E. Yeager, City Clerk. (First published Sept. 24, 1897. K. O. Gazette.)"

The estimate of the engineer, submitted to the council before the contract for the paving was awarded, is as follows:

"City Engineer's Office. Kansas City, Oct.

Names.	Lot.	Block.	Addition.	Front F.
M. A. Randles.....	19, 20	150	Northrup Part	50
Saralina Barker.....	21, 6	10	" "	25
J. H. Linsley.....	45, 46, 47, 6 ft. of 48	189	" "	51
Lissie F. Harrison.....	41, 42	159	" "	50
R. M. Davies.....	17, 18	151	Old City	50
George Mack.....	12	151	" "	25
Frank Sitterman.....	6, 7	144	Northrup's Part	50
Wm. Thompson.....	14	151	" "	25
Wm. Thompson.....	22, 23, part 24	150	" "	50
L. J. Thompson.....	14	151	Northrup's Part	25
Sam Packer.....	11	151	" "	25
Board of Education of Kansas City, Kansas, by W. E. Barnhart, Pres.				
Mrs. M. E. Widener.....	1/2 part 6	150	Wyandotte City	150
L. A. Chapman.....	50 & W. 20 ft. 51	139	Northrup's Part	45
Tim Warren.....	39 & W. 1/2 of 40	137	" "	27.50
Kittie Colwell.....	15, 15	151	Wyandotte City	50
John J. Grueneger.....	21, 22	151	" "	50
John J. Grueneger.....	16, 17	148	" "	50
Mrs. K. Grueneger.....	15, 7, E. 1/2 of 17	150	" "	27.50
Annie M. Pratt.....	49, 7, E. 19 ft. 43	139	Northrup's	44
E. C. Long.....	37, 38	137	" "	50
W. P. Grueneger.....	14, 15	150	" "	50
John H. Studt.....	18, E. 1/2 of 17	150	" "	27.50
John H. Studt, Jr.....	7, 8	150	" "	50
John Cosgrove.....				
Caroline Belaker.....	1, 2, 3, 4, 5	148	" "	125
Kansas City University, by J. S. Chick, Vice Pres.....	4, 5, 6	137	Northrup's	125
The City of Kansas City, H. L. Marshman, Mayor.....				40
Matilda Keeney.....	37, 38	138	Northrup's	50
Adolph Truesky.....	9, and 1/2 10	150	" "	27.50
O. W. Shepherd.....	40, and W. 1/2 41	138	" "	27.50
Anna Hafner.....	19, 20	151	" "	50
Guert Trusky.....	23, 24		" "	50

Engineer's certificate: "State of Kansas, County of Wyandotte, City of Kansas City—ss.: I, Francis House, city engineer, do hereby certify that the within petition is signed by the owners of a majority of the front feet owned by residents abutting on Ann avenue between Sixth and Tenth street. Total number of front feet so owned, 3,520; total number signed, 1,982.50; majority, 445. Francis House, City Engineer."

Attorney's certificate: "State of Kansas, County of Wyandotte, City of Kansas City—ss.: I, T. A. Pollock, city attorney, do hereby certify that the within petition is in due and legal form, and is signed by the parties having a legal right to sign for the property set opposite their names, as shown by abstracts furnished by the city abstracters. T. A. Pollock, City Attorney."

Indorsed on back of petition: "Petition to curb and pave Ann avenue between Sixth street and Tenth street. Granted and order-

ed 19, 1897. To the Honorable Mayor and Councilmen of the City of Kansas City: I herewith submit the following estimate for paving with vitrified brick and curbing Ann avenue from Sixth to Tenth street:

Kind of Work.	Sq. Yard Paving.	Estimate of Cost.	Lin. Ft. Curbing.	Total.
	10,000	\$1.30		\$13,130 00

"I, Francis House, city engineer, do solemnly swear that the above estimate is true and correct, to the best of my knowledge. Francis House, City Engineer."

"Subscribed and sworn to before me this 19th day of October, 1897. Geo. E. Yeager, City Clerk. [Seal.]"

Part of the facts incorporated in an agreed statement made between the parties contained the following: "(9) * * * That the above-entitled action was not commenced until more than thirty days after the time when the amount of the assessments complained of by the several plaintiffs was ascertained,

levied, and fixed by ordinance of the city of Kansas City, Kansas, duly enacted and published as provided by law."

It is alleged in the petition upon which this case was tried that the petition to the mayor and council, above set out, was not signed by the owners of a majority of the front feet, owned by residents of said city, fronting or abutting on Ann avenue from Sixth to Tenth street, and the same was invalid and insufficient to confer jurisdiction upon the mayor and councilmen to make said improvement; that the estimate was not in detail, as required by law. The city pleaded, among other things, the 30-days statute of limitations. Under the agreed statement of facts, the only questions submitted to the trial court related to the sufficiency of the petition of property owners asking for said paving, and the validity of the estimate made by the city engineer, and the controversy was restricted to these two propositions. The court below sustained the contention of defendants in error, and a decree was entered perpetually enjoining the collection of said special assessment taxes levied for paving, and charged against the real estate of the plaintiffs below. The city of Kansas City, Kan., has brought the case here for review.

T. A. Pollock, City Attorney, and F. D. Hutchings, City Counselor, for plaintiffs in error. E. S. Earhart and J. O. Rankin, for defendants in error.

SMITH, J. (after stating the facts). There is nothing in the record before us which distinguishes this case from that of *City of Kansas City v. Kimball*, 60 Kan. 224, 56 Pac. 78. So far as the petition to the mayor and council is concerned, it shows a conformity to the provisions of section 171, c. 32, of the General Statutes of 1897. There is a certificate by the city engineer (to which officer we presume the petition was submitted) stating that the same is signed by the owners of a majority of the front feet, owned by residents, abutting on Ann avenue between Sixth and Tenth streets, and a further certificate by the city attorney showing that the petition is signed by the parties having a legal right to sign for the property set opposite their names, as shown by abstracts furnished by the city abstracters. These certificates, with the petition, were before the council when the prayer of the property owners was granted. The certificate of the engineer shows the total number of front feet owned by resident property owners to be 3,520; total number signing, 1,982.50; majority, 445. There is error in this calculation, in that the majority should be 222.50.

The principal attack made on the validity of the petition for paving is based upon the fact that Huron Place, having a frontage of 400 feet on the avenue to be paved, was dedicated for public purposes on September 28, 1859, and that the mayor, representing

the city, was without authority to join with the other petitioners. It will be seen that the 400 feet signed for by the mayor does not appear, upon the face of the petition, to be the property known as "Huron Place." This fact was shown by evidence allunde the petition to the council. We are concerned here only with the question whether the petition to the council praying for the improvement contained evidence on its face showing that it did not conform to the statute requiring that the same must be signed by the resident owners of a majority of the feet fronting, abutting upon said street to be improved. In *City of Kansas City v. Kimball*, supra, Mr. Chief Justice Doster, speaking for the court, said: "The defendants in error not having commenced their action within the statutory period, the remaining questions are easy of disposal. The law did not require the petition to the mayor and council for the making of the improvements in question to show upon its face that it was signed by the resident owners of a majority of the front feet to be paved. *City of Argentine v. Simmons*, 54 Kan. 700, 39 Pac. 181. The fact, if it were such, that the resident owners of a majority of the front feet did not in reality sign the petition, did not appear upon it or upon other proceedings. Upon the face of the petition and other proceedings, nonconformity to the law did not appear. In such cases the validity of the assessment cannot be challenged beyond the limited period allowed by the statute for so doing. *Doran v. Barnes*, 54 Kan. 238, 38 Pac. 300." It is true that, if the 400 feet frontage of Huron Place be deducted, the petition lacks 177.50 feet of containing a majority of the front feet owned by residents of the city, but inquiry into this question cannot be made after the statute of limitations has barred the right to attack the validity of the assessment. It would be a matter of doubt, if the petition for the improvement showed upon its face that the property represented by the mayor was in fact Huron Place, the legal title to which is in the county, whether jurisdiction had been conferred upon the mayor and council to order the paving done, and contract therefor, at the expense of the property owners. Conforming, however, to the rule laid down in the case quoted from, we are not at liberty to hold that the 400 feet appearing thereon in the name of the city is the tract of land known as "Huron Place," and that the mayor was without power to sign therefor. We must look at the face of the petition. A city can take and hold a fee-simple title to real estate when the same is necessary for municipal purposes, and the petition to the council asking for this improvement does not disclose that the property signed for by the mayor was not so held. In *Doran v. Barnes*, 54 Kan. 238-241, 38 Pac. 300, 301, which was a case involving the levy of a paving tax in the city of Wichita, and the validity of

a petition therefor, the court said: "The mayor and council examined the petition. Upon the hearing thereof, they found that it was signed by the owners of a majority of the abutting front feet, even after omitting one hundred feet therefrom. With this omission, there was 3,398 feet represented. They ordered the petition spread upon the journal. At the time the amount due on each lot or piece of ground liable for the assessment was ascertained, all the proceedings relating to the paving and assessment were apparently regular and valid. We are, therefore, of the opinion that paragraph 590, Gen. St. 1939, is applicable, and that this action ought to have been commenced in the court below within thirty days from the time the amount of the assessment was ascertained." That some of the petitioners were nonresidents is not available to the plaintiffs below after the statute of limitations had run, such fact not appearing upon the face of the petition to the council. The estimate of the engineer, in our judgment, was sufficiently detailed to meet the requirements of the statute. It contained the number of square yards, the cost per square yard, and the total cost. The objection urged against the estimate is that there is no specification whether one or more layers of brick are to be used, and that there is no apportionment as to how much is chargeable to the abutting property or to the city at large. In the case of *Olsson v. City of Topeka*, 42 Kan. 709, 21 Pac. 219, the city proposed to pave a street with stone and asphalt, and the estimate made by the engineer of the cost of the improvements was as follows: "Paving 2,683 square yards, at \$2.85 per square yard, \$7,504.05." This was held to be in sufficient detail, and it corresponds substantially with the estimate in the case at bar. The statute does not require the estimate to state the amount chargeable to the city at large.

Furthermore, we think that section 212, c. 32, of the General Statutes of 1897, providing that no suit to set aside special assessments, or enjoin the making of the same, shall be brought after the expiration of 30 days from the time the amount due on each lot liable for such assessment is ascertained, does not permit an inquiry into the question whether the estimate in this case is or is not sufficiently detailed after that period. The suit to enjoin the collection of the assessments was commenced more than 30 days from the time the amount due for the paving on each lot was ascertained. The estimate of the engineer was one of the steps in the assessment proceedings which followed the granting of the petition of property owners presented to the mayor and council, and, if insufficient, it was shielded from attack by said statute after the 30 days had run. The question first to be determined in this case is whether the mayor and council obtained jurisdiction by a petition, regular upon its face, showing from its recitals that

the requisite number of resident property owners joined in the request for the improvement. This appearing, a defective estimate made by the city engineer, which, under the provisions of the statute, seems to be required for the information of the municipal authorities, cannot be shown to defeat the power to make the improvement after the time permitted by law to begin an action therefor has expired. It seems probable that, had an action been commenced in time, the property owners complaining of this assessment could have defeated the same; for then the range of their attack would have been much wider, and not confined to such narrow limits. Having waited too long, they are not now in a position to obtain relief. The judgment of the court below will be reversed, and a new trial granted.

JOHNSTON, J., concurring.

DOSTER, C. J. I dissent from the first paragraph of the foregoing syllabus and the corresponding portion of the opinion. I adhere to the decision made in *City of Kansas City v. Kimball*, 60 Kan. 224, 58 Pac. 78, but I deny the applicability of that case to the facts of this one. The face of the petition upon which the mayor and council took action in this case did not fail to show nonconformity to the law, but, on the other hand, it affirmatively showed nonconformity to it. The law requires the petition to be signed by "resident owners." Only by conceiving Kansas City as a resident owner of 400 feet of the property fronting on the street to be paved can the petition be upheld as not affirmatively showing nonconformity to the law. Of course, a city can be an owner of property within its own limits; and, for the purposes of the case in hand, we will say that the mayor and council were at liberty to regard it as the owner of the 400 feet in question, although the fact of ownership was in reality otherwise, as subsequently proved. They could not, however, regard it as a "resident owner," because that term, as used in the statute under consideration, means natural persons residing in the city, and perhaps private corporations domiciled there. I say this because the incongruity of classifying a sovereignty, for purposes of taxation, as among the residents of its own territorial limits, is too great to admit of the idea entertained by the majority of the court. If a city is a resident owner within its own limits, and hence qualified to sign a petition for the making of street improvements, it follows that all the regulations as to the making and collection of the assessments to pay for the improvements apply to it, as to private individuals, unless the statute elsewhere provides a different rule. The statute, however, makes no different provision as to it in relation to such matter. Again, if a city, for the purposes of a petition for street improvements, is a resident

owner, within its own limits, we have the anomalous spectacle of a municipality petitioning itself to make a municipal improvement whereby taxes upon its own property may be imposed, and for the nonpayment of which taxes such property may be sold and conveyed away from it. Again, the very statute which authorizes the making of the improvement upon the petition of resident owners authorizes such owners to remonstrate to the mayor and council against the making of the improvement, and also authorizes the mayor and council to consider and determine whether the improvement petitioned for is necessary to be made. Now, suppose the petition in this case had been signed by natural persons only, and that the city had joined with others in a remonstrance against the making of the improvement, as, upon the theory of its being a resident owner, it had the right to do; we would have been treated to the equally anomalous spectacle of a city formally remonstrating to itself against the proposed action by itself, and gravely considering its own remonstrance along with that of others in order to determine the action which it itself should take. The fact is, the statute contemplates the making of street improvements upon the petition, or the refusal to make them upon the remonstrance, of those who are the subjects of municipal authority, —those whose property may be taken in invitum to pay for the improvement, if made, or may go unburdened if not made; and it does not contemplate the sovereignty which itself determines the necessity for making of the improvement, and which levies and collects the taxes to pay for it, if made, joining with private individuals in setting in motion that machinery of the law which eventuates in the action taken. The precise question here involved was determined in accordance with the views above expressed in *City of Atlanta v. Smith*, 99 Ga. 462, 27 S. E. 696, and I think that the decision in that case is a sound precedent to follow.

(63 Kan. 175)

ALLEN et al. v. HOPKINS et al.

(Supreme Court of Kansas. July 7, 1900.)

ABSTRACTS OF TITLE—OFFICER—TITLE OF ACT—PRIVITY OF CONTRACT—BOND OF CORPORATION—CONSTRUCTION—LIABILITY OF SURETIES.

1. Chapter 1, Laws 1889. "An act for the protection of the records of the several counties of the state of Kansas, and regulating the business of abstracting in relation thereto," does not create the business of abstracting into a public office, nor constitute the abstractor a public officer.

2. The words "in relation thereto," constituting the final clause in the title to the above-mentioned act, are meaningless. Their use was a legislative inadvertence, and they should be eliminated in reading and construing the title to the act.

3. The above-mentioned act does not contain more than one subject, and the title to it, with the above-quoted meaningless clause eliminated, clearly expresses a single subject, and is

therefore not repugnant to article 2, § 16, of the constitution.

4. Findings of the jury quoted in the opinion, and held to show privity of contract between the parties.

5. A bond required by statute for purposes of public indemnity was given by a partnership composed of two members, the style of which was, "The Boyden Abstract Company." The body of the bond designated the partnership by such name and style, and it was signed in the same way. The partnership was also designated both in the body of the bond and by its signature as "principal." One of the partners signed the firm name to the bond by himself as "president," and the other attested it as "secretary." They both signed their individual names to the bond, but in the body of it designated themselves as "sureties." Held, that such instrument purported upon its face to be the bond of a corporation, and not of a partnership, and the matters above mentioned to be in the nature of recitals of the character of the obligation as a corporation bond, and that persons, not members of the partnership, who signed themselves as sureties on the bond, are estopped to deny the truth of the recitals.

6. Sureties liable on the bond of an abstractor of titles, to a purchaser of land, for the omission from the abstract of an outstanding mortgage on the land, are not discharged by an extension of time granted by the vendee to the vendor to make good his covenants of warranty against incumbrances contained in his deed.

(Syllabus by the Court.)

Error from district court, Reno county; M. P. Simpson, Judge.

Action by Daniel T. Hopkins and others against F. S. Allen and others. Judgment for plaintiffs. Defendants appeal. Affirmed.

Leland & Harris and Madden & Buckman, for plaintiffs in error. G. P. Alkman, John D. Milliken, H. Whiteside, and Hamilton & Leydig, for defendants in error.

DOSTER, C. J. This was an action upon a bond, required by statute, of a firm of persons engaged in the business of making abstracts of real-estate titles. A verdict and judgment were rendered for the plaintiffs, to reverse which the defendants have prosecuted error to this court.

The first claim of error involves a question of jurisdiction, under the statute, over the defendants; and the second one involves the construction of the statute, and the application of a constitutional provision to it. The act in question is chapter 1, Laws 1889. In order to a consideration of the claims of error mentioned, the title and first section of the act are quoted, and a summary of other sections given.

"An act for the protection of the records of the several counties of the state of Kansas, and regulating the business of abstracting in relation thereto.

"Section 1. It shall be unlawful for any person, firm or corporation to engage in the business of abstracting, or make abstracts of title to real estate in any of the counties of the state of Kansas, without first having executed and filed with the clerk of the county in which said person, firm or corporation intends

to engage in the business of abstracting, a bond, to be approved by the board of county commissioners of said county, with three or more good and sufficient sureties, in the penal sum of five thousand dollars, conditioned that they will properly demean themselves in the business of abstracting, and will in no way mutilate, deface or destroy any of the records of the several county offices to which they may have access, and that they will not in any way interfere with, hinder or delay the several county officers in the discharge of their duties while using said records in the prosecution of said business of abstracting: provided, however, that the records shall in no case be taken from the county office to which they belong. The person, firm or corporation who shall execute and file said bond of five thousand dollars for said purpose, shall be liable on said bond: First, to the state of Kansas; second, to any person who shall be in any way damaged by any mutilation, injury or destruction of any record or records of the several county offices to which he or they may have access, to the amount of damage actually done said person; and third, said person, firm or corporation shall be liable on said bond to any person or persons for whom he or they may compile, make or furnish abstracts of title, to the amount of damage done to said person or persons by any incompleteness, imperfection or error made by said person, firm or corporation in compiling said abstract. And the filing of said bond shall be a guaranty of the good faith and responsibility of said person, firm or corporation engaged in said business of abstracting."

Section 2 provides that, upon the filing of the bond required by section 1, the abstractors shall have access to the various county records, under the supervision, however, of the county officers having the custody of such records, and that, while using the records for their purposes, such abstractors shall be under the same obligation as the officers themselves to protect and preserve them, and shall be subject to the same penalties as those to which the officers are subject for a violation of duty in respect to their care. Section 3 provides that no one shall engage in the business of abstracting without first executing and filing the bond required by section 1, and that all persons who engage in the business of abstracting without having first executed and filed the bond shall be deemed guilty of a misdemeanor, and shall be refused the use of the county records. Section 4 provides that county officers who refuse the use of their records to abstractors who have given the required bond shall be deemed guilty of a misdemeanor.

The bond sued upon was given by a firm of abstractors in Butler county, and, as required by statute, was approved by the board of commissioners of that county. The suit, however, was brought in Reno county. Objection was made to the jurisdiction of the court in Reno county upon the ground that actions

upon bonds given under the above-quoted statute are not transitory, but are local to the county where the bond is filed and approved. This claim is predicated upon the theory that the statute creates the business of abstracting into a public office, and makes the abstractor a public officer, and the bond given by him an official bond. If this claim be correct, the action was local to Butler county, because the Civil Code (Gen. St. 1897, c. 95, § 44) provides that actions upon official bonds and actions against public officers for acts done by them by virtue of or under color of their offices, or for a neglect of their official duties, shall be brought in the county where the cause of action, or some part of it, arose. Neither the cause of action sued upon, nor any part of it, arose in Reno county. The claim of lack of jurisdiction, however, is unfounded. The statute does not create the business of abstracting land titles into a public office, nor make the abstractor a public officer. It only confers upon abstractors a right of access to the public records, and this it does for the private benefit and advantage of the abstractor, and it requires of him security to the public against the loss or mutilation of the records, and security to individuals for whom he undertakes to compile abstracts. He performs no public duty. He occupies no position of public trust. He is simply required to abstain from acts of injury to the public while pursuing his private business vocation, and to indemnify private individuals who suffer loss on account of his wrongful or negligent acts.

Under the second claim of error, it is contended that the act in question contains two subjects, or that if it does not contain two subjects, but only one, such single subject is not clearly expressed in its title, and is therefore violative of article 2, § 16, of the constitution. One of these distinct subjects, it is said, is the protection of the public against interference by abstractors with the work of the county officers, and against the mutilation or destruction of the county records. The other subject, it is said, is the protection of private individuals against loss caused by errors or incompleteness in compiling abstracts. This contention is not sound. There is but one single subject contained in the act, to wit, the subject of abstracting from the county records, and the liability of those who pursue abstracting as a business. The general subject of the act is the liability of abstractors. The specific topics of this general subject are: First, liability in the use of the records, etc.; and, second, liability for errors and imperfections of abstracts when made. Every one, in the pursuit of a business vocation, takes on relations both to the public and to private individuals, and becomes liable both to the public and to private individuals as he may fail in the discharge of his duty to one or to the other. This duality of relationship, however, does not beget the necessity of separate statutory regulations. In such case there is an integral whole, to wit, liability in the

conduct of the business, of which liability to the public and liability to individuals are the elements or parts.

There being, therefore, but one subject in the act, the question next occurs, is that subject clearly expressed in the title? The title reads, "An act for the protection of the records of the several counties of the state of Kansas, and regulating the business of abstracting in relation thereto." The final clause in this title, "in relation thereto," confuses the question and renders it difficult. What is the meaning of that clause? In relation to what is the business of abstracting to be regulated? Is it to be regulated in relation to "the records," or in relation to "the protection of the records," or in relation to both? If the business of abstracting is to be regulated in relation to the records, or in relation to their protection, the liability of the abstractor to private individuals would seem to fall without the purview of the title, because the liability of an abstractor to a private individual for an incomplete or erroneous abstract would seem to bear no relation to the records from which the abstract was made, nor to the protection of such records. To discuss the possible meaning of the clause in question in relation to all the other clauses and to the words of the sentence would involve an undertaking in grammatical rather than legal criticism, which in the end would be fruitless. It is probable that grammarians would relate the clause "in relation thereto" to the preceding clause, "for the protection of the records," so that a reconstruction of such parts of the sentence as concern us would make them read, "regulating the business of abstracting in relation to the protection of the records." The fact is, however, that, whatever meaning grammarians might give to the final clause of the sentence, the law can give no meaning to it. It is but another instance of that inartistically phrased legislation with which the statutes abound,—legislation ordinarily honest enough in design, but so crude and bungling in forms of expression, and so violative of all rules of composition, as to be either impossible of comprehension, or impossible of execution according to its spirit and intent. In the case *In re Hendricks*, 60 Kan. 796, 57 Pac. 965, we were compelled to declare an entire act of the legislature invalid because of its contradictory and meaningless provisions. In *Landrum v. Flannigan*, 60 Kan. 436, 56 Pac. 753, we were compelled to interpolate into a statute, by construction, words not written there, in order to give to it a meaning which the obvious sense of its other provisions showed it possessed. In *Brook v. City of Blue Mound*, 61 Kan. —, 59 Pac. 273, we were obliged, in order to give meaning to the title of an act, to eliminate words which had been inadvertently used. We find ourselves compelled in this case to do the same thing again. The final clause of the title we are considering has no meaning. None can be given to it. We therefore elimi-

nate it, and read the title as follows: "An act for the protection of the records of the several counties of the state of Kansas, and regulating the business of abstracting." It is by no means a pleasant duty to thus rearrange the verbal phraseology of an act of the legislature, and it should not be done if the doing of it can be avoided; but there is often no way by which our duty to uphold and cause the execution of acts of the legislature can be performed without transposing, interpolating, and eliminating words and phrases so as to give effect to the obvious legislative intent. The act under consideration is one of most excellent design. The business of abstracting real-estate titles is an important and responsible one, requiring skill, discernment, painstaking research, and conscientious purpose. It is proper to make it a subject of legislative regulation, and yet the statute which seeks to accomplish the object is crude and bungling in effort. For instance, that part of it which specifies the conditions of the bond requires that the obligee will properly demean himself in the business of abstracting, and will in no way mutilate any of the records, etc., and will not in any way interfere with the county officers. If a common-law bond contained no other conditions than those, it would be difficult indeed to bring within its terms a case of damage to a private individual, occurring through incompleteness or errors in abstracting. It could not be done unless the making of an erroneous abstract should be regarded as a failure by the abstractor to "properly demean" himself in the business of abstracting. A subsequent portion of the statute, however, attaches to the bond a liability, on behalf of private individuals, for incompleteness or errors in abstracts made. But that liability ought to be expressed in terms, as one of the conditions of the bond. Again, the closing sentence of the first section reads, "The filing of the bond shall be a guaranty of the good faith and responsibility of said person, firm or corporation engaged in said business of abstracting." This provision is absolutely meaningless. It contains nothing within itself, is not expressive of any obligation enforceable in the courts, nor does it aid to an understanding of any of the other provisions of the act.

A statement of some of the facts of the case will be necessary to an understanding of the third claim of error. *Hopkins & Lamer* were the owners of mill property in Saline county. One *Newcom* owned a tract of land in Butler county. See & Wells were real-estate agents at Salina, Saline county. They were agents for both *Hopkins & Lamer* and *Newcom* for the sale of their respective properties, and they negotiated an exchange of these properties between the owners. They ordered an abstract of the title to *Newcom's* land from the defendants, a firm of abstractors in Eldorado, Butler county. This abstract was incomplete and erroneous. It failed to show an outstanding mortgage

of \$2,400. The exchange of properties was made by Hopkins & Lamer upon the supposition of the correctness of the abstract. Being damaged by its incorrectness to the extent of the mortgage, they brought suit against the abstract company. One of the defenses was lack of privity of contract between the plaintiffs and defendants. The contention of the defendants was that they had furnished the abstract to Newcom, the owner of the property the title to which they had abstracted, and not to Hopkins & Lamer, the owners of the mill property. If such were the case, it could not be said that privity of contract existed between the parties, and the defendants below, the abstract company, would not be liable. *Mallory v. Ferguson*, 50 Kan. 685, 82 Pac. 410; *Bank v. Ward*, 100 U. S. 195, 25 L. Ed. 621. However, the jury trying the case were asked and made answers to interrogatories as follows: "Q. Did See & Wells order the abstract as the agents of Lamer & Hopkins as well as the agents of Newcom? A. Yes. Q. Did See & Wells, as the agents of Lamer & Hopkins and also of Newcom, order the abstract for the purpose of enabling Lamer & Hopkins to investigate the title to the land? A. Yes. Q. (2) Did Hopkins & Lamer rely upon the abstract in question as delivered to See & Wells? A. Yes. Q. Did Hopkins & Lamer notify See & Wells that they expected them to see that the title they got was a good and perfect one? A. Yes. Q. If you answer No. 2 in the affirmative, state if See & Wells ordered the abstract in question by direction of both parties, in order to comply with the injunction of Hopkins & Lamer that they expected them to see to it that they got a good title. A. Yes. Q. Was the abstract in question ordered for the use and benefit of Hopkins & Lamer, with the intention that the same should be delivered to See & Wells, and that See & Wells might pronounce judgment upon the title for the benefit of Hopkins & Lamer? A. Yes." There was testimony to support these findings. They are therefore conclusive upon us. It is claimed, however, that the jury were influenced to make them by instructions erroneous and misleading in character. We have examined the instructions, and believe them to be correct in point of law, and not misleading in character. It would consume much time and space to set forth the instructions complained of, and show the error of counsel's views, without in the end elucidating any legal principle of consequence.

A statement of further facts will be necessary to an understanding of the fourth claim of error. The bond in suit was executed, filed, and approved by the county commissioners in 1889. It reads as follows: "Know all men by these presents, that the Boyden Abstract Company, of Butler county, Kansas, as principals, and Vincent Brown, Robt. H. Hazlett, F. S. Allen, M. H. Taylor, as

61 P.—48

sureties, are held and firmly bound unto the state of Kansas in the sum of five thousand dollars (\$5,000). The conditions of this bond are that, whereas, the Boyden Abstract Company aforesaid is engaged in the business of abstracting or making abstracts or titles to real estate in the county of Butler, state of Kansas: Now, therefore, if the Boyden Abstract Company aforesaid shall properly demean itself in the business of abstracting, and shall in no way mutilate, deface, or destroy any of the records of any of the county offices to which they may have access, and shall not in any way interfere with, hinder, or delay the several county officers in the discharge of their duties while using said records in the transaction of said business of abstracting, then this obligation to be void; otherwise, to remain in full force and effect. The Boyden Abstract Co., Principal, by F. S. Allen, Pres. Vincent Brown, Robt. H. Hazlett, F. S. Allen, M. H. Taylor. Attest: M. H. Taylor, Sec'y." The Boyden Abstract Company, for whom the above-quoted bond was given, was at the time of the execution of the instrument a partnership between F. S. Allen and M. H. Taylor. Before the liability accrued upon the bond, one Daniel Boyden became a member of the partnership, along with Allen and Taylor. In legal theory this change of membership worked a dissolution of the old partnership and the creation of a new one. Vincent Brown and Robert H. Hazlett, who had signed the bond as sureties for the Boyden Abstract Company, were unaware of the change of membership of the firm; and, as to themselves, they defended the action upon the bond upon the ground that the change of membership released them from their obligation as sureties. They say they became sureties, for F. S. Allen and M. H. Taylor only, and cannot be held for a liability incurred by the new firm of Allen, Taylor & Boyden. There might be some force in this contention if the facts were not peculiar and exceptional. It will be observed that the bond in question has all the appearances of a bond executed by and on behalf of an incorporated company. The principal is named as "The Boyden Abstract Company." The statute requires that names of corporations shall commence with the word "The," and end with the words "Corporation," "Company," etc. Gen. St. 1897, c. 66, § 8. The beginning and ending of the name of this association complies with the requirements of the statute as to corporations. In the body of the bond the Boyden Abstract Company is designated as principal, and the two partners composing it are designated as its sureties. The bond is signed: "The Boyden Abstract Company, Principal, by F. S. Allen, Pres. Attest: M. H. Taylor, Sec'y." And, in addition to such signature and attestation, both Allen and Taylor signed as sureties for the very concern of which they were the sole partnership members. It is unusual

for a partnership to have a president and secretary. These officers are usual only to incorporated companies, and it is certainly unusual for the members of a partnership firm to sign a contract obligation as sureties for themselves. No one looking at the above-quoted bond, and unacquainted with the facts, would suppose that the instrument was other than the obligation of an incorporated company, signed by its executive officers and by its sureties. It purports upon its face to be the bond of a corporation. The decisions are uniformly to the effect that institutions with names of a character like unto that of the concern in question will be understood to be corporations, in the absence of contrary knowledge. The name "The Thomas Harrow Company" fairly imports a corporation. *Seymour v. Thomas Harrow Co.*, 81 Ala. 230, 1 South. 45. The name "The Muskingum Manufacturing Company" implies a corporation. *Harris v. Manufacturing Co.*, 4 Blackf. 267. The name "The Cicero Hygiene Draining Company" denotes a corporation. *Draining Co. v. Craighead*, 28 Ind. 274. So, also, does the name "The Indianapolis Sun Company." *Indianapolis Sun Co. v. Horrell*, 53 Ind. 527. The character of the bond in suit as the bond of a corporation is represented so strongly on the face of the instrument as to amount to a recital of it as a fact. Such being the case, the sureties are estopped to deny that the principal for which they signed possesses the character it represented itself to have, and in which representations they joined to an equal extent. Sureties are favored in law, and they will not be held beyond the exact terms of the obligations signed by them; but, on the other hand they, like other classes of obligors, are estopped to deny the recitals of obligations signed by them. *Brandt. Sur.* § 42 et seq.

A further claim of error urged on behalf of the sureties is that the plaintiffs, *Hopkins & Lamer*, granted an extension of time, upon consideration, to the abstract company, the effect of which was to release them, as sureties, from their obligation. The facts were that, upon discovery of the error in the abstract, *Hopkins & Lamer* induced *Newcom*, who was liable upon the covenants of the deed to them, to give security against the outstanding mortgage before mentioned. This security was in the form of a second mortgage upon lands in another part of the state. The security turned out to be worthless. Nothing was realized upon it, but, if it had been otherwise, it cannot be said that an extension of time was granted to the abstract company. The extension was for six months, but it was to *Newcom*, and was of his liability alone. The security accepted was not even collateral to the liability of the abstract company, but was collateral to the liability of *Newcom* only. The rulings of the court below were all correct, and its judgment is affirmed. All the justices concurring.

BRIDGE v. MAIN ST. HOTEL CO. et al.

(Supreme Court of Kansas. July 7, 1900.)

APPEAL AND ERROR—AMENDMENT OF RECORD—PARTIES—JOINDER OF ADMINISTRATRIX OF DECEASED PARTY—PARTNERSHIP—RIGHTS OF SURVIVING PARTNER.

1. Plaintiff in error cannot amend the record filed by inserting therein an order of revivor against the administratrix of a deceased defendant, where the application to amend was not made until after the expiration of the time within which proceedings in error could have been originally commenced.

2. Proceedings in error will be dismissed where, at the expiration of the statutory period for the institution of proceedings in error, it appears from the record that a party to the judgment sought to be reviewed is not a party to the proceedings in error, though there is a waiver of summons in error by his administratrix, where no order of revivor of the judgment in her favor appears in the record.

3. Under Gen. St. 1897, c. 107, §§ 35, 36, providing that the administrator of a deceased partner shall manage the partnership affairs, unless the surviving partner shall file a bond, a proceeding in error to review a judgment in favor of a firm will be dismissed, where the administratrix of a deceased partner is not made a party defendant in error, and the surviving partner has not filed a bond for the administration of the firm's business.

Error from district court, Brown county; William I. Stuart, Judge.

Action by A. Alice Bridge against the Main Street Hotel Company and others for the recovery of a money judgment, and the foreclosure of a mortgage. There was a judgment in favor of plaintiff, subordinating her claim to the lien of the Horton Hardware Company, and she brought error. Defendants in error move to dismiss. Motion sustained.

Flansburg & Williams and *Jas. Falloon*, for plaintiff in error. *Jas. A. Clark, John, Rusk & Stringfellow, S. L. Ryan, C. W. Ryan, and C. W. Reeder*, for defendants in error.

PER CURIAM. This action was one for the recovery of a money judgment and the foreclosure of a mortgage. The judgment of the court below gave the plaintiff, A. Alice Bridge, a mortgage lien upon the premises second and subordinate to the lien of a partnership firm composed of *Walter H. Steele* and *John Dean*, doing business under the name of the Horton Hardware Company. The final judgment settling the priorities of the liens was rendered December 28, 1898. The case comes to us upon a transcript of the record. This record was not filed here until December 26, 1899, or within two days of the final limit for the commencement of proceedings in error. Intermediate the final judgment and the filing of proceedings in error in this court, to wit, February 11, 1899, *Walter H. Steele*, one of the partners in the Horton Hardware Company, above named, died, and his widow, *Mollie Steele*, was appointed administratrix of his estate. Proceedings to revive the

judgment in the name of the administratrix were seasonably begun, but, because of the disqualification of the judge before whom the motion for revivor was presented to hear such motion and make the necessary order (he having formerly been of counsel in the case), the revivor order was not made until November 6, 1899. It was then made by a judge pro tem. The order of revivor was not incorporated in the transcript of the record filed in this court. April 18, 1900, counsel for plaintiff in error filed in this court a motion to be allowed to amend and complete the transcript of the record by adding to it the revivor proceedings in the court below, and in connection therewith they made a showing of reasons for failure to file it in connection with the remainder of the record which would have been sufficient to justify us in allowing the amendment if in law it could have been made at that late day. The motion to amend was overruled for the reason that more than one year had elapsed since the entry of final judgment in the court below, and because the amendment of records by the insertion of material matter therein cannot be made beyond the statutory period for the commencement of proceedings in error in this court. The defendants in error now move to dismiss because of the lack of necessary parties defendant to the record at the time the case was filed in this court, or, rather, at the expiration of the statutory period for the institution of proceedings in error. This motion must be sustained. It is true that Mrs. Steele, the administratrix, was made a party defendant in this court; but she was not a party defendant to the case in the court below, or, rather, the record, which is that to which we can alone look, shows that she was not a party to it. A summons in error issued out of this court, and duly served upon a person not a party to the case below, or a waiver of summons in error by a person not a party to the case below, but who should have been made a party to such case, or in whose name the judgment of the court below should have been revived, are not substitutes for the necessary revivor proceedings.

It was suggested to us in argument that the estate and interests left by Walter H. Steele, deceased, were the estate and interests of a deceased partner, and that the surviving partner was by statute vested with the partnership estate, and allowed to control and represent its interests, and hence that Mrs. Steele, the administratrix, was not a necessary party in the court below, and that revivor proceedings in her name were therefore unnecessary. Whatever may be the general rule in such cases, the claim of counsel in this case is untenable, because it appears by the record that the surviving partner, John Dean, did not give bond as surviving partner. In such cases the law (Gen. St. 1897, c. 107, §§ 35, 36) vests the administration of the partnership estate in

the administrator of the deceased partner instead of the surviving partner. Hence it is clear that Mrs. Steele was a necessary party in the court below, and, of course, is an equally necessary party in this court. The motion to dismiss is sustained.

SAMUELS et al. v. BURNHAM et al.

(Court of Appeals of Kansas, Northern Department, E. D. June 15, 1900.)

REPLEVIN—PLEADING—APPEAL AND ERROR—TRIAL—INSTRUCTIONS—FINDING VALUE—TAKING WRIT AND RETURN TO JURY ROOM.

1. The fact that in a petition in replevin it appeared from the exhibits attached for the purpose of identifying the goods that a third person was at one time a purchaser of the goods does not render it necessary, in order to state a cause of action, that the inference of such sale be rebutted by an allegation of facts avoiding the effect of the sale.

2. An assignment that the court erred in admitting evidence of a fraudulent transaction as to property sought to be replevied cannot be considered, where no such exception was preserved in the record.

3. It is not error to refuse instructions not warranted by the evidence.

4. In replevin it is only necessary that the jury find the aggregate value of the goods, and no finding of value is necessary if the goods have been delivered to plaintiffs, and judgment is in their favor.

5. In replevin, where the articles enumerated in the petition and in the return of the sheriff were numerous, it was not error for the court to allow the jury to take to their room the writ of replevin and the officer's return, with the instruction that the only purpose for which they could or should use them was in determining what goods the sheriff had found and taken thereunder, since it would be impossible for the jury to remember the various items.

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Replevin by James R. Burnham and others against H. Samuels and others. Judgment for plaintiffs, and defendants bring error. Affirmed.

E. G. Wilson, for plaintiffs in error. Rosington, Smith & Histed, for defendants in error.

PER CURIAM. This was an action of replevin by the defendants against the plaintiffs in error to recover a quantity of merchandise. The allegations of the petition are that the plaintiffs are the owners of the goods, and are entitled to the immediate possession thereof, and that the defendants wrongfully detain them from the plaintiffs. The goods are described, and their value set forth, in the petition. The description, however, is by way of schedules or bills used by wholesale merchants, in which appears the name of M. Davidson as purchaser. There was a demurrer to the petition, which was overruled, and this action of the court constitutes the first assignment of error. The plaintiffs answered by general denial, except that the goods had been sold to M. Davidson. Defendants claimed the goods as mortgagees of M. Davidson. The goods had been sold and delivered by the

plaintiffs to M. Davidson, and this sale the plaintiffs ought to rescind upon the ground that the possession of the goods had been obtained from them by the fraudulent representations of Davidson. There was a trial to a jury, a verdict and judgment for the plaintiffs, and a finding of the value of the goods taken by the sheriff. About half of the goods sold and delivered were found and taken under the writ.

As heretofore stated, the first assignment of error is in overruling the demurrer to the petition. The argument of counsel under this assignment is that, inasmuch as it appeared incidentally upon the exhibits attached for the purpose of identifying or specifying the goods, M. Davidson was at some time a purchaser, it was necessary, in order to state a cause of action, that this inference should be rebutted by allegations of facts avoiding the effect of such sale; that, inasmuch as there were no such allegations of fraud in the procurement of the goods by Davidson, no evidence of such fraud could be admitted upon the trial. The petition states all that is necessary under the Code to constitute a cause of action in replevin. Upon a rescission of a sale procured by fraud, the vendor becomes the general owner, and not a special owner. So that the general allegation of ownership is sufficient. The petition stated a cause of action in replevin, and it was not error to overrule the defendants' demurrer thereto. *Holsington v. Armstrong*, 22 Kan. 110.

The second, third, and fourth assignments of error are grounded upon the insufficiency of the petition, and must fall with the first.

The contention that the court erred in admitting evidence respecting the fraudulent transactions of M. Davidson is not available to the plaintiffs in error. No such exception is preserved in the record.

The fifth assignment of error is in the court's refusal to give certain instructions. They were not warranted by the evidence. The only purpose that could have been subserved by giving them would have been to create confusion in the minds of the jury about questions not properly before them.

The sixth assignment of error is that the court gave certain instructions. This contention is based upon the first assignment of error, that the allegations of the petition were insufficient, and that the court improperly admitted evidence of fraud practiced by Davidson in the procurement of the goods in the first instance. That contention having been determined to be invalid, the sixth must likewise fail.

The seventh assignment of error is that the court instructed the jury that it was unnecessary for them to find the separate values of the various articles of goods in controversy, but to find the aggregate value. Under the provisions of the Code, the goods having been delivered to the plaintiffs in the action, and the verdict and judgment being for the plaintiffs, it was not necessary that a value should be found by the jury at all. In any event,

the aggregate value of the goods was all that it was necessary for the jury to find.

The ninth assignment of error is that the court permitted the jury to take with them to the jury room the writ of replevin and return of the officer, with the instruction that the only purpose for which they could or should use it was in determining therefrom what goods the sheriff had found and taken thereunder. It is contended that the mere permitting of the paper to go to the jury to be examined by them in their deliberations was error, and that the instruction of the court was erroneous. We can see no objection to what the court said to the jury in reference thereto. Its language is: "But this is not to be considered by the jury in any way or for any purpose except to determine what goods were taken and what goods were not taken." The enumerated articles in the petition and in the return of the sheriff were numerous,—were voluminous. In the very nature of things, it would be impossible for the jury to remember the various items. The purpose of introducing the return to the jury covered no more than this. It could cover nothing more.

The tenth assignment of error is that the verdict and judgment are not supported by the evidence. We are of the opinion that no other verdict could have been rendered upon it.

The eleventh assignment of error is that the judgment is excessive. This contention is without merit.

The eighth and twelfth assignments of error are that the court erred in overruling the motion of the defendants for a new trial. There was no error in the proceedings of the court that would authorize it or warrant it in awarding a new trial. The judgment is affirmed.

(10 Kan. A. 22)

HAGAN et al. v. SHERIDAN.

(Court of Appeals of Kansas, Northern Department, E. D. June 15, 1900.)

SUBROGATION — ESTOPPEL — MORTGAGE — EXTINGUISHMENT OF LIEN.

1. Hunt held a first mortgage on the land of H. H. Hagan. McHale held a second mortgage to secure to Sheridan the payment of the note made by H. H. Hagan as principal, and McHale as surety. This second mortgage is expressly subject to Hunt's. Frank Hagan held third mortgage. He took title to the land from H. H. Hagan, and was thereafter compelled to pay the Hunt mortgage to protect his title, taking an assignment thereof. Subsequently he conveyed the land to Lasswell. McHale assigned his mortgage to Sheridan, who seeks to foreclose. Frank Hagan was entitled to subrogation to the lien of the Hunt mortgage.

2. As against Sheridan, he was not estopped to claim the lien by his deed with covenants against liens to Lasswell, nor did his subsequent conveyances to Lasswell have the effect to extinguish this lien by a merger as between Sheridan and Frank Hagan and Lasswell.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; William Thomson, Judge.

Action by Charles Sheridan against H. H. Hagan and others. Judgment for plaintiff. Defendants bring error. Reversed.

G. C. Clemens, for plaintiffs in error.
B. H. Tracy, for defendant in error.

MAHAN, P. J. H. H. Hagan was indebted to the defendant in error upon a promissory note, upon which one McHale was surety. For the purpose of securing McHale against any loss by reason of such suretyship, Hagan mortgaged the land in controversy in this case to McHale. The mortgage is dated January 17, 1887. The note recited in the mortgage is dated May 5, 1884, due four months after date. This note was thereafter renewed several times, the last renewal being June 20, 1894, in the sum of \$1,388.90, including accrued interest. This mortgage was made expressly subject to a prior mortgage to one Hunt for \$600. November 12, 1897, McHale assigned his mortgage to the defendant in error, in consideration of being released from all liability as surety on the note which the mortgage was given to secure. November 18, 1887, H. H. Hagan conveyed to Frank Hagan the land in controversy and other lands, for an expressed consideration of \$5,000, subject to a mortgage held by him against all of the land for \$8,500. Thereafter Frank Hagan, to protect his title, was compelled to take up the Hunt mortgage, which, with interest, amounted to \$1,040, of which he took an assignment to himself. In 1897, just before the commencement of this suit, Frank Hagan conveyed all the land, including the land in controversy, to the defendant Lasswell, for a consideration of \$15,000. To Sheridan's action upon the McHale mortgage the Hagans and Lasswell answered, pleading payment. Frank Hagan further answered, setting up the facts before recited in relation to the Hunt mortgage, and his purchase of the property, and asking that he be subrogated to the lien of Hunt thereunder, and that he be decreed thereunder to have a lien prior to Sheridan's lien. Lasswell answered further, alleging his purchase from Frank Hagan, and that he, as grantor, was liable to make good the title to the land, but did not join in an allegation of the facts or a prayer for subrogation. Upon a trial to the court there was a finding that Sheridan had a first lien upon the land in controversy; that the mortgage lien set up by Hagan was extinguished and discharged before the commencement of the action; and that by reason thereof he had no right, interest, or equity in the premises, and was estopped from asserting any right therein. There was a personal judgment against H. H. Hagan upon the note, and a judgment for the sale of the property, barring the defendants. It is contended by Frank Hagan and Lasswell, who prosecute this petition in error, that they were entitled to be protected by subrogation to

Hunt's prior mortgage, and that the court erred in refusing them subrogation; and, second, that no cause of action as to the indemnity mortgage is stated in the petition in favor of Sheridan.

It seems very clear that there was no merger of the Hunt mortgage in the legal title acquired by Frank Hagan from the mortgagor. As between Frank Hagan and Lasswell, the covenants in Hagan's deed to Lasswell would estop him from setting up a lien under the Hunt mortgage. But as between Frank Hagan and Lasswell upon the one side, and Sheridan upon the other, there was no estoppel created by this deed. So that the finding of the court in this respect is not sustained by the fact, nor is its finding that this mortgage was discharged before the commencement of the suit sustained by the facts of the case. The only contention is that it was discharged because Frank Hagan had conveyed the land to Lasswell. Sheridan is not in the position at all to claim the benefits of the estoppel. He claims in antagonism to both Hagan's and Lasswell's right, and not under either.

Under the second assignment of error,—that is, that the petition states no cause of action,—it is contended: First, that the McHale mortgage was given simply to indemnify McHale, and not in express terms to secure the debt to Sheridan; and, second, that, because McHale was expressly released in consideration of the assignment of the mortgage to Sheridan, there was nothing left to which the condition of the mortgage could apply, and that, therefore, the land was discharged from the lien created by the mortgage, which fact was disclosed by the petition; and that no sufficient breach of the conditions of the mortgage was alleged, because the condition was that the mortgagor shall pay the note and the taxes, and it was not alleged that the defendant, failed to pay the taxes; and, fourth, that it appeared from the petition that the note,—the original note,—in existence when the mortgage was made, which was signed by Frank Hagan, as a co-partner of H. H. Hagan, had been thereafter replaced by a note of H. H. Hagan alone, with McHale as surety; that is, that there had been a complete novation. In the argument it was further contended that the condition of the mortgage upon its face showed it to be an impossible one,—impossible of performance,—in that the day of payment of the note had long since passed at the time the mortgage was made, and the mortgage provided that it should be paid according to its tenor and effect when due. We do not think that any of these objections ought to prevail, in view of the decisions of the supreme court of this state in *Seibert v. True*, 8 Kan. 52; *Same v. Thompson*, Id. 65. Sheridan was entitled, under the rule announced in these decisions, to the benefits of this security without assignment. What difference could it make in

the equity of the parties that Sheridan and McHale should resort to this short method of appropriating the securities to the payment of the debt, rather than by a proceeding against McHale as surety jointly with Hagan, and reaching the security through the equitable interposition of the court? In either event, McHale would be discharged. McHale, after having paid the note, could have resorted to the land for repayment. This was the express intention of the parties. It was further provided in the mortgage that H. H. Hagan should pay the debt to Sheridan, so that the burden was not increased by the assignment to Sheridan. His right was no greater or less than that of McHale. We do not believe that the principle announced in the case of *Lewis v. Lewis*, 58 Kan. 563, 50 Pac. 454, has any application to this case. We are of the opinion that the petition disclosed no novation. We cannot agree with counsel that the record discloses that Frank Hagan derived enough from the land to discharge all the liens on it at the time he took title, so as to bring the case within the principle announced in *Webb v. Meloy*, 32 Wis. 319.

The judgment of the court that the Hunt mortgage had been discharged, and that Frank Hagan and Lasswell were estopped from claiming subrogation thereunder, and, as a consequence thereof, barring them from any interest in the land, was erroneous, and for this reason must be reversed, and the case remanded for further proceedings.

KEITH v. THISLER et al.

(Court of Appeals of Kansas, Northern Department, W. D. Oct. 17, 1899.)

SALES—BREACH OF WARRANTY—LIABILITY OF THIRD PARTY—ACTION ON NOTE.

Where defendant bought a horse warranted to be sound, and gave his note therefor, which was indorsed to plaintiff before maturity, with notice of the warranty, and the horse proved unsound, but was not returned by the purchaser, the latter could not, in an action on the note, recover the damages suffered by the breach of warranty.

Error from district court, Graham county; C. W. Smith, Judge.

Actions by Thisler & Schneider and another against John Keith. The actions were consolidated. From a judgment in favor of plaintiffs, defendant brings error. Affirmed.

H. J. Harwi and W. M. Roberts, for plaintiff in error. G. W. Jones and R. H. Seeds, for defendants in error.

PER CURIAM. This action was brought by Thisler & Schneider, a co-partnership, for the recovery of the amount alleged to be due upon a promissory note in the sum of \$225, executed by John Keith to one Coder, and by him indorsed to plaintiffs. A trial was had which resulted in a verdict and judgment for defendant, Keith. The plaintiffs, as plaintiffs in error, brought the case

to this court, and the judgment was reversed, and a new trial ordered. 7 Kan. App. 363, 52 Pac. 619. While this case was pending, Thisler & Schneider brought an action against Keith and Coder on the other two notes. These actions were consolidated, and tried as one case. When the defendant had introduced his testimony, the plaintiffs interposed a demurrer, which was sustained. The defendant excepted, and brings the case to this court for review. For a statement of the case, see *Thisler v. Keith*, supra.

But one question is presented by the record and assignments of error, and that is, did the court err in sustaining the demurrer to the evidence? The defendant, Keith, filed an answer as follows: (1) A general denial. (2) That on the 4th day of April, 1893, he purchased from Coder a stallion for the sum of \$1,175, which he paid as follows: Cash \$500, and executed his three negotiable promissory notes, for the sum of \$275 each, with interest at 8 per cent. per annum, due August 1, 1894, August 1, 1895, and August 1, 1896. That the notes set out in plaintiff's petition are the notes aforesaid. That at the time of the purchase, as an inducement and consideration, Coder warranted and guaranteed the stallion to be sound, and a sure breeder and foal-getter. That defendant wholly relied upon the warranty in making the purchase, which Coder well knew. That the stallion was not sound, was not a sure breeder and foal-getter. That he was worthless as a breeder, and he was only of the value of \$100 for all purposes. (3) That, immediately after the delivery of the notes, Coder deposited them with the plaintiffs as collateral security for a prior existing indebtedness. That the plaintiffs are holders of the notes without value. That at the delivery thereof Coder informed the plaintiffs that the notes were executed by this answering defendant as a part of the purchase price of the stallion. That he further informed them that he warranted the stallion as aforesaid. That, in the event the stallion did not meet the requirements of the warranty, the notes were to be returned and canceled, together with the amount paid. The stallion did not meet the requirements of the warranty, which was well known to the plaintiffs and Coder prior to the commencement of this action. The notes nor any part of the \$500 were ever returned. That by reason of the premises this defendant has sustained damages in the sum of \$1,000, with interest from April, 1893. Wherefore defendant prayed judgment for the sum of \$1,000, with interest, costs of suit, and that the notes be canceled and declared void.

Where a party purchases property for a specific purpose, and the same is for that purpose warranted by the vendor, if the property fails to meet the requirements of the purchaser or the warranty the vendee has two remedies: He may, by returning the property, rescind the contract, and refuse

to pay the purchase price, or he may elect to stand upon the contract, and recover his damages,—that is, the difference between the value of the property for the purpose for which it was purchased and the actual value of the property received; and when he makes his election he is bound to pursue that remedy. He alleges that the horse was warranted to be sound, a sure foal-getter, and a good breeder; that the horse was not sound, nor was he a sure foal-getter or good breeder; and that the horse for all purposes was not worth to exceed \$100. We take it that this is an election upon the part of the defendant to recover damages upon the warranty. There is nothing in this answer indicating a desire or an attempt on the part of the defendant to rescind the contract. When the case was before this court we held that plaintiffs were not answerable in damages to defendant upon the warranty of Coder. There is nothing in the evidence tending to establish any fact necessary to constitute a rescission of the contract. The answer and the evidence offered by defendant tend to show the amount of damages sustained by reason of the horse not being suitable for the purpose for which he was purchased. We know of no principle of law by which plaintiffs would be held answerable in damages simply because they were the holders of defendant's notes with notice of the warranty. The notes were held by the plaintiffs below by indorsement for value before maturity. The only evidence of notice to plaintiffs of any possible claim of Keith as against the notes was that, upon failure of the warranty, the sale should be rescinded, and the purchase price of the horse, including the notes, returned. It was not claimed that any notice of a failure of the warranty or demand for a return of the notes was ever given or made, but, on the contrary, Keith kept the horse without complaint until long after the notes became due and suit instituted for the recovery thereon. His contract at the time of the purchase was for a rescission in case the horse did not fulfill the warranty. It appears to us that plaintiff in error could not, by neglecting to claim his rights by rescission, change his remedy to one for damages, and set off the same against the notes in the hands of the indorsees. The judgment must be affirmed.

(8 Kan. App. 751)

SHAFFER v. SCHOOL DIST. NO. 1 OF
GREELEY COUNTY.

(Court of Appeals of Kansas, Southern Department, W. D. Feb. 14, 1899.)

PLEADING—SUPPLEMENTAL PETITION.

Where an action is commenced on school-district warrants, and before trial the legislature passes an act legalizing the issue of the warrants sued on, *held*, that the passage of the act is a fact material to the proper determination of the case, and may be set up in a supplemental petition.

(Syllabus by the Court.)

Error from district court, Greeley county; J. E. Andrews, Judge.

Action by W. G. Shaffer against school district No. 1 of Greeley county. Judgment for defendant, and plaintiff brings error. Reversed.

J. U. Brown, W. M. Glenn, and Grattan & Grattan, for plaintiff in error. V. H. Grinstead and Geo. L. Reid, for defendant in error.

SCHOONOVER, J. This action was brought by the plaintiff in error in the district court of Greeley county on two school-district warrants issued by the defendant school district on October 1, 1891, payable to W. G. Shaffer, the plaintiff, in one year from date, in the sums of \$700 and \$50, respectively. The petition alleged the incorporation of the district, the due and regular issuing of the warrants by the officers of the district, and that the issue of the warrants was afterwards ratified by a school-district meeting, and that plaintiff was the owner and holder of the warrants; a copy of them being set out as a part of the petition. The defendant demurred to the petition, and the demurrer was overruled. At the July term, 1895, of court, and before the issues were made up, the plaintiff, by leave of court, amended his petition by filing a supplemental petition setting up the passage of an act of the legislature of 1895 entitled "An act legalizing the issue of certain school warrants therein named," being chapter 356 of the Laws of 1895, which act of the legislature was passed after the commencement of the suit. To that supplemental petition the defendant demurred, and the demurrer was sustained by the court.

The principal question in the case is, did the trial court err in sustaining a demurrer to the supplemental petition, showing the passage of an act of the legislature legalizing the issue of the warrants sued on? The title of the act in question is, "An act legalizing the issue of certain school warrants therein named." The act says, "and said warrants are made legal and valid claims against said school district." The school district had no power to issue the warrants. The legislature had the right to give it that power. Then, if there was an equitable obligation on the school district to pay these warrants, the legislature could pass an act legalizing them and making them valid claims against the school district; that is, it could put the school district in such a position that it could not plead *ultra vires* and avoid the warrants on the technical ground that it had no authority to issue them, when in fact it realized a benefit from the money for which they were issued. This act simply puts the school district in the same position that it would have been in had it been able to issue the warrants when it did so. They are legal on their face, in that the law may be read into them, and people looking at them can say they are

prima facie legal, because the school district had the authority to issue warrants for this purpose. The passage of the act legalizing the issue of the warrants sued on is a fact material to the case, arising since the filing of the original petition; and on notice, and on such terms as the trial court might prescribe, it was proper so to allege in a supplemental petition. The demurrer to the supplemental petition should not have been sustained. The plaintiff should have a trial on the warrants, the same as if the school district had the authority to issue them, subject to all legal defenses. Numerous errors are assigned, but for the reasons given the judgment of the district court will be reversed.

(8 Kan.App. 765)

FALK v. DECOU.

(Court of Appeals of Kansas, Southern Department, W. D. May 16, 1899.)

REPLEVIN—OWNERSHIP—CHATTEL MORTGAGE—DEFECTIVE DESCRIPTION.

1. *Held*, that an allegation of absolute ownership of the property in controversy is sustained by evidence which shows the plaintiff to be a chattel mortgagee in possession.

2. Possession by the mortgagee cures the deficiencies in the description of the mortgaged property.

3. "When a mortgagee takes possession of the future-acquired property under such a stipulation in the mortgage, he then holds the property by way of pledge, but in the same manner as though the mortgage had been executed at the time he takes possession of the property, and in the same manner as though he had taken the property under and by virtue of a chattel mortgage covering the property." *Cameron v. Marvin*, 26 Kan. 612.

4. The instructions complained of in respect to the burden of proof *held* not erroneous.

(Syllabus by the Court.)

Error from district court, Edwards county; S. W. Vandivert, Judge.

Action by Jacob Decou against Charles Falk. Judgment for plaintiff, and defendant brings error. Affirmed.

F. Dumont Smith, for plaintiff in error. Rossington, Smith & Dallas, Samuel Barnum and Adrian F. Sherman, for defendant in error.

MILTON, J. This was an action in replevin by the defendant in error against the plaintiff in error to recover the possession of 827 sacks of flour. The petition alleged that the plaintiff was the owner of 4,800 sacks of flour, embracing six different brands, as enumerated in the petition, which flour was stored in the mill and warehouse of the Kinsley Milling Company; that the flour was purchased by, and delivered to, the plaintiff on the 22d day of October, 1890; and that thereafter the defendant unlawfully and wrongfully took and detained possession of 827 sacks thereof, the same being of the aggregate value of \$1,245. The answer was a general denial. The case was tried to a jury, which returned a large number of special findings of fact. The verdict was for the plain-

tiff in the alternative, and the value of the flour was fixed at \$790. The judgment was in accordance with the verdict.

The basis of the plaintiff's claim of ownership was an instrument in writing, in form a bill of sale, and in the intention of the parties and in legal effect a chattel mortgage, given to the plaintiff by the Edwards County Bank on October 22, 1890, and filed for record the following day. It was signed, "Edwards Co. Bank, by L. G. Boise, Cashier." It was executed and delivered to secure past-due obligations given by the Edwards County Bank to the First National Bank of Larned, as well as an additional loan of about \$1,800 to the first-named bank at the date of the execution of the instrument. The Edwards County Bank was then, and for several years prior thereto had been, the entire owner of the property purported to be owned by the Kinsley Milling Company, although the title to the milling company's real property stood in the name of Fred I. Boise and W. L. Hobbs. L. G. Boise, as the representative of the Edwards County Bank, was the general manager of the milling enterprise, and Hobbs was in the employ of the bank, under the supervision of L. G. Boise. Fred I. Boise was in no way connected with the transaction herein mentioned. Hobbs was in charge of the operating of the mill. It was agreed between representatives of the creditor bank and Boise, for the debtor bank, that the mortgage should cover 4,800 sacks of flour then in the mill and warehouse. A count of the sacks of flour having shown the number to be 4,244, it was then agreed that enough flour from the wheat in the mill should be ground to bring the total number of sacks of flour up to 4,800, and the transaction was thereupon consummated on that basis. It was agreed that the Larned bank should take immediate possession of the 4,244 sacks of flour, and to this end the said bank appointed L. G. Boise as its agent to take charge of the flour, and gave him the following written authority: "Larned, Kan., Oct. 22, 1890. We hereby authorize L. G. Boise, of Kinsley, Kan., to sell and ship all the flour belonging to the First National Bank of Larned, all of said flour being stored in the mill and warehouse of the Kinsley Milling Company, Kinsley, Kan. All sales of said flour are to be made and the same shipped in the name of the First National Bank of Larned, Kan., and all bills of lading are to be made in their name, and forwarded to them by L. G. Boise, First National Bank of Larned, by J. W. Rush, President." Boise thereupon assumed to act as agent for the mortgagee, and exhibited the foregoing writing to Hobbs, and instructed him to continue the sale of flour as usual, subject to the said within instructions. The mill was operated for five or six days after the mortgage was given, and 600 or more sacks of flour were manufactured during that time, and placed with that on hand. On October 28th Boise testified that he agreed to sell two wagon loads of flour

in the sack to Falk, and so informed Hobbs. That quantity of flour was on the same day delivered by Hobbs to Falk. On October 28th, Hobbs delivered several hundred sacks of flour to Falk for the purpose, as stated by Hobbs himself, of satisfying a claim which Falk held against the milling company for wheat sold and delivered. Falk testified that he intended to give the milling company and the bank credit for the value of the flour he had received, and that he had not done so, and did not know the quantity of flour he had obtained. The record is silent as to the number of sacks of flour contained in the two wagon loads delivered on October 25th, and as to the value thereof.

Two of the special findings returned by the jury are as follows: "(3) Is it not a fact that at the time the defendant took the flour in controversy that the only possession of the same that the Edwards County Bank, the Kinsley Milling Company, L. G. Boise, and W. L. Hobbs, or either of them, had, was possession of the same as agent for plaintiff? A. Yes." "(6) Is it not a fact that the defendant, when he took the flour in controversy, took it for the purpose of converting it to his own use in payment of a claim he had against the Kinsley Milling Company or L. G. Boise or some other party? A. It is."

The first assignment of error is that the court erred in overruling the demurrer to the plaintiff's evidence. The point argued is that, whereas the petition and affidavit alleged that the plaintiff was the absolute owner of the property in controversy, the evidence showed a limited ownership thereof, since the bill of sale was merely a chattel mortgage. The case of Kennett v. Peters, 54 Kan. 119, 37 Pac. 999, is relied on as sustaining the contention. In the case cited the action was for conversion, and the petition alleged absolute ownership under a chattel mortgage. The supreme court held that the allegation of general ownership was not satisfied by proof of special ownership under the mortgage. Counsel for defendant in error answer this contention by pointing out that the mortgage in the present case was given to secure a past indebtedness and a present loan, and that the debt secured by the instrument was due immediately after its execution. They cite the following in support of their position: "If a mortgage is given to secure a past-due indebtedness, and no provision is made for any future credit, the condition as to default in the payment of the indebtedness is broken as soon as it is made." Pollock v. Douglas, 56 Mo. App. 487.

Counsel also say that as the mortgagee, through its agent, Boise, was in possession of the mortgaged property after default, the following from *Armel v. Layton*, 33 Kan. 47, 5 Pac. 444, is controlling in the premises: "A mortgagee in possession after default is not merely a lienholder, but he is the real owner of the mortgaged property, and in him is vested the entire legal title." Counsel

further cite the following from the syllabus in *Williams v. Miller*, 6 Kan. App. 626, 49 Pac. 703: "A mortgagee in possession is the owner of the personal property described in the mortgage, as against an officer who takes the property under an attachment as the property of the mortgagor, and possession cures any defect which may arise from authorizing the mortgagor to sell the property." We think the position of counsel for defendant in error is correct, and that the court did not err in overruling the demurrer to the evidence.

Counsel for plaintiff in error next contends that the description of the flour in the bill of sale, by merely naming the various brands, without stating the number of sacks of each kind, was insufficient, and that the bill of sale was void for uncertainty. Possession by the mortgagee cured the deficiencies in the description of the property. It may be fairly inferred from the evidence that when the bill of sale was executed there was sufficient wheat in the mill to produce, when ground, the number of sacks of flour necessary to make the total number thereof 4,800. As fast as it was sacked the flour was placed with that already in the possession of the agent of the plaintiff. *Cameron v. Marvin*, 26 Kan. 612; *Jones, Chat. Mortg.* § 178.

It is further contended that the oral agreement to manufacture flour which should be subject to the mortgage was void. It was held by the supreme court in the case of *Cameron v. Marvin*, supra, that a party cannot mortgage property which is afterwards to be created, purchased, or procured; but it is also decided in the same case: "When a mortgagee takes possession of the future-acquired property under such a stipulation in the mortgage, he then holds the property by way of pledge, but in the same manner as though the mortgage had been executed at the time he takes possession of the property, and in the same manner as though he had taken the property under and by virtue of a chattel mortgage covering the property."

It is further contended that the court erred in instructing the jury that the mortgage on flour to be made out of wheat then on hand would, under the facts proved, be valid up to the total of 4,800 sacks of flour contemplated by the mortgage, and that the burden of proof would be on the defendant to show by a preponderance of the evidence that the flour he purchased was not a part of the mortgaged flour. It is claimed that, since the burden of proof in a replevin suit is always on the plaintiff, it devolved on the plaintiff in this action to prove that the flour purchased and taken by Falk was part of the flour in existence when the mortgage was made. Counsel says that, since none of the flour manufactured after the mortgage was given was covered by the mortgage, Falk or any other person had a perfect right to purchase all or any part of it, and that he did so purchase the flour free from any lien. The jury found that about 600 sacks of flour were

manufactured after the execution of the bill of sale, and were placed in the possession of the mortgagee. It must be held, therefore, that Falk wrongfully took from the possession of the mortgagee the flour in controversy, and that the burden was properly placed on him to show that he obtained flour other than that which was received by the mortgagee's agent as part of the 4,800 sacks. The judgment of the district court is affirmed.

(8 Kan. App. 753)

STEVENS v. BEASELEY.

(Court of Appeals of Kansas, Southern Department, W. D. Feb. 14, 1899.)

ERROR FROM JUSTICE—REVIEW—ABSENCE OF EVIDENCE.

1. Gen. St. 1897, c. 103, §§ 146-148 (Gen. St. 1889, pars. 4962-4964), control in respect to proceedings in error taken to review a judgment of a justice of the peace.

2. In proceedings in error taken to review a judgment of a justice of the peace, alleged errors in giving and refusing instructions cannot be considered in the absence of the evidence offered at the trial wherein such judgment was rendered.

(Syllabus by the Court.)

Error from district court, Finney county; William Easton Hutchison, Judge.

Action by George W. Beaseley against John A. Stevens. Judgment for plaintiff, and defendant brings error. Affirmed.

A. J. Hoskinson and H. F. Mason, for plaintiff in error. Milton Brown, for defendant in error.

MILTON, J. The defendant in error sued the plaintiff in error before a justice of the peace of Finney county to recover a balance claimed to be due for pasturing cattle. Stevens filed a bill of particulars, claiming judgment for loss of cattle occasioned by Beaseley's negligence. A trial by jury was had, resulting in a verdict and judgment for Beaseley in the sum of \$152.58. Stevens carried the case to the district court by petition in error and bill of exceptions. The district court sustained Beaseley's motion to dismiss the proceedings in error. Plaintiff in error now asks that such decision be reversed. In the bill of exceptions the instructions given by the justice of the peace were set out, but the evidence was not preserved. It was therein stated, however, that the instructions were applicable to the testimony, and that there was evidence introduced by the defendant below tending to show negligence on the part of Beaseley, and evidence by the latter to a contrary effect.

The proceedings in error from the justice's court were taken under section 1, c. 92, Laws 1897 (Gen. St. 1897, c. 95, § 313), which provides that it shall only be necessary to incorporate in a bill of exceptions so much of the evidence as is necessary to present the error complained of, and that, where error is assigned on the instructions, the instructions given by the court shall be incor-

porated in the record, as well as those refused on which error is predicated, and it shall be sufficient to state that testimony was offered to which the instructions on which the error is predicated were applicable, without incorporating any such testimony in the record. Counsel for plaintiff in error contend that the bill of exceptions was sufficient and valid, under the foregoing provisions, while counsel for defendant in error claims that said chapter 92 is void. The title thereof reads, "An act entitled An act amendatory of section 303, Laws of 1889, concerning civil procedure and exceptions in writing, and requiring the supreme court to prescribe rules for the making of records in appeals and proceedings in error to the appellate court." Section 1 of the act purports to amend section 303 of the Laws of 1889. An examination of the Laws of 1889 shows that there is no section 303 therein, and section 303 of the General Statutes of 1889 relates to probate courts. Apparently, therefore, chapter 92 is wholly inoperative; but, even if said act be considered valid, it clearly relates to proceedings in error from district courts to the supreme court or to the courts of appeals. The provisions of sections 146-148, c. 103, Gen. St. 1897, control in respect to proceedings in error taken to review a judgment of a justice of the peace. This view is supported by the language of section 14 of said chapter 103 (Gen. St. 1889, par. 5041), and by the following cases: *Alvey v. Wilson*, 9 Kan. 401; *Kerner v. Petigo*, 25 Kan. 652. Section 148, *supra*, which was enacted in 1870, reads: "In all bills of exceptions it shall be competent for the party preparing the same to set out the pleadings, motions and decisions of the justice of the peace thereon, and the whole of the evidence given, or so much as may be necessary to preserve the point or points raised and decided on the trial, and the rulings and decisions of the court and exceptions made thereto on the trial." At that time the action of a justice of the peace in giving and refusing instructions was not reviewable. *Thellen v. Hann*, 27 Kan. 778. By section 3, c. 152, Laws 1885 (Gen. St. 1889, par. 4900; Gen. St. 1897, c. 103, § 144), it was provided that a justice of the peace might grant a new trial for the same reasons and on the same terms and conditions as were provided in the Code of Civil Procedure in like causes. Prior to the passage of chapter 92, Laws 1897, the supreme court, in the case of *Commissioners v. Boyd*, 31 Kan. 765, 3 Pac. 523, had decided as follows: "Where certain instructions given by the district court to the jury are alleged for error, held that, in the absence of all the evidence, the supreme court cannot tell whether such instructions are materially erroneous or not." We think this decision is applicable and controlling in the present case, and that all of the evidence relating to the matters referred to in the instructions complained of should have been

preserved. The district court did not err in dismissing the proceedings in error, and its judgment will be affirmed.

(8 Kan.App. 761)

NAYLOR v. BOARD OF COM'RS OF GRAY COUNTY.

(Court of Appeals of Kansas, Southern Department, W. D. March 20, 1899.)

FEEES AND SALARIES — COUNTY ATTORNEY — POWER OF COUNTY BOARD.

Under the provisions of paragraph 1799, Gen. St. 1889 (Gen. St. 1897, c. 30, §§ 66-68), a board of county commissioners of a county, the population of which was between 1,000 and 5,000, was given the authority and discretion to fix the salary of the county attorney of such county at a less sum than \$400.

(Syllabus by the Court.)

Error from district court, Gray county; Francis C. Price, Judge.

Action by J. B. Naylor against the board of county commissioners of Gray county. Judgment for defendant, and plaintiff brings error. Affirmed.

James B. Naylor, John Harper, and Peters & Nicholson, for plaintiff in error. Harry Brice, Co. Atty., and H. F. Mason, for defendant in error.

MILTON, J. This action was brought by the plaintiff in error to recover the sum of \$800, alleged to be due him as salary for the years 1895 and 1896 as county attorney of Gray county. In October, 1894, the board of county commissioners of Gray county fixed the salary of the county attorney at \$280 per year, and thereafter the plaintiff in error was elected to that office, and served for the years stated. The statute under which the commissioners purported to act was paragraph 1799 of the General Statutes of 1889 (Gen. St. 1897, c. 30, §§ 66-68), which reads: "The county attorneys of the several counties of this state shall be allowed by the board of county commissioners, as compensation for their services, as salary, per year, as follows: In counties of from 1,000 to 5,000 inhabitants, not more than \$400; provided, that in any county which shall have attached thereto six or more unorganized counties for judicial purposes the compensation shall be \$700; from 5,000 to 7,500 inhabitants, \$400; from 7,500 to 10,000 inhabitants, \$500; from 10,000 to 12,500 inhabitants, \$700; from 12,500 to 15,000 inhabitants, \$1,200; * * * 25,000 inhabitants and upwards, \$2,000."

At the regular meeting of the board of commissioners of said county, in April, 1895, the plaintiff in error filed his voucher for \$100, the sum he claimed to be due as his salary for the first quarter of the year, which claim, as presented, the county commissioners declined to allow, but instead allowed \$70, for which they issued a county warrant in due form, payable to the order of the plaintiff in error. He refused to accept

the warrant, and for each of the succeeding quarters of the year 1895 and of the year 1896 presented his voucher for \$100, with precisely the same result. The eight vouchers filed by the plaintiff in error were annexed to his petition as exhibits, and the eight warrants for \$70, each, drawn in his favor by order of the board of county commissioners, were attached as exhibits to the answer of the defendant board. The case was submitted to the court on the pleadings, and judgment was entered in favor of the defendant for costs.

As the record is presented to us for review, it consists of a transcript duly certified, a case-made, and a petition in error, all separate. The defendant in error has moved to dismiss the proceedings in error for the reason that neither the transcript nor the case-made is attached to the petition in error, and for the further reason that the case-made is invalid because not served within the time allowed by the trial court. On the 31st day of May, 1897, plaintiff below was given 90 days in which to make and serve the case, and service thereof was made on August 31, 1897. Excluding May 31st and including August 31st, we find that the case-made was not served within 90 days, as provided for in the order of the court. It is therefore invalid. *Insurance Co. v. Koons*, 26 Kan. 215; *Gimbel v. Turner*, 38 Kan. 679, 14 Pac. 255.

The transcript bears evidence of having been attached to the petition in error, though in a careless manner. We have therefore decided to determine the case upon its merits. Counsel for plaintiff in error contend that when, under the constitution of the state, the legislature may confer on tribunals transacting the county business of the several counties such power of local legislation as it shall deem expedient, the legislature has not in fact conferred on the boards of county commissioners the power to fix the salary of county attorneys in counties of from 1,000 to 5,000 inhabitants. Counsel would read the statute as follows: "The county attorneys of this state shall be allowed by the boards of county commissioners as compensation for their services, as salary per year, in counties of from 1,000 to 5,000 inhabitants, \$400." It is argued that the statute does not confer a discretion on the board of county commissioners to fix the salary of a county attorney at less than \$400 per year, but it forbids their allowing more than that sum. We are unable to adopt this view; for, if the statute be so construed, the salary to be allowed to county attorneys would be \$400, irrespective of the population of the county, unless such population should exceed 7,500 inhabitants. Such construction would also eliminate as meaningless a considerable portion of the statute. The apparent intention of the legislature was to fix the salaries of county attorneys according to population in all counties having more than 5,000 inhabitants, and to leave it to the discretion of the boards of county commission-

ers in counties having fewer than 5,000 inhabitants to fix such salaries at \$400 or less. This view is strengthened by the fact that under the provisions of another statute the boards of county commissioners are authorized to examine, settle, and allow accounts against their respective counties. The judgment of the district court is affirmed.

JONES et al. v. STEELMAN et al.

(Supreme Court of Washington. July 5, 1900.)
CANCELLATION OF INSTRUMENT—BREACH OF TRUST—EVIDENCE.

Members of a firm were indebted in the sum of \$1,000, evidenced by a note which A. had signed as surety, and to secure him they deeded property worth \$2,500 to him, on an agreement that the property should be sold to the highest bidder, and the proceeds applied to the payment of the note and interest, and other small debts of the firm, and the balance divided between the members. A. conveyed the property to one of the members of the firm for \$1,050, on condition that he pay the firm note and individual debts owing by him to A., and A. testified that his understanding of the arrangement was that he should sell the property for at least enough to pay the note. *Held*, that the evidence showed collusion between A. and his grantee, and no honest effort to sell the property to others, and hence the deed to A.'s grantee should be canceled.

Appeal from superior court, Clarke county; A. L. Miller, Judge.

Suit by W. A. Jones and Lettie J. Jones against S. F. Steelman, Hannah C. Steelman, and D. K. Abrams, for the cancellation of a deed. From a decree in favor of defendants, plaintiffs appeal. Reversed.

W. W. McCredie, for appellants. W. H. Metcalf, for respondents.

WHITE, J. The appellants are husband and wife, and were such at the times of the transactions herein mentioned. S. F. and Hannah C. Steelman are husband and wife, and were such at the times of the transactions herein mentioned. From October, 1897, to May 3, 1899, appellants and the Steelmans were partners in the operation of a flouring mill in Ridgefield, Wash. The flouring mill was situated upon a tract of land conveyed by H. A. Lamb and others, of the date of October 15, 1897, to W. A. Jones and S. F. Steelman, for the consideration expressed in the deed of \$1,250, and was conveyed subject to a mortgage for \$928 in favor of J. M. Arthur & Co. The mill and land are the property in controversy in this action. The mortgage mentioned in this deed was on the 13th day of April, 1899, assigned by J. M. Arthur & Co. to respondent Abrams. One thousand dollars was borrowed by the partnership from one Bellows, for which W. A. Jones, S. F. Steelman, and D. K. Abrams gave their joint and several promissory note; Abrams signing such note as surety. With this \$1,000 the J. M. Arthur & Co. indebtedness was paid, but the mortgage was not canceled;

it being assigned to respondent Abrams as his security for becoming surety on the Bellows note. The reasonable value of the property in controversy is \$2,500. The note given to Bellows has not been paid. The foregoing facts are not disputed. The appellants claim that on the 3d day of May, 1899, the appellants and respondents Steelman gave a deed of said property to respondent Abrams, pursuant to an agreement between appellants and all the respondents that said respondent Abrams should sell said property for what it was reasonably worth, pay the Bellows note and interest, and divide the balance of the money realized from the sale between the appellants and respondents Steelman; that the respondent Abrams, instead of discharging the trust imposed in him, secretly and unknown to appellants, and in collusion with the respondent S. F. Steelman, conveyed said property to said Steelman upon the condition that said Steelman pay Bellows' note and individual debts owing by said Steelman to Abrams. The appellants ask that the deed from Abrams to Steelman be set aside, and that Abrams be required to carry out the trust imposed in him, or surrender the trust property to the court; that he be required to give a full account of his actions as trustee, and that, if he has wasted any of the trust property or placed it beyond the control of the court, appellants have judgment against him for what may be reasonable and just; and that appellants may have such other and further relief as may seem equitable and just. The respondents claim certain individual advancements by respondents Steelman to the partnership, amounting to about \$100. The respondents claim, also, that in the month of May, 1899, the said appellants and respondents Steelman not being able to pay said mortgage indebtedness, and the respondent Abrams being liable for the amount thereof on the note given to Bellows, the said appellants and the said respondents Steelman executed and delivered to said respondent Abrams a deed of conveyance of said partnership property, with the understanding and agreement that the said Abrams should, at his convenience, pay and discharge the Bellows note, as a consideration for said deed, and that said Abrams sold and conveyed said property to said S. F. Steelman, who agreed to pay the indebtedness represented by the Bellows note. The court below found: "(6) That on or about the 3d day of May, 1899, the said partnership being unable to pay the said mortgage indebtedness, the same then being, with interest accrued, the sum of ten hundred and fifty (\$1,050) dollars, the plaintiffs and the defendants S. F. Steelman and Hannah C. Steelman, his wife, for the purpose of paying: First, the said mortgage indebtedness; and, second, such other indebtedness of said partnership as the proceeds of the sale of said partnership property, if sold by the said Abrams, might cover, over and above the

amount due and to become due on said mortgage,—made, executed, and delivered to said defendant D. K. Abrams the certain deed of conveyance of said partnership property mentioned in plaintiffs' complaint. (7) That thereafter the said defendant D. K. Abrams, being unable to sell said property so conveyed to him for any sum in excess of said indebtedness thereon, bargained, sold, and conveyed the same to the defendant S. F. Steelman for the sum of ten hundred and fifty dollars, the amount due on said mortgage, and for the payment of said sum said grantee then and there assumed and agreed to pay the said indebtedness." As a conclusion of law the court found "that the said deed of conveyance of the said defendant D. K. Abrams to the said defendant S. F. Steelman was bona fide and in good faith, made pursuant to the power and title vested in the said D. K. Abrams by the conveyance to him of the said plaintiffs and the said defendants S. F. Steelman and Hannah C. Steelman, and should, therefore, be permitted to stand, subject to the payment by the said defendants S. F. Steelman and Hannah C. Steelman of the said mortgage indebtedness, with accrued and accruing interest thereon, and that the defendants recover judgment for their costs and disbursements herein against the plaintiffs."

The testimony in the case is somewhat conflicting, but tends to support the contention of the appellants. The court below found that the conveyance was made to Abrams for the purpose of paying: First, the mortgage indebtedness; and, second, such other indebtedness of the partnership as the proceeds of the sale might cover if sold by Abrams,—to this extent finding in favor of the contention of the appellants that a sale of the property by Abrams was contemplated, and repelling the claim of the respondents in their answer that the deed was made to Abrams with the understanding and agreement that he should, at his convenience, pay and discharge the Bellows note, as the consideration for said deed. The agreement was made in the first instance between W. A. Jones and Abrams. Jones testifies that the property was given to Abrams to settle up the partnership business; that his agreement with Abrams was that Abrams was to take the property, put it on the market, either through himself or his agent, get as good a price as he could, pay off the indebtedness against the firm, and divide whatever was left between Steelman and himself. Abrams stated that the property ought to bring \$2,400; that no special limit as to the price was fixed, but that it was to be put on the market by Abrams or his agent, and sold for the best price that could be got for it. A Mrs. Thomas testifies that she heard a conversation between Jones and Abrams relative to what should be done with the property; that it was to be put up and sold to the highest bidder, and the proceeds to be divided after the debts were

paid. The testimony of Abrams himself bears out the theory that the property was to be sold by him for the benefit of the partnership. He says he had the privilege of selling it to Jones or Steelman, or any stranger, for the face of the mortgage, if he could not get any more; that he was to sell the property for as much as he could get for it, but he was to sell it even if he did not get more than the mortgage; that, if he sold it for more than the mortgage, the proceeds were to go to pay the debts; that he was to sell it for enough to pay off the mortgage; and that he was to sell it to the highest bidder. The following is from the testimony of Abrams on cross-examination: "Q. I understood you that you didn't talk with Jones about it until the day before you came up to have the deed made out, but prior to that you hadn't talked with Jones? A. No, sir; I don't think I did. Q. You were to take this property and sell it for as much as you could get for it, but you were to sell it even if you didn't get more than the mortgage? A. Yes, sir. Q. If you sold it for more than the mortgage, what were you to do with it? A. It was to go to pay the debts. Q. After the debts were paid, what was to be done? A. Nothing said about that. Q. You were to sell for as much as you could get, but were to sell for enough to pay off the mortgage? A. Yes, sir. Q. And to sell to the highest bidder? A. Yes, sir. Q. That was the understanding? A. Yes, sir. Q. Under that understanding the deed was made to you? A. Yes, sir. Q. You canceled the mortgage? A. Yes, sir. Q. Did you cancel it the same day? A. I think so. Q. You think it was about the same day? A. Yes, sir. Q. When you sold it to Steelman, you took a mortgage back for how much? A. \$1,000. Q. Is that on record? A. I think so. Q. When did you put it on record? A. Steelman put it on record. Q. Are you sure it is on record? A. I supposed it was. Q. You are not sure about that? A. No, sir. Q. You don't know about when it went on record? A. No, sir."

This testimony is consistent with the claim of appellants, and inconsistent with the defense set up in the answer of the respondents, that the conveyance was an absolute conveyance to Abrams in consideration that Abrams would assume and pay the Bellows note. Abrams further testifies that he tried to find a purchaser for the property; that he talked with two or three about it, and that two or three letters from proposed purchasers were written to him; that Jones and Steelman were trying to find buyers, and he supposes these letters came through their activity; that Jones had told him of a buyer. All this tends to show that Abrams held the property in trust to sell for the benefit of the partnership. Steelman testifies that the deed to Abrams was for the face of the mortgage, and that: "He was to dispose of it any way he saw proper. He was to sell the property to whoever he could, and satisfy Mr. Bellows and the face of the mort-

gauge. He was on the note of Bellows, and he was responsible for the money." It will be seen from this testimony that at least the note of Bellows was to be paid by a sale of the property. The pleadings of the appellants and respondents show that the Bellows note has not yet been paid. As between Bellows and Jones, Jones is still liable on the Bellows note, for Bellows was not a party to any arrangements made between Steelman and Abrams as to the payment of the Bellows note. This itself is sufficient ground for setting aside the deed from Abrams to Steelman; for the debt to Bellows has not been discharged, and Jones is still liable therefor. Steelman says Abrams was to sell the property and satisfy the Bellows note. This has not been done. The court below recognized this in its conclusions of law, and in the decree entered thereon; for in its conclusions of law the court says that the conveyance from Abrams to Steelman should stand, subject to the payment by Steelman of the mortgage indebtedness with accrued and accruing interest thereon, and the decree adjudges that the conveyance should stand, subject to the payment of the Bellows note. The court cannot make a contract for the parties. Jones never agreed to convey this property to Steelman in consideration that Steelman would pay the Bellows note. The liability of Jones to Bellows on the Bellows note is not discharged by this decree, or by any arrangement made between Steelman and Abrams, so far as Bellows' right to look to Jones alone for the payment of the note, if he so elects, is concerned. There are other circumstances in this case tending to show collusion, as alleged in the appellants' complaint, between Abrams and Steelman. Here is property worth \$2,500. Nine days after it was conveyed to the trustee, it is sold to one of the partners conveying it (thereby divesting the legal title of the other partners) for \$1,050, just the amount due on the Bellows note and Arthur & Co. mortgage, for which a mortgage was given by Steelman to Abrams, left in the possession of Steelman, and recorded by him on June 1, 1899. Not one dollar passed. Other indebtedness of the partnership, amounting to something like \$300, remains unpaid. By this transaction one partner takes all the firm assets, worth \$2,500, for \$1,050, making by the transaction \$1,450, yet leaving the despoiled partner still liable to the creditors of the firm for the entire indebtedness of the firm, amounting to about \$1,350. The evidence shows that Abrams and Steelman, without the knowledge of Jones, a few days before the transfer was made to Abrams, went to a lawyer and consulted him with reference to having the Arthur & Co. mortgage foreclosed; that Abrams had confidence in Steelman; that Steelman was anxious to get the property if he could get Jones out. "The principle is well settled that trustees are bound to exercise care and prudence in the execution of

their trust, in the same degree that men of common prudence ordinarily exercise in their own affairs. * * * This rule concerning the extent and limits of the trustee's duty to use care, diligence, and prudence applies to all his transactions in connection with the trust, and all his dealings with the trust property, by which the interests of the beneficiary can be affected." 2 Pom. Eq. Jur. 1070. The sale will not be set aside for mere inadequacy of price, if due diligence was used by the donee of the power to sell under every possible advantage. "Where there are suspicious circumstances connected with the fact of inadequacy of price, as where the parties stand in a fiduciary relation to each other, * * * inadequacy of consideration will become very pertinent, and oftentimes conclusive, evidence that fraud and undue influence have been used to bring about a bargain advantageous to one side and ruinous to the other." Perry, Trusts (4th Ed.) § 187. Abrams was the agent of Jones, Steelman, and the creditors of the partnership. In a trust of this character the trustee is bound to act with entire fairness and impartiality between all the parties he represents. It has been held that trustees in deeds of trust with power of sale to secure debts are considered as the agents of both parties, and they must act with the strictest impartiality and integrity; and where it is shown that they have abused their trust, or have combined with one party to the detriment of the other, or where it appears that a substantial injury has resulted from their acts in failing or neglecting a wise and sound discretion, equity will grant relief. *Goode v. Comfort*, 39 Mo. 313; *Sherwood v. Saxton*, 63 Mo. 78; *Williamson v. Stone*, 128 Ill. 129, 22 N. E. 1005. At the time of the conveyance from Abrams to Steelman, it was agreed between Abrams and Steelman that Steelman would secure Abrams by a mortgage on other property for \$300, which Steelman individually owed Abrams. The evidence in this case fails to show any honest effort on the part of Abrams to sell the property to outsiders. Steelman, in his testimony, in substance, says he intended to buy back the property before he signed the deed to Abrams; that, when Jones proposed to deed the property to Abrams, it "kind of stunned" him to deed away his property and have nothing to show for it; that he then talked to Abrams without Jones' knowledge, and after that turned the property over to Abrams.

As we view the evidence in this case and the circumstances surrounding the transactions, we are convinced that, under the rules governing a court of equity, the deed from Abrams to Steelman should be set aside and held for naught, and it is so adjudged and decreed. It is further adjudged and decreed that the respondent Abrams under and pursuant to the understanding and agreement set out in the complaint, is a trustee of appellants and respondents Steelman, for the

purpose of selling said property for what it is reasonably worth, and applying the proceeds: First, to the payment of the Bellows note; and, next, to the payment of the other debts of said partnership; and, if any balance remains, the same to be divided between the appellants and respondents Steelman. This cause is remanded to the court below, with instructions to enter a decree in accordance with this opinion, and also to direct said trustee to sell said property, on notice usually given of sale of real property on execution, at either public or private sale, as the court below may decree; said sale to be subject to confirmation by the court, and the proceeds to be distributed as in this opinion indicated. The court below is further directed to ascertain the partnership indebtedness and the advances, if any, made by the respondents Steelman as claimed in their answer; and, if any balance shall remain after paying said Bellows note, the partnership debts, and the said advances, and the costs of this action hereafter accruing in the court below, the same shall be divided between the appellants and respondents Steelman. And it is further ordered and adjudged that the judgment and decree entered herein in the court below on December 28, 1899, be reversed and set aside. And it is further ordered and adjudged that all the costs in this action that have accrued to the present time in the court below be paid by the respondents, and, further, that appellants have and recover their costs in this court.

DUNBAR, C. J., and REAVIS, ANDERS, and FULLERTON, JJ., concur.

CITY OF NEW WHATCOM v. ROEDER.

(Supreme Court of Washington. June 23, 1900.)

TAXATION — INTEREST AND PENALTIES — COUNTY CURRENT FUND — STATUTES — RETROSPECTIVE EFFECT.

1. Sess. Laws 1899, p. 290, c. 141, § 6, provides that the county treasurer shall collect all taxes, including those levied for municipal purposes, and that all collections from penalties and interest on delinquent taxes shall be credited to the county current expense fund. Const. art. 11, § 12, prohibits the legislature from imposing taxes on counties, towns, or municipal corporations for local purposes, but provides that the legislature may empower municipal corporations to levy taxes for local use. *Held* that, since interest and penalties are no part of taxes proper, a municipal corporation has no right thereto, though collected on taxes levied for its local purposes, but such penalties and interest belonged to the county.

2. Sess. Laws 1899, p. 290, c. 141, § 6, requires the county treasurer to collect all taxes, including those levied for municipal purposes, and declares that taxes shall become delinquent after the 31st of May, from which time interest shall be charged at the rate of 15 per cent. per annum, and that all collections from "penalties and interest on delinquent taxes" shall be credited to the county current expense fund. *Held*, that the grant to the county current fund applied to "penalties" in the legal

sense of the term; as well as to "interest," and is retrospective in effect, and thus included penalties and interest to be collected on taxes which had been levied for municipal purposes prior to the passage of the act.

Appeal from superior court, Whatcom county; H. E. Hadley, Judge.

Mandamus by the city of New Whatcom against Victor A. Roeder, treasurer of Whatcom county, to compel an accounting of interest and penalties received on taxes levied for municipal purposes. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Thomas M. Vance and A. E. Mead, for appellant. C. H. Hurlbut, E. P. Nicholson, and Ed. E. Hardin, for respondent.

WHITE, J. The appellant, Victor A. Roeder, is the county treasurer of Whatcom county, state of Washington, and has been such county treasurer since January 1, 1899. The respondent, the city of New Whatcom, is a municipal corporation of the third class, organized and existing under the laws of the state of Washington. On the 11th day of January, 1900, the city of New Whatcom, the respondent herein and plaintiff in the court below, instituted an action in the nature of a mandamus proceeding against the appellant, as defendant in the court below, to obtain a peremptory writ requiring the appellant as county treasurer of Whatcom county, state of Washington, and as ex officio collector of taxes of the city of New Whatcom, to account to the respondent for all moneys received by the appellant in his official capacity on the collection of penalties, interest, and costs on delinquent taxes; the affidavit for a writ of mandamus executed for and on behalf of the city of New Whatcom by Hon. Ed. E. Hardin, mayor of said city, stating that the appellant, as ex officio collector of taxes for respondent, had failed and refused to render an account of his collections from municipal levies made by respondent that had accrued on penalties, interest, and costs on delinquent taxes since January 1, 1899. The respondent sought not only an accounting of moneys received by him as such collector of taxes on penalties, interest, and costs on delinquent taxes, but sought an order requiring the appellant to pay over to the respondent its proportionate part of all penalties, interest, and costs on delinquent taxes received by the appellant in his official capacity on the collection of delinquent taxes since January 1, 1899, and asked that the appellant be required to include in his monthly returns to the respondent its proportionate part of all penalties, interest, and costs on delinquent taxes. The answer of the appellant was filed on February 8, 1900. The allegations of respondent's affidavit were, in effect, admitted by the answer, and the appellant justified his failure to include in his monthly return to the treasurer of the respondent any amount received by him

as penalties, interest, and costs on delinquent taxes, on the ground that since the 15th day of March, 1899, under an act of the legislature of 1899 approved on that date, he was required, as treasurer of Whatcom county, and ex officio tax collector of respondent, to credit all such sums so received by him as such county treasurer to the current expense fund of Whatcom county. Trial was had thereafter under the pleadings heretofore referred to. The only testimony considered at the trial is contained in the stipulation filed February 14, 1900, included in the statement of facts. The decision of the court in the trial of the cause was reserved for a time, and on March 23, 1900, the court rendered a judgment in favor of respondent, to the effect that respondent was entitled to a peremptory writ of mandate requiring appellant, as such county treasurer, to account to the treasurer of the respondent for all penalties, interests, and costs collected by the appellant since January 1, 1899, on delinquent municipal tax levies for the year 1898 and all previous years, from and including the year 1893, and requiring the appellant to include in his certified return thereafter to the treasurer of the respondent all such collections of penalties, interest, and costs on such delinquent taxes. Appellant excepted to the conclusions of law and decree so made and rendered, and on said date appealed from the judgment of said court.

There is no controversy whatever between the respondent and appellant concerning the facts of this case. What is the proper interpretation and construction of section 6, c. 141, p. 200, Sess. Laws 1899, is the question to be considered. The section reads as follows:

"Sec. 6. Section sixty-eight of said act is hereby amended to read as follows: 'Sec. 68. The county treasurer shall be the receiver and collector of all taxes extended upon the tax books of the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county. All taxes upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May of each year, after which date they shall become delinquent, and interest at the rate of fifteen per cent. per annum shall be charged upon such unpaid taxes from the date of delinquency until paid: provided, however, when the total amount of tax payable by one person is two dollars or more, then if one-half of such taxes be paid on or before said thirty-first day of May, then the time of payment of the remainder thereof shall be extended, and said remainder shall be due and payable on or before the thirtieth day of November following; but if the remaining one-half of such taxes be not paid on or before the thirtieth day of November,

then such remaining one-half shall be delinquent, and interest at the rate of fifteen per cent. per annum shall be charged thereon from the first day of June preceding until paid: *provided, further, there shall be an allowance of three per cent. rebate to all payers of taxes who shall pay the taxes on real property in one payment and in full on or before the fifteenth day of March next prior to the date of delinquency. All rebates allowed under this section shall be charged to the county current expense fund, and all collections from penalties and interest on delinquent taxes shall be credited to the current expense fund.'*"

The respondent contended that that portion of the section above italicized was prospective only in its operations, while the appellant contended that it was not only prospective, but retrospective. The trial court adopted the view of the respondent, and rendered a judgment to the effect that on all municipal tax levies made since the approval of the act the penalties and interest on delinquent taxes should be credited to the current expense fund, but that on all municipal levies made prior to the date of the approval of the act the appellant should account to, and pay over to, the respondent all penalties, interest, and costs collected on delinquent taxes.

The respondent calls our attention to section 12, art. 11, of the state constitution, which reads: "The legislature shall have no power to impose taxes upon counties, cities, towns, or other municipal corporations, or upon the inhabitants or property thereof, for county, city, town, or other municipal purposes, but may by general laws vest in the corporate authorities thereof the power to assess and collect taxes for such purposes." It is not claimed in this action that any of the taxes proper, assessed by the city and collected by the appellant, have been retained by him. It may be conceded, also, that the legislature has no power to levy a tax upon a municipal corporation without its consent. The fund from the tax levy proper belongs to the municipality. A tax is not a debt, and does not bear interest unless imposed by statute. The legislature has not conferred upon counties, cities, towns, or other municipal corporations, under the section of the constitution quoted, the power to impose penalties and interest on unpaid taxes. Such penalties and interest are imposed only under the general laws of the state. It is provided in the section quoted that: "The county treasurer shall be the receiver and collector of all taxes extended upon the tax books of the county, whether levied for state, county, school, bridge, road, municipal or other purposes, and also of all fines, forfeitures or penalties received by any person or officer for the use of his county. All taxes upon real property made payable by the provisions of this act shall be due and payable to the treasurer as aforesaid on or before the thirty-first day of May of each year, after which date

they shall become delinquent, and interest at the rate of fifteen per cent. per annum shall be charged upon such unpaid taxes from the date of delinquency until paid." It will be observed that the legislature, and not the municipality, fixes the date of the delinquency and the interest charge; in other words, creates the delinquent fund arising from this source. In tax laws penalties proper and interest charges are imposed for mere delinquencies in order to hasten payment. The general law of the state imposes this charge as a penalty for neglect to pay the tax in due season. The fund arising from this source is created by the legislative act of the sovereign state, and it follows that the legislature has a right to dispose of this fund to the same extent as other fines and penalties arising from the violation of other laws of the state. Our attention has been called by the respondent to the case of *State v. Mish*, 13 Wash. 302, 43 Pac. 40, wherein the court says: "It must be held that the penalty and interest collected upon taxes levied for the benefit of the city belonged to it as much as the taxes so levied." It must be remembered, however, that this language of the court had reference to the conditions as they then existed, and that this decision only attempted to follow the decision of the court in the case of *School Dist. v. Hedges*, 13 Wash. 69, 42 Pac. 522, wherein it was held that, "in the absence of any statute upon the subject," the penalty and interest on delinquent taxes should be apportioned to the several funds included in the tax upon which they are collected. We would adhere to these decisions were it not for the express provisions of section 6, p. 200, Sess. Laws 1899, which provides that penalties and interest on delinquent taxes shall be credited to the current expense fund of the county.

One other question remains: Is section 6 of the revenue law of 1899 prospective only in its operation, or is it both prospective and retrospective? We think it is both prospective and retrospective in its operation. It must be remembered that in the penalty and interest fund as it existed when the law of 1899 was enacted the municipality had no vested interest. It was permitted, because of want of legislation on the subject by the state, to receive this fund. "A right cannot be regarded as vested, in the constitutional sense, unless it amounts to something more than such a mere expectation of future benefit or interest as may be founded upon an anticipated continuance of the existing general law." *Cooley*, Const. Lim. 359. The legislature, having created this fund, had a right at any time to legislate as to its disposition. So far as the fund had been collected and placed to the credit of the municipality prior to the legislation of 1899, the act should not be held to be retrospective. For that part of the fund collected after the act of 1899 went into effect the act should be held to be retrospective. As a rule, a statute will be construed as

prospective, and operating in future only, unless a legislative intent to the contrary is declared, or necessarily implied from the circumstances or the language used. There is a *prima facie* presumption that the meaning of a word repeatedly used in a statute is identical in all places, unless there is something to show that there is another meaning intended. Not only may contemporaneous and prior statutes be considered in construing a given act, but a subsequent statute may often aid in the interpretation of a prior one. Expired and repealed acts, in *pari materia* with the statute to be construed, may also be considered in the interpretation thereof. In construing a given act, the meaning of words and terms as used therein may be gathered from the consideration of other acts in *pari materia* in which such words or terms were also used. That construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole.

A review of the different revenue acts of this state concerning interest and penalty on delinquent taxes will enable us, under the foregoing rules of construction, to interpret the meaning of the words "penalty" and "interest," as used in the act under consideration. It is not necessary to investigate and consider the decisions of the supreme courts of other states to ascertain the meaning of the word "penalty" or the word "interest," for the reason that said words have well-defined meanings under our own laws. At each recurring session of the state legislature these terms have been specifically defined by the legislature, and defined in such a way that there can be no uncertainty as to their meaning. The terms "penalty" and "interest" have at no time in the revenue history of the state of Washington been "interchangeable." These terms have had express, well-defined meanings. The legislature that enacted the section quoted certainly had in mind the legislation that had hitherto been upon the statute books. It did not have in mind the definition given to the word "penalty" by the supreme courts of other states, or the view entertained generally by lexicographers of the application of that term. This legislative body certainly considered that from territorial days revenue statutes, in defining delinquent taxes, had provided for the addition of a certain amount as penalty, and the reckoning of a certain percentage on the amount due as interest on and after a certain date. The legislature of 1899 also recognized that no penalties whatever were provided on delinquent taxes under the act of 1897, and it is fair to presume that the legislature considered that under previous acts of that body large amounts were due from the different taxpayers of the state, on account of penalties having accrued under the different revenue laws that have been enacted since the organization of the territory and

state. The legislature of 1899 was fully advised of the fact that penalties and interest had heretofore accrued on delinquent taxes, and it was fully advised that those different acts were, in substance, as follows:

Sess. Laws 1889-90, p. 565, § 97, provides that taxes shall become delinquent on the 1st day of January annually, and that a penalty of 10 per cent. shall immediately accrue on the date of delinquency, and shall thereafter be charged up against such delinquent taxes, and all such unpaid taxes shall bear interest at the rate of 10 per cent. per annum until paid or forfeited. The section further provides that, if any treasurer shall receive payment of such taxes without including such penalty, he shall be liable to the county for the amount of such penalty.

Sess. Laws 1891, p. 317, § 97, provides that taxes shall become delinquent on the 1st day of March of each year, and that upon that date a penalty of 10 per cent. shall thereupon be added, and from and after the 1st day of March said unpaid taxes and penalty shall bear interest at the rate of 20 per cent. per annum until paid.

Sess. Laws 1893, p. 359, § 83, provides that, if taxes are not paid on or before the 1st day of April next ensuing, they shall become delinquent, and a penalty of 5 per cent. shall thereupon be added, and from the 1st day of April said unpaid taxes and penalty shall bear interest at the rate of 20 per cent. per annum from said date until paid.

Sess. Laws 1895, p. 513, § 14, provides that the county treasurer shall be the receiver and collector of all taxes, and that taxes shall be due and payable to the treasurer on or before the 31st day of May in each year, after which they shall become delinquent. Thereafter a penalty of 2 per cent. shall attach upon all such taxes, and interest at the rate of 12 per cent. shall be charged upon such unpaid taxes from the date of delinquency until paid.

Sess. Laws 1897, p. 169, § 68, provides that taxes shall become delinquent if not paid on or before the 31st day of May in each year, and interest at the rate of 15 per cent. shall be charged upon such unpaid taxes from the date of delinquency until paid. (It will be noticed that the word "penalty" is eliminated from the act of 1897.)

Sess. Laws 1899, p. 290, § 6, provides that taxes shall become delinquent if not paid on or before May 31st in each year, and thereafter shall bear interest at the rate of 15 per cent. per annum until paid.

In other words, it is apparent that the delinquent taxpayer was required under the acts of 1889-90, 1891, 1893, and 1895 to pay a certain penalty after his taxes became delinquent, and in addition to that penalty he was required to pay interest at the respective rates named in said session laws, and since the date of the amendatory revenue act of 1897 the only additional burden to the taxpayer is the interest. In the face of these provisions, we are not justified in as-

suming that the legislature, at its session of 1899, used the term "penalty" in the same sense as it used the word "interest." Different meanings must be given to the words used, and they must be the meanings attaching to the words in other acts in pari materia, some of which we have cited. In considering our revenue statutes, the terms "penalty" and "interest" have been given definitions by our legislature, and those definitions have been applied in a practical way in the execution of the different revenue statutes. When the legislature adopted the section herein referred to, it knew very well that no penalties were to accrue on delinquent taxes under the provisions of that section, and it also knew that there were no penalties to attach under the provisions of the revenue law approved in 1897. It follows, then, as a logical conclusion, if it intended the act to be prospective only, that it would have been satisfied with the word "interest" in the concluding sentence of the section quoted. By the provisions of this section the county treasurer is directed to credit into the current expense fund all penalties on delinquent taxes. According to the interpretation of the act contended for by respondent and adopted by the trial court, the county treasurer will have no fund known and designated as "penalties" to credit to the current expense fund. In other words, the word "penalty" will have to be treated as surplusage, and, to uphold the construction given the statute by the lower court, the term will necessarily have to be eliminated entirely from the statute. We think in using the word "penalty" in the section under consideration the legislature had in view "penalties," under that name, imposed under previous revenue laws, and, entertaining this view, we must hold that the act is retrospective as well as prospective. It follows that the judgment and decree of the trial court, entered herein on the 23d day of March, 1900, directing the issuance of a peremptory writ of mandamus in this action against the appellant, and adjudging costs in favor of respondent, should be reversed and set aside, the action should be dismissed, and the appellant should recover his costs in this court and in the court below; and it is so ordered and adjudged.

DUNBAR, C. J., and REAVIS, ANDERS,
and FULLERTON, JJ., concur.

(22 Wash. 536)

BLEWETT v. BASH et al.

(Supreme Court of Washington. June 13,
1900.)

MORTGAGES—JOINT OBLIGORS—ALTERATIONS
— DISCHARGE — FORECLOSURE — SUBROGA-
TION—EVIDENCE—APPEAL AND ERROR.

1. Where, in a proceeding to foreclose a mortgage, no objection was made to the introduction of the mortgage on the ground that its execution had not been proven, this objection cannot be raised on appeal, since the

certificate of acknowledgment in due form by the notary public constitutes prima facie proof of execution.

2. While, in the absence of evidence to the contrary, interlineations and erasures in written instruments are presumed to have been made before execution, this presumption does not apply to an erasure of the signature of an obligor, since, in the nature of the case, such erasure must have occurred after execution.

3. Since a discharge of one joint obligor does not discharge the others, in the absence of a showing that such discharge was without their consent, defendant's contention, in a suit to foreclose a mortgage, that plaintiff was discharged from liability on his guaranty of the original debt by reason of the erasure of the name of one of his joint obligors, is not tenable.

4. Where plaintiff in a suit to foreclose a mortgage claims to be subrogated to the right of the original grantee by reason of having paid the debt, as guarantor, and alleges his obligation as several, an objection to the admission of the written guaranty on the ground that it shows a joint obligation is not well taken, since the guaranty is only collaterally in issue, and plaintiff's right to be subrogated does not depend on the question of whether he was a joint or several obligor.

5. Defendants, in order to support their plea of payment of a certain mortgage indebtedness to a bank, introduced an alleged copy of a contract under which H. agreed to pay such indebtedness, and called as a witness H.'s agent in the transaction, who denied having signed any such agreement, but admitted an agreement to take up another indebtedness of defendants, in no way connected with the mortgage indebtedness. The president of the creditor bank testified to the same facts, and that plaintiff, not H., had paid the mortgage indebtedness. *Held*, that this testimony did not tend to vary the terms of a written contract, and was therefore properly admitted.

Appeal from superior court, King county; E. D. Benson, Judge.

Bill by Edward Blewett against A. W. Bash, Charles Bruhn, Pauline Bruhn, and others, to foreclose a mortgage. From a judgment in favor of plaintiff, defendants Charles and Pauline Bruhn appeal. Affirmed.

Ballinger, Ronald & Battle, for appellants. Bausman, Kelleher & Emory, for respondent.

ANDERS, J. On May 1, 1891, the defendants Henry Bash and Susan W. Bash executed a promissory note for \$1,225, payable to the order of defendants A. W. and Flora S. Bash 90 days after date, with interest from date until paid at the rate of 1 per cent. per month. To secure the payment of said note the makers thereof on said May 1, 1891, executed and delivered to the payees therein named a mortgage on lots numbered 8 and 9 in block 3 in the Highland addition to the city of Seattle. Thereafter the said A. W. and Flora S. Bash assigned the note and mortgage to the Washington National Bank of Seattle. On June 29, 1892, the plaintiff, Blewett, and others guaranteed the payment of this note on or before October 27, 1892, to which last-mentioned date the time of payment of the note was extended by the bank. After the note became due, and on December 20, 1892, the plaintiff, Blewett,

paid the principal and interest then due on the note, and received both the note and mortgage, uncanceled, from the bank. On March 21, 1893, the makers of said note and mortgage sold and conveyed, by deed duly signed, witnessed, and acknowledged, the premises described in the mortgage of May 1, 1891, to the defendant Charles Bruhn; and in said deed they covenanted that the property therein described was free from all liens and incumbrances, save a certain mortgage, which they agreed to pay off and satisfy. Prior to the time this deed was executed and delivered, the mortgage had been duly recorded in the office of the county auditor of King county. The plaintiff instituted this action to foreclose this mortgage by right of subrogation. The complaint alleges, among other things, the making of the note and mortgage by Henry and Susan W. Bash; that on or about June 29, 1892, the plaintiff, in writing, guaranteed the payment of the note, at the special instance and request of defendants Bash, and subsequently, on the failure of the defendants Bash to pay it, did himself discharge the obligation; and that, upon the indorsement and delivery of the note to the Washington National Bank, the indorsers (payees), defendants Albert W. Bash and Flora S. Bash, assigned and transferred with it, as collateral, the mortgage therein set forth. The defendants Bash and the defendants Bruhn answered separately, the former admitting the execution of the note and mortgage set forth in the complaint, the assignment to the Washington National Bank, and the guaranty of the payment of the note by plaintiff, but denying that the note was not paid by them, and alleging affirmatively that the plaintiff, by their direction, and with funds and moneys furnished by them to him for that purpose, paid to the Washington National Bank, the then owner and holder of said note, the full amount of the same, together with interest thereon to the date of payment, and then and there discharged the said note and mortgage, together with the obligation to pay therein contained, and that the plaintiff has, ever since the payment of the note and mortgage, and the receipt and acceptance of the same from said bank, wrongfully held said note and mortgage, and now wrongfully holds the same, as a pretended claim and demand against the defendants Bash, and has failed, neglected, and refused to surrender the said promissory note or to cancel the said mortgage, although the defendants Bash have heretofore duly demanded the surrender of the note and the cancellation of said mortgage. The defendants Charles and Pauline Bruhn in their answer deny the material averments of the complaint, except the making of the note by the defendants Henry and Susan Bash, and allege affirmatively that the note had been fully paid and discharged. The affirmative matter set forth in each of these answers was denied in plaintiff's reply. A trial was had by the

court, which resulted in a judgment and decree foreclosing the said mortgage, and ordering the premises therein described to be sold to satisfy the mortgage indebtedness, together with certain taxes admitted to have been paid by the plaintiff. The defendants Bash introduced no evidence at the trial, and the defendants Bruhn alone have appealed.

It is claimed by the appellants that the trial court erred in admitting the mortgage in evidence, for the alleged reason that there was no proof of its execution. It appears that, at the time when it was proposed to offer the mortgage in evidence, something was said about introducing a certified copy, which it was understood would be presumptive evidence of execution; and it appears from the record that the appellants waived the production of the certified copy, and the respondent thereupon introduced the original instrument. The objection made to its introduction was that it was incompetent and immaterial. No suggestion seems to have been made to the court that the execution of the deed had not been proved, and, if such objection had been made, it would have been unavailable, for the reason that, under our statute as construed by this court in *Gardner v. Mill Co.*, 8 Wash. 1, 35 Pac. 402, the deed, with the certificate of acknowledgment in due form by the notary public, constituted *prima facie* proof of execution.

It is further claimed by appellants that the court erred in admitting in evidence or considering the guaranty of the payment of the note, over the objection that it appeared upon the face of the instrument that it was not in the same condition in which it was at the time of its execution, and that it showed on its face that it was a joint, and not a joint and several, guaranty. The first name in the list of signatures to this guaranty (that of J. Loring Whittington) appears to have been erased, but when, or by whom, or by whose direction, does not appear from the record. The next name in the order of signing is that of the respondent, and after that appears the firm name of Metcalfe, Little & Jurey. This court has adopted the rule that interlineations and erasures in written instruments will be presumed, in the absence of evidence to the contrary, to have been made before execution. *Kleeb v. Bard*, 12 Wash. 140, 40 Pac. 733. The learned counsel for the appellants concede this to be the settled law of this state, but they insist that the rule is not applicable here, for the reason that, in the very nature of things, the erasure of a signature must follow execution. This is, no doubt, true as to the person whose name is erased; but it does not necessarily follow, as claimed by the appellants, that the release of one of several joint obligors releases all the others. In the first place, it may be well to observe that no release was pleaded in this case;

and, in the second place, neither of the other parties who signed the instrument is claiming to be released from the obligation thereof. On the contrary, the respondent is claiming and insisting that he paid the note by reason of his guaranty to pay, and that he is entitled to be subrogated to the rights, remedies, and security possessed and held by the Washington National Bank at the time of payment. The release of one of several joint guarantors or sureties will not effect a discharge of the others, unless the release of the one is granted without the consent or acquiescence of such others; and, for aught that appears in the record, the name of Whittington may have been erased from the guaranty either before the other guarantors signed it, or afterwards, but with their knowledge and approval. There being nothing in the record to show that the respondent was released from his obligation as guarantor, the contention of the appellants that, if he did pay the note with his own money, he was under no legal obligation to pay it, and was therefore a mere volunteer, and hence not entitled to recover the amount so paid, cannot be sustained. Nor was it error on the part of the court to admit the guaranty in evidence without previous explanation as to the apparent erasure. See *City of Fairhaven v. Cowgill*, 8 Wash. 686, 36 Pac. 1093. If this were a direct action on the guaranty, the appellants' contention that, being joint and not joint and several, it was inadmissible under the allegation of the complaint that the plaintiff in writing guarantied the payment of the note, would not be without merit. But the right of subrogation claimed by the respondent does not depend upon the question whether he was or was not a several guarantor, but upon the fact that he was bound by the guaranty, and paid the debt of his principals. It must be borne in mind that the complaint in this case, as we have seen, also alleges, in effect, that the plaintiff (respondent), as guarantor, paid the amount due on the note to the Washington National Bank, the then owner and holder of the note and mortgage. If, however, there was in fact a variance between the allegations and the proof in this particular, it was not fatal to the cause of action; and, under our statute providing that this court shall consider all amendments as made which might have been made in the court below, it would be our duty to consider the complaint as amended to conform to the proof, rather than to reverse the judgment on account of the variance. It is a well-settled principle that a surety or guarantor who pays the debt of his principal will be substituted in the place of the creditor of such principal, as to all securities for the debt held by the creditor, and will be entitled to the same benefit from them as the creditor himself might have had. *Brandt, Sur.* (2d Ed.) §§ 298, 301, 315. See, also, *Sheld. Subr.* (2d. Ed.) §§ 2, 3.

At the trial the appellants, in order to prove payment of the note and mortgage by the defendants Bash, introduced in evidence, over the objection of the respondent, an alleged copy of a contract entered into between one Hammond and defendant Henry Bash, dated June 17, 1892, whereby the latter, among other things, authorized the former to pay all claims against him (the said Bash) then held by the Washington National Bank of Seattle, for which they then held certain securities, among which were \$75,000 of stock of the Culver Gold-Mining Company, and wherein and whereby the said Hammond agreed to tender within a reasonable time to the Washington National Bank, for the said Bash, all sums due from him to the Washington National Bank, amounting to \$6,369.30, with interest from May 17, 1892, and to take up all stock and other collaterals held by said Washington National Bank as security, provided the said Washington National Bank would accept the same, and deliver to said Hammond the said stock and other collateral securities so held by it as security; and it was agreed in said contract that all such stock and other collaterals taken up should be held by the said Hammond as security for the payment of all sums advanced by him according to the provisions of the agreement. The party representing said Hammond in this alleged agreement was called as a witness by the appellants. He, however, denied having signed any such agreement as set forth in the alleged copy, but admitted that he agreed with Mr. Bash to take up the mining stock owned by the latter and in possession of the bank, and to pay the amount for which it was pledged, and that he did so. And he further testified, in substance, that he had no knowledge of the note and mortgage in controversy until the time at which he tendered to the bank the amount for which the stock was pledged as collateral security, and that the contract which he made in reference to redeeming the stock had no connection whatever with the note and mortgage now under consideration. The president of the Washington National Bank was called as a witness for plaintiff, and he also testified that the bank received from the representative of Hammond (one Ammdon) only the amount that was secured by the mining stock, and that the note in controversy was paid by the respondent, and that the indebtedness of Mr. Bash against the mining stock had no connection at all with the mortgage indebtedness. The latter testimony was objected to by counsel for appellants on the ground that it tended to change or vary the terms of his written contract. But we see no merit in such objection. As we have already stated, the same testimony was given by the witness called on behalf of the appellants. We perceive no error in the record, and the judgment of the court below is therefore affirmed.

DUNBAR, C. J., and REAVIS, J., concur.

HUDSON v. HUDSON. (L. A. 716.)

(Supreme Court of California. July 9, 1900.)

DIVORCE—JURY—SPECIAL ISSUES—DEPOSIT—DISCRETION OF COURT—ABUSE—BILL OF EXCEPTIONS—INTERLINEATION BY COURT—AMENDMENTS—REFUSAL—REMEDY.

1. Where special issues were submitted on demand of defendant and against the objection of plaintiff, it was not an abuse of discretion for the court to require defendant to make a deposit of one day's per diem and mileage before ordering the jury.

2. Where bill of exceptions, as certified, showed that defendant moved for a nonsuit on the ground of insufficiency of evidence, the fact that the trial court made an interlineation in the record to the effect that the evidence was sufficient to prove all the allegations of the complaint was not prejudicial to defendant, since the court on appeal would disregard it as an attempt to forestall the very question to be examined.

3. Under Code Civ. Proc. § 652, providing that, if the court in any case refuses to allow an exception in accordance with the facts, the party desiring the bill settled may apply by petition to the supreme court to prove the same, where, after defendant had submitted a proposed bill of exceptions, and before it had been acted on, he filed certain amendments with plaintiff's attorney and with the clerk of the court, his remedy on a denial by the court of his motion to allow such amendments is by petition to the supreme court, and not by appeal.

Commissioners' decision. Department 2. Appeal from superior court, San Diego county.

Action by Charles K. Hudson against Annie S. Hudson. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

A. M. McConoughey, for appellant. McNealy & Andrews, for respondent.

CHIPMAN, C. Divorce on the ground of extreme cruelty. Plaintiff had judgment, from which defendant appeals. She also appeals from sundry orders hereinafter referred to. There is no brief for respondent. The record is in a very unsatisfactory condition, and it has been with much difficulty that we have been able to unravel its perplexities, and ascertain just what alleged errors are properly before us. The record is attempted to be brought here by bill of exceptions. We will endeavor to follow appellant's points as made in her brief.

1. The demurrer on the ground of want of sufficient facts was properly overruled. The complaint alleged numerous and grievous acts of cruelty quite sufficient to constitute the statutory offense. The motion of defendant for judgment on the pleadings was properly overruled.

2. At the demand of defendant, and against the objection of plaintiff, certain issues of fact were tried by a jury, and the verdict was against defendant. It was not an abuse of discretion for the court to require defendant to deposit with the clerk one day's per diem and mileage of the jury, as a condition for making the order. It was within the discretion of the court to refuse a jury on any or all the issues, and it was equally within

its discretion to impose reasonable terms in case it granted the jury at the request of one of the parties against the wish of the other.

3. The bill of exceptions, as certified, states that defendant moved for a nonsuit upon the ground of insufficiency of the evidence to entitle plaintiff to the relief demanded. The record states as follows: "Said motion for a nonsuit was made after evidence had been given and received in behalf of the plaintiff, *which evidence was sufficient to prove all the allegations of the bill of complaint*, and after defendant had introduced all of her evidence in support of her charges of adultery on the part of plaintiff, and after the jury had found and returned into court their verdict that plaintiff was not guilty of adultery with any person named in said amended answer." It was not error for the court to deny the motion. Appellant claims that the clause noted above in italics was interpolated by the judge, and was error. There is nothing in the certified bill of exceptions to show how the clause came to be inserted, or that it was objected to. In a proposed amended bill of exceptions, which the court refused to allow, it appears that this clause was inserted at plaintiff's request and against defendant's objection. Assuming, however, that the judge should not have allowed this clause to be inserted, we cannot see that it injures defendant, for this court will disregard it as an attempt to forestall the very question which is to be examined on the evidence brought up.

4. The findings were filed and decree was entered December 7, 1898. The only bill of exceptions that was settled and signed by the court was filed February 17, 1899, and recites: "This cause coming on to be heard, the foregoing evidence was introduced, and the foregoing proceedings were had. Whereas, defendant desires that the same be made a part of the record herein, I do hereby certify," etc. The bill recites the overruling of defendant's demurrer, her motion for judgment on the pleadings, her demand for a jury trial and her motion for nonsuit, and some other matters not material to be noticed. Then follow some questions to witnesses and answers by them, of which the bill says, "No other evidence pertinent to defendant's objections was introduced at said trial." We have examined these questions, some of which were objected to by plaintiff, and his objection sustained. While in one or two instances the objections, in our opinion, were not well taken, it is apparent that defendant did not suffer material injury by the rulings of the court.

5. The bill of exceptions just considered was not satisfactory to defendant, and after it was submitted as defendant's proposed bill, and before the court had finally acted upon it, defendant's attorney served upon plaintiff's counsel certain proposed amendments to the bill, which, with plaintiff's proposed amendments thereof, were delivered

to the clerk to be presented to the judge for settlement, and defendant's attorney moved the court to allow said amendments. These proposed amendments, in addition to proposing much of the evidence that had been omitted from the first draft, then before the court, sought to amend the bill by adding thereto defendant's notice of intention to move for a new trial, which seems to have been omitted from the first proposed bill. The motion was supported by the affidavit of defendant's attorney, in which he stated that he is the sole counsel of defendant, and "as such prepared the proposed bill of exceptions, intending to incorporate the matter proposed to be incorporated by the above-described amendment; that said amendment is the only manner in which defendant can assign and show the errors complained of in said notice of intention: that said matter proposed as said amendment was accidentally omitted in said proposed bill of exceptions; that said notice of intention to move for a new trial avers as ground therefor that said findings and decision of the court are against the evidence, and are not supported by the evidence." On February 11, 1899, the court denied defendant's motion, and thereupon, February 17, 1899, settled and certified the bill already noticed. Defendant appeals (1) from the order refusing to amend her bill of exceptions; (2) from the order striking out therefrom certain evidence and leaving therein certain evidence; (3) from the order refusing to settle her proposed bill of exceptions, which latter order was made March 3, 1899. These several orders were in fact refusals to amend the bill of exceptions first proposed, which was settled and certified by the court. The order of March 3d, purporting to refuse to settle defendant's proposed bill of exceptions, was in fact a refusal to settle certain amendments proposed to the bill which was then under submission, and which was settled February 17th. But, if this last order be regarded as a refusal to settle any bill of exceptions, appellant cannot have relief by this appeal. Section 652, Code Civ. Proc., does not apply where a trial judge has refused to settle any statement or bill of exceptions. The remedy for such refusal, if wrongful, is by mandamus. *Lauders v. Landers*, 82 Cal. 480, 23 Pac. 126. Where the trial judge in settling a bill refuses to allow one or more exceptions, which, in accordance with the facts, ought to be allowed, the remedy is by petition to this court. Section 652, Code Civ. Proc.; *Lauders v. Landers*, supra; *Hyde v. Royle*, 86 Cal. 352, 24 Pac. 1059; *Id.*, 89 Cal. 590, 26 Pac. 1092; *In re Gates*, 90 Cal. 257, 27 Pac. 195; *Tibbetts v. Banking Co.*, 97 Cal. 258, 32 Pac. 174. As there is nowhere in the record any notice of intention to move for a new trial, except in the proposed amendments to defendant's bill of exceptions which were refused, the appeal strictly is here on the judgment roll alone.

Under the circumstances, however, we have looked into the bill of exceptions as certified. Discovering no error therein, and ascertaining that the judgment is sustained by the findings, we advise that the judgment and orders appealed from be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and orders appealed from are affirmed.

130 Cal. 114

WOLFSKILL v. LOS ANGELES RY. CO.
(L. A. 705.)

(Supreme Court of California. July 9, 1900.)
HIGHWAYS—FRIGHTENED TEAM—INJURY TO
PEDESTRIAN—CONTRIBUTORY NEGLIGENCE.

Plaintiff was injured by being knocked down by a team driven by defendant's servant. The driver was an experienced man, and was driving on a street through the middle of which a railroad ran, on which a train was approaching. Shortly before the team reached the point where plaintiff was standing on the sidewalk, he stepped down from the curb, and walked slowly towards the middle of the street. When he had gone four or five feet from the sidewalk, the team, frightened by the approaching train, crowded towards the sidewalk, in spite of the driver's efforts to control them, and struck plaintiff, knocking him down and injuring him. The driver of the team and others shouted at plaintiff in time for him to have gotten out of the way if he had heeded the warning. Held to justify findings that the team was not driven negligently or at a dangerous speed, and that the driver was not guilty of negligence, but that plaintiff was negligent in going in front of the team and not looking out to avoid being run over, and hence no recovery could be had.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by Milton Wolfskill against the Los Angeles Railway Company. From a judgment for defendant entered after trial by the court, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

S. O. Houghton and Chas. D. Houghton, for appellant. Bicknell, Gibson & Trask, for respondent.

CHIPMAN, C. Action for personal injury. Jury trial was waived. The trial was by the court, and defendant had judgment. The appeal is from the judgment, and from the order denying plaintiff's motion for a new trial.

The injury occurred at the crossing of Aliso and Alameda streets, in the city of Los Angeles. A team of horses, owned by defendant was being driven by an employé of defendant along Alameda street, at a point where the track of the Southern Pacific Company's railroad runs along the middle of said street. The driver was going north, along the east side of the street; but as he

came near Aliso street, noticing a train of cars coming towards him, he crossed the track, for some unexplained reason, to the west side of Alameda street, and continued along that side of the latter street towards the crossing of Aliso street. Plaintiff was a flagman of the Southern Pacific Company, and his duty was to flag trains at this crossing. Defendant's evidence showed that plaintiff started from the curb on the west side of Alameda street, and near the crossing of the two streets, to go towards the middle of Alameda street, about the time defendant's horses were approaching the corner. The horses became frightened by the train at that moment coming along Alameda street. The horses shied away from the train, and towards the curb; and in doing so the near horse struck the plaintiff and knocked him down, thus injuring him.

The court, in its second and third findings, found, in effect: (1) That at the time of the injury the team was not being driven carelessly or negligently, nor at a speed dangerous to the lives or limbs of persons on said Alameda street, and that the driver exercised due care and was not guilty of any negligence; (2) that at the time plaintiff received the injury he was not exercising ordinary care, and was guilty of negligence, in this: "That he went in front of said pair of horses as they approached him, and did not look out to avoid being run against by them, and did not pay attention to the approach of said horses and said wagon, and did not take any care or caution whatever to avoid being run against by said horses." The ground of the appeal is that the evidence does not support these findings. It is not necessary that the evidence should sustain both these findings, in order to support the judgment. To have found for plaintiff, it must have appeared that defendant was negligent and that plaintiff was free from negligence; there being no evidence tending to show that defendant's conduct was wanton or willful. The evidence is sharply conflicting upon some material points touching plaintiff's negligence in not heeding the warning given him, and as to the want of care on the part of defendant's driver. It was the province of the court to reconcile the conflicts and pass upon the weight to be given the evidence. We can do no more than look into the evidence far enough to discover whether or not there was sufficient to sustain the findings. The driver testified that, when he first saw plaintiff, he (plaintiff) was standing on the southwest corner of the two streets, and that he was walking very slowly towards the middle of Alameda street. Witness testified that he thought he was about to stop. Witness thought there was plenty of room to pass plaintiff. "The train frightened my horses, and they crowded over towards him, and the near horse struck him." He was asked, when he observed plaintiff's dangerous position, if he could stop his horses, and an-

answered: "No, sir; not at that time. I was using every effort to do so. The horses were frightened by the engine. * * * I have handled teams ever since I was old enough to handle them, and I am thirty-six years old. I hallooed at this man. Mr. Hartwell [who was in the wagon] hallooed at the top of his voice. When we hallooed at him, he had plenty of time to get out of the way." The witness Hartwell testified: "As we got pretty near to the corner the flagman [plaintiff] stepped down from the curb to walk out towards the center of the street, and the horses struck him with their breasts and run over him. To attract his attention, we called to him to look out, or 'Hello,' or something to that effect. I did so. * * * The driver hallooed. The horses were frightened on that occasion. * * * The occasion of their fright was the train passing,—the engine and cars. * * * I saw him step down from the curb before we got there. When he was hit, I should say he was some four or five feet from the curb. The driver at the time was trying to pull the horses away from him. He was walking slow. * * * We were (I could not say how far) some forty feet (thirty or forty feet) from the southwest corner of the street when I first saw Mr. Wolfskill. I was sitting by the side of the driver, in front. * * * When I first saw Mr. Wolfskill he was on the walk. The train was coming and he stepped down. The train was coming from the north. * * * Question by the Court: Did that train cause the shying to occur? A. Yes, sir." The witness Hubbard, who was in the wagon testified: "We went north on Alameda street, and, on the east side of the street, somewhere between Commercial and Aliso, we crossed from the east to the west side. When near the corner of Aliso and Alameda the train came along and scared the horses. They started, and the driver done all he could to hold them, and the flagman was standing out somewhere near the corner, and they hollered at him to look out. Apparently, he didn't seem to move, and the neck yoke of the wagon hit him and knocked him down, and the near horse stepped on him." He testified that the horses appeared to be frightened at the approaching engine. "Question. Could he have gotten out of the way when they hollered at him? A. I believe he could if he had tried." Plaintiff's evidence tends to contradict the facts as above narrated in some particulars, and it tends in some degree to show carelessness on the part of the driver, and to exculpate plaintiff from the charge of having contributed to his injury by his want of care. The question, however, of the weight of the evidence, and as to where the preponderance lay, and as to how far the statements of witnesses were to be taken as true, was for the trial court to determine, and cannot be reviewed here. We think there was sufficient evidence to justify the findings, and the

judgment and order must therefore be affirmed, and we so advise.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(129 Cal. 118)

PEOPLE v. VANN. (Cr. 624.)¹

(Supreme Court of California. July 9, 1900.)

RAPE—ASSAULT TO COMMIT—CONSENT—EVIDENCE—PROOF OF AGE—FAMILY RECORD—REFRESHING MEMORY—BIRTH—ATTENDING PHYSICIAN—BYSTANDERS—EXCLUSION FROM COURT ROOM—EVIDENCE—PREJUDICE.

1. Under Pen. Code, § 261, defining rape as sexual intercourse with a female under 16 years of age, and not the wife of the perpetrator, and section 220, punishing an assault to commit rape by imprisonment in the state prison, the fact that a girl under 16 years of age went voluntarily to the room of defendant by previous appointment affords no defense to a charge of an assault to commit rape; since, as she was incapable of consenting to rape, she is equally incapable of consenting to an attempt to commit it.

2. Where, in proving a girl's age at the time defendant made an assault to commit rape on her, her mother referred to the entry of the girl's birth in the Family Bible to refresh her memory, an objection to the entry as hearsay evidence was not well taken, since it was not offered in evidence.

3. Where, in proving a girl's age at the time defendant made an assault to commit rape on her, a physician testified that he attended the mother when the girl was born, it was not error to allow him to refresh his memory by referring to the entry of the date of such attendance in his cash book.

4. Under Pen. Code, § 261, defining rape as sexual intercourse with a female not the wife of the perpetrator, in the following cases (subdivision 1): Where the female is under 10 years of age; (subdivision 3) where her resistance was overcome by force; (subdivision 4) where she is prevented from resisting by any intoxicating narcotic or anesthetic substance administered by the accused,—where defendant was charged with rape under subdivision 1, and the state claimed defendant had administered a drug to the prosecutrix, evidence that defendant carried liquors up to her and others from the barroom below, all the afternoon just preceding the assault, was not objectionable as proving the crime under subdivisions 3 and 4, since in dividing section 261 into different subheads it was not intended to establish a rule of pleading or create different kinds of crime, but merely to put beyond doubt the rule that on an information for rape the things mentioned in such subdivisions could be proven.

5. Where, on trial of defendant for an assault to commit rape, the district attorney, when the prosecutrix was called to testify, asked defendant to consent to an order excluding all bystanders from the court room, and on his refusal requested the bystanders in the name of common decency to withdraw, such request was not prejudicial to the defendant.

6. Where defendant was charged with an assault to commit rape in a room on the second floor, the mere asking the question in the presence of the jury, in order to get a ruling of the court on it, whether or not a friend of the defendant, on the approach of the marshal, rushed down the back stairs, and threw sticks against the window to warn the defendant, was not prejudicial to defendant.

¹ Rehearing denied August 8, 1900.

Commissioners' decision. Department 2. Appeal from superior court, Colusa county.

Marvin Vann was convicted of an assault with intent to commit rape, and he appeals. Affirmed.

Milton Shepardson, for appellant. Atty. Gen. Ford, for the State.

COOPER, C. Defendant was convicted of an assault with intent to commit rape. He appeals from the judgment and from an order denying his motion for a new trial. The evidence shows that the person upon whom the alleged assault was made was a girl under 16 years of age; that she went voluntarily to the room of defendant by previous appointment, and made no resistance.

1. It is claimed that the verdict is contrary to the evidence. The argument is that although, under the statute, a girl under the age of 16 is incapable of consenting to the crime of rape, yet, if she consents to the attempt, it is no assault, because an assault implies that the party assaulted was not soliciting, but resisting, the assault. This question has been decided as contended for by defendant by several decisions of able courts. It has also been held by many decisions of the highest courts of the states that where the female, under the law, is incapable of consenting to rape, she is equally incapable of consenting to an attempt to commit it. The latter view has been adopted in this state. *People v. Gordon*, 70 Cal. 467, 11 Pac. 762; *People v. Verdegreen*, 106 Cal. 211, 39 Pac. 607; *People v. Gomez*, 118 Cal. 327, 50 Pac. 427; *People v. Roach* (filed June 23, 1900) 61 Pac. 574. The rule is well stated in *People v. Verdegreen*, supra, where it is said: "It is true that an assault implies force by the assailant and resistance by the one assaulted; and that one is not, in legal contemplation, injured by a consensual act. But these principles have no application to a case where, under the law, there can be no consent. Here the law implies incapacity to give consent, and this implication is conclusive. In such case the female is to be regarded as resisting, no matter what the actual state of her mind may be at the time. The law resists for her."

2. It is claimed that the court, under defendant's objection, admitted in evidence an entry in the Family Bible for the purpose of proving the age of the person assaulted, and that such ruling was error. Upon a careful examination of the record we do not find that the Family Bible or any entry therein was admitted in evidence. The mother of the girl testified that her daughter was born on the 2d day of August, 1884, and that on the 15th day of October, 1899, she was 15 years and 3 months old. She was then asked if, at the time of the birth of her daughter, she made any data or memoranda, and answered: "Yes, sir. Shortly after Neva was born, as soon as convenient, I made an entry, in my own handwriting, in the Family Bible.

Q. And your testimony as to the time of her birth is from the memoranda which you made at the time in the Bible? A. Yes, sir. Q. And your memory is that this is also your recollection from the facts as you have already testified, and from the fact that you made this memoranda at the time? A. Yes, sir." These questions were objected to by defendant upon the ground that "no sufficient foundation had been laid, and as hearsay." We think the witness only referred to the entry to refresh her memory. Neither the Bible nor the entry was offered or received in evidence. No objection was made as to the time of the entry, nor that it was not in the handwriting of the witness. A witness may refresh his memory by a written entry or memorandum made at the time, and it is not necessary that the writing itself be admissible in evidence. 1 Greenl. Ev. § 436; *People v. Le Roy*, 65 Cal. 613, 4 Pac. 649. The case of *People v. Mayne*, 118 Cal. 517, 50 Pac. 654, is not in conflict with the views herein expressed. In that case the Bible was admitted in evidence under defendant's objection. It is said in the opinion: "It was not competent for the prosecution to introduce as a piece of substantive evidence in support of this issue her written declaration made several years previously." For the reasons above stated, it was not error to allow Dr. Gray to refresh his memory as to the date of the birth of the girl by an entry in his cash book August 2, 1884. He stated that he attended the mother at the birth of the child, and that he made the entry at the time in his cash book, and that by the entry he knew the date to be August 2, 1884.

3. The court, under defendant's objection, allowed evidence showing that defendant, in company with the prosecutrix, and another young girl of about 17, and a young man in company with her, were in the parlor of the Farmers' Hotel in the town of Colusa on the day of, and about an hour before, the assault; that while there the four were engaged in drinking, and did drink wine; that defendant went downstairs to the barroom of the hotel, and brought up the drinks to the party. Defendant's counsel contends that this was evidence tending to prove that defendant administered intoxicating narcotics with intent to prevent the prosecutrix from resisting, under subdivision 4, § 261, Pen. Code, and that he is not charged with any such acts. He puts the proposition in this form: "Where a defendant is charged with rape under subdivision 1, of section 261 of the Penal Code, is evidence that the crime of rape committed by him under subdivisions 2, 3, 4, 5, and 6 admissible to prove the charge?" The proposition has been squarely passed upon and answered in the affirmative by this court in *People v. Snyder*, 75 Cal. 324, 17 Pac. 208, where it is said: "We think the true construction of section 261 to be that thereby the legislature meant merely to put beyond doubt the rule that on

an information for rape the things mentioned in the subdivisions could be proven, and would establish the crime. It is not intended to alter or establish a rule of pleading, or to create six different kinds of crime." Under the decision in the above case the evidence was properly admitted.

4. It is claimed that the conduct of the district attorney in making certain statements and repeating certain questions was error. We have examined all the matters alleged to be error in this regard, and find therein nothing which would warrant us in reversing the case. One of the matters most strongly urged to be error is that when the prosecutrix was called as a witness the district attorney asked the defendant to consent to an order of court that all bystanders be excluded from the court room. The defendant refused to give his consent, and the order was not made. The district attorney then said: "I will ask all bystanders, then, in the name of common decency. If they have daughters or sisters of their own, to absent themselves from the court room during the testimony of this little girl." The defendant, without objecting to the statement, or asking to strike out the request, saved an exception thereto. The judge remarked, "It is improper for the district attorney to make this demand." We do not think the request could have injured the defendant. It was not the statement of any fact not in evidence, nor was it any statement as to the character or motives of defendant. It does not appear to have been made through any passion or prejudice, or with intent to injure defendant. One Turman, who appears to have been one of the parties engaged in drinking in the parlor of the hotel, was near the hotel, and went upstairs just after the marshal and other parties went to the room of defendant. The witness Anderson, who was with the marshal, testified that they met Turman 10 or 12 feet from the room, and that Turman asked the witness what he thought about it. The following questions were then asked of the witness by the district attorney: "Q. Did you see anything of Turman after he went down the back stairs of the Bond building? Now, during the time that Scoggins went down after the keys and was gone, what did Turman do?" The court sustained defendant's objections to both these questions. The district attorney then said: "I will ask the court directly, and take a square ruling on it. It seems to me it is a part of the res gestæ, and ought to be admitted. The Court: I will allow it. (Defendant excepts.) Q. I will ask you whether or not it is true that Turman rushed down the back stairs, and commenced throwing up sticks against the window to notify this man to get out of there?" The question was objected to by defendant as irrelevant and leading, and the objection sustained. The ruling of the court was evidently correct. We cannot perceive how the

asking of the question by the district attorney could have injured defendant. If the question was asked for the purpose of having the jury believe that Turman did try to notify defendant to get out of the room, and if the jury did believe it, from the mere asking the question, it could not have injured defendant. The district attorney asked permission of the court to ask the question. No motion was made to strike it out. It does not appear that the district attorney was acting in bad faith, or that he by insinuation endeavored to get facts before the jury that in his opinion he could not prove. The defendant appears to have been treated fairly by the district attorney. The court so carefully guarded his rights that few errors are seriously urged. The judgment and order should be affirmed.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

129 Cal. 96

**FIRST NAT. BANK OF SAN FRANCISCO
v. CITY AND COUNTY OF SAN
FRANCISCO. (S. F. 1,337.)**

(Supreme Court of California. July 2, 1900.)

TAXATION—NATIONAL BANK—PROPERTY.

Rev. St. U. S. § 5219, providing that shares of stock in a national bank may be taxed in such manner as the legislature may direct, does not authorize a tax on the bank's personal property, notwithstanding the legislature has made no provision for the taxing of shares, and the tax levied does not exceed in amount what might have been assessed on the shares under legal authority therefor.

In bank. Appeal from superior court, city and county of San Francisco.

Action by the First National Bank of San Francisco against the city and county of San Francisco. From a judgment in favor of defendant, plaintiff appeals. Reversed.

Lloyd & Wood, for appellant. Franklin K. Lane, for respondent.

HARRISON, J. The plaintiff is a national banking association, organized and existing under and by virtue of the laws of the United States, and having its principal place of business at the city and county of San Francisco. It brought the present action to recover from the defendant the sum of \$8,290, paid by it under protest for taxes assessed and levied upon certain personal property owned by it on the first Monday of March, 1896, consisting of fixtures valued at \$3,600, and money on hand amounting to the sum of \$49,333. Upon the trial of the cause the court made findings of fact upon the issues before it, and rendered judgment in favor of the defendant. The plaintiff has appealed, bringing the cause here upon the judgment roll alone.

The right of the state to exercise its power of taxation over the property of a national

bank is limited and defined in section 5219, Rev. St. U. S. Under the provisions of that section the real property of the bank may be taxed "to the same extent, according to its value, as other real property is taxed," and the shares in the association may be assessed, as other personal property, to the owners or holders thereof, and taxed in such manner as the legislature may determine and direct, subject to two restrictions, not necessary to mention herein. As the authority of the state to tax the property of the association is derived under this section, it can exercise this power only to the extent and in the mode prescribed by the section. In *People v. National Bank of D. O. Mills & Co.*, 123 Cal. 53, 55 Pac. 685, it was held that the tax permitted by this section is the only tax which can be levied upon the property of the bank; that the provision for assessing the shares of the association to the owners or holders thereof is the only authority given to the state under which it may tax the personal assets of the bank, and that an assessment to the bank of its personal assets is void. The same ruling was afterwards made in the circuit court of the United States for this district, in *City and County of San Francisco v. Crocker-Woolworth Nat. Bank* (C. C.) 92 Fed. 273, and also by the supreme court of the United States in *Bank v. Owensboro*, 173 U. S. 664, 19 Sup. Ct. 537, 43 L. Ed. 860. In the case last cited the court, after declaring that, were it not for the permissive legislation of congress, a state would be wholly without power to levy any tax, either direct or indirect, upon the national banks, their property, assets, or franchises, quoted the above section 5219 at length, and said: "This section of the Revised Statutes is the measure of the power of a state to tax national banks, their property or their franchises. By its unambiguous provisions the power is confined to a taxation of the shares of stock in the names of the shareholders, and to an assessment of the real estate of the bank. Any state tax, therefore, which is in excess of and not in conformity to these requirements, is void." The failure of the state to enact a law directing the manner or place of taxing the shares of the association does not justify its officers in levying or collecting a tax for which there is no authority in law, even though it appear that the holder of the shares has thereby contributed no more to the expense of the government than he would have done under legal authority therefor. In *Bank v. Owensboro*, supra, the court held that the contention herein urged that a tax against the bank upon its personal assets was equivalent to a tax upon its shares was untenable. The judgment of the superior court is reversed, and that court is directed to enter judgment in favor of the plaintiff for the amount prayed for in its complaint.

We concur: TEMPLE, J.; McFARLAND, J.; VAN DYKE, J.; HENSHAW, J.

129 Cal. 98

CITY OF OAKLAND et al. v. HART, Judge of Superior Court. (S. F. 2,379.)

(Supreme Court of California. July 2, 1900.)

JUDGE—QUALIFICATION—APPOINTMENT—
VALIDITY.

Where a judge of a superior court considers himself personally disqualified to hear a case, and plaintiffs and defendants request him to select another judge, and approve the selection of a superior judge of another county, who proceeds to hear the case without objection until important matters have been disposed of, all objections to the regularity of the appointment and his power to act are waived.

In bank. Petition for writ of prohibition by the city of Oakland and others against E. C. Hart, superior court judge. Denied.

Robt. Y. Hayne, for petitioners. G. W. McEnerney and E. J. McCutchen, for respondent.

PER CURIAM. This in an original petition in this court for a writ of prohibition, prohibiting and restraining the respondent from any further acting as judge in a certain action pending in the superior court of the county of Alameda, in which the Contra Costa Water Company is plaintiff and these petitioners are defendants. The facts necessary to be stated are these: The said action of the Contra Costa Water Company against these petitioners (the city of Oakland et al.) was brought to restrain the defendants therein from enforcing a certain ordinance fixing the rates to be charged for water furnished by the said Contra Costa Water Company to the city of Oakland. It was brought in the superior court of the county of Alameda, and assigned to department 3 of that court, of which Hon. F. B. Ogden is presiding judge. When the pendency of this action was first called to the attention of Judge Ogden, in April, 1900, he suggested to counsel for the respective parties that he considered himself disqualified to try the case, because he was a ratepayer for water furnished by said water company, and suggested that counsel agree upon some other judge to try the case. He suggested, also, that two of the other judges of Alameda county were also disqualified for the same reason; that Judge Green of said county was not disqualified, but he was too busy and crowded with other cases to try said case, but that, if counsel consented, the case might be transferred to Judge Green, and he could select another judge. To this the attorney for the defendants (petitioners here) stated that he did not desire the matter to take that course, but did desire that Judge Ogden himself should select the judge, and that he (the attorney) did not desire to take the responsibility of agreeing upon another judge, but would consent to whatever judge might be named by Judge Ogden. The matter was mentioned several times, with the same result; and on May 7, 1900, Judge Ogden, with the knowledge and consent of the attorney for the defendant therein, as well

as with the consent of the attorney for the plaintiff, wrote the following telegram, to be sent to the respondent herein: "May 7, 1900. To Judge E. C. Hart, Sacramento, Cal.: All counsel in case of *Contra Costa C. W. Co. vs. City of O.*, as well as judges of this county, unite in request that you sit in said cause. Judge here is disqualified. If you accept, can you be here Wednesday morning to hear demurrer? F. B. Ogden." This telegram was sent to the other three judges of the superior court of Alameda county and was signed by Judge Green and Judge Ellsworth, the other judge not being found. It was returned to Judge Ogden, and a pencil mark was made across the names of the other two judges; Judge Ogden thinking that the dispatch ought to be sent in his name alone. This telegram was delivered to the attorney of the defendant and one of the attorneys of plaintiff in said case, and was by them taken to the telegraph office and forwarded to the respondent at Sacramento. This selection of the respondent, Judge Hart, was consented to by the attorney of the defendants. This fact appears not only upon the face of the telegram itself, which was delivered to the attorney for the defendants, and by him and the other attorney forwarded, but also by the testimony in the case which was submitted by consent on the hearing of this application. It was thought best to get a judge from Sacramento, because, as Sacramento had its own waterworks, there were no questions in that county about fixing rates. The respondent, Hart, immediately telegraphed to Judge Ogden that he would accept the appointment, and would be in Oakland on the next Wednesday morning, and was there at that time. Judge Ogden accompanied the respondent to the bench of the court, and introduced him to the attorneys as Judge E. C. Hart, who had been selected to try the case. No objection whatever was made by the attorney for the defendants therein to Judge Hart sitting in the case, and Judge Ogden caused the clerk of the court to enter the following order: "The demurrer and the motion herein coming on regularly this day for hearing, whereupon Hon. E. C. Hart, judge of the superior court of Sacramento, was requested by counsel for the plaintiff and defendant herein to act in the above-entitled cause, three of the judges of the court being disqualified, and Judge Hart having consented thereto, it is ordered that the matters herein be, and the same are hereby, continued to Wednesday, May 19, 1900." A demurrer to the complaint, having been interposed, was argued before Judge Hart, who took the same under advisement, and afterwards made an order overruling the same, and giving the defendants certain time to answer. Other matters were submitted and considered, without any objection to the respondent acting, before additional counsel was retained by the defendants therein. Afterwards additional counsel was employed by defendants, and

"thereafter all of said attorneys and counsel for the defendants in said cause took part in several interlocutory applications in the same before the Hon. E. C. Hart, without any objection." Thereafter a motion was made by defendants to compel the plaintiff to submit certain books to inspection, and this motion was submitted to Judge Hart, who afterwards denied the same, but, on application of defendants, added to the order that it was made without prejudice to a renewal of the motion. This occurred about the 11th of June, 1900, down to which time no objection whatever had been made to Judge Hart sitting in the case; but on June 12, 1900, for the first time, counsel for defendants in said cause objected to the further action of respondent as judge in the case, and to his hearing or determining any matter or proceeding therein, and after testimony and argument the objection was overruled by respondent. Thereafter this present proceeding for a prohibition was instituted in this court.

The position of the petitioners here is that Judge Ogden was disqualified from trying the case because he was a water-rate payer, that for the same reason he had no jurisdiction to request another judge to sit, and that his act in requesting the respondent to sit as judge of the superior court of Alameda county was without jurisdiction, and that the consent of the parties could not give it validity. As both sides assume that Judge Ogden was disqualified to try the case because he was a ratepayer, we will assume that proposition to be true, for the purposes of this case, although we are not to be understood as definitely determining that question. Neither are we at all inclined to hold that Judge Ogden, even if disqualified to try the case, could not have legally called in the respondent to hear and determine the case in question without any request or consent of the parties; for the constitution (article 6, § 8) provides, without any qualification, that "a judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof"; but it is not necessary to consider that proposition, because here the respondent was called to try the case with the consent, and practically at the request, of the petitioners. This is not a case to which the rule applies that consent cannot give jurisdiction. It is, for instance, not a case like *Bates v. Gage*, 40 Cal. 183, where it was sought by stipulation to give the district court jurisdiction to sit in a certain county at a time when it had no jurisdiction to sit there, and where it was said that consent of parties could not confer jurisdiction upon a court "when, in the nature of things, it could acquire no jurisdiction. They could not by their stipulation make a court." In the case at bar the superior court of Alameda county had full jurisdiction of the subject-matter of the action and of the parties, and the re-

spondent was a duly-elected and acting superior judge, qualified officially to preside in that court. There was no disqualification attaching to him personally, and therefore the question whether consent can confer jurisdiction upon a personally disqualified judge does not arise. Therefore the petitioners, having requested Judge Ogden to select a judge, and having approved the selection which he made and carried his request to the respondent, and having proceeded with the hearing of the case before the respondent, without objection, until important matters had been disposed of, cannot now be heard to repudiate their own act. We have been referred to no case where it has been held that a party, having consented to the calling in of a qualified judge to preside over a court having competent jurisdiction of the case, can in the midst of the hearing of the action stop further proceedings upon any such suggestion of the irregularity or invalidity of the manner in which he was called in as is made in the case at bar. The case of *Lillie v. Trentman*, 130 Ind. 16, 29 N. E. 405, is very similar to the case at bar. There the regular judge, being disqualified in a certain case, had called in another judge to try it; and one of the parties, having made no objection until certain matters in the case had been determined, then objected to his finally disposing of the case. The court, having intimated that it might presume that the order calling in the special judge was legally made, but that it did not care to put its decision on that ground, said: "What we do decide is that when a judge has been called or an attorney has been appointed to try a cause, as provided in section 415, Rev. St. 1881, and no objection is made to his appointment at the time, or to his sitting in the cause at the time he assumes jurisdiction, all objections to the regularity of such appointment shall be deemed waived. A practice that would permit a party litigant to proceed for months before a de facto judge, to make issues, and obtain rulings upon legal questions involved in the controversy, and then, if not satisfied with some of his rulings, or not disposed to go into trial when the cause is ready for trial, would be able, in a moment, to arrest proceedings and oust the jurisdiction of the judge, cannot be tolerated." In *Field v. Mark*, 125 Mo. 502, 28 S. W. 1004, where the regular judge of the court was disqualified on the ground of interest, and had appointed another judge to try the cause, with the consent of parties, the court said: "He could have called in another judge 'without consulting the other side; but when, as the record shows, he consulted their wishes, and they agreed with him upon Judge Sloan, the point is without merit either in ethics or law.'" Our conclusion is that the petition for a peremptory writ should be denied.

The foregoing views make it unnecessary

Cal.Rep. 60-62 P.—25

to consider the question whether or not Judge Green, who was free from all color of disqualification, did also request the respondent to act as judge of the superior court of Alameda county in the case in question. We see nothing in the point attempted to be made, that, when Judge Ogden sent the dispatch to the respondent, he thought that the latter was the person who had formerly been attorney general of the state. He intended to request the person who was superior judge of the county of Sacramento; and, when the latter appeared at Oakland to take his seat as judge in the superior court there, the events which then took place constituted of themselves a request that the respondent act as judge, all of which was with the additional knowledge and consent of counsel for petitioners. Respondent had no intimation that he was objectionable to either party until June 12th. If petitioners, instead of consenting that respondent be called in, and really requesting it to be done, had objected to him before any proceedings were had in the case, he would have been free to refuse to act if he had preferred to take that course; but, in the present condition of the case, it would, no doubt, be somewhat embarrassing for him to retire without consent of both parties. The prayer of the petitioners is denied, and the proceeding is dismissed.

BEATTY, C. J. I concur in the judgment, and generally in the foregoing opinion, but am unwilling to assent to the view, intimated therein, that Judge Ogden could have called in another judge of his own selection, without the consent of the parties. The course that should have been pursued was that originally proposed by Judge Ogden, viz. to send the cause to Judge Green's department, not because the case was governed by the express provisions of subdivision 4 of section 170 of the Code of Civil Procedure, as amended in 1897 (St. 1897, p. 287), for it is at least doubtful if that amendment applies except in cases of actual bias on the part of the judge, but the transfer should have been made to Judge Green's department because it has been held here that, in a county where there are several departments of the superior court, the disqualification of the judge to whose department a particular cause has been originally assigned is no ground for a change of venue, if there is another judge of the same court before whom it may be tried. *City of Oakland v. Oakland Water-Front Co.*, 118 Cal. 251, 50 Pac. 268. The only ground upon which that decision can be supported is that it is the duty of the superior court in the case supposed to reassign the cause to a department whose judge is not disqualified; for otherwise there could be no trial at all, or else the parties would have to await the assignment of a judge by the governor, or submit to the selection of a judge by a judge himself disqualified, and possibly deeply interested in the result of the trial.

I do not think the law intends that a litigant should ever be placed in such a dilemma, and, according to our repeated decisions, he cannot be so placed in a county where there is but one judge of the superior court. There, if the judge is disqualified, for interest, consanguinity, or other cause, either party may move for a change of venue, and the motion must be granted without hesitation or delay. *Krumdick v. Crump*, 98 Cal. 117, 32 Pac. 800; *Anaheim Union Water Co. v. Jurupa Land & Water Co.* (Cal.; May 12, 1900) 61 Pac. 80. Nor can the right to a change of venue be defeated by the act of the disqualified judge in calling in another judge to hear the motion. This was expressly decided in *Remy v. Olds* (Cal.) 42 Pac. 239, but since a rehearing was granted in that case, and the controversy settled by the parties, it cannot be cited as authority. In a more recent case, however, the principle upon which *Remy v. Olds* was decided has been affirmed in emphatic terms: "The reason why the judge of the county cannot call another to try the case is stated in *Krumdick v. Crump*, supra. It is that the judge shall neither try his own case nor select his judge." *Bank v. Taylor*, 125 Cal. 249, 57 Pac. 987. This is the controlling principle, and it applies in all counties alike, whether there be one department of the superior court or more than one department. No litigant can be compelled to accept a judge selected by a judge himself disqualified. He can always defeat such an attempt by moving, and insisting upon his motion, for a change of venue. But it does not follow from this that a disqualified judge cannot, with the express consent of the parties, call in a judge from another county to try the cause, instead of transferring it to another county for trial. In case of a change of venue, it is made the duty of the judge to transfer the cause to the county agreed upon by the parties; and there is no reason why they should not be allowed to agree that, instead of changing the place of trial, the judge by whom they are both willing the cause may be decided should come to the county where it is pending, and conduct the trial there. The convenience of witnesses and the saving of expense would often be controlling reasons for such a course. But the contention on the part of petitioners is that the plain words of the statute take from the disqualified judge the power to invite another judge to preside in his place, even with the express consent of the litigants. To do so, they contend, would be to "sit or act" in the case in a matter not included in the exceptions enumerated in section 170 of the Code of Civil Procedure. I do not construe the last clause of that section as an enumeration of exceptions to the rule against sitting or acting in a cause, but, rather, as a legislative declaration that the words "sit" and "act" are not used in a sense which would embrace the arrangement of the calendar,

the regulation of the order of business, or the transferring of the action or proceeding to another court. This clause means nothing more than if it had said, "But this inhibition shall not be construed as applying to the arrangement of the calendar," etc., and this is very different from an exception which strengthens the rule. It gives a sense to the words "sit or act" which excludes an order transferring the cause and all similar orders, and an invitation to a judge agreed upon by the parties is precisely analogous to an order transferring the cause to a county agreed upon. It is not sitting or acting in the cause, in the sense of the statute. In this case I consider that Judge Hart was invited by consent of the parties, and that, at all events, it was too late to object to his acting in the cause after the parties had voluntarily argued and submitted the demurrer to his decision. When another judge has been invited to try a cause by a disqualified judge, the remedy for a dissatisfied litigant is to move for a change of venue. If he waives that remedy,—if he consents, either expressly or impliedly, to the selection of the judge so invited,—he cannot claim that his trial of the cause is an excess of jurisdiction.

129 Cal. 145

BREE v. WHEELER. (Sac. 674.)

(Supreme Court of California. July 10, 1900.)
WATERS AND WATER COURSES—PROPORTION
OF WATER—TITLE—ADVERSE USER
—CONTINUITY—NECESSITY.

Defendant's claim of title to one-half the water in a stream by adverse user for five years was not established where plaintiff had at least once each year interrupted the water used by defendant by turning it out of the head of the defendant's ditch.

Commissioners' decision. Department 1. Appeal from superior court, Nevada county.

Action by William Bree against Lewis Wheeler for the determination of water rights. Judgment entered awarding one-half of the water to plaintiff and one-half to defendant. From the judgment, and an order denying plaintiff's motion for a new trial, he appeals. Reversed.

Chas. W. Kitts, for appellant. J. M. Walling, for respondent.

COOPER, C. Suit to determine the right to the water running in a stream known as "Rattlesnake Creek." Judgment awarding one-half the water to plaintiff and one-half to defendant. Plaintiff made a motion for a new trial, which was denied, and he appeals from the judgment, and an order denying his motion. Defendant in his answer claimed and set forth that he had been in the adverse possession and use of all the waters of said stream for more than five years prior to the commencement of the action. The court found "that the defendant has constantly, under a claim of right

adverse to the plaintiff, used one-half of the waters of said stream at the point of his diversion, under an adverse claim of right against the plaintiff, ever since the year 1887; * * * that the use of said water by the defendant has been every year, at least, once interrupted, by turning it out of the head of defendant's ditch by the plaintiff, but the court finds such acts by the plaintiff to have been mere trespasses." Upon this finding alone the court, as a conclusion of law, found defendant to be the owner of one-half the water of the creek. The finding does not show all the facts essential to establish title in defendant by adverse user. The user, in order to ripen into a title, must have been continuous and uninterrupted. Washb. Easem. (4th Ed.) p. 172; Ang. Water Courses, § 214; Water Co. v. Hancock, 85 Cal. 226, 24 Pac. 645. Interruption of adverse user, however slight, prevents acquisition of title by prescription. American Co. v. Bradford, 27 Cal. 368; Cave v. Crafts, 53 Cal. 138; Ball v. Kehl, 95 Cal. 613, 30 Pac. 780. The possession must have been open and notorious, and not clandestine. Water Co. v. Hancock, 85 Cal. 226, 24 Pac. 645; Unger v. Mooney, 63 Cal. 595; Ang. Water Courses, § 215. Here the court fails to find that the use by defendant has been continuous and uninterrupted, but finds affirmatively that it has been interrupted at least once a year. It may have been interrupted many times during each year, and the finding be true. The court adds that the interruptions were "mere trespasses." If the water was the property of plaintiff, he had the right to turn it out of defendant's ditch, and he would not commit a trespass in so doing. A man can do as he pleases with his own property without committing a trespass. The finding does not show how long these interruptions continued, nor whether they were as continuous as the use by defendant. Neither does the finding show that the use by defendant has been open or notorious.

As the case must be remanded for a new trial, it is proper to observe that the complaint does not allege that the plaintiff is the owner of the water of said creek. There is an attempt to allege an appropriation by one Sheets, the grantor of plaintiff, but the acts showing an appropriation are not pleaded. The complaint also attempts to allege title in plaintiff by adverse possession, but contains the allegation that the defendant has from time to time interrupted the use of the water. It is claimed in defendant's brief, and the evidence tends to show an agreement in the year 1885 between plaintiff and defendant by which each was to take one-half the water. The answer contains no allegation as to any such agreement, nor is there any finding thereon. The judgment and order should be reversed and the cause remanded, with directions to the lower court to allow the

parties to amend their pleadings within a reasonable time, if so advised.

We concur: CHIPMAN, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the cause remanded, with directions to the lower court to allow the parties to amend their pleadings within a reasonable time.

6 Cal. Unrep. 458

PATISON v. PRATT. (Sac. 606.)

(Supreme Court of California. June 10, 1900.)

APPEAL—REVIEW.

Findings based on conflicting evidence will not be disturbed.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county.

Action by Henry C. Patison against Samuel Pratt. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

Maddox & Stonesifer, for appellant. P. J. Hazen, for respondent.

SMITH, C. The action was brought to recover the possession or value of certain live stock and hay taken by defendant from the plaintiff. The defense was a general denial, and, as to the live stock, justification of the taking under the "act relating to estrays," etc., of March 27, 1897 (St. 1897, p. 198). The court found the ownership of the property in controversy in the plaintiff, and the taking of the same by the defendant. The only specifications with regard to these findings are the insufficiency of the evidence to justify the finding of ownership "at any time after * * * June 15, 1897," the date of the sale of the animals by the constable as estrays, or to justify the finding that "defendant took said property without right." This disposes of the question as to the hay in favor of the plaintiff, and leaves us to consider only the plea of justification, under the act, for the taking of the live stock. On this point it appears from the evidence that the animals were taken up on a tract of land described as the north half of section 22 of a specified township and range, and that the date of the taking was May 3, 1897. This land prior to November 21, 1895, belonged to the plaintiff's wife, Nellie Patison, but was subject to a deed of trust executed by her predecessors in title, Henry Patison and wife, to secure their promissory note to the Sacramento Bank for \$2,000, of date June 22, 1881, payable June 22, 1885; and on the day named (November 21, 1895) the trustees executed to the assignee of the bank (one Powell) a deed purporting to convey to him the land. Afterwards, and prior to November 14, 1896, Mrs. Patison, who had continued in possession, leased the east

half of the tract to one Laughlin, and on that day (Laughlin being in possession under his lease) she executed to one Murphy a lease of the whole tract for the term of three years; the rent reserved being a fourth of the crops, and he covenanting to cultivate the premises. Both the plaintiff and his wife testified that, on account of the failure of the lessees to cultivate the land as covenanted, the possession of both quarter sections, except 43 or 44 acres on the Murphy quarter, and a small part of the Laughlin quarter planted to grain, had been surrendered to Mrs. Patison; and that they were in possession at the time of defendant's entry and the taking of the property sued for, and also that the animals were taken up on the part of the land not in grain. The defendant, who had taken an assignment of Murphy's lease, of date April 10, 1897, and also a lease from Powell, claims that he was in possession of the premises prior to the taking, and that the animals, or some of them, were trespassing on the growing grain. His evidence on these points was evasive and otherwise unsatisfactory, but may be regarded, without affecting the result, as contradicting that of the Patisons. The court found that the animals taken up by the defendant "were not straying upon any premises in the possession of or leased by the defendant"; and in view of the evidence, which, to say the least, is conflicting on this point, the finding cannot be disturbed. It follows that the taking of the animals by defendant was a mere trespass.

Other points are made, but, in the view we take of the case, are immaterial. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: CHIPMAN, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

6 Cal. Unrep. 455

PALMER et al. v. CONTINENTAL INS. CO.¹
(Sac. 619.)

(Supreme Court of California. July 9, 1900.)
INSURANCE—STIPULATION AGAINST LIABILITY WHILE PREMIUM NOTE IS DUE AND UNPAID—VALIDITY.

1. Where an insurance policy provided that the insurer should not be liable while any note for premiums remained past due and unpaid, and the notes executed in payment of premiums contained a similar provision, and the property was destroyed while the first premium note was due and unpaid, the provision was valid, and the insured, by tendering the amount of the note, could not hold the insurer liable for the loss.

2. Civ. Code, § 2598, enacting that an acknowledgment in a policy of the receipt of a premium is conclusive evidence of its payment, so far as to make it binding, notwithstanding a stipulation that it shall not be binding until the premium is actually paid, applies only to a policy containing a stipulation that it shall not be binding until the premium is actually paid.

¹ Reversed in banc. See 64 Pac. 97, 132 Cal. 63.

Commissioners' decision. Department 2. Appeal from superior court, San Joaquin county.

Action by Mary G. Palmer and another against the Continental Insurance Company. Judgment for plaintiffs, and defendant appeals. Reversed.

Frank H. Gould, for appellant. Louttit & Middlecoff, for respondents.

SMITH, C. The suit was brought on a policy of insurance, to recover for loss by fire of part of the insured property. The judgment was for the plaintiffs. The appeal is from the judgment, and from an order denying a new trial.

The policy was issued June 7, 1897, and purports to be "in consideration of twelve dollars paid, and the payment of installments, when due, as follows: Twelve dollars on the first day of June, 1898, 1899, 1900, 1901," etc. The actual consideration consisted of two notes made by plaintiffs to defendant March 27, 1897,—one for \$48, payable in installments as above stated; the other for \$12.65, payable on or before October 1, 1897 ("being first payment for policy of insurance based upon application made this day," etc.). In the mortgage occurs the following provision, following the agreement for insurance: "But it is expressly agreed that this company shall not be liable for any loss or damage that may occur to the property herein mentioned while any note or obligation, or part thereof, given for the premium, remains past due and unpaid." And similar provisions are contained in each of the notes. The note for the "first payment" was overdue and unpaid at the time of the fire, which occurred October 11, 1897. Payment was tendered October 15th, but declined on the ground that the loss had already occurred.

The agreement in the policy that the company should not be liable for any loss occurring during default in payment of any note "given for the premium" in its terms applies to all notes coming under that description, including the note given for "first payment"; nor is such an agreement objectionable on the score of public policy or otherwise. On the contrary, agreements of this character in policies of insurance are quite common, and have been sustained in many cases. *Joyce, Ins. §§ 1209, 1204, 1205; Insurance Co. v. Dorman*, 125 Ind. 189, 25 N. E. 213; *Gorton v. Insurance Co.*, 39 Wis. 121; *Jolliffe v. Insurance Co.*, Id. 111; *Williams v. Insurance Co.*, 19 Mich. 451; *Robinson v. Insurance Co.*, 76 Mich. 641, 43 N. W. 647; *Wall v. Insurance Co.*, 36 N. Y. 157; *Curtin v. Insurance Co.*, 78 Cal. 619, 21 Pac. 370. The only case cited to the contrary is that of *Insurance Co. v. Wolf*, 37 Ill. 355. But the decision in that case is obviously based upon a misapprehension of the principle invoked to sustain it, which, as stated by the court, is that, "in a deed for conveyance of lands the recital of payment of the consider-

ation may be contradicted, provided it is not sought by such evidence to impair the effect of the deed as a conveyance." The meaning of this, as explained in *Kimball v. Walker*, 30 Ill. 511, 512, cited in the decision, is that the effect of a deed or conveyance operating under the statute of uses cannot be destroyed by proving there was no consideration. But this principle could have no application to the case under consideration, where it was not sought to impair the effect of the policy in question, but to establish its real terms.

It is, however, contended by respondents that a different rule is established by the provision of section 2508 of the Civil Code, which reads as follows: "An acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment, so far as to make the policy binding, notwithstanding any stipulation therein that it shall not be binding until the premium is actually paid." But the effect of this provision is simply to apply to policies of insurance the rule applying to deeds above referred to, and thus to make the acknowledgment of receipt conclusive so far as to make the policy binding. Before the enactment of the Code the point was disputed. In some cases the acknowledgment of receipt was held to be conclusive, as, e. g. in *New York Cent. Ins. Co. v. National Protection Ins. Co.*, 20 Barb. 468, and in *Gott v. Same*, 25 Barb. 189, cited in the annotated edition of the Code and in *Field's Code*. In others, as, e. g. in *Sheldon v. Insurance Co.*, 26 N. Y. 460, cited in same, and in this state in the case of *Bergson v. Insurance Co.*, 38 Cal. 541, cited in *Farnum v. Insurance Co.*, 83 Cal. 258, 23 Pac. 869, the contrary was held. Hence in the case last cited, in construing this section, all that is held is "that a tender of the payment of the premium in full, within the term of the credit allowed, is a sufficient compliance with the condition of payment to sustain an action on the policy"; and similarly in *Griffith v. Insurance Co.*, 101 Cal. 636, 36 Pac. 113, the rule is said to be that, where credit is given for the premium, "the company insuring is liable for a loss which may occur during the period of credit." The reason for the rule, and for its limitation as given, is thus expressed in the former case (citing *Van Schoick v. Insurance Co.*, 68 N. Y. 440): "The fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed that it was meant by the insurer or supposed by either party to make that condition a potent part of the contract." To hold otherwise, it is added, "would be [to impute] a fraudulent intent to" the insurer. Hence the section of the Code cited must be construed as applying only to the

class of policies described in it (that is to say, to cases where there is "a stipulation [in the policy] that it shall not be binding until the premium is actually paid"), and as providing that in such cases the policy cannot be annulled by showing, in contradiction to its recitals and to the acts of the parties, that the premium was in fact not paid. Hence the section does not provide generally that the "acknowledgment in a policy of the receipt of premium is conclusive evidence of its payment," but merely that it is thus conclusive "so far as to make the policy binding." Beyond this, as in the case of deeds, the receipt is not conclusive; nor are the parties precluded from showing that the consideration was other than as stated. But here the respondent does not question the validity of the policy, but seeks to enforce its provisions. Nor does it seek to vary the written instrument by evidence allunde, but relies upon the express terms of the policy and of the note, which, upon familiar principles, are to be taken together as parts of one transaction. Civ. Code, § 1642. Nor is it even claimed that the premium was not paid, but simply that it was paid by the note for "first payment;" which was accepted as payment to the extent and upon the terms stipulated, and subject to the express agreement that the liability of the company should cease pending default. We therefore advise that the judgment and order denying a new trial be reversed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

129 Cal. 160

COUNTY BANK OF SAN LUIS OBISPO v.
GOLDTREE et al. (L. A. 615.)

(Supreme Court of California. July 11, 1900.)

MORTGAGES — FORECLOSURE — COMPLAINT —
ATTORNEY'S FEES SECURED BY MORTGAGE —
REAL ESTATE — SALE IN PARCELS — PROTEC-
TION OF INTEREST OR EQUITY.

1. Under Civ. Code, § 2924, providing that a transfer of property, other than in trust, as security for the performance of another act, shall be deemed a mortgage except in case of personal property accompanied by change of possession, where a complaint on a note and to foreclose a mortgage shows the execution of the note, and that afterwards defendants conveyed to plaintiff certain real estate by deeds containing the declaration that the conveyance was intended as a mortgage to secure the payment of the note in suit, the complaint is sufficient to withstand a demurrer for want of facts.

2. Where a note contains an agreement to pay attorney's fees, and a deed was executed to secure the payment of the note, it is proper to make the judgment for attorney's fees a lien on the mortgaged premises, since the agreement for attorney's fees constituted a part of the note.

3. Where a decree in foreclosure of a mortgage was in proper form, and directed the sale of real estate in substantial compliance with

the statute, if the defendants desired the property sold in separate parcels they should have made application therefor, as required by Code Civ. Proc. § 694.

4. Where a defendant in a suit to foreclose a mortgage has an interest in the land not covered by the mortgage, or an equity he desires protected, he should present the matter to the court, and, on failure to do so, cannot complain of the decree.

Commissioners' decision. Department 2. Appeal from superior court, San Luis Obispo county.

Suit by the County Bank of San Luis Obispo against N. Goldtree and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Graves & Graves, for appellants. W. H. Spencer, for respondent.

GRAY, C. This is an action on a note and to foreclose certain grant deeds of land given by way of mortgage to secure the payment of said note. Defendants appeal from the judgment.

The complaint shows that defendants jointly executed to plaintiff a note for \$33,119.58, and thereafter, as security for the payment of the same, defendants conveyed to plaintiff, by deeds of grant, certain described real estate; "that said conveyance of said real estate by defendants to plaintiff is and was intended by both plaintiff and defendants as a mortgage to secure the payment of said promissory note." The note provides for the payment of 2 per cent. on the sum due as attorney's fees in case suit is brought to collect the same. The answers of defendants consisted solely of general denials of the allegations of the complaint. At the trial the defendants admitted that each and every allegation in the complaint contained was true. In the decree an attorney's fee, as provided in the note, was allowed, and, with the other amounts found to be due to plaintiff, was made a lien on the lands described in the complaint. The decree was in the usual form, and directed that all and singular the mortgaged premises, or so much thereof as might be sufficient to raise the amount due plaintiff, together with costs of suit, and expenses of sale, and which may be sold separately without material injury to the parties interested, be sold at public auction in the manner prescribed by law. A deficiency judgment was also provided for in the decree in the usual form.

1. A conveyance by deed of grant is deemed to be a mortgage when it is intended as a mortgage to secure the payment of a promissory note or the performance of any other obligation. The complaint states a cause of action for the foreclosure of a deed given by way of mortgage. Civ. Code, § 2924. The demurrer was properly overruled.

2. The attorney's fee was properly allowed, and properly made a lien on the mortgaged premises. A copy of what is called in the complaint a "promissory note" is set out therein, and it appears to contain,

in addition to the usual terms of a promissory note, an agreement for attorney's fees in case suit is brought. Following this is the allegation that the conveyance of the land was made to secure the payment of the "said note." This term, "said note," as used in the complaint, evidently includes the contract to pay attorney's fees previously set out as a part of the note. The truth of this allegation of the complaint having been admitted on the trial, it follows that we must treat the deeds as having been given to secure the payment of an attorney's fee, as well as the principal and interest of the note. It was proper, therefore, not only to give plaintiff judgment for an attorney's fee as provided, but also to make such fee a lien upon the mortgaged premises. There is nothing in conflict with this position in *Boob v. Hall*, 107 Cal. 160, 40 Pac. 117, nor in the case therein cited, *Clemens v. Luce*, 101 Cal. 432, 35 Pac. 1032; for in the former case no agreement for an attorney's fee was alleged, and in the latter (*Clemens v. Luce*) the terms of the mortgages confined them to securities for the payment of the principal and interest of the note, it nowhere appearing in the mortgages "that they were given as security for the payment of any attorney's fee whatever." In the cases of *Russell v. Findley*, 122 Cal. 478, 55 Pac. 143, and *Irvine v. Perry*, 119 Cal. 352, 51 Pac. 544, 949, the agreement as to attorney's fees provided for their payment only, and not that the mortgage should secure them; and it does not appear that the notes in those cases provided for the payment of any attorney's fee. In the case at bar we think it does appear from the complaint, and the admission of its truth, that the conveyance was made to secure the attorney's fee, for the promise to pay such fee is a part of the instrument secured.

3. The decree, in directing the sale of the property, substantially follows the provisions of section 726, Code Civ. Proc., and is in proper form. If the defendants desired the property sold in separate parcels, they should have proceeded to that end in accordance with section 694, Id. If any defendant had any interest in any of the lands described in the complaint that was not covered by the mortgage, or if he had any equity that he desired to have protected, he might have presented the matter to the trial court in a proper manner. It does not appear that he presented any such matter to that court in any manner, and he cannot now be heard to complain.

4. Section 726, Code Civ. Proc., providing for a deficiency judgment, is not in conflict with any constitutional provision, but is a valid law, and has been so recognized for upward of 25 years. Under it, the court was warranted in providing for the entry of a deficiency judgment. The judgment should be affirmed.

We concur: CHIPMAN, C.; COOPER, C

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(129 Cal. 128)

STARR v. KREUZBERGER et al. (Sac. 641.)
(Supreme Court of California. July 9, 1900.)

MASTER AND SERVANT—NEGLIGENCE—HIDDEN DEFECT—KNOWLEDGE OF MASTER—DUTY—RISK—ASSUMPTION BY SERVANT.

Plaintiff, an employé of defendant, was engaged in laying a 4-inch wall in front of an old wall, and tying the two together. The old wall was 13 inches thick, up to 14 feet in height, with an 8-inch fire wall and gable built on top of it; and, after building the 4-inch wall up 12 feet, defendant ordered plaintiff and others to take a course of brick from the old wall, when plaintiff inquired, "Aren't we getting pretty high?" and defendant replied, "No; that's all right;" and, in consequence of removing such course, the gable wall fell on plaintiff. Plaintiff had worked for defendant two years prior to the injury, and testified that he did not know where the 8-inch wall began. *Held*, that plaintiff was not guilty of contributory negligence.

Commissioners' decision. Department 2. Appeal from superior court, Sacramento county.

Action by Albert H. Starr against L. Kreuzberger and another. From a judgment in favor of plaintiff, and an order denying a new trial, defendants appeal. **Affirmed.**

Holl & Dunn, for appellants. Henry Starr, A. P. Catlin, and A. L. Shinn, for respondent.

CHIPMAN, C. Action by an employé against his employers to recover damages for a personal injury claimed to have been sustained through their negligence. The defendants claimed that the injury was the result of plaintiff's carelessness. The cause was tried by the court, and plaintiff had judgment. Defendants moved for a new trial, and the appeal is from the order denying the motion.

Some objections are made to the findings, as contradictory and argumentative, but the principal question argued is that the findings are not supported by the evidence. The injury resulted from the falling of a brick wall on which plaintiff was working as a bricklayer. The findings challenged were: "Finding 3. That said brick wall was in an unsafe condition for the work for which plaintiff was employed and directed to perform, and which defendants knew, but of which plaintiff was ignorant. That while working, and through and by the negligence of the defendants in employing plaintiff upon said work and directing him in the manner of performing the same, and without fault or negligence on the part of the plaintiff, the said wall fell upon and injured plaintiff," etc. "Finding 4. That plaintiff did not have a better opportunity than the defendants of seeing and knowing the condition of said wall. That plaintiff was not guilty of carelessness or negligence in work-

ing upon said wall." Plaintiff was a journeyman bricklayer of 30 years' experience. Defendants were partners and contractors for the work being done; Kreuzberger being an experienced bricklayer and contractor, and Harvie a carpenter and contractor. The work was being done on a small brick building, part of the premises of the City Brewery, in Sacramento, attached to the east side of the main brewery building. It was a one-story brick structure, with a brick gable front. The improvement consisted in raising the building an additional story, and adding to the thickness of the wall by building a new 4-inch wall of pressed brick from the ground, upon and against the entire front. The roof was first detached from the walls of the building and raised to the required height, and supported there free from the walls. The new wall was to be tied or fastened to the old wall by cutting out two courses of brick across the front every two feet, and inserting therein what were called "headers," or courses of brick crosswise of the main wall, so as to connect the main with the new wall, and thus tie them together. These grooves were cut continuously across both buildings, as both were undergoing similar changes. We have to deal, however, with the smaller building, and shall refer only to it. The walls of this building were originally 12 or 14 inches thick from the ground up to the bottom of the ceiling joists, a distance 12 or 14 feet. From this point a fire wall extended upward "several feet above the bottom of the ceiling joists," and was 8 or 9 inches thick, resting on the 12-inch wall. Upon this fire wall was the front gable end, of the same thickness as the fire wall. Successive grooves were cut, and no question is made that this could be done safely in the 13-inch wall, but the last groove was cut about 2 inches below where the 8-inch fire wall rested on the 13-inch wall, which undermined the fire wall or gable end, and it fell upon and injured plaintiff while he was at work. Appellants say in their brief: "It is not denied that cutting this last groove, four and one-half inches deep, into the thirteen-inch wall, two inches below the point where the nine-inch wall commenced, caused the nine-inch gable wall to fall; and the whole question is whether the plaintiff is free from negligence in cutting this groove." It is conceded by both parties that there was no danger in cutting the grooves in the 13-inch wall, and all of them had been cut, by direction of Kreuzberger, as continuous grooves; i. e. from end to end, without leaving any sections of the bricks in the grooves. There is evidence that, where there is danger from the upper portion of the wall giving way when undermined in this manner, the proper and safe course to pursue is to leave portions of the wall, at intervals, undisturbed; but in the 13-inch wall this, it is conceded, was not necessary, and no such precaution was taken. There were six workmen on the job and all

were on the scaffold at the time the last groove was reached, and they had begun work on it when defendant Kreuzberger appeared.

Plaintiff testified that he was employed by defendant Kreuzberger, and was working under his direction, as, it appears, were the other workmen, also. At the time of the accident they were working on a scaffold 9 or 10 feet high, and they had carried up the 4-inch wall about 12 feet. Plaintiff was working at the east end of this wall or corner of the building, and on his left were the other workmen at intervals along the scaffold. The top of the brick wall at the corner was so high above the scaffold that plaintiff could not reach to the top. He testified: "I am not certain how high that thirteen-inch wall extended up. There was a fire wall on the building. I did not know at that time how high the fire wall was. There was nothing on the front of the building where I was working to indicate where the fire wall commenced. Standing upon that platform where I was at work, I could look up and see that the fire wall was an eight-inch wall at the top. * * * At the time we were cutting the slot, just before the wall fell, we had built up the four-inch wall to where the course of stone was put on, and that would stop our work until the stone masons had completed theirs. Mr. Kreuzberger came to me and said that he did not see how we were going to continue the work there; that the stone masons were in the way. But he says, 'You can cut a slot through there for the next header, and then you and Corsaw go up to the Buffalo Brewery.' I said, 'Where will I cut?' He turned to the wall and said, 'Well, about here,' putting his finger on the wall. I looked up and said, 'Aren't we getting pretty high?' And he said, 'No; that's all right.' Then Corsaw, standing inside of me, said: 'Well, what's the matter with cutting under the header?' That would bring it two courses still lower than he first indicated. He said: 'All right. Let it go at that. And have them all cut on the same line.' He left then and went towards Mr. Day's corner. * * * He came back and finally said, * * * 'Just cut that slot through, and you and Corsaw come up there, and the other boys will have to knock off.' He turned then and left again. We went to work and cut where he told us; that is, under the header." He then describes how the work proceeded, and how as the last brick was knocked out of the groove the wall fell over on them. Plaintiff was given a very searching cross-examination as to what he meant when he said to Kreuzberger, "Aren't we getting pretty high?"—the purpose being to show that plaintiff was fully warned of the danger, and knew as well as his employer did the exact conditions under which he was working. He testified: "The reason I asked him that question was to be

sure that we were not cutting too high in that twelve-inch wall, so as not to cut into the eight-inch wall and through that wall. In other words, I wanted to be sure that we were not cutting too high. Q. In other words, you suspected you might be up where you might be cutting into the eight-inch wall? A. No, sir; if I had had the least suspicion of it I would not have cut there." Plaintiff was further pressed upon this point, and testified: "Q. Now, if you wanted to be certain, you had not been certain before that, had you? There was a doubt in your mind? A. Well, we had not cut there. No; there was not a doubt after he had given me the order. * * * I asked the question to be certain, and that is about the only way I can explain that. I asked that question in order to be certain that we were all right." Further cross-examination developed the fact that plaintiff had, two years before, worked on the building and helped to lay the gable wall. "From the fact, then, of seeing the wall, and from having constructed that wall, you knew exactly how it was constructed? A. At the time it was constructed; yes. Q. Knew as much about it as Mr. Kreuzberger did? A. No, sir; I don't think so, because he was the boss there and looked after the work. He would look at it more particularly than I would." He was asked what information Kreuzberger had that he (plaintiff) did not have, and answered: "Why, he was the contractor there. He had been up there and figured. He must have been up there and figured on the work that he was going to do." Witness Day, one of the bricklayers on the job, testified: "It could not be seen from the outside, where we were at work on the platform, where the eight-inch wall commenced. Mr. Kreuzberger came along the platform and pointed out the place to cut the groove. He indicated the course of bricks to be removed, and we cut out the course which he indicated. After the wall fell I examined it, and found that the wall broke off within one or two courses of brick from the point where the eight-inch wall joined the twelve-inch wall." Hansen and Lynch, two other bricklayers who assisted in the work, testified that the groove was cut where Kreuzberger directed, and that they could not tell from the platform where the 8-inch wall joined the 12-inch wall. Corsaw, who worked next to plaintiff, testified that they could not tell from the scaffold where the 8-inch wall commenced. "We would have to get a ladder and get up on top of the wall, and measure the wall on the inside from the top down to the thirteen-inch wall, where the eight-inch wall commenced, to ascertain that fact." The architect, Mayo, testified: "A day or two before the gable end or fire wall fell, I told Lucas Kreuzberger [defendant] that that wall must be taken down. He knew that it had to come down, for the contract and speci-

cations required that eight-inch wall to be taken down." Jackson, a laborer on the work, testified that Kreuzberger was on the top of the wall several times; that he (witness) had been ordered by the architect to take the gable wall down. "I was about to commence upon it, when Mr. Kreuzberger came along and ordered me not to do it. I asked Mr. Kreuzberger who was boss of this work, and he said he was, but he must humor Mayo a little. He said he would save money by not taking the wall down." There is nothing in the evidence to warrant the inference that the architect ordered the wall taken down because of any fear that it might fall. The significance of this evidence lies in its tendency to prove that Kreuzberger knew all about the wall, and in tending to give rise to a further inference that, in his endeavor to avoid taking the wall down, he was not as mindful of his servants' safety as it was his duty to be, as a master, or as he otherwise would have been. The evidence is given with considerable fullness because of defendants' very earnest contention that the court drew erroneous deductions from it, and because it is seriously contended that under well-settled rules of law the evidence shows that plaintiff contributed to his injury by his own negligence, and should not recover.

Appellants cite numerous cases, from which they deduce the following: "The doctrine established by these cases is that an employé engaged upon work that is dangerous, or using defective appliances or machinery, or working upon dangerous or insecure scaffolding, cannot recover damages for any injuries received through such defects, provided he knew or had the means of knowing the dangerous condition of such machinery or appliances; nor can he recover if his means of discovery of the defects and dangerous condition is as good as that of his employer." In the case of *Silveira v. Iversen* (recently decided by this court; opinion filed March 24, 1900) 60 Pac. 687, reference was made to *Magee v. Railroad Co.*, 78 Cal. 437, 21 Pac. 114, where the rule relied upon by appellants, that the servant cannot recover if his knowledge is as good as that of his master, was held to be erroneous. In that case it was said: "The master has no right to assume the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire, and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them." Mr. Justice Temple, in the *Silveira Case*, said: "The employé is not required to use any degree of care or diligence to discover defects. He will be held to have assumed the risk only when he knew, and will be held to have known when

the defect was so obvious that he must have known, or simply refused to open his eyes and see, or when he was put upon inquiry by some discovery or suggestion of danger which it was gross carelessness for him to neglect."

It is strongly urged that, because plaintiff helped to construct this wall two years before, he must be held to have known all about it. But he testified that he did not know where the 8-inch wall joined the 13-inch wall, and this is the vital fact in the case. We must assume that defendants knew this fact, and, if they did not know it, the duty was cast upon them to know it, and plaintiff had a right to assume that they did know it. The evidence is that this fact could not be discovered from any point where the men were working, and that to have ascertained the place of junction of the main wall and the fire or gable wall would have required the laborers to make an investigation apart from their duties, and which it was defendants' duty to make, and which plaintiff had a right to assume that defendants, as contractors, had made. When plaintiff remarked to Kreuzberger, "Aren't we getting pretty high?" he, no doubt, had in his mind that they were near the 8-inch wall, and perhaps too near to make it entirely safe to cut the groove where Kreuzberger indicated. But, when he was assured by his employer that it was all right to go ahead where he pointed out, I think plaintiff was exonerated from making any independent investigation, and was justified in assuming that there was no danger, and that his employer knew more about the condition of the wall than he did. The danger was not obvious. It depended upon a fact which plaintiff did not know, and which it was his employer's duty to know, and we think plaintiff was justified in going forward in obedience to the directions given him. See 1 Bailey, Pers. Inj. § 898 et seq., where the question is discussed, and the cases pro and con are collected.

We do not think the findings are amenable to the objection that they are contradictory and argumentative. The alleged argumentative feature is in respect of allegations found in the answer which the finding negatives. One finding states that plaintiff was ignorant of the unsafe condition of the wall, and another finding states that he did not have a better opportunity than defendants for seeing and knowing its condition. Defendants' point is that, because the finding was that plaintiff had no better opportunity, it in effect found that he had "as good an opportunity as defendants of seeing and knowing" the danger. We fail to see any necessary contradiction in the findings. It is advised that the order be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(129 Cal. 157)

JARMAN v. REA. (S. F. 2,064.)

(Supreme Court of California. July 10, 1900.)

**APPEAL — UNDERTAKING — SUFFICIENCY —
MOTION TO DISMISS — RECORD — COURT
WILL NOT EXAMINE.**

1. Where appellant's undertaking was not conditioned for payment in case of a dismissal of the appeal, but was otherwise sufficient, and he filed an unobjectionable undertaking before the hearing of a motion to dismiss the appeal for lack of an undertaking, the first undertaking is not so deficient as to be void, but is insufficient within Code Civ. Proc. § 954, providing that an appeal shall not be dismissed for insufficiency of the undertaking if a sufficient undertaking be filed in the supreme court before the hearing of the motion.

2. A motion to dismiss an appeal on grounds relating to the form and sufficiency of the specifications of error will be denied, since the court will not examine the record on such motion.

In bank. Appeal from superior court, Santa Clara county.

Motion to dismiss appeal for the lack of an undertaking. Denied.

H. V. Morehouse, F. J. Hambly, D. W. Burchard, E. M. Rea, and D. W. Herrington, for appellant. D. M. Delmas, Edwin A. Wilcox, and A. H. Jarman, for respondent.

HARRISON, J. The respondent has moved to dismiss the appeal herein upon the ground that the undertaking on appeal provides only that the appellants will pay all damages and costs which may be awarded against them on the appeal, and does not contain the clause "or on a dismissal thereof," which is required by section 941, Code Civ. Proc. Before the hearing upon the motion the appellant presented a good and sufficient undertaking, which was approved by the chief justice, and filed with the clerk of this court, and contends that for that reason the motion should be denied. Although the right of appeal is to be liberally construed, yet the party who has recovered a judgment against another ought not to be subjected to further cost in sustaining such judgment if it was properly rendered, or to delay in its enforcement; and for the purpose of indemnifying him in these respects an undertaking on appeal is provided for by statute. Section 940, Code Civ. Proc., declares that "the appeal is ineffectual for any purpose" unless an undertaking, "as hereinafter provided," is filed within five days after service of the notice of appeal. The character and terms of the undertaking are given in section 941, and section 954 provides: "No appeal can be dismissed for insufficiency of the undertaking thereon if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal." The respondent is in all cases entitled to such an undertaking as is prescribed in section 941, and if the appellant, after notice of a motion to dismiss his appeal for want of such undertaking, fails to present a sufficient undertaking before the hearing of the motion, his ap-

peal will be dismissed, even though the defect be merely "insufficiency." In *re Fay's Estate*, 126 Cal. 457, 58 Pac. 986. The above provision of section 954 contemplates that, although an undertaking has been filed, it may be of such a character or in such a form as not to fully indemnify the respondent against the costs and damages which he may sustain by reason of the appeal. The use of the phrase "insufficiency of the undertaking" indicates a distinction between an undertaking which does not fully comply with all the terms of section 941 and the entire absence of an undertaking. An undertaking may be filed which is so defective as not to constitute any obligation upon the sureties therein, and which is in reality no undertaking at all. In such a case there is more than mere "insufficiency." There is an entire want of indemnity to the respondent, and section 954 has no application. In *Associates v. Wilkins*, 71 Cal. 623, 12 Pac. 410, there were appeals from two separate orders, and a single undertaking, which did not distinctly refer to either appeal. It was held that it was so ambiguous that it must be regarded as if none had been filed, and that to permit a new undertaking to be filed under section 954 would be in effect to permit a new appeal to be perfected after the time fixed by law. The same ruling was made in *Ditch Co. v. Bachtold*, 109 Cal. 111, 41 Pac. 813; In *re Heydenfeldt's Estate*, 119 Cal. 346, 51 Pac. 543. In *Clarke v. Mohr*, 125 Cal. 540, 58 Pac. 176, the undertaking was executed before the order denying a new trial had been made, and for this reason it was held that there was no consideration for the undertaking. See, also, *Society v. Freese* (Cal.) 59 Pac. 769; *Stackpole v. Herman*, 126 Cal. 465, 58 Pac. 935. On the other hand, the undertaking may be defective in the form in which it is framed, and yet sufficiently indicative of an intent to comply with the terms of the statute to be binding upon the sureties; or it may be defective in that it indemnifies the respondent against only a portion of the costs and damages that may be awarded him. There is in such cases a mere "insufficiency," which, under section 954, may be remedied by the filing of a sufficient undertaking. In *Spreckels v. Spreckels*, 114 Cal. 60, 45 Pac. 1022, there were two appeals, one from the judgment and the other from an order, which were properly recited in the undertaking, and the sureties stipulated that the appellants would pay all costs and damages which might be awarded against them "on the appeals or either of them, or on the dismissal thereof or of either of them." It was held to be a sufficient compliance with the statute, although the penal sum of the undertaking was \$600 in gross, instead of \$300 for each of the appeals. In *Association v. Broad* (Cal.) 61 Pac. 868, the body of the undertaking was sufficient in form, but its execution by one of the sureties was informal. The undertaking was held to be merely insuffi-

ment, and a new one was permitted to be filed. It cannot be said in the present case that there is an entire want of the undertaking provided by section 941. The sureties undertake that the appellant "will pay all damages and costs which may be awarded against him on the appeal." The omission of a similar provision in case of a dismissal of the appeal does not defeat or impair the undertaking in case there should be an affirmance of the judgment. The undertaking is merely defective in failing to provide for indemnifying the respondent in case the appeal should be dismissed. This must be held to be only an "insufficiency," which may be remedied by the filing of another undertaking. The ground for the dismissal set forth in the notice of motion that the transcript does not contain any specifications of the errors of law, or the particulars in which the evidence is insufficient to support the verdict, relates to the form and sufficiency of the specifications, and cannot be considered upon a motion to dismiss the appeal. An appeal cannot be dismissed when the record in the transcript must be examined for the purpose of ascertaining the sufficiency of the grounds urged in support of the motion. See *Howell v. Howell*, 101 Cal. 115, 35 Pac. 443; *Randall v. Duff*, 105 Cal. 271, 38 Pac. 739; *Gregory v. Diggs*, 108 Cal. 123, 41 Pac. 34. The motion to dismiss the appeal is denied, and the undertaking filed herein June 29, 1900, will stand as the undertaking on this appeal.

We concur: BEATTY, C. J.; HENSHAW, J.; McFARLAND, J.; VAN DYKE, J.

132 Cal. 637; 6 Cal. Unrep. 458

BASSETT et al. v. FAIRCHILD et al. (S. F. 1366.)

(Supreme Court of California. July 2, 1900.)

APPEAL—ERROR—WAIVER—DISCUSSION IN BRIEF—CORPORATIONS—OFFICERS—RIGHT TO COMPENSATION—RATIFICATION OF ACTS OF OFFICERS—STOCKHOLDERS' MEETING—QUORUM—BOARD OF DIRECTORS—RESOLUTION.

1. An assignment of error not discussed in appellant's brief will not be reviewed.

2. Where a director of a corporation performed services as its manager not pertaining to his duties as director, he is entitled to recover what such services were reasonably worth, though no rate of compensation was fixed by the board of directors in advance of the performance of the services.

3. Where a director rendered services for the corporation as manager, which were outside of his duties as director, for which he received payment without the authority from the board, such payment might be properly ratified thereafter; and the directors cannot be held liable therefor, as for a wrongful expenditure of funds.

4. Under Civ. Code, § 308, declaring that a majority of the directors of a corporation form a quorum, the passage of a resolution ratifying payment of compensation to one of their members for services outside his duties as a director was not invalidated by the fact that such director was present when the vote was taken, though his presence was necessary to

constitute a quorum, where the resolution was passed without his vote.

5. Stockholders of a corporation may ratify the action of the board of directors in ratifying a payment to a director for services outside his duties as a director, and the fact that such director was present at the stockholders' meeting at which action thereon was taken did not invalidate it; a majority of the stockholders, independent of such interested stockholder, having voted in favor of the resolution.

6. The fact that such ratification was a ratification of all the acts of the directors since the preceding stockholders' meeting could not be urged against its validity as a ratification of such payment, where the objection was made to the adoption of the resolution at the meeting on the ground that it would cover such specific payment, since that phase of the question was thereby distinctly presented and voted on by the stockholders.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by A. C. Bassett and another against J. A. Fairchild and others. From a judgment in favor of plaintiffs, and from an order denying their motion for a new trial, defendants appeal. Reversed.

Frank Shay, C. H. Wilson, and E. W. McKinstry, for appellants. Gunnison, Booth & Barnett, for respondents.

McFARLAND, J. It is averred in the complaint that each of the plaintiffs is the owner of at least five shares of the capital stock of the corporation defendant, the Bitumen Consolidated Mining Company, the capital stock being \$300,000, divided into shares of \$100 each, and that this action is brought on behalf of themselves and other stockholders. It is also averred that, during the times when the alleged wrongs were committed, defendants Fairchild, Perine, Walrath, and Miles were directors of the corporation defendant; the whole number of directors being six, and the other two being plaintiff Bassett and one Swift. It is further averred that said defendants, being a majority of the board of directors, improperly expended certain moneys of the corporation, and the purpose of the action is to recover from them the amount of money alleged to have been thus expended. The court rendered judgment against Fairchild, Perine, and Walrath for \$10,729.90, which sum consists of \$8,665.80 found to have been improperly expended, and legal interest thereon for several years, and against defendant Miles for \$7,129.90 for money, and interest thereon, found to have been improperly expended by the directors by acts in which he participated. From the judgment and from an order denying their motion for a new trial the defendants appeal.

The court found the appellants liable for \$1,888.05 paid out by them as expenses incurred in defending a certain action brought in the superior court by the San Luis Bituminous Rock Company against the defendant corporation herein and certain others of the individual defendants herein. The ground of this finding is that, owing to the nature

of that action, the defendants therein other than the corporation should have borne the expenses of the litigation; and, as this finding is not discussed in appellants' brief, it may be dismissed without further notice.

The chief item of appellants' liability allowed by the court which is contested by appellants is \$6,475 paid defendant Fairchild for services as general manager of the corporation defendant before his compensation therefor had been fixed, which sum, with interest thereon, makes up the main amount of the judgment. The record shows that after the case had been submitted to the trial court that court made an order, on August 29, 1896, that judgment be entered for plaintiffs for \$1,888.05 alone. In a written opinion attached to one of appellants' briefs, the learned judge of the lower court gives his reasons, which we think are exceedingly cogent, for not allowing judgment for the \$6,475 paid to Fairchild. But afterwards the court made findings and ordered judgment for the \$6,475 and interest, in addition to the said \$1,888.05, and, under an amendment to the complaint, gave judgment, also, for an additional \$332.25, which will be referred to hereafter, and ordered that \$2,000 be allowed plaintiffs as a counsel fee, to be paid out of the judgment by a receiver who was appointed to collect the same. There is no averment, or proof, or finding of any fraud committed by appellants, but the theory of the complaint seems to be that in authorizing the payment of the said money to Fairchild the appellants acted with gross negligence. The appellants admit the payment of this money, and justify it. The findings seem to follow the theory of the complaint; but so far as they may be construed to find that appellants were guilty of such negligence as would render them liable on the ground of negligence alone, or that they willfully intended to injure the corporation for their own personal gain, they are not supported by evidence. However, the findings on these points need not be closely scrutinized, for the order denying the motion for a new trial contains this language: "There is no evidence in this case that either of the defendants Perine, Walrath, or Miles acted for their own private gains. If any finding bears that construction, I regret it, and, if it were necessary to support the judgment, I would grant a new trial. Neither, under my views of the law, is the finding as to negligence material. Perine, Walrath, and Miles are held liable upon the ground that they voted money of the corporation to Fairchild without authority of law. If it be assumed that the corporation was indebted to Fairchild for past services, none of the defendants are liable for the money paid to him. * * * Upon the main question, whether Fairchild had any legal claim for compensation before his salary was fixed by the board, I see no reason to change the views expressed by me in deciding the case." It is apparent, therefore, that the judgment

was based on the principle that the payment of the money to Fairchild was unlawful because it was paid before his salary as general manager had been fixed, and that, as will be seen hereafter, it was so entirely illegal and ultra vires that it could not be ratified or made valid by any subsequent act of either the directors or the stockholders. We do not think that the judgment can be affirmed on that principle, under the facts of this case.

The corporation defendant was organized in September, 1891. Its main purpose was to control the mining and marketing of bituminous rock to be taken from several different mines or deposits of bitumen. It appears that these several mines were mainly owned by the persons who formed the corporation defendant, and became its stockholders and directors. The corporation took leases from the owners of these several mines, by the terms of which it was to give them a royalty of one dollar a ton for every ton of bitumen taken from the mines. It seems quite apparent that the main profit which the organizers of the corporation expected to receive was to come through the royalty of one dollar per ton to be paid for the rock taken from the mines which they owned; and, in this connection, we think that the court erred in sustaining an objection to the question asked Fairchild on the witness stand, whether at the time of the organization of the corporation "it was designed, intended, or expected by the directors of the Bitumen Consolidated that, outside of the royalties, there would be large earnings or dividends." Immediately after the organization of the corporation, and in September, 1891, Fairchild was duly elected vice president and general manager, and remained such during the time mentioned in the complaint. He immediately commenced to perform his duties as general manager, which duties were numerous and onerous, and occupied almost his entire time. The various kinds of work which he did as manager fully appear in the evidence, and need not be here given in detail. It is sufficient to say that his work included direction and supervision of the mining operations in the various leased mines; the supplies required; contracting for hauling rock from mines to cars; purchasing sacks for the rock; attending to shipping receipts and collecting moneys; securing transportation facilities; chartering vessels for shipping rock to points on the Northern Pacific Coast; seeing that cars which came to San Francisco were properly loaded, and delivered in proper shape to purchasers; looking after office management; and attending to all "business of the corporation which come along from day to day." Before his employment he had visited points as far north as Vancouver, British Columbia, in the interest of the use and sale of bituminous rock, and had become acquainted with public officials and others having control of street paving, and

was thus enabled to procure contracts with them for sale of the rock of the corporation. There is no doubt that his services were highly valuable, and the evidence abundantly shows that they were worth what he received, and there is no doubt that they were of such a character as to preclude any reasonable supposition that they were to be gratuitous. But there was no resolution of the board of directors and no express contract determining what compensation he should have for his services as manager prior to November 9, 1892, and for this reason it is contended by respondents that he cannot legally have any compensation prior to that date. Fairchild expected to receive compensation for his work as manager, the amount to depend somewhat upon the volume of business that would be developed; and the testimony of Walrath, president, and Perine, treasurer, of the corporation, shows that it was not expected by them or the other directors that he was to work gratuitously. Moreover, his work as manager was done with the knowledge of the directors, but there was no formal action taken on the subject until November 9, 1892. Some time before that date the president paid Fairchild, on account of his services, out of the money of the corporation, \$3,000; and on November 9, 1892, the board of directors passed a resolution which, after reciting that Fairchild had been in the employ of the corporation since its organization, "as managing agent and manager," and had been paid by the president \$3,600 for his services, declared that "the act of said president in advancing and paying said J. A. Fairchild said sum of thirty-six hundred dollars on account of his services be, and the same is hereby, approved, ratified, and confirmed." There were present at this meeting four directors, who constituted a quorum; Fairchild was one of the four, but he did not vote on the resolution, which was passed by the votes of the other three. At this same meeting a resolution was passed reciting that Fairchild had been elected general manager in September, 1891, and had ever since been acting as such, without having his salary fixed, and declaring that his salary "be, and the same is hereby, fixed at the monthly sum of two hundred dollars per month from November 1, 1891, to April 1, 1892, and that thereafter he should receive a salary of seven hundred and fifty dollars per month, which should remain the same until changed by the board of directors." On the 10th day of January, 1893, there was a general meeting of the stockholders. At this meeting there were present stockholders representing 2,510 shares of the capital stock, of 3,000 shares; and by a resolution adopted by a majority of the shares, exclusive of those represented by Fairchild, it was resolved "that all the acts of the board of directors and officers of

this company for the past year be approved and ratified."

The by-laws provide that "the compensation and terms of office of all officers of the corporation (other than directors) shall be fixed and determined by the board of directors." This language does not, on its face, mean that the compensation must be expressly and definitely agreed upon and settled before performance of the services; but respondents contend that under the general law, established by judicial decisions, there can be no lawful allowance to an officer of a corporation for services, no matter what their character and value, where the amount of the compensation had not been fixed prior to the rendition of the services. Many authorities on this subject have been cited on both sides, and they are, to some extent, conflicting. Most of those cited by respondents merely declare the rule that a "director," as such, without some previous understanding, is not entitled to pay for services which are within the ordinary duties to be expected of him as director, although some of them, no doubt, apply the rule to other officers or agents who are also directors; but as to the last proposition the weight of authority and reason is the other way. As a general rule, when one person performs valuable services for another, whether the other be a corporation or a natural person, the law raises an implied promise to pay a reasonable compensation for the services, unless they are performed under circumstances which show an understanding that they were to be gratuitous. It frequently happens that one natural person performs valuable services for another natural person, for which the former cannot recover because circumstances show that they were rendered without any expectation of compensation. Now, it has been held that directors of corporations cannot, without previous express contract, receive compensation for such ordinary services as are usually rendered by directors without pay; for the common understanding, as declared by judicial decisions, is that such services are presumed to be rendered gratuitously. But that presumption does not apply to those onerous services performed by officers and agents of a corporation, though they be also directors, for which compensation is usually demanded and allowed, and which could not reasonably be expected to be performed for nothing. The correct rule is stated by the United States supreme court in *Construction Co. v. Fitzgerald*, 137 U. S. 98, 11 Sup. Ct. 36, 34 L. Ed. 608. In that case Fitzgerald, who was a director of a corporation and its treasurer, acted as superintendent and general manager, and as such did valuable work, "not at all pertaining to his office as director"; and the question was whether he was entitled to compensation for such work done before any compensation was fixed. The opinion of the court states that the trial court "instructed

the jury that 'if Fitzgerald, the plaintiff, acted as superintendent, treasurer, or general manager of said company, and transacted the usual business that devolves upon such officer of such a concern as that, with the knowledge and consent of the defendant' (during the time before compensation was fixed), there would be an implied agreement on the part of the defendant to pay what the services are reasonably worth, and afterwards repeated this instruction more in detail, confining it to services as manager." The verdict was for Fitzgerald, and the judgment was affirmed. The court said: "The general rule is well stated by Mr. Justice Morton (since chief justice of Massachusetts) in *Pew v. Bank*, 130 Mass. 391, 395: 'A bank or other corporation may be bound by an implied contract in the same manner as an individual may. But, in any case, the mere fact that valuable services are rendered for the benefit of the party does not make him liable upon an implied promise to pay for them. It often happens that persons render services for others which all parties understand to be gratuitous. Thus, directors of banks and of many other corporations usually receive no compensation. In such cases, however valuable the services may be, the law does not raise an implied contract to pay by the party who receives the benefit of them. To render such party liable as a debtor under an implied promise, it must be shown, not only that the services were valuable, but also that they were rendered under such circumstances as to raise the fair presumption that the parties intended and understood that they were to be paid for, or, at least, that the circumstances were such that a reasonable man, in the same situation with the party who receives and is benefited by them, would and ought to understand that compensation was to be paid for them.' Tested by this rule, we think that the court fairly left it to the jury to determine whether Fitzgerald rendered services of such a character and under such circumstances that he was entitled to claim compensation therefor. It could not properly have been held, as matter of law, that he was not so entitled." And if, under such circumstances, assumpsit would lie for the services, the board of directors would certainly have power to pay the reasonable value of such services. *Rogers v. Railway Co.*, 22 Minn. 25, is a case directly in point. It is stronger in support of the proposition above stated than the case at bar, because the charter of the corporation in that case provided that the board of directors should appoint the officers, "and fix their compensation for the services to be rendered." Rogers was a director, and was appointed secretary, of the corporation, and also acted as its land commissioner and attorney, and sued for the value of services rendered in such capacities. There had been no compensation fixed, nor any contract made, before the services were rendered; and it was contended there, as

here, that no compensation could be recovered for past services. But it was held otherwise. The court said, among other things, as follows: "The evidence showed that the plaintiff, while acting as land commissioner, was a member of the board of directors. If his services as land commissioner had been performed by him simply as a director, it might be that he could not recover for the same, since, in the absence of a special agreement for compensation, he would, according to many authorities, be presumed to have acted gratuitously. But the duties and labors of a land commissioner of a land-grant railroad company do not necessarily nor presumptively pertain to a director, as such. Indeed, it would be unreasonable to suppose that duties so onerous would be undertaken by one acting simply as a director without pay. For such extraordinary services, outside of and beyond his duties as director, a party may certainly recover, notwithstanding his directorship, for the reason that, even if he performs the duties of director gratuitously, these services are not a part of those duties,"—citing cases. In *Henry v. Railroad Co.*, 27 Vt. 435, there was a standing resolution of the board that a director should not receive more than two dollars per day for special services; yet a director was allowed to recover for services which were outside his duties as a director in an amount much greater than could have been allowed under the resolution for services as director. The court said: "There are services which may be rendered for the benefit of a corporation, the performance of which may be delegated by the directors to other persons. For that purpose the directors may employ, as their agents, those who are not members of the corporation, or they may employ one of their own number. A director is not incapacitated to discharge those duties, and receive the same compensation which other agents would be entitled to recover. * * * In rendering those services the plaintiff was not acting in his official capacity as director, but as the agent of the corporation, and his compensation is no more limited by that vote than it would be if the services had been rendered by others who were not directors." In *Sawyer v. Bank*, 6 Allen, 209, the court, speaking of the circumstances under which the presumption arises that officers of a corporation are to be paid for their services, says: "Such a presumption arises in reference to any species of work, labor, or employment which is usually and commonly the subject of hire and reward, and paid for, whether any specific bargain is or is not made concerning it." In *Beach, Priv. Corp.* § 208, the author says: "When the charter of a corporation provides that certain officers may be elected, and their salary fixed, by a board of directors, and a president is thus elected, but without a salary named, the law raises an assumpsit on the part of the corporation to pay a reasonable compensation for his serv-

ices rendered after election." In *Mor. Corp.* § 508, the author says: "If a director is properly employed to perform services which do not pertain to his office as director, he is entitled to such compensation as has been agreed upon, or as the services are reasonably worth." There are many other authorities to the same effect as those above cited, but they are too numerous to refer to here. See *Ang. & A. Corp.* § 317; *Pew v. Bank*, 130 Mass. 391; *Chandler v. Bank*, 13 N. J. Law, 255; *Shackelford v. Railroad Co.*, 37 Miss. 209; *Association v. Meredith*, 49 Md. 389; *Cheaney v. Railway Co.*, 68 Ill. 575; *Bank v. Drake*, 29 Kan. 311; *Severson v. Milling Co.*, 18 Mont. 13, 44 Pac. 79; *Felton v. Mining Co.*, 16 Mont. 81, 40 Pac. 70. There was nothing decided in *McCarthy v. Water Co.*, 111 Cal. 323, 43 Pac. 956, that conflicts with the views hereinbefore stated. There the plaintiff, who was a director of the corporation defendant, sought to recover of the latter the value of services rendered without any previously fixed salary or compensation; and a judgment in his favor was reversed merely because the trial court had erroneously excluded evidence offered by the defendant which "tended to show the relations of the parties, * * * and to throw light on the question whether or not it was intended that he should have compensation." The court referred to *Barstow v. Railroad Co.*, 42 Cal. 465, which was also an action brought by a director to recover for services rendered before his compensation had been fixed, and quoted from the opinion in the latter case as follows: "The situation of the parties at the time—the relations, if any, in which they stood, of a business character or otherwise—are important to be known and considered in order to arrive at a correct solution of the ultimate question involved." In neither the *McCarthy* Case nor the *Barstow* Case is there anything in the nature of a decision that there cannot be a recovery by an officer of a corporation who is also a director unless his salary had been previously fixed, but the contrary in both cases is assumed and necessarily decided. In the *McCarthy* Case it is assumed that plaintiff could have recovered on "an implied contract arising out of, and inferable from, the situation and relation of the parties"; and it is further said that "respondent, being a director of appellant, was not entitled to compensation for services rendered the corporation, unless the circumstances were such as to raise an implied assumption to pay what they were reasonably worth."

We conclude, therefore, upon the authorities above noticed, as well as upon reasonable and just principles, that Fairchild was not precluded from having a legal claim for the value of his services merely because that value had not been fixed beforehand; that, therefore, the allowance of his claim by the board of directors on November 9th—there being no fraud in the transaction—was not an illegal and invalid act, merely because the

compensation had not been previously fixed; and that the amount of such claim cannot upon that ground be recovered by respondents. Directors "are required to exercise reasonable care and sound business judgment, but nothing further than this. * * * They must exercise the same diligence and care that men of usual prudence and skill would exercise in the management of a similar business for themselves." *Cook, Stock, Stockh. & Corp. Law*, § 708.

The contention of respondents that the act of the board on November 9th was invalid because the presence of Fairchild was necessary to make a quorum is not maintainable. There is a broad statement of this proposition of respondents in section 3929 of *Thompson on Corporations*, but the authorities there cited do not sustain the text. The main case cited is *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218, 17 L. R. A. 412; but all that was decided in that case was that "it is essential that the majority of the quorum of a board of directors shall be disinterested in respect to the matter voted on"; citing 1 *Beach, Corp.* § 276; *Smith v. Association*, 78 Cal. 289, 20 Pac. 677. In the latter case (78 Cal., 20 Pac.), *Garey and Crow*, who were directors, were interested in the matter voted on, and they, with two others, made the necessary quorum of four at which the resolution in question was passed; and the court said: "It was essential to its adoption that a majority of the quorum should vote for it (Civ. Code, § 308); and, clearly, there could not have been such a majority unless the vote of either *Garey* or *Crow* was counted in the affirmative." From this language, as well as from what is subsequently said in the opinion, it is clear that, if either *Garey* or *Crow* had been disinterested, the court would have upheld the resolution. In 1 *Beach, Corp.* § 276, it is said: "Generally a majority constitutes a quorum, and a majority of the quorum may validly act," and "in the case of directors, who occupy a fiduciary relation to the company, it is essential that the majority of the quorum shall be disinterested in respect of the matters voted upon." See, also, *Buell v. Buckingham*, 14 Iowa, 284, and cases there cited; *Foster v. Planing-Mill Co.*, 92 Mo. 79, 4 S. W. 280. Our Civil Code (section 308) provides, without any qualification, that "a majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act." We think, therefore, that as a quorum was present when the resolutions of November 9th were passed, and as they were passed by a majority of the quorum who were disinterested in the matter voted on, the adoption of the resolutions was a valid corporate act. Moreover, there is no sound objection to the validity of the ratification by the stockholders on January 10, 1893, of the above-mentioned acts of the board of directors. The ratification was done

by the holders of a majority of the stock, independent of the stock represented and voted by Fairchild. Under the authorities, there can be no sound contention that the acts of the appellants in question were ultra vires, and therefore void and entirely beyond the reach of ratification. The stockholders could have provided beforehand for the compensation here in controversy, and the majority of stockholders can ratify "acts performed without their authority, if they might have authorized the performance of the acts in question in advance." 2 Mor. Corp. § 626. And it is clearly the law that acts intra vires can be ratified by a majority of the stockholders, and that their discretion in the premises cannot be questioned by single stockholders. Cook, Stock, Stockh. & Corp. Law, § 684, and cases there cited; *Wickersham v. Crittenden*, 110 Cal. 332, 42 Pac. 803. "The rule of stockholders' meetings is that the majority governs, and every stockholder contracts that such should be the rule." *San Diego, O. T. & P. B. R. Co. v. Pacific Beach Co.*, 112 Cal. 53, 44 Pac. 333, 33 L. R. A. 788. Neither does it matter that the ratifying resolution was a general one, covering all the acts of the directors; for the record shows that express objection was made to its adoption on the ground that it included the compensation paid to Fairchild, and therefore there can be no pretense that the stockholders were ignorant of what they were doing. *Underhill v. Improvement Co.*, 93 Cal. 300, 312, 313, 28 Pac. 1049.

For the foregoing reasons, the judgment and order appealed from must be reversed. Of course, the action of a board of directors in allowing compensation to one of its members should be closely scrutinized, for by such action great injustice is sometimes done; but the asserted principle upon which this case was decided in the court below cannot be maintained, namely, that under no circumstances can an officer of a corporation who is a director be allowed compensation for services unless the compensation had been fixed beforehand, and that in such case there is neither power in the board of directors to make the allowance, nor in the stockholders to ratify. In the case at bar it is quite apparent that the services of Fairchild were not merely formal and pretentious. They included the different kinds of work ordinarily expected of the manager of a large business, and it is almost common knowledge that such services are not rendered gratuitously, and that they generally command large compensation.

It is contended by appellants that after the case had been submitted the court made an order allowing an amendment to the complaint, in which there was set up, for the first time, a claim of about \$300 for money paid out for an entertainment given to the board of supervisors of San Francisco at one of the mines (which appellants contend was legitimately expended in furtherance of the sale of bituminous rock, and resulted in ben-

efit to the corporation); that in the amendment there was also first set up a claim for \$2,000, which was alleged to be reasonable, for counsel fees; that the court also made an order that these new averments "are deemed to have been by defendants denied"; and that these orders were erroneously made. The record, however, does not clearly show that these things occurred as claimed by appellants. Of course, appellants were entitled to contest these new items of the entertainment and the counsel fees, but it does not clearly appear that they were not allowed to do so; and, as a new trial is to be ordered, it is not necessary now to consider these matters. In case judgment, after another trial, shall be rendered merely for the \$1,838.05 paid out in the litigation hereinbefore referred to, or for that and also the small amount paid for the entertainment, the court would hardly allow \$2,000 for counsel fees; for the latter sum would absorb nearly the entire judgment, leaving nothing for the plaintiffs or for the receiver,—a person who, in this class of cases, is generally provided for with inconsiderate liberality. The judgment and order denying a new trial are reversed.

We concur: HENSHAW, J.; TEMPLE, J.

(129 Cal. 131)

HORSMAN et al. v. ALLEN et al. (Sac. 679.)¹
(Supreme Court of California. July 9, 1900.)
CHURCHES—LEGISLATIVE BODIES—CHANGE OF
CONSTITUTION—REVISION OF CONFESSION OF FAITH.

In 1841 the general conference of the Church of the United Brethren in Christ adopted a written constitution providing that "there shall be no alteration of the constitution unless by request of two-thirds of the whole society," and that "no rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands." In 1889 the general conference adopted a new constitution and a revised confession of faith, which revision, however, was not so radical as to destroy the identity of the church. The faction represented by plaintiffs refused to acquiesce in these changes on the ground that they were ultra vires and void; and plaintiffs, as trustees, now claim the possession of the church's property. *Held* that, since no act of the general conference of 1841 could derogate from the power of its successors, the conference of 1889 had full power, as the highest legislative body of the church, to alter the old constitution and confession of faith, provided such alteration did not destroy the church's identity, and hence the faction which adhered to the society under the new constitution constituted the church, and defendants, representing that faction, are entitled to the property in suit.

Commissioners' decision. Department 2. Appeal from superior court, Tulare county.

Action by H. C. Horsman and others, trustees of the Radical faction of the Church of the United Brethren in Christ, against Paris Allen and others, trustees of the Liberal faction of the same church, to determine the rights of the parties to the use and control of certain land. From a judgment in favor

¹ Rehearing denied August 10, 1900.

of plaintiffs, and from an order denying a motion for a new trial, defendants appeal. Reversed.

E. T. Cosper and M. L. Pipes, for appellants. Davis & Allen, for respondents.

SMITH, C. The controversy in this action grows out of a schism in the Church of the United Brethren in Christ, occurring at the general conference of the church at York, Pa., in the year 1889. The Church of the United Brethren originated in a voluntary association of Protestants of various denominations at some period during the eighteenth century; and its original creed was simply that of the orthodox Protestant churches generally, but allowing divergences in matters wherein they differed. It received its first organization from a conference of its ministers held at Baltimore, Md., in the year 1789. Its first general conference was held at Mt. Pleasant, Pa., in 1815, at which time a form of discipline and a confession of faith were adopted. Up to this time the church was without any formal discipline or confession of faith, nor until the year 1841 did it have any constitution. In that year an instrument known as the "Constitution of 1841" was adopted by the general conference. It is distinguished from other ordinances of the general assembly only in the name given to it, and in the nature of its contents. Its preamble reads: "We, the members of the Church of the United Brethren in Christ, * * * ordain the following articles of constitution." This would seem to indicate that a submission of the constitution to the members of the church for adoption was contemplated, but in fact it was not so submitted. It contained, among other provisions, the following: "(1) No rule or ordinance shall at any time be passed to change or do away with the confession of faith as it now stands. (2) There shall be no connection with secret combinations. (3) There shall be no alteration of the constitution, unless by request of two-thirds of the whole society." At the general conference of 1889 a new constitution and a revised confession of faith were adopted by a vote of 110 to 20. Thereupon the minority assembled in another part of the city, and undertook to carry on the session of the conference; claiming that it had exceeded its powers, and that the other delegates, by their illegal action in adopting and adhering to the amended constitution and revised confession, had abandoned the Church of the United Brethren in Christ and organized another and distinct church. Both organizations continued to use the old name, and their respective adherents have come to be called, those of the majority organization, "Liberals," and those of the minority, "Radicals." Since then the schism has become general throughout the United States. In the Tulare circuit (the locus of the matters involved in this suit) most of the members

(75 out of 80) have gone with the Radical division of the church. The immediate purpose of this action is to determine the respective rights of the parties to the use and control of two tracts of land situate in the county of Tulare, conveyed in the years 1878 and 1879 to G. D. Wood et al., "trustees, and their successors in office, in trust for the United Brethren in Christ, for camp-ground, meeting-house, and parsonage purposes." The plaintiffs are the trustees elected by the quarterly conference of the Radical Church for the management of the church property. The defendants occupy a similar position with regard to the Liberal Church, and are in the occupation of the property in controversy.

It is alleged and found that the legal title to the lands in question is in the plaintiffs. But the action of the quarterly conference could not operate to transfer the title of the original trustees to the new trustees appointed by it. *Blakeslee v. Hall*, 94 Cal. 159, 29 Pac. 623; *Wat. Corp.* pp. 28, 29, 31. The title to the land is therefore still vested in the trustees named in the deeds, or such of them as survive. The error is, however, immaterial for the purposes of this case. The legal title is held upon the trusts named in the deed. Under these the officers and members of the local church have the right to use and occupy the lands in accordance with the regulations of the church; and these rights may be vindicated, in an appropriate action, by any of them suing for themselves and the others. *Baker v. Ducker*, 79 Cal. 372, 21 Pac. 764; *Watson v. Jones*, 13 Wall. 720, 20 L. Ed. 666. Hence, the plaintiffs, if they represent the true Church of the United Brethren in Christ, have the right to occupy and control the lands in question, and, if hindered in the exercise of the right, may maintain the action. The sole question, therefore, is as to the identity of the church: If the Radical is the true church, the plaintiffs are entitled to recover; otherwise, not. This question has been involved in numerous cases, some resulting in favor of the Radical, some in favor of the Liberal, organization. Of the former kind are the cases of *Brundage v. Deardorf* (C. C.) 55 Fed. 839, and *Bear v. Heasley*, 98 Mich. 279, 57 N. W. 270, 24 L. R. A. 615; of the latter, *Schlichter v. Keiter*, 156 Pa. St. 119, 27 Atl. 45, 22 L. R. A. 161; *Kuns v. Robertson*, 154 Ill. 200, 40 N. E. 343; *Lamb v. Cain*, 129 Ind. 486, 10 N. E. 13, 14 L. R. A. 518; *Russle v. Brazzell*, 128 Mo. 93, 30 S. W. 526; *Itter v. Howe*, 23 Ont. App. 236; *Rike v. Floyd*, 6 Ohio Cir. Ct. R. 80, 53 Ohio St. 653, 44 N. E. 1136; and *Philomath College v. Wyatt*, 27 Or. 390, 31 Pac. 206, 37 Pac. 1022, 26 L. R. A. 68. We agree in the conclusion, and generally with the reasoning, of the latter cases.

There is, it must be admitted, a very strong prima facie case against the plaintiffs. The Radical division of the church, represented by them, had its origin in the secession of a small minority from the general conference,

"the highest legislative and judicial body * * * in the church." In such a case the seceding body must, in general, be regarded as abandoning the church; nor is there any exception to this rule, unless in the case of a usurpation of power in the governing body so revolutionary in its character as to result either in the creation of a new and essentially different organization, or in such a radical change of the articles of faith as to constitute an essentially different religion from that previously followed by the church. *Watson v. Jones*, 13 Wall. 722, 20 L. Ed. 666. These and other principles involved in the case are elaborately and profoundly discussed by Judge Miller in the case cited. The courts are in no way concerned with the transactions of ecclesiastical bodies, except in so far as tangible rights of person or property are affected. Questions relating to these are divided by the courts into three classes: The first is where property, by the express terms of the grant, "is devoted to the teaching, support, or spread of some specific form of religious doctrine or belief"; the second, where it is held by or in trust for an independent congregation; and the third, where it is held by or in trust for a congregation or other association subordinate to some general church organization. The case, it will be observed, belongs to the last of these categories, and the decisions bearing on the first have no application. In cases of this class the trust can be affected only by a change of political organization or of religious creed of the kind we have described; that is to say, so radical in nature as to affect the identity of the original organization or of the original faith. Accordingly the plaintiffs' case rests upon the alleged existence of these grounds, and the justice of this contention is the question to be determined.

The specific claim made is that the act of the general conference in the premises was in violation of the three provisions of the constitution of 1841 cited above, and therefore ultra vires. The position of the plaintiffs, therefore, seems to rest upon three grounds, namely: (1) Failure to observe the requirements of the old constitution relating to its amendment; (2) the repeal of the article as to secret societies; and (3) the revision of the confession of faith. But the second and the third of these grounds are involved in the first, in so far that a decision against the plaintiffs on that must be conclusive also as to the other grounds; for, if the adoption of a new constitution was otherwise within the powers of the general conference, those powers must have extended also to the adoption of the specific provisions complained of. For it cannot be fairly contended that the abrogation of the provision as to secret societies, or the changes made in the confession of faith, were of a character to touch the identity either of the organization or of the faith of the church. Indeed, it is clear from the record that the contention of the plaintiffs with reference to these changes is

based upon the supposed fact that they were forbidden by the constitution of 1841; and certainly, but for the provisions of that instrument, no objection could be reasonably urged against them. It follows, if it be assumed that the change of the constitution was otherwise within the powers of the general conference, that these objections fall to the ground. They become material only on the contrary assumption. The case may therefore be considered under two aspects, namely: (1) Upon the assumption that the action of the general conference in adopting the new constitution was in violation of the provision of the constitution of 1841 as to amendments, and therefore ultra vires; and (2) as involving the question of the validity of the action of the conference in this regard. Under either aspect, we are of the opinion that the merits of the case are with the appellants; but, in view of the importance of the questions involved, both aspects of the case will be considered.

1. The case was considered under the former aspect in *Bear v. Heasley*, supra. In that case the judges agreed in holding that the general conference, in adopting the new constitution, failed to observe the requirements of the constitution of 1841, and that its act was therefore void. The majority of the court held that by this action the general conference and those members of the church who adhered to it put themselves outside the pale of the church, which thereafter consisted of the minority organization. But we regard the reasoning of the dissenting judge (Grant, J.) as the most satisfactory, and will adopt it: "Grant that the action of the conference was illegal in declaring the amendments adopted; it is indeed a startling proposition that by this act the conference destroyed its identity, ceased to represent the church, seceded from it, and thereby became a new and different church. The proposition finds no principle in law, equity, or good sense upon which to stand. The fifteen who left the regularly constituted conference became the seceders, and not those who remained in it. * * * The minority in this case have mistaken their remedy. They should have pursued a legal and orderly course, which was clearly open to them. They should have protested, and, failing in this, have applied to the proper courts to determine the validity of the proceedings to adopt the amended constitution; and, if such courts found them void, they would hold the old constitution in force, and compel the officers of the church to recognize and act under it. This proposition seems to me so clear that I deem further argument unnecessary." Pages 294, 295. In reaching this conclusion the judge seems to have had in view the changes attempted in the political organization of the church, only, and not the effect of the changes in the confession of faith on the creed of the church,—a subject already considered by him. For this, perhaps, the courts could not furnish a remedy, or

at least a complete remedy. Hence, could it be held that the revision of the confession of faith constituted an essential change of the faith of the church, the contention of the plaintiffs might be sustained. But questions of this kind are, in general, of purely ecclesiastical jurisdiction, and it is only in very extreme cases—of which this is not one—that the ordinary courts can pass on them. We must therefore regard the decision of the general conference, “the highest legislative and judicial body * * * in the church,” as conclusive upon the question here involved. In this we agree with Judge Grant in the opinion cited, where the question and the principle governing its decision are thus stated: “It is contended * * * that the revised confession of faith is a radical change from the old, and that by its adoption the faith and doctrine upon which the church was founded have been subverted and overthrown. * * * If this contention be sustained, it follows that the minority are entitled to the possession of the church property. [But] it is the settled law of this country that the judgments of the judicial tribunals of the church organizations upon matters of faith, discipline, and the general polity and tenets of the church are binding upon the civil courts. * * * There can be no exception to the rule, except in a case where even in the minds of laymen no doubt can exist, and it is clear, beyond controversy, that the fundamental principles of the church have been destroyed by the one party, and been adhered to by the other.” Pages 288–290. Numerous authorities are cited to the above proposition, and among others *Watson v. Jones*, *supra*, which may be regarded as the leading case, and as such conclusive, upon the question. Any other rule would be destructive of the liberty which by the laws of this country is accorded to religious societies.

2. With regard to the validity of the constitutional amendment, it was held in *Brunnage v. Deardorf*, *supra*, that the action of the general conference in adopting the new constitution was *ultra vires* and therefore void; and from this, without discussing the question as to the effect of a void amendment of the constitution on the identity of the church, the conclusion was reached that the defendants (representing the Radical branch of the church) were entitled to the property in question. The specific point on which the actual decision was rested was that, in the submission of the constitution to the vote of the members, sufficient notice of the submission and of the day of election was not given to the entire membership. But the case—being under the Ohio law—must be regarded as in effect overruled by the subsequent decision in *Floyd v. Rike*, 53 Ohio St. 653, 44 N. E. 1136. In the case last cited, and in other decisions cited *supra*, it was held that the proceedings for the submission of the new constitution to the members of the church constituted a substantial fulfillment of the requirements of

the constitution of 1841. We think, however, while concurring in this view, that the conclusion reached may be placed upon grounds perhaps more satisfactory. The constitution of 1841 was itself but an act or ordinance of the general conference, adopted by it over half a century after the original organization of the church. Nor is there anything in the instrument to differentiate it from other ordinances, except the name and the expression of the will of the general assembly that it should not be amended unless as therein provided. But it is a fundamental principle of the law that a legislative body cannot derogate from the powers of its successors, and that the latest act must always control. The maxim is “*Leges posteriores priores contrarias abrogant*” (1 Reporter, 25b, cited in *Broom*, Leg. Max. 28); and it is difficult to perceive how the application of this maxim can be escaped. The term “constitution” is used in several senses. In a broad sense of the term, we may speak of a constitution resting upon usage, or acquiescence, as in England. But in this country, when we use the term, we refer exclusively to the sovereign acts of the people, acting by conventions or in other constitutional modes. *Cooley*, Const. Lim. pp. 5, 6. Such constitutions can neither be made, abrogated, or amended otherwise than by written acts of the people generally. The same power that made is competent, and is alone competent, to unmake or alter. Where the power of enacting constitutional laws is vested in the ordinary legislature the same principle applies, but its operation is different. The same body that enacts may repeal or amend. Hence in England it is an admitted principle that the power of parliament is unlimited in this respect. *Id.* It cannot be affirmed that the power of making constitutional enactments, otherwise than as implied in the general legislative power, was vested in the general conference of the church, but certainly whatever power was vested in the conference of 1841 was vested in that of 1889; and, if this can be assumed to be the power of making constitutional laws, then it follows, not only that the former conference could not derogate from the powers of the latter, but that the powers of neither could be impaired by usage or the acquiescence of the church. In England the power of changing the constitution, whether resting upon previous statutes or upon usage, is admittedly in the parliament; and the same principle applies here to the general conference, which is found to be “the highest legislative body * * * in the church.” Obviously, therefore, if we use the term in the American sense, the notion of a constitution adopted by acquiescence is unknown to American constitutional law. The record, however, does not sustain the proposition that the supposed constitution was acquiesced in as such by the church. The acquiescence was not universal, and there was always a difference of views on

the subject. The act of 1841, it is true, was generally obeyed, and to that extent there was an acquiescence. But, being the act of the highest legislative body in the church, it was binding on all, and all officers, official bodies, and members of the church were compelled, in this sense, to acquiesce in it. We must therefore regard the action of the general conference of 1889 in adopting a new constitution as valid and binding on the church, if not as a constitution, at least as an ordinance of the church. We advise, therefore, that the order denying a new trial be reversed, and the cause remanded for further proceedings.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order denying a new trial is reversed, and the cause remanded for further proceedings.

6 Cal. Unrep. 472

PEOPLE v. WALKER. (Cr. 583.)

(Supreme Court of California. July 9, 1900.)

CRIMINAL LAW—APPEAL—ARREST OF JUDGMENT—MOTION TO VACATE JUDGMENT—DISCHARGE FROM IMPRISONMENT—CORRECTION OF MINUTES—VACATION OF ORDER STAYING EXECUTION.

1. Under Pen. Code, § 1237, permitting an appeal from a final judgment of conviction or from an order denying a new trial, and from an order made after judgment affecting the substantial rights of the party, and section 1259, providing that, on appeal by a defendant from a judgment, the court may review any intermediate order or ruling involving the merits, or which may have affected the judgment, an appeal will not lie from an order denying a motion in arrest of judgment, since it may be reviewed on appeal from final judgment.

2. Under Pen. Code, § 1239, requiring an appeal from a judgment to be taken within a year, an appeal from a conviction in a criminal case, taken more than one year after rendition of judgment, cannot be considered.

3. An appeal will not lie from an order overruling a motion to discharge from imprisonment, nor from an order denying a motion to vacate the judgment of conviction, since the judgment of conviction was appealable, and all objections could have been reviewed on appeal from it.

4. An appeal will not lie from an order overruling a motion to correct the minutes of the court as to arraignment of defendant, under Code Civ. Proc., § 963, allowing an appeal from a special order made after final judgment.

5. Where the court, at defendant's request, stayed execution of judgment of conviction until the judgment had become final by the expiration of more than a year after its entry without appeal, and without a motion for a new trial, defendant cannot object to an order vacating an order directing a commitment to issue; otherwise, the court would be powerless to carry the judgment into effect.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco.

George Walker was convicted of embezzlement, and he appeals. Appeal dismissed.

Geo. D. Collins, for appellant. Atty. Gen. Ford, for respondents.

COOPER, C. The defendant was convicted of the crime of embezzlement, and has appealed, or attempted to appeal, (1) from an order denying his motion in arrest of judgment; (2) from the final judgment; (3) from an order denying a motion to be discharged from imprisonment; (4) from an order denying a motion to vacate judgment; (5) from an order denying a motion to correct the minutes of the court as to arraignment of defendant; (6) from an order setting aside an order staying proceedings.

The order denying the motion in arrest of judgment could have been reviewed upon appeal from the judgment. It was not an order made after judgment, and is therefore not an order from which an appeal will lie. Pen. Code, §§ 1237, 1259; *People v. Clarke*, 42 Cal. 625. The judgment was rendered February 6, 1896, and the appeal therefrom taken June 9, 1899. This was more than one year after the rendition thereof, and the appeal cannot be considered. Pen. Code, § 1239; *Langan v. Langan*, 89 Cal. 195, 26 Pac. 764. The motion to be discharged from imprisonment and the motion to vacate the judgment were, in fact, attempts to attack the validity and sufficiency of the judgment after the time for appealing therefrom had expired. Any grievances the defendant may have suffered by the irregularity or invalidity of the judgment could have been redressed upon an appeal therefrom if taken in proper time. The judgment being appealable, the attack upon it should have been by direct appeal, and not from subsequent orders refusing to annul or vacate it. *Goyhnech v. Goyhnech*, 80 Cal. 400, 410, 22 Pac. 175; *Reay v. Butler*, 69 Cal. 585, 11 Pac. 463. The motion to correct the minutes of the court was made after the judgment had become final. There was no appeal pending from the judgment or from any order denying a new trial. It is not apparent to us how the correction of the minutes of the court, after the judgment had been rendered more than one year, could have benefited the defendant. The order, therefore, did not affect any of his substantial rights. Furthermore, it was not an order from which an appeal could be taken. *Griess v. Insurance Co.*, 93 Cal. 413, 28 Pac. 1041. If the order staying proceedings affected any substantial rights of defendant, he should have appealed from that order. It appears that the order was made at defendant's request. The bill of exceptions states: "That the court, by its order, at the request of defendant, stayed the execution of the judgment, and on September 30, 1898, ordered all proceedings stayed in said action until the further orders of the court; that no further order was made by the court until the 9th day of June, 1899, when, on motion of the district attorney, the court ordered that said order of September 30, 1898, be vacated and set aside, and a commitment to said state prison forthwith issue." The appeal is from the order vacating the order directing a commitment to issue. It is

not made to appear how the order vacating the order of September 30, 1898, could, of itself, affect any right of defendant. The order directing a commitment to issue was correct. The judgment had become final by the expiration of more than one year after its entry. No motion for a new trial had been made, nor was any such motion pending. The court had denied the other motions made by defendant. It would be strange if, under such circumstances, the court had no power to enforce the sentence. If the contention of defendant is correct, the court, after having, at defendant's request, stayed proceedings until the full expiration of his time to appeal or make a motion for a new trial, would be powerless to carry the judgment into effect. The law does not contemplate any such absurdity. The order vacating the order of September 30, 1898, should be affirmed. The appeal from the judgment and from all other orders should be dismissed.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order vacating the order of September 30, 1898, is affirmed. The appeal from the judgment and from all other orders is dismissed.

129 Cal. 107

BRAUN et al. v. WOOLLACOTT et al. (L. A. 629.)

(Supreme Court of California. July 9, 1900.)

PARTNERSHIP — PLEADING — AVERMENT — SUFFICIENCY — DISSOLUTION — BOND TO SECURE CONSIGNMENTS — ACTION — BY WHOM BROUGHT.

1. Where the complaint averred that at all times mentioned plaintiffs were partners, and that ever since a given date N. had failed to pay any part of plaintiffs' claim and the same was still owing, it was a sufficient allegation that plaintiffs were partners when the suit was begun.

2. Where plaintiffs' firm was dissolved by written agreement prior to commencing the action, but by such agreement all doubtful claims, including the one in suit, were to be placed with attorneys for collection, and the proceeds divided among the original partners, a finding that there had been no dissolution as to the claim in suit was supported by the evidence.

3. Where plaintiffs' firm was dissolved, prior to the commencement of the action, by a written agreement which provided that all doubtful claims, including the one in suit, should be collected and the proceeds divided among the partners, the action was properly brought in the name of the firm, since the firm should be treated as continuing for the purpose of winding up its business.

4. Plaintiffs agreed in writing with N. to consign him a stock of merchandise, on his furnishing a bond with two sureties for his performance of the agreement. Defendants were the sureties on the bond furnished. The agreement to consign was to run one year; N. to take an inventory, report sales, and remit monthly, and plaintiffs to have the right to verify N.'s accounts and inventories. The bond contained substantially the same provisions, and was conditioned that N. would faithfully discharge his duties as consignee and account, and limited defendant's liability to \$2,000.

61 P.—51

Shipments were made to N. and remittances made by him for nearly a year, when he failed, being indebted to plaintiffs. Held, in an action on the bond, that evidence that the bond was only intended to secure the first shipment was properly rejected, since the bond and agreement were unambiguous and not susceptible of parol explanation.

5. Where plaintiffs sued on a bond on which defendants were sureties, and which was conditioned that N. should faithfully perform his duties as consignee, evidence that N. had a partner and that the firm handled the goods consigned was properly rejected as immaterial.

Commissioners' decision. Department 2. Appeal from superior court, Los Angeles county.

Action by F. W. Braun and others against H. J. Woollacott and another. From a judgment for plaintiffs, and from an order denying a new trial, defendants appeal. Affirmed.

T. E. Gibbon and Chas. T. Rowland, for appellants. Walter Rose and Sheldon Borden, for respondents.

CHIPMAN, C. Action against defendants as sureties on a bond executed by one A. J. Newton for the faithful performance and accounting to plaintiffs by him as consignee of certain goods. Plaintiffs had judgment, and defendants appeal from an order denying their motion for new trial.

1. It is contended that the complaint does not state a cause of action, because it fails to show that plaintiffs were co-partners when the action was commenced, and is therefore fatally defective; citing *Afferbach v. McGovern*, 79 Cal. 268, 21 Pac. 837; *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750; *Holly v. Helskell*, 112 Cal. 174, 44 Pac. 406. The point was raised at the trial by an objection to any testimony being introduced by plaintiffs for the reason above stated. There was no demurrer to the complaint. The court found that plaintiffs had capacity to maintain the action as co-partners, and this finding is also attacked. The two points will be considered together. The allegation of the complaint is "that during all the times hereinafter mentioned they [plaintiffs] were co-partners doing business under the firm name and style of F. W. Braun & Co." The cases cited were actions to recover possession of personal property, and it was held that the complaint must show right of possession when the action is commenced. The allegation of the complaint covers all the times mentioned therein, and these dates embraced the transactions sued upon. There is also an allegation "that said Newton has ever since said 26th day of December, 1894, failed and refused to account for any portion of said balance, * * * and the said balance, to wit, the sum of five hundred and ninety-seven dollars and fifty cents, is yet due and unpaid on said account." We think the allegation that plaintiffs "during all times hereinafter mentioned were co-partners," etc., may fairly be said to include the times above stated during which the account sued for remained due and unpaid, and this included the filing of the

complaint. The court found that plaintiffs were co-partners at the time of the execution of the bond sued upon, and "that as to the cause of action sued there has never been any dissolution of said co-partnership, and the same has ever since continued in existence and still continues to exist. It appeared that on December 31, 1894, a written agreement was executed by all the co-partners by which Brunswig purchased Finlay's interest in the firm, and that on that day the co-partnership contract expired. All doubtful claims due the old firm were by the agreement to be passed to profit and loss before the firm books were to be balanced, "and all said accounts or notes must be given immediately to reliable attorneys for collection by suit, proceeds of which to be divided pro rata between us when received." Braun, one of the firm, testified that the account here in controversy was rejected by the new firm and passed to attorneys for collection, and that there has never been any other dissolution of the co-partnership, except as in the agreement set forth. "As to those accounts we have had no final settlement." Appellants contend that the contract entered into by the partners included in the assignment to the new firm all the doubtful accounts. Finlay was to receive a stated sum in money, which was paid, and it was also provided, "The balance due me [Finlay] for interest on capital and for profits for the year 1894, as will appear when said books are balanced, to be immediately paid to me, also, by said L. N. Brunswig." Following this was a provision that in ascertaining the profits the new firm should have the right to reject accounts "they may deem doubtful or not collectible," and these were to go to profit and loss, and to belong to all the original partners when collected. We think the trial judge rightly held this contract to mean that, as to these doubtful accounts, they were to belong to all the partners, and, as to them, that the partnership continued for the purpose of enforcing collection by suit or otherwise. It does not appear, except by a recital in the agreement of sale to Brunswig, just when the partnership expired, and it is only from the agreement that we can determine that the partnership had expired by limitation. Assuming that it had so expired, it was competent for the parties to treat it as continuing for the purpose of winding up the business; and this, it seems to me, may fairly be inferred was the intention. The bond given by defendants on its face shows that it was given to the firm, and we see no reason why the action might not be brought in the name of the partners suing in their co-partnership capacity. In *Busfield v. Wheeler*, 14 Allen, 139, the case was that of a debt to a co-partnership secured by lien. The claim had been assigned to one of the partners on dissolution, and the action was subsequently brought in the name of the firm. The court said: "The debt and the lien for its security accrued to the co-partnership. All proceedings for enforce-

ment of the claim must be had in the name of the co-partnership, notwithstanding its dissolution and the assignment of his interest by one co-partner to the other. The remaining partner takes all the rights of the firm, and may exercise them in the name of the firm, for all purposes necessary for their enforcement and for closing up the joint business. The demand was properly made, therefore, by Busfield in the name of the firm, and the statement that the whole interest belonged to himself does not injure its effect." That the action may be brought in the name of the co-partnership, see *Peacock v. Peacock*, 16 Ves. 49; *Crawshay v. Maule*, 1 Swanst. 495, at page 506 et seq.; *Ex parte Williams*, 11 Ves. 3; *Molen v. Orr*, 44 Ark. 486; *Holmes v. Shands*, 26 Miss. 639. The rule is similarly stated in 1 Lindl. Partn. § 217. Mr. Collyer says that "the powers of partners with respect to rights created pending the partnership remain after dissolution." Colly. Partn. §§ 186, 199, cited in *Osment v. McElrath*, 62 Cal. 466, 9 Pac. 731.

2. It is contended that the court erred in holding that the bond covered a continuous furnishing of goods by plaintiffs to Newton, and in not restricting the contract to the first consignment. It appears that plaintiffs agreed in writing on January 11, 1894, to deliver to Newton, on consignment, certain merchandise, on condition that he would, before the agreement was to go into effect, make a bond with two sureties, satisfactory to plaintiffs, for the faithful performance of the agreement. Newton furnished the bond now in suit on January 17, 1894, and on the 18th or 19th of January plaintiffs made the first delivery of goods. Deliveries continued from time to time under the agreement until December 1, 1894; the total amounts being \$4,448.68, of which Newton paid \$3,851.18, leaving unpaid \$597.50, for which the action was brought. Both parties treat the written agreement between Newton and plaintiffs and the bond executed by defendants as contemporaneous agreements to be considered together. The agreement to consign goods was to continue in force for one year, and was dated January 11, 1894. It contained the following: "That the said first parties [plaintiffs] agree to deliver to their place of business in Los Angeles, to A. J. Newton, a stock of merchandise, consisting principally of paints and paint goods, and such other goods as the parties may hereafter agree upon; said goods to be handled by said second party on consignment only." The ownership of the goods was to remain in first parties until sold and paid for, and Newton had the right to sell in the course of trade, "and all goods sold in each month shall be paid for in cash on or before the 10th of the succeeding month at the invoice price. And the said second party agrees to take an inventory of stock on hand the first of each month, and report to said first parties on or before the 10th of each month the amount of goods on hand the first day of the month,

and amount of sales at invoice price during the preceding month." First parties also had the right "to investigate the stock on hand in possession of second party, and also the books of account, to verify the statements as to the stock on hand and sales heretofore provided for," etc. The bond contained substantially the same provisions, and provided that "if the said Newton shall well and faithfully discharge his duties as such consignee, and shall also account for all moneys and all property, goods, and chattels and other things which may come into his possession or under his control as such consignee, then the above obligation to be void; otherwise," etc. The limit of liability was \$2,000. Deliveries of goods under the contract did not reach the limit until in April. Payments were made and accounts rendered by Newton and goods were delivered to him from time to time until December, when he failed and became insolvent, at which time he owed the amount now claimed. Appellants contend that the bond limits their liability "to the first stock lot or supply of goods delivered by plaintiffs to Newton for the purpose of enabling him to open business, and for stocking his store to that end." We are cited to lexicons for the meaning of the word "stock." The definitions given do not confine the meaning to the goods with which the merchant begins business, but, rather, to the goods he employs in trade. I do not see that the dictionaries throw any light upon the meaning of the bond or agreement. Without going into an analysis of the various clauses of the bond and agreement which bear upon the point, it seems evident from the contracts themselves that the intention of the parties was that during the life of the bond plaintiffs were to consign to Newton as his requirements demanded and as the parties might agree, and defendants, as sureties, stood for Newton's faithful performance of his covenants within the limit of \$2,000. In this view of the agreement, which was the view of the trial court, it was not error to refuse the evidence offered by defendants to show the meaning of the phrase "stock of merchandise," and that the contracts were understood to mean that no more goods than \$2,000 in value were to be furnished to Newton. Other questions similar in character and involving the same principle were rightly refused. Nor was it material that Newton had a partner in business, and that this co-partnership handled the goods. They were sold to Newton, the contract was with him and the account was kept with him, and to him alone plaintiffs looked for their money. It was immaterial how he disposed of the goods, or to whom, so long as he paid for them according to his contract. Defendants alleged in their answer, among other things, that the bond was given to secure the payment of a single stock of goods, and that it was not intended to cover or secure the payment for any future sales and delivery of goods, and that it was the intention of de-

fendants, when executing the bond, that, when the first stock of goods furnished was paid for, the bond should thereby be satisfied, and all liability of defendants would thereupon cease. It was to prove these allegations of the answer that defendants offered to show the intention of defendants by conversations had between the parties prior to entering into the contracts. We can discover no such ambiguity in either of the instruments as would warrant us in holding parol evidence admissible to explain their meaning, or to show the intention of the parties in entering into them. The fact that the answer alleged facts which were irrelevant, immaterial, or incompetent as a defense gave no right to establish them by proof, and it was not error to exclude the evidence sought to be introduced to establish such facts. We advise that the order be affirmed.

We concur: GRAY, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

(62 Kan. 217)

DENNING et al. v. YOUNT.

(Supreme Court of Kansas. July 7, 1900.)

REPEAL OF CITY ORDINANCES—EFFECT—REAL ESTATE—COMMISSIONS.

1. That part of section 8, c. 1, Gen. St. 1897, which provides that the repeal of a statute does not affect any right accrued, duty imposed, or penalty incurred thereunder, has no application to city ordinances.

2. Real-estate agents were denied the right to recover commissions for the sale of land upon the ground that their business was carried on in violation of a city ordinance requiring the payment of a license tax with the provisions of which they had failed to comply. Pending a suit to recover such commissions, the ordinance was repealed, without a saving clause. *Held*, that the repeal did not act retrospectively, nor did it have the effect of giving validity to a transaction which was unlawful at the beginning.

(Syllabus by the Court.)

Error from court of appeals, Southern department, Central division.

Action by Walter Denning and Mahlon E. Johnson against George W. Yount. On the death of defendant Mary A. Yount, his administratrix, was substituted. Judgment for defendant was affirmed in the court of appeals (59 Pac. 1092), and plaintiffs bring error. Affirmed.

McDermott & Johnson and F. C. Johnson, for plaintiffs in error. Pollock & Lafferty, for defendant in error.

SMITH, J. Walter Denning and Mahlon E. Johnson brought suit against George W. Yount before a justice of the peace, alleging that they were partners engaged in business as real-estate agents, and that defendant was indebted to them in the sum of \$265 for commission on a sale of land negotiated by them. Defendant denied liability, and among other defenses set up an ordi-

nance of the city of Winfield, by the provisions of which it was made unlawful for any person, firm, or company to carry on in that city the business of real-estate and loan agents or brokers without paying a semi-annual license tax of \$10. It was conceded that the plaintiffs had not complied with such ordinance. They obtained judgment in that court, which was reversed here. *Yount v. Denning*, 52 Kan. 629, 35 Pac. 207. This court decided that the failure of Denning and Johnson to pay the license tax imposed by the municipality where they conducted the real-estate business rendered the prosecution of that calling by them unlawful, and that no recovery could be had for the commission claimed by them on the sale of said property. This decision was made at the January term, 1894, and the cause remanded to the district court for a new trial. After the case was docketed for another trial in the court below, the city ordinance above referred to was appealed, without any saving clause. Upon a second trial it was contended that such repeal gave the plaintiffs below the right to recover to the same extent as if the ordinance never existed. The trial court, however, did not take this view of the law, and plaintiffs were not permitted to recover, which judgment was affirmed by the court of appeals, and the judgment of that court has been certified here for review. While the judgment of the district court must be affirmed, we cannot agree that the affirmance should be based upon the reasons given by the court of appeals. The syllabus of the case by that court is as follows: "(1) The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed. See *State v. Boyle*, 10 Kan. 113; subdivision 1, § 8, c. 1, Gen. St. 1897. (2) The rule for the construction of ordinances is the same as for the construction of statutes. See 17 Am. & Eng. Enc. Law, 264." The section of the statute cited is applicable to legislative acts, and not to ordinances, which are mere by-laws of a municipal corporation. In *City of Humboldt v. McCoy*, 23 Kan. 249, it was held that the constitutional provision that "no bill shall contain more than one subject, which shall be clearly expressed in its title," has no application to city ordinances. Again, in *City of New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426, it was decided that a section of the statute concerning county jails had no application to city prisons or jails. While the rules of construction of statutes and ordinances may be the same, yet it does not follow that a statutory provision concerning the effect of the repeal of a law can be extended to include city ordinances.

The real-estate agents were engaged in an unlawful vocation at the time they made the sale of the real estate for which they claim a commission. There was no right of recovery of this commission at the time the

sale of the land was made, and the authorities are almost unanimous to the effect that a subsequent repeal making the act lawful will not act retrospectively, so as to render that lawful which was done in violation of the law. *Suth. St. Const. §§ 336, 480*. In *Lawson, Cont. § 279*, it is said: "Where a contract made in violation of a statute is void, the subsequent repeal of the statute does not make it valid." 2 *Pars. Cont. § 674*, states the proposition thus: "But if one agrees to do what is at the time unlawful, a subsequent act making the act lawful cannot give validity to the agreement, because it was void at the beginning." See, also, *End. Interp. St. § 488*; *Clark, Cont. 507*; *Bish, Cont. § 479*; *Roby v. West*, 4 N. H. 285, 17 Am. Dec. 423. The case of *Bailey v. Mogg*, 4 Denio, 60-62, is in point. It is there said: "But, while the Revised Statutes were in force, he could not compel payment for his services as an unlicensed physician, whatever remedies might have been prescribed and administered. Such was the law in 1840, when the services were rendered, and as to his case it was the same in 1845, when the cause was tried. The repeal of the previous prohibitory laws by the act of 1844 had no effect upon cases which arose before that act was passed." *Woods v. Armstrong*, 54 Ala. 150; *Handy v. Publishing Co.*, 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 469; *Puckett v. Alexander*, 102 N. C. 95, 8 S. E. 767, 3 L. R. A. 43. Cases cited by counsel for plaintiffs in error, holding that no sentence can be pronounced for violation of a criminal statute which has been repealed without a saving clause, are not in point; nor decisions to the effect that procedure in pending actions must be governed by the law as it stands at the time of trial, not when the action is brought. In 15 Am. & Eng. Enc. Law, 942, and note, a large number of authorities are collected upon the principal question. The judgment of the court of appeals will be affirmed. All the justices concurring.

STATE v. JUNE.

(Supreme Court of Kansas. July 7, 1900.)

INDICTMENT AND INFORMATION—REQUISITES AND SUFFICIENCY—FORM OF ALLEGATIONS—FALSE PRETENSES.

An information charged that defendant, by means of false and fraudulent pretenses, did unlawfully procure from a certain bank a letter of credit for a certain sum. It then charged that defendant, by the use of the letter and a check on the bank for an equal sum, purchased cattle therewith, and in the manner and by the means aforesaid, and by means of false and fraudulent representations and pretenses, did unlawfully, feloniously, and willfully obtain from and induce the said bank to part with the sum of \$1,900, and that said defendant, in the manner and by the means aforesaid, did then and there unlawfully and willfully cheat and defraud said bank out of \$1,900. *Held*, that the information charged but one offense, and that the obtaining of money by means of false pretenses.

Appeal from district court, Dickinson county; O. L. Moore, Judge.

Robert June was convicted of procuring money by means of false pretenses, and appeals. Affirmed.

C. S. Crawford and H. S. Martin, for appellant. A. A. Godard, Atty. Gen., and J. S. West, Asst. Atty. Gen., for the State.

PER CURIAM. This is an appeal from a judgment of conviction of obtaining money under false pretenses. The appellant claims that the information charged two offenses. He alleges its defect in that respect as his principal ground of appeal to this court. The information averred that the defendant, by means of false and fraudulent pretenses, the details of which were fully set out, "did then and there unlawfully, feloniously, and designedly obtain from said the Abilene National Bank, and Rynaldo M. White, as cashier of said bank, said letter of credit, of the value of nineteen hundred dollars," etc. It then narrated the use made of the letter of credit by the defendant, in connection with his check upon the bank of an equal amount, in the purchase of some cattle; and further averred that the defendant, "in the manner and by the means aforesaid, and by means of said false and fraudulent representations and pretenses, did unlawfully, feloniously, knowingly, designedly, and willfully obtain from and induce said the Abilene National Bank to part with the sum of nineteen hundred dollars," etc. It then concluded in the following language: "And that said Robert June, in the manner and by the means aforesaid, and at and within said county of Dickinson and state of Kansas, did then and there unlawfully, feloniously, knowingly, designedly, and willfully cheat and defraud said the Abilene National Bank, and Rynaldo M. White, as cashier of said bank, out of said sum of nineteen hundred dollars," etc. The information is narrative and prolix in its detail of the acts and conduct of the defendant, but we think it evident that it charges but the single offense of obtaining money by means of false pretenses. The closing portion above quoted seems to have been intended as a statement of the wrongful effect produced by the false representations and pretenses thereinbefore set forth, and to give character to the information as one for obtaining money only by means of false pretenses.

Exceptions were taken to some of the testimony. The testimony, however, was competent and admissible. The record does not show the commission of any error, and the judgment of the court below is affirmed.

In re CHAMBERLIN.

(Supreme Court of Kansas. July 7, 1900.)

HABEAS CORPUS—SCOPE OF REMEDY.

Where one has been committed to jail for trial by an examining magistrate on evidence

tending to show that he is guilty of the offense charged, he is not entitled to his release on habeas corpus, on the ground that the evidence does not sustain the charge against him; the proceedings before indictment being limited to the inquiry as to whether the magistrate had jurisdiction to commit, the sufficiency of the proceedings, and whether there is testimony fairly tending to show probable cause.

Petition by W. L. Chamberlin for writ of habeas corpus. Application denied.

Quinton & Quinton, for petitioner. A. A. Godard, Atty. Gen., J. S. West, Asst. Atty. Gen., and A. B. Jetmore, for respondent.

PER CURIAM. The petitioner was charged with embezzling money intrusted to him by J. B. Furry to be invested in railway stocks. On the preliminary examination, the magistrate found that there was probable cause to believe the petitioner guilty of the offense, and committed him for trial. He asks to be released, claiming that the testimony does not sustain the charge of embezzlement, that there was in fact no agency, that no purchase or delivery of stock was expected by Furry, that it was a mere gambling transaction termed "bucket shopping," and that, therefore, no conviction could be had upon the charge of embezzlement. We have looked through the testimony produced at the preliminary examination, and find much to sustain the contention of the petitioner, but the merits of the prosecution are not determinable in a habeas corpus proceeding. The scope of the inquiry in cases like this, before indictment or information, is whether there was jurisdiction to commit, as to the sufficiency of the process and proceedings, and whether there is testimony fairly tending to show probable cause. The jurisdiction of the magistrate and the sufficiency of the process are not questioned, and the only contention is that the testimony heard by the magistrate did not warrant the binding over of the petitioner. We find some testimony tending to show agency, that the money alleged to have been embezzled was furnished the petitioner for the actual purchase of railway stocks, and that he has misapplied and converted it to his own use. Where there is testimony tending to make out probable cause, this court upon habeas corpus cannot weigh the evidence for and against to determine the guilt or innocence of the accused. On the testimony before us, we cannot say that the commitment is illegal; and therefore the writ will be refused, and the petitioner remanded.

(62 Kan. 221)

STATE v. KORNSTETT.

(Supreme Court of Kansas. July 7, 1900.)

CRIMINAL LAW—PRELIMINARY EXAMINATION — HOMICIDE — JURY — DISQUALIFICATION — OPINIONS — CONFESSION — INSTRUCTIONS — SENTENCE.

1. When a person charged with felony is afforded an opportunity for a preliminary examination, and thereby given reasonable notice

of the character of the offense charged against him, and thereupon enters a plea of guilty, averments that he did not understand the proceedings, or know that what he said and did there would be construed as a waiver of a preliminary examination, do not state a sufficient ground for abatement of the prosecution.

2. An information charging the defendant with an assault with intent to ravish a girl, and that then, with deliberation and premeditation, he choked and beat her, and struck her head against a tree with great violence, and that afterwards he threw her body into a well, all with intent to kill and murder her, and that the wounds and injuries so purposely and feloniously inflicted caused her death, is not obnoxious to a motion to quash on the ground of duplicity.

3. The fact that persons drawn as jurors were served with process on Sunday, and were excluded from the court room while other jurors were being examined as to their qualifications, does not disqualify them for jury service, nor operate to the prejudice of the defendant.

4. It is fixed and positive opinions in regard to the issues involved in a criminal prosecution which disqualify persons called as jurors, and not mere impressions obtained from rumor and newspaper reports, slight and fugitive in character, which do not indicate a condition of mind that precludes a fair and impartial examination of the facts when presented in the testimony.

5. An extrajudicial confession will not be received in evidence unless it has been freely and voluntarily made. If it has been extorted by fear, or induced by hope of benefit, profit, or amelioration, it should be excluded; but mere advice or admonition to the defendant to speak the truth, which does not import a threat or benefit, will not render a confession then given incompetent.

6. Where proof of confession by the defendant has been received, and also circumstantial evidence of the offense charged, an instruction by the court which assumes that both direct and circumstantial evidence have been submitted to the jury is not misleading or prejudicial.

7. The charge of the court should be applicable and limited to the facts in evidence; and where the testimony shows beyond question that the defendant was either guilty of murder in the first degree, or innocent of any offense, it is unnecessary to charge the jury as to any degree of the offense other than murder in the first degree.

8. Section 290 of the crimes act, which provides that, "whenever any person under the age of sixteen years shall be convicted of any felony, he shall be sentenced to imprisonment in a county jail not exceeding one year, instead of confinement and hard labor, as prescribed in the preceding provisions of this act," does not apply to felonies for which the death penalty is imposed.

(Syllabus by the Court.)

Appeal from district court, Harper county; P. B. Gillett, Judge.

John Kornstett was convicted of murder, and appeals. Affirmed.

Geo. E. McMahon and John Bally, for appellant. A. A. Godard, Atty. Gen., J. S. West, Asst. Atty. Gen., and R. P. McColloch, for the State.

JOHNSTON, J. John Kornstett was charged with and convicted of the murder of his cousin, Nora Kornstett, and the severest penalty of the law was adjudged against him. In substance, the information charged the appellant with having attempted to ravish

his cousin, and then that with deliberation and premeditation he choked and beat her, and struck her head against a tree with great violence, and that afterwards he threw her body into a well about 20 feet deep, all with intent to kill and murder her, and that the wounds and injuries so purposely and feloniously inflicted caused her death. When taken before a magistrate for preliminary examination, he entered a plea of guilty; and subsequently, when the information was filed and he was arraigned before the court, he again entered a plea of guilty of the charge alleged. Subsequently he was brought before the court, and was fully informed of the penalty for the crime charged against him, and was asked whether he desired to change his plea of guilty, which had previously been entered, and in response to the inquiry he insisted that the plea of guilty should stand. About a week after that time an application was made to withdraw the plea of guilty, which was granted by the court; and later, when arraigned again, he stood mute and refused to plead, and upon the order of the court a plea of not guilty was entered for him.

On this appeal the first contention is that he had no preliminary examination, and that his plea in abatement should have been sustained. The docket entries of the magistrate recite that he was afforded an opportunity for a preliminary examination when he entered a plea of guilty and was bound over for trial in the district court. In the plea which was filed he admits that he was taken into a room, and that there were present officers and other persons, whom he did not know; that papers were read to him, and proceedings were had which he did not understand, and which he did not fully remember. Other matters were alleged as to the locking of the doors and the fear of mob violence, and that he did not know that what he said or did there would be construed as a waiver of his right to a preliminary examination; but, upon the whole, we think that the defendant was offered a preliminary examination, and that reasonable notice was given to him in regard to the nature and character of the offense charged against him. "For the purpose of authorizing a final trial, and requiring the defendant should plead to the merits of the action, all that is necessary is that the defendant should be given a fair opportunity to know by a proffered preliminary examination the general character and outlines of the offense charged against him." *State v. Bailey*, 32 Kan. 83, 3 Pac. 769.

The second error assigned is that the information charged murder in the first degree in two different forms, and upon that ground a motion to quash was made. In the first part of the information an attempt to ravish is alleged, but it is not stated that the attempt to ravish caused her death. All the facts and circumstances from the first assault and attempt to ravish to the

throwing of the body into the well are set out at considerable length in the single count of the information. It appears to have been a single and continuous transaction, and, although murder had been charged in briefer and general terms, proof of all that occurred there was competent, and must necessarily have been brought out upon the trial. The defendant was not prejudiced by the fullness of the averments, and we think there was no such duplicity in the information as to make it obnoxious to the motion to quash.

The showing made upon an application for a change of venue did not warrant the court in granting it, and the fact that some of the persons who were drawn as jurors were served with process on Sunday, and that they were excluded from the court room while others were being examined as to their qualifications to sit as jurors, did not disqualify them for jury service, nor in any way prejudice the rights of the defendant.

It is next contended that incompetent jurors served upon the jury after having been challenged for cause by the defendant. The one who approached most closely to the line of incompetency was J. W. Means. He had read newspaper accounts of the killing of the girl, and of the charge that the defendant had killed her. He testified, among other things, that at the time he had accepted and assumed the statements which he read and heard to be true. However, upon final examination he stated that he had not formed or expressed an opinion as to the guilt or innocence of the defendant, and had then no definite opinion on the question; that what he had read and heard had created no more than an impression,—such an impression as one gets from reading a newspaper statement. It is fixed and positive opinions which disqualify (State v. Start, 60 Kan. 236, 56 Pac. 15), and not mere impressions obtained from newspaper reports, slight and fugitive in character, which do not indicate a condition of mind that precludes a fair and impartial examination of the facts as presented in the testimony (State v. Medlicott, 9 Kan. 257). We cannot expect to find intelligent jurors who have not heard or read of such an offense, when committed in the community in which they live,—men who are wholly void of information, and entirely unimpressed by a report of the tragedy. A fair-minded person, who from rumors and newspaper reports has gained only light impressions from what he has heard and read, and which will not weigh in the consideration of the testimony, is not within the prohibition of the statute excluding those who have formed or expressed an opinion on the issue or material facts to be tried. Cr. Code, § 204. When the oral argument was concluded, we had grave doubts as to the competency of this juror; but a reading of the whole examination satisfies us that his condition of mind was

such that he would fairly consider the case, and that, when the statutory tests were applied, he was not disqualified.

Proof of confessions made by the defendant was received in evidence over his objections, and upon these rulings error is assigned. About the time of his arrest he was closely questioned by the sheriff, who believed the defendant was connected with the commission of the offense, and before admitting his guilt he was told that some of his prior statements had been found to be untrue. He finally acknowledged his guilt to the sheriff, giving the circumstances in considerable detail, and he afterwards repeated the confession to a number of other persons. He knew that suspicion was directed towards him, and that there was considerable excitement in the community because of the brutal character of the crime; but the sheriff, to whom the confession was first made, testified that it was not given by reason of any threat made or promise held out. While the defendant claimed that he was induced by the pressure of fear and hope to make the admission, the sheriff states that he told the defendant that he believed the defendant knew who committed the offense, and that he had better tell all he knew about it; that, if he was guilty, it would be better for him to admit the truth; and that, if he was innocent, that he should stick to it, regardless of the suspicion against him, and that he (the sheriff) would protect him. It is claimed, and the defendant testified, that hope was held out to him that the punishment for the offense would be confinement in the reform school or reformatory; but this is expressly denied by the sheriff, although he does state that, in response to an inquiry by the defendant, he explained to him the character of those institutions. It is well settled that an extrajudicial confession will not be received in evidence unless it has been freely and voluntarily made. If it has been extorted by fear, or induced by hope of profit, benefit, or amelioration, it will be excluded as involuntary. However, mere advice or admonition to the defendant to speak the truth, which does not import either a threat or benefit, will not make a following confession incompetent. According to the testimony of the sheriff, the confession was admissible; and the fact that the defendant confessed so freely and frequently to others at different places and times, and under varying circumstances, appears to sustain the sheriff.

Complaint is made of rulings of the court in charging the jury. In one instruction the jury was told that "the state is relying partly on what is known as 'circumstantial evidence,'" and in another part of the charge the court spoke as though both direct and circumstantial evidence had been submitted to the jury. It is contended that the testimony was wholly circumstantial, and that the assumption that there was direct evidence was misleading and prejudicial. While

the classification of the testimony was of little consequence in this case, it can hardly be said that the confessions made were to be treated as circumstantial evidence. They are direct, in the sense that the information is communicated by the defendant himself, who has actual knowledge of the facts. Circumstantial or presumptive evidence is that which shows the existence of one fact by proof of the existence of others from which the first may be inferred. The defendant here had actual knowledge of his connection with the killing of the girl, and his statement went directly to the main fact to be established. In another part of the charge, where the court was describing the elements of the crime, the disjunctive "or" was used between the words "premeditation" and "deliberation"; but, in the connection in which it was used, it could not be misleading, as the whole charge set out in particular the ingredients of the offense, and instructed that the jury could not convict the defendant unless all were established to the satisfaction of the jury and beyond a reasonable doubt. Many instructions were requested which were not given, but those given so completely covered the case that there are no good grounds for complaint. No error was committed by the court in declining to instruct the jury on murder in the second or any of the lower degrees of the crime. The charge of the court should be applicable and limited to the facts in evidence. The court is never required to state rules of law, however correct in the abstract, which have no relevancy to the case before it. The testimony in the present case shows beyond question that the defendant was either guilty of murder in the first degree or innocent. If his own statement, so frequently made, is true, he is guilty of murder in the first degree. If it is not true, he should be acquitted. This was the view taken by the court, and it is one which is fully justified by the testimony.

Another objection is made to the sentence, which required that the defendant should be confined in the penitentiary for a period of not less than 1 year, and until the death warrant was signed, when he should suffer death. The defendant was less than 16 years of age when the offense was committed, and the statute provides that, "whenever any person under the age of sixteen years shall be convicted of any felony, he shall be sentenced to imprisonment in a county jail not exceeding one year, instead of confinement and hard labor, as prescribed by the preceding provisions of this act." Gen. St. 1890, par. 2253 (Crimes Act, § 299). It is argued that the words "any felony," used in the section quoted, mean every felony, and necessarily include murder in the first degree, or any other degree, and that therefore the only punishment which could be imposed on the defendant is confinement in the county jail not exceeding one year. There can be little doubt about the interpretation of the

provision. The statute expressly provides that persons convicted of murder in the first degree shall suffer death, and that was the punishment imposed by the sentence in this case. The punishment provided in the quoted section is a substitute for confinement and hard labor as prescribed by the preceding provisions of the act; and, as confinement and hard labor are never imposed as punishment for murder in the first degree, it would seem clear that it is not one of the felonies the punishment for which is "prescribed by the preceding provisions of this act." The statutory provisions were borrowed from the Missouri Code, and the supreme court of that state, in construing the provisions, says: "This section seems capable of but one construction, and that is to require imprisonment in a county jail as a substitute for imprisonment in the penitentiary, where such offenses as were punishable by imprisonment in the penitentiary have been committed by a youth under sixteen. A felony punishable by death is not within the meaning or letter of the statute." *State v. Barton*, 71 Mo. 288; *State v. Adams*, 76 Mo. 355; *State v. Schmidt*, 136 Mo. 644, 38 S. W. 719. The subsequent statutory provision, enacted in 1872, which provides that a person sentenced to the penalty of death shall not be executed until the time is fixed for his execution by the governor, and requiring him to be confined in the penitentiary until the death warrant is issued, does not operate to repeal the statute prescribing punishment for murder in the first degree, nor does it modify the sentence of the law. *State v. Crawford*, 11 Kan. 32. The latter statute (chapter 166, Laws 1872) is in the nature of a statutory direction to the warden as to the execution of the sentence, and not a modification of the penalty which the law imposes. *In re Dyer*, 56 Kan. 489, 43 Pac. 783.

The sufficiency of the evidence is challenged, but on that question there is no trouble. In our view, it abundantly sustains the verdict, and an analysis of the same is not necessary. Some other objections are urged, which do not seem to require special attention, and we find nothing in the record which would justify the setting aside of the verdict or the reversal of the judgment. Judgment affirmed. All the justices concurring.

STATE v. ANDREWS.

(Supreme Court of Kansas. July 7, 1900.)
CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

In a criminal prosecution, where the evidence of the defendant's guilt is partly circumstantial, it is error to refuse an instruction to the jury tendered by the accused in the following language: "A few facts or a multitude of facts proven, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty. In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the defendant

committed the crime, but they must be inconsistent with any other rational conclusion."
(Syllabus by the Court.)

Appeal from district court, Ottawa county; R. F. Thompson, Judge.

A. N. Andrews was convicted of larceny, and appeals. Reversed.

R. R. Rees, for appellant. A. A. Godard Atty. Gen., and F. D. Boyce, Co. Atty., for the State.

SMITH, J. The appellant was convicted of larceny from a freight car, and sentenced therefor to a term in the penitentiary. Omitting the formal parts, the information charged "that on the 19th day of November, 1898, in the county of Ottawa, state of Kansas, one A. N. Andrews did then and there unlawfully, feloniously take, steal, and carry away the following goods and chattels, to wit: One sack of white sugar, of the value of \$5; one sack of brown sugar, of the value of \$5; three boxes of dried fruit, of the value of \$5 each; one sack of prunes, of the value of \$5; one sack of green coffee, of the value of \$3.50,—all of said goods and chattels then and there being the property of the Atchison, Topeka & Santa Fé Railway Company, a corporation, and said goods and chattels then and there being in a certain freight car belonging to said railway company, when so unlawfully, feloniously taken, stolen, and carried away." The evidence against the appellant introduced on the part of the state was for a large part circumstantial in character. The only testimony not of such nature was that of the sheriff, who, in a conversation with the accused after his arrest, said to the prisoner, "I am surprised that you would mix up in a deal of this kind," in answer to which the latter said that what he had done was for the benefit of his family. No one saw the appellant commit the larceny. There was testimony, however, that, after being away from home most of the night, he returned with two sacks of sugar, a sack of prunes, some coffee, two boxes of raisins, and a box of currants and oranges. This property corresponded in description with goods consigned for shipment contained in a car of the Atchison, Topeka & Santa Fé Railway Company, on which the seal was broken, and from which the goods were missing. The court refused the following instruction on behalf of the defendant below: "A few facts or a multitude of facts proven, all consistent with the supposition of guilt, are not enough to warrant a verdict of guilty. In order to convict on circumstantial evidence, not only the circumstances must all concur to show that the defendant committed the crime, but they must be inconsistent with any other rational conclusion." In this there was error. Applied to circumstantial evidence, the language of said instruction has been approved in *Horne v. State*, 1 Kan. 47, and in *State v. Hunter*, 50 Kan. 302, 32 Pac. 37. It is

not determinable whether the conviction resulted from the force of the direct or the circumstantial evidence, or by the combined strength of both. It was within the province of the jury to disregard the testimony of the sheriff, and to base their verdict solely upon the incriminating circumstances surrounding the accused. This being true, it was proper to furnish a guide to the jury to govern them in the consideration of the probative force of such circumstances as were shown, tending to establish the guilt of the defendant. *State v. Kornstett*, 61 Kan. —, 61 Pac. 805.

An objection was made to the information, in that it fails to aver that the larceny was committed in a freight car on a railway in this state. Section 84, c. 100, Gen. St. 1897. It becomes immaterial, however, to consider this objection, for the reason that the information can be amended on another trial of the case. The judgment of the court below will be reversed, and a new trial ordered. All the justices concurring.

(62 Kan. 231)

In re DAVIS.

(Supreme Court of Kansas. July 7, 1900.)

COURT OF COMMON PLEAS—ESTABLISHMENT—MAJORITY VOTE.

The language of section 27 of chapter 16 of the Laws of the Special Session of 1898, "An act concerning a court of common pleas for the counties of Crawford and Cherokee in the state of Kansas," that "if a majority of the electors in each of the counties voting at such election shall favor the creation and establishment of said court," etc., the court shall be established, does not mean a majority in each county who voted upon the proposition to establish the court, but it means a majority of all the electors in each county who voted at the election upon any or all candidacies for office or propositions submitted; and, inasmuch as such majority in Crawford county did not vote in favor of the establishment of the court, the court was never legally authorized.

(Syllabus by the Court.)

Application of John Davis for discharge on habeas corpus. Discharge granted.

Arthur Fuller and L. J. Phelps, for petitioner. B. S. Galtskill and Morris Cliggitt, for respondent.

DOSTER, C. J. This is an original proceeding in habeas corpus, and it involves a construction of certain provisions of chapter 16 of the Laws of the Special Session of 1898,—an act creating the court of common pleas of Cherokee and Crawford counties, and defining its jurisdiction. The petitioner, John Davis, was convicted of a felony in that court, and by its judgment was ordered imprisoned in the state penitentiary. He alleges that the act creating the court is unconstitutional, in that it contains an abnegation of the legislative power to ordain the taking effect of itself as a law, and the delegation of such power to the electors to determine whether it shall have an existence as a law; and, as an alternative proposition,

he alleges that if the act of the legislature was not an abnegation of its power, and a delegation of it to the people, but was in the nature of a privilege to accept or reject the benefits of an enacted law, the electors did not, as provided by the act, vote to accept the benefits of its provisions, and therefore that the court sentencing him never rightfully came into existence. The portions of the act material to notice are as follows:

"Section 1. That a new court of record be and such court is hereby created and established for the counties of Cherokee and Crawford, to be called the court of common pleas. Said court shall have one presiding judge, whose style of office shall be 'judge of the court of common pleas'; and said court shall have two clerks, and style of office shall be 'clerk of the court of common pleas': provided, however, that the majority of the qualified electors of said counties shall vote in favor thereof as hereinafter provided."

"Sec. 10. The governor shall, immediately upon the passage of the act, and the approval of the same by the qualified electors of Cherokee and Crawford counties as hereinafter provided, appoint and commission a judge for the court hereby created, who shall be a resident member of the bar of Cherokee or Crawford counties, Kansas, whose term of office shall commence with the date of his commission and who shall hold his office until his successor is elected and qualified."

"Sec. 12. The governor shall, upon the passage of this act and the approval of the same by the qualified electors of Cherokee and Crawford counties as hereinafter provided, appoint and commission for the court hereby created two clerks, one for the county of Cherokee and one for the county of Crawford, whose terms of office shall commence with the date of their said appointments, and who shall hold their office until their successors are duly elected and qualified."

"Sec. 26. At the general election to be held on the Tuesday next succeeding the first Monday in November, 1899, and each four years thereafter, there shall be elected a judge of said court of common pleas, whose term of office shall be four years from the first Monday in January following his election, or until his successor is duly elected and qualified; and there shall be elected in each of said Cherokee and Crawford counties a clerk of said court for said county at the general election to be held on the Tuesday next succeeding the first Monday in November, 1899, and each two years thereafter."

"Sec. 27. That the board of county commissioners of Cherokee and Crawford counties shall submit to a vote of the qualified electors of said counties, at the next general election or at a special election to be called and held in said counties for that purpose, the question of establishing a new court of record for said counties, to be called the court of common pleas. The board of county commissioners of Crawford county shall

meet in joint session with the board of county commissioners of Cherokee county, at the commissioners' room at the court-house at Columbus, Cherokee county, Kansas, on or before the 23d day of January, 1899, for the purpose of determining whether or not a special election shall be called in said counties of Cherokee and Crawford for the purpose of submitting to the qualified electors thereof the question of whether or not the court of common pleas of said counties shall be established. If said boards of commissioners of said counties shall, by a majority vote thereof, in joint session, decide to call special election to vote upon said proposition, it shall be the duty of the county commissioners of each of the said counties to call a special election to be held on the same day in each of the said counties, not more than forty-five days after the date of said joint session, and of which special election thirty days' notice shall be given; said election to be held as provided by law for the holding of special elections in this state. The ballots to be furnished and used at said special election shall bear the printed words and characters thus:

"Shall a court of common pleas be established for Cherokee and Crawford counties, Kansas?"

Yes	<input type="checkbox"/>
No	<input type="checkbox"/>

"Each elector shall designate his vote by a cross in the blank after the word 'Yes' or 'No' as he desired to vote for or against said proposition. Said election shall be conducted, and the ballots cast thereat shall be counted and returned, as provided by law in other elections, and shall be canvassed at a joint session of the boards of commissioners of Crawford and Cherokee counties to be held in the city of Columbus, on the Friday next succeeding the date upon which said election shall be held. The county clerks of said counties shall immediately certify the result of said election to the governor of the state of Kansas, who, if a majority of the electors in each of the counties of Cherokee and Crawford voting at such election shall favor the creation and establishment of said court of common pleas, shall immediately appoint a judge and clerks for said court as hereinbefore provided in this act."

The boards of county commissioners of the two counties did not call a special election for the purpose of submitting to the electors the question of the establishment of the court, as they were authorized to do by section 27, above quoted. The vote upon that question was therefore taken at the general election in November, 1899. At that election a majority of the voters of Cherokee county, voting at such election, voted in favor of the establishment of the court; but a majority of the electors of Crawford county, voting at such election, did not vote in favor of its establishment. In the last-named county 7,013 electors voted at the election. Out of this number, 3,095, or 44 less than a majority, voted in

favor of the establishment of the court, and 2,940 voted against it. It will be observed, therefore, that, while a majority of those who voted in Crawford county upon the proposition voted in favor of it, yet, adding together all who voted both for and against it, there were 978 who voted at the election for candidacies for office and upon other propositions who did not vote at all upon the proposition to establish the court. Therefore the proposition to establish the court did not receive the actual assent of a majority of the electors in Crawford county voting at such election. However, as authorized by section 26 of the act, the electors of the two counties voted for a judge and for clerks for each of said counties. The result of the election was certified to the governor, who, in accordance with section 10 and the closing sentence of section 27, made an appointment to the office of judge for the time preceding the commencement of the full term provided for said office.

As before stated, the validity of the act is attacked upon the ground that section 27 contains an abnegation of the legislative power to will and ordain the law, and an attempted delegation of it to others than the constituted authority. This raises an interesting question, and one that is becoming important in this state, in view of the frequent reference by the legislature to the people of the question whether they will accept the benefits of statutory provisions enacted in their behalf. The question was submitted to us in *Re Hendricks*, 60 Kan. 796, 57 Pac. 905, but it did not become either necessary or proper for us to undertake its determination in that case; nor, in the view we have of this case, does it now become either necessary or proper for us to undertake to determine it. Whether the statute now under consideration furnishes an instance of an attempted enactment of a law by popular vote, which the courts, as a rule, condemn, or furnishes an instance of the acceptance by popular vote of the provisions of a legislatively enacted law, which the courts, as a rule, approve, does not become necessary for us to consider. We may admit, as contended by the respondent, that the act in question is an instance of the latter kind, and that it is therefore constitutionally valid. The question still remains, did the electors of the judicial district provided for vote, within the terms of the act, to accept the benefit of its provisions, and avail themselves of the opportunity to establish the court? It would seem, from the closing sentence of section 27, that the taking effect of the act, or, as the respondent prefers to express it, the acceptance of the benefits of the act, was conditioned upon "a majority of the electors in each of the counties of Cherokee and Crawford voting at such election in favor of the creation and establishment of said court." Only in that contingency could the governor appoint a judge and clerks ad interim for the court. So, also, by section 1 of the act the creation and establishment of the court was

conditioned upon a proviso "that the majority of the qualified electors of said counties shall vote in favor thereof as hereinafter provided." What was meant by the clause "as hereinafter provided" will presently receive our attention. For the moment we will assume that it meant, as provided by section 27, a favorable vote by a majority in each county voting at the election. Hence, the establishment of the court being conditioned upon the vote of "a majority of the electors in each of the counties of Cherokee and Crawford voting at such election," the question occurs, what was meant by the words "a majority voting at such election." We feel clear that they mean a majority of all those who voted at the election, whether they voted upon the proposition to establish the court or did not. The language of the act is plain. There is scarcely occasion for the application to it of rules of construction. Electors voting at an election at which two or more propositions are submitted, or at which candidacies for two or more offices are voted for, are those who vote for or against any one of the propositions or for or against any of the candidates, whether they vote for or against all of such propositions and candidates, or only for or against a part of them. The total number of such electors who voted at such election, whether they voted upon all of the propositions submitted, or for or against all of the candidates, are "the electors voting at such election." Hence, in order to the establishment of the court, the statute required a majority of the electors voting at such election in each of the counties to favor its establishment. Inasmuch as a majority of the electors voting at the election in Crawford county upon the various propositions and candidates submitted to them did not vote in favor of the establishment of the court, the proposition to establish it failed of the requisite approval. Upon the question of the construction of statutes phrased like the one under consideration, the case of *Board of Trustees of Sumner Co. High School v. Board of Com'rs of Sumner Co.* (recently decided) 60 Pac. 1057, is directly in point.

Counsel for respondent contend that the particular language of the act under consideration brings the case within the principle announced in *Board v. Winkley*, 29 Kan. 36, and *State v. Echols*, 41 Kan. 1, 20 Pac. 523. The case first cited involved the consideration of an act providing for the taking of a vote upon the question of the payment of a bounty for the growing of hedges. The statute (chapter 91, Laws 1871) read: "If a majority of the votes cast are for the bounty they shall declare said law to be in full force and effect." The vote upon the hedge-bounty proposition was taken at a general election at which candidates for office were voted for. A majority of all who voted at the election did not vote in favor of the bounty proposition, but a majority of those who voted upon the bounty proposition voted in favor of it. Upon a consideration of the meaning of the statute, it

was held that the proposition was carried. The court rested the decision in part upon the ground that "the electors who were present at the polls, and while voting for township officers, did not vote upon the bounty propositions, are presumed to assent to the expressed will of the majority of those voting thereon." In *State v. Echols*, supra, a similar vote under a similar statute at a general election was considered. The statute read, "After said election the ballots on said question shall be canvassed in the same manner as in the election for county officers, and if a majority of all the votes cast shall be in favor of establishing such high school," etc., the school shall be established. In the last-cited case, *Board v. Winkley*, supra, was regarded as a controlling authority and was followed. The decisions of these cases were correct, but the writer, speaking for himself alone, thinks the reasoning in them unsound, and likewise unnecessary to uphold the decisions. What was meant in each of the statutes by the words "majority of the votes cast" was majority cast on the particular proposition submitted. The contexts of the statutes in each of the cases, and the particular language under consideration, showed this; and it was unnecessary to indulge the presumption that those who did not vote at all upon the question were presumed to assent to the will of the majority, or, in other words, to count those who did not vote at all upon the proposition as voting in favor of it. Counsel for the respondent quote from the closing sentence of section 27 of the act under consideration, that, "if a majority of the electors in each of the counties voting at such election shall favor the creation and establishment of said court," etc., and, emphasizing the word "favor" contend that its use constitutes a legislative adoption of the rule of the former cases of *Board v. Winkley*, supra, and *State v. Echols*, supra, that those who do not vote upon a proposition are presumed to assent to the will of a majority of those who do vote upon it. We cannot concur in this reasoning. The way for an elector to signify his favor for a candidate for office, or for a proposition to be voted upon, is to cast a ballot for him or for it. When the statute speaks of an elector favoring a candidate or a proposition, it means favoring him or it by casting a ballot for him or it. It implies the ascertainment of his favor by means of the authorized and only permissible and recognizable evidence of it, to wit, a ballot; and it does not mean the ascertainment of his favor by presuming his agreement to the action of the majority of such of his fellows as choose to express themselves. He may be bound in some cases by the action of the majority, by failing to dissent from it; but not where the law, in order to bind him, requires the expressed assent of a majority of the whole of an ascertainable number, which is the case under the law we are considering.

It is also contended by counsel for respondent that, if their views as above stated should

be regarded as unsound, the result of the vote must nevertheless be held favorable to the establishment of the court, because the language of section 27, which we have been considering, relates only to the special election authorized by it, and the ascertainment of the result and the contingent appointment of the judge and clerks to follow thereafter. It is argued that section 27 only furnishes the rule for a special election, and inasmuch as no special election was called, but the vote was taken at a general election, the statute appropriates those general provisions of law elsewhere found for ascertaining and declaring the result. The statute is not as clear as it should be, but upon this matter we feel convinced that counsel are also mistaken. It is true that the provisions of section 27 relate to a special election, but other sections of the act, instead of appropriating the provisions of the general election law for the ascertainment of the result of a vote taken at a general election held under such act, appropriate the provisions of this same section 27 for the ascertainment of such result. Section 1 declares that the court shall be established in the event "that the majority of the qualified electors of said counties shall vote in favor thereof, as hereinafter provided"; section 10 requires the governor to appoint a judge upon the approval of the act, "by the qualified electors, as hereinafter provided"; and section 12 requires him upon the approval of the act "by the qualified electors, as hereinafter provided," to appoint clerks for the court in the two counties named. The clause "as hereinafter provided," which occurs in these sections of the statute, refers to the thereafter provided terms and conditions of section 27. Hence, for the ascertainment of the result of the general election, the statute appropriates the special provisions relating to the special election. These provisions govern, and they did not authorize the establishment of the court, except in the contingency of an affirmative vote favoring its establishment by a majority of all the electors, in each of the counties, voting at the election, upon the various propositions and candidacies thereat submitted. We would like to be able to reach a different conclusion. We are reluctantly forced to the one we announce, but the law is plain, and by that only can our action be governed. There is no legally established court of common pleas for the counties of Cherokee and Crawford. The prayer of the petitioner is granted, and he is ordered discharged from custody. All the justices concurring.

(10 Kan App 771)

GARFIELD TP., FINNEY COUNTY, v. FINNUP.

(Court of Appeals of Kansas. Southern Department. W. D. May 16, 1899.)

COUNTIES—DE FACTO EXISTENCE—WARRANTS—PRESENTATION FOR PAYMENT.

1. The decisions of the supreme court in *Riley v. Garfield Tp.*, 38 Pac. 500, 54 Kan. 463,

and *Id.*, 49 Pac. 85, 58 Kan. 299, followed as to the liability of Garfield township, in Finney county, for valid debts created by the board of commissioners of Garfield county during the de facto existence of said county.

2. In an action against Garfield township, in Finney county, to recover on warrants issued by the board of commissioners of Garfield county, the petition alleged that the warrants had been duly presented to the treasurer of Garfield county for payment, and by him indorsed, "Not paid for want of funds." Held, that failure to allege presentation of the warrants for payment to the township board of said Garfield township did not render the petition demurrable. *Board of Com'rs of Finney Co. v. Board of Com'rs of Gray Co.*, 54 Pac. 1100, 8 Kan. App. 745.

(Syllabus by the Court.)

Error from district court, Finney county; A. J. Abbott, Judge.

Action by F. Finnup against Garfield township, Finney county. Judgment for plaintiff. Defendant brings error. Affirmed.

Milton Brown, for plaintiff in error. A. J. Hoskinson, for defendant in error.

MILTON, J. In this action, F. Finnup recovered judgment against Garfield township, Finney county, on a number of county warrants issued under the authority of the county commissioners of Garfield county prior to March 7, 1893, at which date the organization of that county was declared invalid by the supreme court in the case of *State v. Board of Com'rs of Garfield Co.*, 54 Kan. 372, 38 Pac. 559. Each of the counts of the petition was in form as follows: "Plaintiff states, for his ——— cause of action, that the defendant is a duly-organized municipal corporation, and the legal successor of Garfield county, Kansas, and is constituted of the same territory and inhabitants formerly composing Garfield county, Kansas, and that on ——— day of ——— the board of county commissioners of Garfield county audited and allowed to the plaintiff against said Garfield county, Kansas, the sum of ——— dollars, and ordered a warrant issued on the treasurer of said county, a copy of which is hereto attached, marked 'Exhibit ———,' and made a part hereof, and that on the ——— day of ——— said warrant was duly presented to the treasurer of said county for payment, and indorsed by said treasurer, 'Presented for payment, and not paid for want of funds,' and that the defendant is indebted to the plaintiff upon said warrant in the sum of ——— dollars, with six per cent. interest thereon from the ——— day of ———." The defendant filed a motion, consisting of several separate paragraphs, to strike certain allegations from the petition, and, in effect, asked that each and every allegation of each count of the petition be stricken out. The motion was overruled. The defendant then demurred on all except the second of the statutory grounds. The demurrer being overruled, the defendant answered by a general denial, and an allegation that Garfield county never had a legal existence, and that on the 7th day of March, 1893, the

supreme court of Kansas had so decided; and a further allegation that one of the warrants, on its face, appeared to have been issued at an adjourned meeting of the county commissioners. The affidavit verifying the answer related only to the allegation respecting the invalidity of the county organization. The plaintiff offered in evidence the original warrants, and no further evidence was introduced by either party. The following admission appears in the record: "It is admitted that there were persons claiming to act and were acting as the various county officers, as named under the law of Kansas, of the alleged county of Garfield, up to the time the supreme court, in the case of *State v. Rowe*, declared them to be usurpers." The foregoing refers to the case of *State v. Board of Com'rs of Garfield Co.*, supra.

After a careful consideration of the various propositions argued by counsel, we have reached the conclusion that the trial court did not err in overruling the demurrer and the motion to strike out, and that the judgment in favor of the plaintiff below was correct. The reasons for this conclusion are as follows: The status of Garfield township as a municipality, and in relation to the creditors of Garfield county, has been settled and determined by the legislature and the supreme court. In the case of *State v. Board of Com'rs of Garfield Co.*, supra, wherein the act creating Garfield county was declared unconstitutional and void, and the county was held to be an unconstitutional and void organization, the rights of its creditors were expressly declared not to have been adjudicated or determined. Eleven days after that decision was rendered, chapter 98, Laws 1893, entitled "An act creating the township of Garfield, of Finney county, Kansas," etc., took effect. By this act the territory formerly known as "Garfield County" became a municipal township of Finney county. Section 2 of the act declared that the territory so attached should in no way become liable for any of the indebtedness theretofore created by Finney county, and section 3 declared that Finney county should in no way become liable for the indebtedness theretofore created by the organization theretofore known as "Garfield County." In the case of *State v. Lewelling*, 51 Kan. 562, 33 Pac. 425, the said act was declared constitutional and valid. In *Riley v. Garfield Tp.*, 54 Kan. 463, 38 Pac. 560, on the hearing of the motion to quash the alternative writ of mandamus, the court held: "The township of Garfield, in Finney county, is, as a public municipal corporation, the legal successor of Garfield county, and therefore is liable for the valid debts created by that county during its de facto organization or existence." In the same case, in the trial on its merits, the court held that Garfield county, from the time of its organization until the decision in the case of *State v. Board of Com'rs of Garfield Co.*, supra, was a county de facto, and that the acts of its officers

were the acts of de facto officers, and binding as such between the people of the county and persons dealing with them as public officers. *Riley v. Garfield Tp.*, 58 Kan. 299, 49 Pac. 85. From the foregoing, it is clear that Garfield township became the municipal successor of Garfield county, and therefore liable for the payment of the warrants sued on in this action, as the same were in due form, and, presumptively, properly issued. The decision in *Vandriess v. Hill*, 58 Kan. 611, 50 Pac. 872, is not only not opposed to, but in fact sustains, the conclusion we have reached.

Counsel for plaintiff in error seems to claim that the defendant in error is bound by the language of the "admission" hereinbefore quoted, and that thereunder the officers who issued the warrants sued on must be regarded as usurpers. This position is untenable, in view of the decision in *Riley v. Garfield Tp.*, supra.

The contention that the plaintiff should have pleaded that he had made a demand on the proper officers of Garfield township for payment of the warrants is answered by the decision of this court in the case of *Board of Com'rs of Finney Co. v. Board of Com'rs of Gray Co.*, 8 Kan. App. 745, 54 Pac. 1100, where it was held that such an allegation was not necessary. This question was not raised by the answer, and was therefore waived. Besides this, the petition here alleges that the warrants were duly presented to the treasurer of Garfield county for payment, and indorsed by the said treasurer, "Presented for payment, and not paid for want of funds."

Other claims of counsel do not require specific mention. The judgment of the district court is affirmed.

(8 Kan. App. 783)

CLARK v. STATE ex rel. SUMNEY.

(Court of Appeals of Kansas, Southern Department, W. D. May 16, 1899.)

BASTARDY—EVIDENCE—EXAMINATION BY PHYSICIAN.

In bastardy proceedings, where the relatrix and the defendant agree that a physician shall make an examination for the purpose of determining the duration of pregnancy, held, that certain statements made by the relatrix to the physician during the examination were competent.

(Syllabus by the Court.)

Error from district court, Edwards county; J. E. Andrews, Judge.

Proceedings by the state, on the relation of Eva Sumney, against James Clark. Judgment for the state. Defendant brings error. Reversed.

J. C. Ellis, W. N. Beezley, and F. Dumont Smith, for plaintiff in error. A. C. Dyer, for defendant in error.

SCHOONOVER, J. In the district court of Edwards county the plaintiff in error was adjudged to be the father of the illegitimate

child of the complaining witness, and ordered to pay the sum of \$50 annually for its support for a period of 12 years, and costs of suit. The prosecuting witness testified that the first intercourse took place about the 15th of July. The plaintiff in error testified that the first intercourse took place on August 3d. The plaintiff in error doubted his paternity of the unborn child and the chastity of the witness at the time of his first connection with her. Plaintiff in error proposed that witness be examined by a competent physician, and, if the examination disclosed that her pregnancy was of not more than four months' duration, he would regard himself as the author of the girl's trouble, and would marry her. The offer was finally accepted, and Dr. Pearson, a reputable practicing physician, was agreed on to make the examination. The examination was made, and, in the judgment of the examining physician, it disclosed that the pregnancy was more than six months advanced. On the trial of the case Dr. Pearson testified as to the result of the examination, but the trial court refused to permit him to testify that during the examination the complaining witness stated to him that the first connection took place, as stated by defendant, on August 3d. The refusal of the trial court to admit this testimony is the first error assigned.

The evidence was excluded on the theory that it was a confidential communication, and therefore incompetent. Paragraph 4418, Gen. St. 1889 (Gen. St. 1897, c. 95, § 334), provides: "The following persons shall be incompetent to testify: A physician or surgeon, concerning any communication made to him by his patient with reference to any physical disease, or any knowledge obtained by a personal examination of such patient." The provisions of this section cannot be construed to cover the facts as disclosed by the record in this case. Dr. Pearson was not present as the physician of the complaining witness. She was not his patient. The examination was not made for the purpose of treating her for any physical, or supposed physical, disease. She agreed and submitted to the examination for the sole purpose of satisfying the plaintiff in error as to whether he was the father of the child. She knew that the result of the examination was to be made known to her parents and to the plaintiff in error before she submitted to it. Under such circumstances, statements made by her to the physician during the examination, as to the time when the first connection took place, cannot be regarded as confidential. *Railroad Co. v. Murray*, 55 Kan. 338, 40 Pac. 646; *People v. Cole* (Mich.) 71 N. W. 455. In the case of *Nesbit v. People*, 19 Colo. 441, 36 Pac. 221, it is said: "The testimony of Dr. Eskridge was further objected to on the ground that his consultation with the accused was professional and confidential, and that any communication made by the accused, and any infor-

mation gained by the physician in the course of such consultation, were privileged, and could not be divulged without the consent of his patient, the defendant. This ground of objection is not sustained by the record. The consultation was mutual, not confidential. It was not secured by the accused in his own behalf and for his own sake alone. It was agreed to between the prosecution and the defendant for the express purpose of enabling the physician to testify as to defendant's mental condition. It cannot be that defendant could seek and obtain such an examination at the hands of the court, and with the consent of the prosecution, with the privilege of introducing the testimony if the result of the examination should be favorable to him, and yet reserve to himself the power of excluding the testimony if it should be unfavorable. The objection to the admissibility of the testimony was properly overruled. Its weight was for the jury, to be considered in connection with other testimony upon the same subject." Under the circumstances, the statements made by the relatrix during the examination to the physician were competent. Several errors are assigned, but for reasons given the judgment of the district court is reversed, and a new trial ordered.

(18 Kan.App. 776)

LARABEE v. COOK.

(Court of Appeals of Kansas, Southern Department, W. D. May 16, 1899.)

SURETIES—CONDITIONS OF BOND—INCREASE OF OBLIGATION.

"The law will not increase or enlarge the terms of an undertaking to the prejudice of its signers, or create a liability against the sureties which they did not intend to incur, and which is not within the express conditions of the undertaking." *Edwards v. Ellis*, 27 Kan. 348.

(Syllabus by the Court.)

Error from district court, Stafford county; Ansel R. Clark, Judge.

Action by J. D. Larabee against J. B. C. Cook. Judgment for defendant, and plaintiff brings error. Affirmed.

J. W. Rose, for plaintiff in error. Moseley & Dixon, for defendant in error.

SCHOONOVER, J. J. D. Larabee commenced an action in replevin against L. A. Hall, in the district court of Stafford county, to recover certain personal property on which Larabee held a chattel mortgage. A redelivery bond was executed, signed by J. B. C. Cook, defendant in error, and others, conditioned as follows: "Now, we, the undersigned, residents of said county, bind ourselves to the said plaintiff in the sum of three thousand dollars, that said defendant shall deliver to the said plaintiff the property herein returned to him, if such delivery be adjudged, and pay all costs and damages awarded against him in said action." The property was valued at \$1,080.76.

Upon the final trial the amount of Larabee's interest in the property was found to be \$924.16, with interest. The costs amounted to \$474.02. Execution was issued, the costs were paid in full, \$605.84 in cash was paid on Larabee's interest, and property described in the redelivery bond, and valued at \$231, was turned over to the sheriff by L. A. Hall. There was no judgment for damages. The issue in this case is clearly stated in the brief of defendant in error, as follows: "Plaintiff contends that the judgment obtained in the replevin action should not be credited with any property that was returned under the execution, but only by the actual amount that such property subsequently brought at forced sale by Larabee under his chattel mortgage (which was eighty-eight dollars). Defendant on his part contends that by a return of any part of the property his obligation on the redelivery bond is pro tanto fulfilled. He also claims that under the conditions of his bond he never in any manner, by implication or otherwise, assumed or agreed to pay Hall's indebtedness to Larabee, or guaranteed that the property in dispute would sell for an amount equal to Larabee's interest therein." The contention of the defendant in error is correct. There was no judgment for damages. The property was described, itemized, and a value placed on each article in the redelivery bond at the time it was executed. Under the conditions of the bond, when the property, or any part of it, was returned, the obligation of the sureties created by the bond should be reduced to the extent of the property returned at the value designated in the bond. In the case of *Edwards v. Ellis*, 27 Kan. 348, the supreme court said: "It is well settled that the law will not increase or enlarge the terms of an undertaking to the prejudice of its signers, or create a liability against the sureties which they did not intend to incur, and which is not within the express conditions of the undertaking." *Henrie v. Buck*, 39 Kan. 381, 18 Pac. 228; *Hays v. Closon*, 20 Kan. 120; *Brock v. Bolton* (S. C.) 16 S. E. 370. The judgment of the district court is affirmed.

(10 Kan.App. 27)

DENTON et al. v. GROVES.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

APPEAL—REVIEW OF EVIDENCE—GAMBLING CONTRACT.

1. In order to challenge in this court the sufficiency of the evidence to support the findings of fact by a jury, the party aggrieved should file his motion in the trial court to set such findings aside, and obtain a ruling thereon.

2. The question as to whether or not a grain deal is a gambling contract is one to be determined by the jury, under proper instructions; and where it is submitted to and determined by a jury, and their finding is supported by some evidence, and it is approved by the trial court, it will not be disturbed.

(Syllabus by the Court.)

Error from district court, Leavenworth county; Louis A. Myers, Judge.

Action by Denton Bros. against W. H. Groves. Judgment for defendant, and plaintiffs bring error. Affirmed.

William A. Porter, for plaintiffs in error.
J. H. Gillpatrick, for defendant in error.

McELROY, J. The plaintiffs in error, Denton Bros., in 1891 were partners engaged in the grain and elevator business at Leavenworth City. The defendant in error, Groves, was superintendent of the linseed-oil mills located in that city. During the months of May and June Denton Bros. were selling on their own account, and for account of their customers, on the board of trade in Chicago large amounts of rye for September, 1891, delivery. The amount thus sold aggregated something over 100,000 bushels, including 5,000 bushels for account of the defendant, Groves. The rye was sold at 61.5 cents per bushel. Within a short time there was an advance in the price, until, about the middle of August, when the deal was closed, it was selling at 93 cents. The defendant, Groves, put no money into the venture. The margins and losses, amounting to \$1,581.25, were paid by the plaintiffs and charged to the account of the defendant. Denton Bros., as plaintiffs, brought suit on the account for the recovery of the amount due, with interest. The defendant answered, denying that any rye was actually sold or purchased, or intended to be sold or purchased, for delivery, and alleged that the transaction out of which the alleged indebtedness arose was simply a deal in options,—a wager upon the future price of rye,—and that the defendant was not legally liable to the plaintiffs thereon. A trial was had before the court and jury, which resulted in a verdict for the defendant, and judgment against plaintiffs for costs. The plaintiffs, as plaintiffs in error, prepared their case-made, and present the record to this court for review, and allege numerous errors in the proceedings of the trial court, which we will examine.

1. The plaintiffs in error complain that the defendant was permitted to badger their witnesses and carry the cross-examination far beyond the lawful limit. The plaintiffs in error cite two instances in proof of this contention. We have examined the record in this regard, and find that plaintiffs in error neither objected nor excepted to the manner or extent of the cross-examination. However, it is not apparent that the defendant abused his privileges in the cross-examination of witnesses. The witnesses appeared, from some cause, to understand with difficulty the exact questions asked.

2. That the court erred in refusing certain instructions requested: "(4) If either of the parties intended an actual delivery of the property, it is not void, as a gambling contract, even though it resulted in settling the

difference of the prices without the delivery of the grain. (5) The jury are instructed that the burden of showing the illegality of the contract is on the defendant." These instructions were refused. The court, however, instructed the jury as follows: "(2) One has a right to sell and agree to deliver at some future time property which he does not own at the time of sale, but which he expects to go into the market and buy; but an agreement for a sale and future delivery of grain is a gambling contract, and illegal, if it is the understanding or intention of both parties at the time that there is to be no actual sale, purchase, receipt, or delivery of the grain at the time fixed for the delivery thereof, but only that the parties shall then settle, and the purchaser receive or pay the 'difference' between the agreed price and the market price, according as the market price is less or greater than the agreed price; and, if the jury believe from the evidence in this case that such was the intention of these parties, the plaintiffs cannot recover in this case." And at plaintiffs' request the court further instructed the jury as follows: "The illegality of a contract is never presumed, but must always be proven. And in this case, if you find from a preponderance of the evidence that the plaintiffs have proven a valid contract with the defendant, then the burden of showing that such contract is illegal or void as against public policy devolves upon the defendant." The court committed no error in refusing the instructions. The instructions given very fairly presented the question sought to be presented in the instructions refused.

3. That the special findings are not supported by the evidence. The court, at plaintiffs' request, submitted certain special findings, which were answered by the jury as follows: "Ques. 1. Did Denton Bros. buy the actual grain in Chicago, and fill their contract of 105,000 bushels of rye? Ans. 1. No. Ques. 2. Was it the intention of Denton Bros. to furnish the actual rye sold for Groves, at the time the sale was made, on June 26, 1891? Ans. 2. No. Ques. 3. Did Groves tell Denton on June 26, 1891, the day that the sale was made, that he did not intend to deliver the rye? Ans. 3. No; not according to evidence." The special findings are supported by the evidence. Besides, there was no motion to set them aside, but, on the contrary, the plaintiffs accepted the special findings, and moved for judgment thereon. If plaintiffs were not satisfied with the special findings, they should have made a motion to set them aside.

4. That the verdict is not sustained by the evidence: The plaintiffs in error during the months of May and June, 1891, sold for September delivery, on the board of trade at Chicago, about 115,000 bushels of rye, 5,000 bushels of which was sold on account for the defendant, Groves. The rye was sold at 61½ cents per bushel. Within a short time there was an advance in the

price, until the 14th of August it sold at 93 cents, at which time the venture was closed out at a loss. The defendant, Groves, put no money into the transaction. The margins and losses were all paid by Denton Bros., and charged to the account of the defendant. The plaintiffs in error contend that at the time the rye was sold they intended to deliver the same in September, according to contract; that afterwards they were unable to secure rye in the country with which to fill the contract; that in consequence of the lack of necessary money to advance for margins they were compelled to go on the open market in Chicago and buy the rye with which to fill the contract; and that this was done. On the other hand, the defendant contended, and still contends, as to the contract, that he had no rye to deliver, that he never intended to deliver any grain, that the intention was to settle the differences, whether it be a loss or profit, and that this was all well understood by Denton Bros. and all other parties connected with the transaction. It is not very clear, from the plaintiffs' version of the contract, whether there was a real contract for the sale of rye between any of the parties. The plaintiffs, in their brief, say, "Denton Bros. presented this statement of loss to Groves on or before August 15, 1891." In the account as kept by Denton Bros. upon their books they did not charge Groves, in the first instance, with the amount of the purchase of the rye, but left the matter open until in August, when they charged him with the loss on the transaction. If it was a real sale and purchase of grain, it would be reasonable to suppose that they would charge him with the amount of rye at the agreed price. It is not clear from the plaintiffs' description of the transaction and the method of executing it, that any rye was ever purchased, sold, delivered, or intended to be delivered or received. A gambling contract is tested by the intention of the parties. In this case the Dentons say that the intention was to deliver the actual rye. Some of plaintiffs' witnesses say actual rye was delivered, but when they describe the transaction it is not clear that they ever intended to or did deliver any rye. An examination of the entire evidence satisfies us that the transaction was not a real bargain and sale of rye for future delivery, but that it was a gambling contract; that all the parties connected with it contemplated merely the settlement of differences in price, whether lower or higher. The motion for a new trial was properly overruled. The judgment is affirmed. All the judges concurring.

STARRETT v. SHAFFER, Sheriff, et al.
(Court of Appeals of Kansas, Southern Department, W. D. May 16, 1890.)

MOTION FOR NEW TRIAL—HEARING.

"It is error for a trial court to overrule a motion for a new trial merely pro forma. Ev-
61 P.—52

ery trial court should exercise its best judgment when such a motion is presented to it, and should rule accordingly." Railroad Co. v. Keeler, 4 Pac. 143, 32 Kan. 163.

(Syllabus by the Court.)

Error from district court, Ness county; J. E. Andrews, Judge.

Action by F. P. Starrett against W. H. Shaffer, sheriff, and another. Judgment for defendants, and plaintiff brings error. Reversed.

G. R. McKee, for plaintiff in error. N. H. Stidger, for defendants in error.

SCHOONOVER, J. This is an action commenced in the district court of Ness county for an injunction. The case was tried on the 17th day of February, 1898, and taken under advisement until the regular May term. On the 17th day of May the court rendered judgment for defendants. The plaintiff failed to file a motion for a new trial, but asked and obtained 60 days in which to prepare a case for this court. On the 27th day of June, 1898, the following proceedings were had: "And now, on this 27th day of June, 1898, the same being an adjourned day of the regular May term, 1898, of said court, coming on to be heard the above-entitled cause of action, and it appearing to the court that judgment had been rendered herein on the 17th day of May, 1898, and it appearing further to the court that the plaintiff had failed to file a motion for a new trial within three days of the time of the rendition of said judgment and before the said court adjourned, and the attorney for the defendant having failed to except to the ruling of the court at that time, and the court having given him sixty days in which to prepare his case for the court of appeals, and the defendants thirty days in which to suggest amendments thereto; and the court, further considering the matter, finds that on account of the number of days given the plaintiff in which to prepare his case for the court of appeals, and believing himself to have prejudiced the rights of the plaintiff, does on this day, upon his own motion, set aside said judgment and render judgment herein as of to-day, * * * whereupon, on this 27th day of June, 1898, said plaintiff filed his motion for a new trial, which was, without argument and without hearing from counsel, overruled by the court, to which ruling of the court plaintiff at the time duly excepted, and was allowed one day in which to prepare his case-made for the court of appeals, and amendments to be suggested forthwith by defendants, the parties waiving notice of settling case." It is evident that the trial court exercised its discretion for the sole purpose of assisting plaintiff in error to a review of his case on its merits in this court. Whatever we may think of the practice pursued by plaintiff in error, he now insists that this court reverse the judgment of the district court for the reason that the motion for a new trial was overruled without argument or consideration. The facts

disclosed by the record are that the judgment complained of was rendered on the 27th day of June, 1898, and on the same day plaintiff filed his motion for a new trial, which was by the court overruled pro forma. Our supreme court has said, in the case of *Railroad Co. v. Keeler*, 32 Kan. 163, 4 Pac. 143, that "It is error for a trial court to overrule a motion for a new trial merely pro forma. Every trial court should exercise its best judgment when such a motion is presented to it, and should rule accordingly." In the case of *State v. Summers*, 44 Kan. 637, 24 Pac. 1099, it was held that "It is error for a trial court to overrule a motion for a new trial merely pro forma, even if the case is submitted to the court for trial without a jury by the agreement of the parties." *State v. Bridges*, 29 Kan. 138; *Railroad Co. v. Cook*, 18 Kan. 261; *State v. Summers*, 44 Kan. 637, 24 Pac. 1099; *Railroad Co. v. Ryan*, 40 Kan. 12, 30 Pac. 108; *Larabee v. Hall*, 50 Kan. 311, 31 Pac. 1062; *Smith v. Benton*, 54 Kan. 708, 39 Pac. 701. The judgment of the district court will be reversed, and a new trial granted.

(8 Kan. App. 788)

KAUTER v. ENTZ et al.

(Court of Appeals of Kansas, Southern Department, W. D. May 16, 1899.)

COURT OF APPEALS—FILING PETITION IN ERROR—SERVICE OF CASE—MADE—GENERAL APPEARANCE.

1. This court cannot consider the question whether a district court erred in sustaining a demurrer to a petition, when the petition in error is filed in this court more than one year after the ruling of the court sustaining such demurrer was made. *Blackwood v. Shaffer*, 24 Pac. 423, 44 Kan. 273.

2. A ruling quashing the summons and setting aside the service made on the defendant "is not available as error when more than one year has intervened between the making of the order and the commencement of proceedings in error." *Newberry v. Railway Co.*, 35 Pac. 210, 52 Kan. 613.

3. Where a case was not served on defendants until nearly nine months after the final order quashing a summons and setting aside the service thereof on a defendant was made, and the time was not extended by the court, *held*, that under sections 588, 589, c. 95, Gen. St. 1897, the case was served too late, and this court is without jurisdiction to review the alleged error.

4. The filing of a demurrer to a petition is a general appearance.

(Syllabus by the Court.)

Error from district court, Finney county; William Easton Hutchison, Judge.

Action by John Kauter against Henry Entz and others. Judgment for defendants, and plaintiff brings error. Dismissed as to certain defendants, and reversed as to defendant John O'Loughlin.

One Christ. Fritz brought an action of replevin in the district court of Finney county to recover certain live stock of John Kauter, the plaintiff in error herein, which had been taken possession of by Kauter under and by virtue of a certain chattel mortgage executed by Fritz to Kauter. Fritz executed a re-

plevin undertaking, signed by himself as principal, and by John O'Loughlin and Charles Shultz, two of the defendants in error herein, as sureties. Judgment was rendered in favor of Kauter and against Fritz, and Fritz then applied for a stay of execution, which was granted, and a supersedeas bond signed by Fritz, as principal, and by Henry Entz, another defendant in error herein, and John O'Loughlin, was filed. Fritz failed to prosecute a petition in error to reverse said judgment, and more than one year elapsed from the date thereof, and the judgment became final. Plaintiff in error, Kauter, then brought this action in the district court of Finney county against Entz and O'Loughlin on the replevin and supersedeas bonds. Copies of the bonds were not set out in the petition. A summons was issued to the sheriff of Finney county and served on Henry Entz, and returned "Not found" as to O'Loughlin. Entz filed a motion to require the plaintiff to make his petition more "definite and certain, by alleging facts showing whether he sought to recover on the replevin undertaking or supersedeas bond, and to allege facts showing why he did not attach such exhibits." On the same day O'Loughlin filed a motion to require the plaintiff "to elect upon which cause of action set out in his petition [the replevin undertaking or supersedeas bond] he would prosecute his action." Both of the motions were sustained by the court, and plaintiff amended his petition by setting up facts showing why he was unable to file a copy of the replevin bond; nothing being said in the amendment about the supersedeas bond. Defendants demurred to the petition as amended, and plaintiff asked leave to amend, which was granted, and the demurrer was then withdrawn. The amended petition set out the execution of the replevin undertaking signed by Charles Shultz and John O'Loughlin. Afterwards the plaintiff further amended his petition by making Charles Shultz a party defendant and attaching a copy of the replevin undertaking, and further amended it so as to make it conform to the ruling of the court requiring him to elect, and elected to stand on the replevin undertaking signed by O'Loughlin and Shultz, but not by Entz. To the petition thus amended, O'Loughlin filed a demurrer, which was overruled. Entz then demurred to the petition as thus amended on the ground and for the reason that it did not state facts sufficient to constitute a cause of action against him. The demurrer was sustained, and final judgment rendered in favor of Entz for costs. Before final judgment was rendered in favor of Entz, summons was issued to Kearny county, and was by the sheriff of said county served on Shultz and O'Loughlin. Shultz appeared and filed his motion to quash said summons and set aside such service, which motion was sustained. Another summons was then issued to Kearny county, and served on

O'Loughlin, Shultz, and Entz. Entz appeared specially and moved to set aside the service of such summons, and this motion was heard with a plea in abatement filed by said O'Loughlin, and the court sustained both the motion and plea.

Milton Brown, for plaintiff in error. A. J. Hoskinson, for defendants in error.

SCHOONOVER, J. (after stating the facts). The principal question in this case is, did the Finney county district court obtain jurisdiction of the persons of John O'Loughlin and Charles Shultz by service of summons and their appearances in the Finney county district court? Plaintiff in error in his brief sets out, among others, the following specifications of errors: "Third. That the district court erred in sustaining the demurrer of Henry Entz to the plaintiff's second amended petition, and rendering judgment for costs in favor of said Entz against said Kauter. * * * Fifth. The district court erred in sustaining the first motion by defendant Shultz to quash and set aside the summons and service on him, the said Shultz, over the objections and exceptions of the said plaintiff. Sixth. The district court erred in sustaining the second motion filed by said Shultz to quash and set aside a summons and the service thereof on him, the said Shultz. * * * Tenth. The district court erred in sustaining the plea in abatement by the said O'Loughlin, and in rendering a judgment for costs against said Kauter. * * * Other specifications of error are set out in plaintiff in error's brief, but it will be unnecessary to consider them, as they merely present the same question as the specifications here set out, but in a different form.

At the outset we are met by an objection of counsel for defendants in error to the consideration by us of the third, fifth, and sixth specifications of error, and we must hold that the objection is well grounded. The order sustaining the demurrer filed by Entz, and entering final judgment in his favor, was made on the 10th day of May, 1897, and the petition in error was not filed until June 4, 1898,—more than one year from the date of the final judgment; and this court cannot, therefore, review the alleged error. *Blackwood v. Shaffer*, 44 Kan. 273, 24 Pac. 423. The ruling quashing and setting aside service of the first summons served on Shultz was made May 10, 1897, and the petition in error having been filed more than one year thereafter, this court is without jurisdiction to review the alleged error. *Newberry v. Railway Co.*, 52 Kan. 613, 35 Pac. 210. The case-made was not served on defendants until nearly nine months after the final order quashing the second summons served on Shultz, and, as it does not appear from the record that the court made any order extending the time for serving a case, it must be held that under sections 588, 589, c. 95, Gen.

St. 1897, the case was not served in time, and the plaintiff cannot now ask to have the ruling reviewed. *Insurance Co. v. Koons*, 26 Kan. 215.

The only error assigned in plaintiff in error's brief which this court has power to review, and which it is necessary to consider, is the ruling sustaining O'Loughlin's plea in abatement, and in determining this question we find that it is not necessary to decide whether jurisdiction was obtained by any of the various writs of summons. We must hold that by filing his demurrer the defendant O'Loughlin entered a full appearance to the action. *Carter v. Tallant*, 51 Kan. 516, 32 Pac. 1108; *City of Crawfordsville v. Hays*, 42 Ind. 200. In the last-named case it was held that a full appearance to an action waives all defects in the process and in the service thereof. O'Loughlin filed his demurrer after the plaintiff had elected to stand on the replevin undertaking, and the jurisdictional question was clearly presented. Had the plaintiff elected to stand on the superseas bond, the question of jurisdiction as to O'Loughlin's person would probably not have arisen, since service of summons was made on Entz in Finney county,—the county where the action was brought. The petition in error is dismissed as to defendants in error Henry Entz and Charles Shultz, and the judgment of the district court on the plea in abatement of defendant in error John O'Loughlin is reversed, and the cause remanded, with instructions to overrule said plea in abatement.

SCHUSTER v. GRAY.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

APPEAL—PETITION IN ERROR—NECESSITY—DISMISSAL OF APPEAL.

A proceeding in error will be dismissed, in the absence of a petition in error required by section 13, c. 83, Gen. St. 1897, providing that proceedings for reversal shall be by petition, to be entitled "Petition in Error."

Error from district court, Jefferson county; Louis A. Myers, Judge.

Action between G. W. Schuster and D. M. Gray. From the judgment, Schuster brings error. Dismissed.

Wm. F. Gilluly and Gephart & Schaeffer, for plaintiff in error. Morse & Casebeer, for defendant in error.

PER CURIAM. The record here presented contains a case-made, and nothing more. There is no petition in error filed or presented. Section 13, c. 83, Gen. St. 1897, reads: "The proceedings to obtain such reversal, vacation or modification shall be by petition, to be entitled Petition in Error, filed in a court having power to make such reversal, vacation or modification, setting forth the errors complained of; and thereupon a summons shall issue and be served, or publication made, as

in the commencement of an action. A service on the attorney of record in the original case shall be sufficient." The proceeding is not brought in conformity with any statute regulating the manner of bringing cases to this court for review. In the absence of a petition in error, we have no jurisdiction in the matter,—can decide nothing, except to order the proceeding dismissed. *Cohen v. Trowbridge*, 6 Kan. 385. The proceeding is therefore dismissed.

(8 Kan.App. 841)

AMERICAN INV. CO. v. COULTER et al.
(Court of Appeals of Kansas, Southern Department, W. D. June 19, 1899.)

WITNESS—INCOMPETENCY—"ADVERSE PARTY"
DEFINED—MORTGAGE—MISDESCRIPTION
—VENDOR AND PURCHASER.

1. The words "adverse party," as used in section 322 (now section 333) of the Code (Gen. St. 1889, par. 4417; Gen. St. 1897, c. 95, § 333), are not limited to the adversary positions of plaintiff and defendant, but affect any party, whether plaintiff or defendant, whose interests are actually adverse to those of another party to the action, who appears in the capacity of executor, administrator, heir at law, next of kin, surviving partner, or assignee, where the latter has acquired title to the cause of action immediately from a deceased person.

2. When the plaintiff sought reformation and foreclosure of a real-estate mortgage, as against subsequent grantees of the mortgagors, and its petition alleged that the mortgage was intended to convey land in range 7 in Rice county, Kan., but that by mistake it was described as being in range 17, the latter lying entirely outside said county, and where the general index in the office of the register of deeds of that county showed that the mortgage conveyed land in range 17, and the numerical index relating to the S. E. ¼ of section 6, township 18, range 7, described the mortgaged tract as being in range 17, and the record of the mortgage itself also described the land as being in the last-named range, *held*, that such records did not charge the subsequent grantees with constructive notice that the mortgage conveyed, or was intended to convey, land in range 7.

(Syllabus by the Court.)

Error from district court, Rice county; Ansel R. Clark, Judge.

Action by the American Investment Company against Flora A. Coulter and others. From the judgment, plaintiff brings error. In 1887 George W. Barber and wife gave to plaintiff their note, secured by mortgage, purporting to convey certain land in Rice county, Kan. Thereafter the mortgagors conveyed certain land in Rice county to William Coulter, Jr., who in the same year conveyed to M. R. Laughlin. No reference was made in the deeds to any mortgage, and the Barbers, when they made their deed, owned no other real estate than that described therein. The mortgagee thereafter sued to reform the mortgage by making the description apply to the land conveyed to Coulter and Laughlin, and made them defendants, alleging that they bought with notice of the mortgage. Coulter and Laughlin in their answer denied such notice. The mortgagors did not answer, but testified that Coulter had knowledge of the mortgage, and

that he had orally agreed to pay the same. This evidence the court excluded. Personal judgment was rendered against the mortgagor and judgment for costs against plaintiff, and it brought error, making the mortgagors parties. Affirmed.

Keller & Dean, for plaintiff in error. J. W. Brinckerhoff, for defendants in error.

MILTON, J. A preliminary question arises on the motion filed by the defendants in error to dismiss the petition in error for the reason that the mortgagors were not made parties to the appellate proceedings. We think the motion ought to be overruled, as it appears that a reversal of the judgment in favor of the plaintiff might benefit, but could not in any wise injure, the mortgagors. The exclusion of the offered testimony of the mortgagors in respect to the alleged transaction between themselves and William Coulter, Jr., deceased, whereby the latter orally assumed and agreed to pay the mortgage in controversy, is complained of by counsel for plaintiff in error in their brief; their principal contention being that the Barbers were not adverse parties in their relation to the other defendants. We are unable to agree with this view. While the mortgagors did not plead in the action, their interests were clearly adverse to those of Mrs. Coulter and her children. Had the offered testimony been received, its effect might have been to charge the decedent's estate with the primary liability for the payment of the mortgage debt,—a result clearly advantageous to the mortgagors. In the case of *Shorten v. Judd*, 56 Kan. 43, 42 Pac. 337, Mrs. Mott, one of the defendants, testified in behalf of the plaintiff, her minor son, and at the same time in her own behalf, concerning a transaction or communication with William Judd, deceased; the executor of the decedent's will being a party defendant. The court, after holding the reception of this testimony erroneous, said: "On account of this error the judgment must be reversed, but, as Mrs. Mott has now disclaimed any interest, she will be a competent witness as to the alleged marriage on the next trial." From the above decision it appears that the words "adverse party," as used in section 322 of the Code (Gen. St. 1889, par. 4417; Gen. St. 1897, c. 95, § 333), are not to be limited to the adversary positions of plaintiff and defendant, but affect any party, whether plaintiff or defendant, whose interests are actually adverse to those of another party to the action, who appears in the capacity of an executor, administrator, heir at law, next of kin, surviving partner, or assignee, where the latter has acquired title to the cause of action immediately from a deceased person.

Another important contention of counsel for plaintiff in error is that the reception record and the index records in the office of the register of deeds of Rice county imparted constructive notice to William Coulter, Jr.,

and to his grantee, Laughlin, as to the fact that plaintiff's mortgage was intended to cover the Barber land in that county. The extent to which indexes of registration records impart constructive notice has received much attention from the courts of last resort in many of the states, but does not appear to have been fully determined by the supreme court of this state. In the case of Poplin v. Mundell, 27 Kan. 138, the court considered the effect of the delay of the register in making an entry in his receiving book of deeds deposited with him for record. On this point the opinion reads: "It seems to us that when the party holding the title presents his deed, duly acknowledged and certified, to the register of deeds, for record, and demands that it be placed upon record, and the register thereupon accepts the same, and duly indorses it filed of the date it was so presented, such party has discharged his whole duty to the public, and his muniment of title cannot be shaken by any subsequent purchaser." Further on in the opinion occurs this statement: "The conveyance itself was properly recorded at length, and although, taking the evidence of plaintiff alone, it may be said that she was misled by the temporary omission on the receiving book, we cannot bring our minds to the conclusion that the delay in making the entry deprived the record of the power of imparting constructive notice of its existence and contents to her." The court also said: "If the question of total omission on the part of the register of deeds was before us, we would be inclined to hold the law does not impose upon the party holding the title the responsibility of seeing that the duties prescribed by the statute upon the register for the protection and security of other parties are in fact faithfully discharged by such officer." The inference from this decision is plain that, in the opinion of the supreme court, the indexes alone do not impart constructive notice as to the contents of registration records. In Wade, Notice (2d Ed.) § 165, it is said: "Where, however, the question has come up directly for decision, it has been held, in the majority of cases, that the failure to index is an act of misprision, for which the officer is liable to the searcher of the record who is thereby misled to his injury." And in section 173: "But the current of authority seems to be decidedly against the doctrine that the index is an essential part of the record." It may be said, however, that the entries in the reception record and in the indexes were sufficient to put William Coulter, Jr., and M. R. Laughlin upon inquiry, at the date of their respective purchases of the land, concerning the title thereof. The question then arises, how far should such inquiry have been pursued? The reception record showed that the mortgage in question had been filed for record. The general index disclosed that such mortgage described the land as being in range 17. The numerical index, while indi-

cating by its heading that the land was in range 7, in the description thereof gave its location as being in range 17. Which index should be regarded as sufficient to put a searcher upon inquiry as to the existence of the mortgage against the land which was finally conveyed to Laughlin? Certainly not the general index, for it stated that the land was in range 17. It is evident that the numerical index was, at the best, ambiguous. From either of these indexes a searcher would have ascertained that the instrument was recorded in Book 32. Referring to Book 32, he would have found the land described as being in range 17. In our opinion, that would have ended the inquiry, and nothing short of proof of actual notice or knowledge on the part of the subsequent grantees as to the mistake in the descriptive portion of the mortgage would have entitled the plaintiff to a reformation thereof as against such grantees. In the case of Scoles v. Wilsey, 11 Iowa, 261, the land was described in the mortgage as being in the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of a certain section; and the owner of the mortgage sought a reformation thereof so as to describe the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of the section, and to foreclose the same against the last-named tract, after the sale of a portion thereof to an innocent purchaser without notice of the existence of the mortgage against said lands, other than the notice imparted by the public record. The law of that state required the recorder to keep an index or entry book, in which, when an instrument was filed for record, he should enter the names of the parties thereto, the date of filing, the date and nature of the instrument, the book and page where recorded, and the description of the property conveyed. The court, after referring to the requirements of the registry law, and remarking that, under the system of that state, titles to and incumbrances on property could be traced and searched for, not only through the names of parties, but by the description of the property as contained in such index, said: "A searcher for incumbrances, for instance, would have no occasion to look beyond the index book, until he found a piece of property which, in description, would correspond with that the title of which he was investigating; and it would be strange indeed that he should, under such circumstances, be charged with a knowledge of facts recited in a mortgage given on another and distinct piece of property." If we follow the doctrine of the foregoing case, it would be necessary to hold that the indexes were insufficient to impart notice to the grantee of the Barbers that the latter had mortgaged, or intended to mortgage, land in range 7; and, if we hold that such indexes would have required the searcher to find and read the record of the mortgage given by the Barbers to the plaintiff, the reading thereof would end the inquiry, as already remarked. In Jennings's Lessee v. Wood, 20 Ohio, 261, the court, in its opinion, said, "The reason

that a party is chargeable with constructive notice is that by an examination of the record he will have actual notice." And in the syllabus of the same case the court declared "that a party can only be chargeable with constructive notice from the record when the record would give him actual notice." We shall not attempt to lay down any general rules relating to registry records and indexes thereof, as it is generally true that each case involving entries in such records must be decided according to its own peculiar facts. Under the facts of the present case, we hold that neither actual nor constructive notice was shown on the part of William Coulter, Jr., and M. F. Laughlin, or either of them, as to the existence of a mortgage, actual or intended, against the W. ¼ of the S. E. ¼ of section 6, township 18, range 7, in Rice county. The judgment of the district court is affirmed.

HOFFMAN v. STEFFEY et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

PLEADING—FORMAL AMENDMENTS—LIMITATIONS.

Defendant was legatee and executor of testator's will, and the testator's sole heir at law filed a petition to set it aside within two years from the probate thereof, to which a demurrer was sustained because defendant was named as executor neither in the caption nor the body of the petition, although it clearly appeared from the averments of the petition that the suit was against him both in his own right and as executor; and over two years after the probate of the will an amended petition was filed, in which defendant was named as executor. *Held*, that the action was not barred by the two-years statute of limitations, since the amendment was formal and not substantial.

Error from district court, Jefferson county; Louis A. Myers, Judge.

Action by Elnora Hoffman against Silas Steffey and others. From a judgment in favor of defendants, plaintiff brings error. Reversed.

Gilluly & Worwick, for plaintiff in error. Morse & Casebeir, for defendants in error.

PER CURIAM. This is an action by the plaintiff in error, as heir at law of one Puderbaugh, to set aside a will. The defendant Steffey was the sole legatee under the will, was guardian of Puderbaugh on account of insanity at the time of his death, and was named as his executor, without bond, in the will. He qualified and took possession of the estate, paid the debts, and made his final report, showing money in his hands amounting to about \$800. There was a demurrer to the original petition, which was sustained on the ground of a defect of parties, in that the petition did not state that the defendant in error was sued in his own right and as executor of the last will of Puderbaugh. It is further contended that

the petition was defective in not stating what the relation was between the plaintiff and the deceased. There was an amended petition filed, naming the defendant in error Steffey as executor and as guardian. To this amended petition a demurrer was sustained, and the contention is that it was properly sustained, because it appeared upon the face thereof that the action was barred by the statute of limitations as to Steffey, as executor, and because more than two years had elapsed from the probating of the will before the amendment was made naming him in the petition as executor and guardian. In fact, there were three separate demurrers by Steffey,—one in his individual right, one as executor, and one as guardian,—all of which were sustained, the case dismissed at the costs of plaintiff, and judgment rendered against him therefor.

Defendant in error objects to the consideration of the case on the ground that the record is not complete,—that the certificate thereto does not conform to the statute. There is a substantial compliance with the statute, although some of the decisions would seem to support the contention that, inasmuch as it appears that an answer of one of the defendant heirs is not embodied in the transcript, therefore, it is incomplete, and that we cannot consider the errors or review the judgment.

The errors assigned are based upon the action of the court in sustaining the demurrers, and we are of the opinion that they are well grounded in law. The allegations of the petition are full, and disclose that the defendant Steffey was the only person interested adversely to the heirs; and, although he was not named in the caption of the petition as executor, in the body it is disclosed that he is sued in his individual capacity, as well as executor of the last will of Puderbaugh. So that the defect, at most, was merely formal, and not substantial. For the same reason, the contention that the action was barred because the amendment to the petition was not made within two years is not well grounded. Steffey was sued within two years. The action was brought in time. The petition not only charges him with having, in his own individual interest, by coercion, and during the time he was guardian of the deceased, caused a will to be executed by an insane person, but alleges every fact necessary to charge him as executor. There was no new party to bring in. He was before the court. As we said before, the amendment was merely formal, and not substantial. While he was before the court defending against these charges, it cannot be said that the statute of limitations was running against him as executor because in the petition he was not named as executor. The judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the amended petition, and for further proceedings in the case.

(10 Kan. App. 32)

ENSIGN v. HART.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

DEPOSITION—SUPPRESSION—WITNESS.

1. No reversible error can be predicated on the overruling of a motion to suppress a deposition, where such deposition is not offered in evidence upon the trial of the action.

2. Where a party offers the testimony of a witness before the court or jury, he is bound by the testimony given by such witness, unless the witness should state things different to what the party had reason to suppose he would at the time he called him.

(Syllabus by the Court.)

Error from district court, Johnson county; John T. Burris, Judge.

Action by Daniel Ensign against William Hart. On the death of plaintiff, Dewey Ensign, executor, was substituted. Judgment for defendant, and plaintiff brings error. Affirmed.

This action was commenced by Daniel Ensign against the defendant, William Hart, for the recovery of an amount alleged to be due upon a promissory note, upon an account, and for a loan, aggregating \$248.75, with interest. Daniel Ensign died testate after the action was instituted. That action was thereafter revived in the name of Dewey Ensign, executor, who filed an amended petition containing three counts. The first count set out a promissory note in the sum of \$100, with interest, alleged to have been executed by defendant on February 7, 1897, payable to Daniel Ensign; the second set out an account for various items, amounting, in the aggregate, to \$48.75; and the third for an alleged loan of \$100, with interest from February 6, 1897. The defendant, William Hart, filed an answer containing (1) a general denial; (2) a denial of the execution of the promissory note; (3) a denial of each item and charge in the account set out as the second cause of action in the amended petition; (4) an allegation of payment; (5) that the account set out in the second cause of action in the amended petition was incorrect, unjust, untrue, and that there was nothing due thereon; (6) a specific denial of every allegation, statement, and averment in the third count of the amended petition. And for affirmative relief the defendant alleged that plaintiff was indebted to him upon an account for the keeping, feeding, and pasturing horses, for work, and for other items, amounting, in the aggregate, to the sum of \$140, which was due, less the sum of \$100, paid thereon on the 6th day of February, 1897; that the sum of \$100 set out in the third count of the amended petition was a payment made by Daniel Ensign on this account; and that plaintiff was indebted to defendant in the sum of \$40 as a balance on the account, for which he prayed judgment. The plaintiff, for a reply, denied the correctness of the defendant's account. The amended answer and reply were each verified. The plaintiff, before the trial, dismissed the cause

of action set out in the first count of his petition, which declared upon the promissory note. On the trial, after plaintiff had rested, the defendant demurred to the evidence in support of the plaintiff's second cause of action, which was sustained. The jury returned a verdict in favor of the defendant, and against the plaintiff, for \$1.10. The plaintiff filed his motion for a new trial, which was overruled, and he, as plaintiff in error, presents the record to this court for review, alleging errors, which we will examine in order: (1) The court erred in refusing to suppress the deposition of Howard Hastings. (2) The court erred in rejecting competent evidence offered by plaintiff. (3) The court erred in sustaining defendant's demurrer to the evidence in support of the second count of plaintiff's petition. (4) The court erred in refusing to instruct the jury as requested by plaintiff. (5) The court erred in admitting incompetent evidence on behalf of defendant. (6) The court erred in instructing the jury. (7) The court erred in overruling plaintiff's motion for a new trial.

I. O. Pickering, for plaintiff in error. H. L. Burgess, for defendant in error.

McELROY, J. (after stating the facts).

1. Prior to the trial, in pursuance of a notice served by the defendant, the clerk of the district court of Johnson county, where the action was pending, took the deposition of Howard Hastings. When the deposition was concluded, the attorneys for the respective parties agreed, in the presence of the clerk, that he should make and attach the proper certificate, and file the deposition with the papers in the case. The officer interpreted this to mean that the parties waived the formal sealing, addressing, and transmission of the deposition to himself. The plaintiff thereafter filed his motion to suppress the deposition for the reason that the same was not properly sealed, addressed, and transmitted to the clerk of the court. This motion was overruled, and is assigned as error. The defendant did not introduce the deposition in evidence, so that whatever error was committed in this respect by the trial court was harmless.

2. The only evidence offered by plaintiff in error that was rejected, of which complaint is made, was that of Howard Hastings, whose deposition was transmitted in this informal manner. The plaintiff in the action offered to read certain portions of this deposition, which was denied upon objection by the defendant. The evidence offered related to certain statements and declarations made by Daniel Ensign, during his lifetime, to the witness. These declarations were hearsay, incompetent, and properly rejected.

3. Did the court err in sustaining the demurrer to the evidence in support of the cause of action in the second count of plaintiff's petition? This contention is based upon the claim that defendant's answer admitted

that he purchased the articles charged in the account. We do not so read the answer. The defendant in his verified answer denies each and every allegation in that count of the petition. It is clear that it was the intention of the pleader to put in issue every declaration or matter stated therein. The only evidence offered as to this cause of action was the testimony of the defendant. The plaintiff, in support of this count, placed the defendant upon the witness stand. He admitted the purchase of some few of the items mentioned in the account, but declared that he paid for the same; denied the correctness of the account, and all the items thereof, as sued, and any indebtedness therefor. It is contended by the plaintiff in error that so much of the witness' testimony as could be construed into an admission was proof of plaintiff's account and that all other of his declaration might be disregarded by the jury. This contention is not tenable. Where a party sees fit to introduce a witness, he is bound by the declarations of such witness, unless the witness should state things different to what the party had reason to suppose he would at the time he called him. There was a total lack of evidence to support this cause of action, and the court properly sustained the demurrer.

4. The plaintiff in error points out no incompetent testimony, neither in his specifications of error nor in his argument. We therefore conclude that he waives this assignment of error.

5. That the court erred in refusing to instruct the jury as requested by plaintiff. The contention here is that the court erred in refusing to submit an instruction as follows: "If the jury believe from the evidence that the \$100 was loaned to the defendant, as claimed by the plaintiff, then you will compute interest thereon at the rate of 6 per cent. from the date of said loan to the present time." The plaintiff, in his amended petition, alleged that on February 6, 1897, Daniel Ensign loaned \$100 to the defendant, which sum he agreed to return in 90 days, with 6 per cent. interest. The defendant concedes that he received the money on that date, but avers that it was paid to him as a part payment of the account he had against Ensign. The parties all agree that Daniel Ensign, on February 6, 1897, made his check in the sum of \$100, payable to Hart; that defendant received and cashed the check. The plaintiff, to support his contention that it was a loan, offered Dr. Malone. This witness testified that on December 9, 1896, or January 9, 1897, he was in a room with Daniel Ensign in the presence of Hart, when he heard Ensign state "that Hart desired to borrow \$100," but the witness says no loan was at that time made. No one contends that the money was delivered to Hart at an earlier date than February 6, 1897. The testimony with reference to this transaction on that date shows that the \$100 was paid to the defendant in part payment of his account

against Ensign. There is not one word of evidence from which the jury or court could conclude that this \$100 transaction was a loan. The instruction was not warranted by the evidence, and the court properly refused the same.

6. That the court erred in instructing the jury. Complaint is made that the court erred in submitting to the jury the first five instructions. The instructions given by the court, as a whole, fairly presented the triable issues under the evidence. The court committed no error in this respect.

7. That the court erred in overruling plaintiff's motion for a new trial. There is nothing presented under this assignment of error in addition to what has already been noted. From what we have said, it follows that the court properly overruled the plaintiff's motion for a new trial. The judgment will be affirmed. All the judges concurring.

MILLER v. SMITH.

(Supreme Court of Idaho. June 21, 1900.)

COUNTY COMMISSIONERS—MEMBER OF BOARD—APPEAL FROM JUDGMENT REMOVING COUNTY OFFICER—IGNORANCE OF THE LAW—POWER OF BOARD—DUTY OF COUNTY ATTORNEY—APPROVAL OF OFFICIAL BONDS—ALLEGATIONS OF INFORMATION—PROOF OF INTENT—PUBLICATION OF PROCEEDINGS—FINDINGS OF FACT—CONCLUSIONS OF LAW.

1. Under our constitution and statutes, an appeal will lie from the judgment of a district court removing a county officer.

2. Individual members of the board of county commissioners cannot perform services for the county, and charge for them as commissioners.

3. Boards of commissioners are entireties, and can only act as empowered by law and collectively.

4. The board is given certain limited powers, and a single member of such board is not empowered to act alone and bind the county in any manner.

5. Members of the board cannot perform duties of road overseer, and draw pay therefor as commissioners.

6. The plea of ignorance of the law will not protect a member of the board from removal from office when it is shown that he has repeatedly violated the plain provisions of the law.

7. Boards of county commissioners are given a general supervisory power over county affairs, but they cannot, as a board or as individual members thereof, perform the duties imposed by law on any other county officer, and draw compensation as county commissioner therefor.

8. A board of county commissioners has no authority to appropriate money for repairing and constructing roads and bridges, and place the same at the disposal of a member of such board, and authorize him to superintend the construction of such work, and allow him compensation as a commissioner for so doing.

9. A county attorney may be removed from office, under the provisions of Rev. St. § 7459, for incompetency, or a neglect to perform the duties imposed on him by law. Courts will not tolerate any connivance or collusion between the county attorney and the board for the unlawful appropriation of county funds.

10. The board is prohibited from approving official bonds unless the sureties possess the qualifications prescribed by Rev. St. § 396.

11. When a member of the board is charged with violation or neglect of duty in the approval of official bonds, the allegation that he acted with the board in the approval of such bonds should be clear and specific.

12. The law requires the publication of the proceedings of the board in but one newspaper in the county.

13. Frequent violations of the plain provisions of the law are probative facts, from which the ultimate fact of fraudulent, willful, or corrupt intent may be drawn.

14. Findings of fact and conclusions of law should be separately stated, but when the material issues are passed upon it is not cause for reversal that an ultimate fact is placed with the conclusions of law, as it is difficult many times to distinguish between an ultimate fact and a conclusion of law.

(Syllabus by the Court.)

Appeal from district court, Fremont county; Jo. C. Rich, Judge.

Action by David E. Miller against James Smith. Judgment for plaintiff. Defendant appeals. Affirmed.

Dietrich, Chalmers & Stevens, for appellant. Hawley, Puckett & Hawley, P. Averitt, and J. A. Bagley, for respondent.

SULLIVAN, J. This action was commenced by the respondent, who is a citizen and taxpayer of Fremont county, against the appellant, who is a member of the board of county commissioners of said county, demanding his removal from said office, under the provisions of section 7450, Rev. St., and to recover the statutory penalty of \$500 therein provided for. The information or complaint accuses the appellant of charging and collecting illegal fees for services rendered in his office, and knowingly, willfully, and corruptly approving official bonds given by certain county officers, and of doing other acts in his official capacity in violation of law. It contains upwards of 60 specifications of official misconduct. The answer admits some of the specifications of the information, and denies others. The trial was by the court, which made its findings of fact and conclusions of law in writing, and entered judgment against appellant, removing him from his said office, and in favor of the respondent for the statutory penalty of \$500 and costs of suit. The appeal is from the judgment.

A motion to dismiss this appeal was made by respondent on the ground that the judgment in this proceeding was final, and no appeal would lie therefrom. Section 9, art. 5, of the constitution of Idaho is as follows: "The supreme court shall have jurisdiction to review, upon appeal, any decision of the district courts or the judges thereof. The supreme court shall also have original jurisdiction to issue writs of mandamus, certiorari, prohibition and habeas corpus, and all writs necessary or proper to the complete exercise of its appellate jurisdiction." This section and our statutes of appeal clearly authorize an appeal from the judgment in a proceeding to remove an officer, and the appeal herein is authorized.

Section 7450, Rev. St., under which this proceeding is brought, is as follows: "When an information in writing, verified by the oath of any person, is presented to a district court, alleging that any officer within the jurisdiction of the court has been guilty of charging and collecting illegal fees for services rendered or to be rendered in his office, or has refused or neglected to perform the official duties pertaining to his office, the court must cite the party charged to appear before the court at a time not more than ten nor less than five days from the time the information was presented, and on that day or some other subsequent day, not more than twenty days from that on which the information was presented, must proceed to hear, in a summary manner, the information and evidence offered in support of the same, and the answer and evidence offered by the party informed against; and if on such hearing it appears that the charge is sustained the court must enter a decree that the party informed against be deprived of his office, and must enter a judgment for five hundred dollars in favor of the informer and such costs as are allowed in civil cases." By the information or complaint filed, the defendant is accused of charging and collecting illegal fees for services rendered by him, and is also accused of refusing and neglecting to perform official duties pertaining to his office as county commissioner. The illegal fees are alleged to have been charged and collected for services in receiving a bridge, for furnishing stray brands, for blacksmith work, and for presenting and having allowed by the board the following claims, among others, to wit:

St. Anthony, Idaho, July 19, 1899.
Fremont County, Idaho, to James Smith, Commissioner, Dr.

April 18 & 19. Receiving bridges at Rudy, by order of chairman, 2 days, at \$6.00	\$12 00
May 22. To Edmunds road district to order bridges placed across canals, 1 day, \$6.00	6 00
May 24. Trip to Market Lake to order repairs on roads and bridges, 4 days, at \$6.00	24 00
Expenses horse feed at Rexburg.50
Expenses horse feed at Market Lake	3.00
Expenses horse feed at Rexburg.50
	4 00
June 27. To Texas Slough Bridge to have bridge repaired, 1 day.....	6 00
Horse feed50
	\$52 50

Also, the following claim, it is alleged, was presented and allowed:

Fremont County, Idaho, to James Smith, Commissioner, Dr.

To services rendered in connection with the breaking down of South Fork Bridge, by order of the chairman of board, (Oct. 2, 3, 4, 5, 6, 7, 9 (7 days, at \$6.00)	\$42 00
--	---------

The following is an item from another bill presented by and allowed to the defendant:

To repairs on road from Lodi to Island Park, as per instructions from board, July 29th, 31st, Aug. 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th (11 days, at \$6.00) \$66 00

We quote the above as samples of bills presented by the defendant, Smith, as county commissioner, and allowed by the board of which he was a member.

The defendant testified in his own behalf that his belief and understanding were that it was his duty, as county commissioner, to take care of all roads and bridges, where it was absolutely necessary, and that he should get therefor \$6 per day. This court held in *Rankin v. Jauman* (Idaho) 39 Pac. 1111, as follows: "The per diem allowed by the statute to members of the board of county commissioners is only chargeable for the time the board is actually in session. The law does not contemplate that members of the board may perform services for the county as individuals, and then charge for it as commissioners. The viciousness of such a course is too apparent to require comment." It is also there held that boards of county commissioners are entireties, and can only act collectively and as empowered. The law does not authorize a member of the board to act for the board, nor has it given a single member of the board, when acting alone, any authority whatever. It is shown that some of the road districts in Fremont county did not have road overseers, and it is shown that the board employed a competent bridge man at \$5 per day, and the record shows that the board of commissioners fixed the compensation of road overseers at \$2.50 per day. If county commissioners were permitted to usurp the office of road overseer, and perform the duties of such officer, and pay themselves \$6 per day and expenses therefor, road work would cost the taxpayers much more than was contemplated by the lawmaking power; and county commissioners cannot shield their unlawful acts under the plea of ignorance of the law, for, if that would relieve them of persistent and many times repeated unlawful acts, it would be impossible to remove an unfaithful or incompetent officer from office. For it is a well-recognized fact that an officer who persistently and repeatedly violates his official duties will, when called to account, attempt to give very plausible reasons for such violations of the law. County commissioners are provided by law with a legal adviser, in the county attorney, and are expected to keep within the law, especially in matters already passed upon by the courts. In the case of *Rankin v. Jauman* (Idaho) 39 Pac. 1111,—a case quite similar to the one at bar,—the court held that the compensation of county commissioners was fixed by law at \$6 per day, and that commissioners could not act except as a board, as an entirety. That was a case where the commissioner attempted to perform the duties of road overseer, and charged the county \$6

therefor, and pleaded ignorance of the law. This court in that case said: "Officers are supposed to know the law under which they act. The maxim, 'Ignorantia legis neminem excusat,' is forcefully applicable in their cases." While boards of county commissioners are given general supervisory power over county affairs, they cannot, as boards or as individual commissioners, perform the duties of any other particular officer, and recover their \$6 per diem therefor.

On the recommendation of defendant as commissioner, the board of which he was a member made an appropriation of \$400, placed it in the hands of the defendant, and authorized him to build a road between St. Anthony and Island Park, or to superintend the construction of it, which he did and charged therefor at the rate of \$6 per day, whereas, if said board had appointed a competent road overseer for that purpose, they would have saved the county \$3.50 per day, as the salary of road overseer was fixed at \$2.50 per day. The record also shows that each of the other county commissioners was given an appropriation of several hundred dollars, and authorized to expend the same on road work in their commissioners' district. Defendant testified that the question of the regularity and legality of performing the road work in that manner was submitted by the board to the county attorney, and that he informed them that he thought they had a right to do it in that way. No record was made on the minutes of the board of a submission of said matter to the county attorney, nor of his advice thereon. Courts will not countenance any connivance or collusion between the county attorney and the board for the appropriation of county funds.

There was an attempt on the part of the appellant to show that the county attorney advised the board that the official bonds of county officers were passed upon by the county attorney, and that the board approved the bonds under the advice of the county attorney. The record, we think, fairly shows that the form of the bond was passed upon by the county attorney, and not the sufficiency of the sureties; and it is not the form of the bond that is attacked, but the sufficiency of the sureties, under that provision of the statute which declares as follows: "No person shall be accepted as surety on such bond except he shall, during the year immediately preceding, have been assessed and paid taxes, in his own right, upon property to the amount for which he has become surety." See section 396, Rev. St. The court found as a fact that the defendant and the other members of the board of county commissioners at their session in January, 1899, approved a large number of official bonds, the sureties on which had not during the year immediately preceding been assessed and paid taxes upon property to the amount for which they had become sureties, and that defendant, as a member of said board, approved said bonds willfully

and knowingly, and therein failed and refused to perform his official duty. We think the evidence clearly sustains said finding. In fact, it is admitted that said sureties did not possess the proper qualifications; and the appellant seeks to evade responsibility by showing that he was ignorant of the law, and that the county attorney's advice was had upon the matter. It was the duty of the board to approve proper bonds, and not the county attorney. As we understand the record, the county attorney referred to the form of the bond, and not to the sufficiency of the sureties. The county attorney is presumed to know the law as set forth in our statutes and the decisions of the courts, and it is no part of his duty to ascertain whether a surety possesses the proper qualifications. The county attorney is subject to removal from his office, the same as any other officer, for incompetency; and for him to ignore the law on the questions involved in this case would certainly indicate gross incompetency. To advise the county commissioners that they could, as a board, appropriate money out of the county treasury, and place it in the hands of a commissioner and authorize him to construct roads therewith, under our present law, would clearly indicate corruption or incompetency, if not both. No objection was made to the sufficiency of the allegations of the second cause of complaint in the information, but it has been suggested that it is not alleged that the defendant acted with said board when it was in session in the approval of said official bonds, and for that reason said allegations are not sufficient. We think the allegations of the information should be made clear and specific, and, had objection been to the sufficiency of said allegation, the objection should have been sustained. However, the defendant admits that he acted with the board in the approval of said bonds; and, leaving the second cause of action, as to the approval of official bonds, out of consideration, the record contains sufficient to sustain the judgment of the trial court.

The appellant, as a member of said board, and while acting with said board, authorized the publication of the minutes of their proceedings in three newspapers published in said Fremont county, and paid each of said newspapers therefor. The evidence shows that the defendant opposed and voted against the publication of said proceedings in more than two of said newspapers, and that he did vote in favor of publication in two of said newspapers; and that is alleged to have been an infraction of official duty. The court found that the defendant voted against printing said proceedings in the Fremont County Journal, and in favor of printing them in the Fremont County News and the Market Lake Sentinel. The statute contemplates the publication of a synopsis of the proceedings of the board in but one newspaper in the county. Counsel for appellant contend that, while the acts of which their

client is accused in many instances were infractions of the law, it has not been proved that said acts were done fraudulently, willfully, or corruptly. The statute itself (section 7459) does not specifically require that fees shall be fraudulently, willfully, or corruptly charged and collected, to warrant the removal of the officer; nor does it declare that neglect of official duty shall be willful or corrupt. The statute contemplates that when illegal fees are charged and collected, or when an officer has refused or neglected to perform the official duties pertaining to his office, and those facts are properly shown to a court, the informer has made out his case. The proof of those facts is proof of the intent with which they were done, and such acts can only be excused by showing that they were done or not done by reason of a wrong construction of an obscure or doubtful statute, but cannot be excused by a plea of ignorance of the plain provisions of the law. If ignorance of the law will excuse such flagrant violations of the law as are shown in this case, the people are at the mercy of ignorant and corrupt officials, and the plea of every dishonest or corrupt official would be ignorance of the law. Officers must be judged by their acts, and not by their plea of ignorance of the plain provisions of the law after its repeated violations, which result in their pecuniary or other advantage.

It is contended by counsel for appellant that the court did not find as a fact that the acts of which the appellant is accused were done fraudulently, willfully, or corruptly. Frequent violations of the plain provisions of a statute, to the pecuniary advantage of the officer, are probative facts from which the ultimate fact of intent may be drawn; and while it is true that the trial court did not, under the heading of "Findings of Fact," find that said acts were done fraudulently, willfully, or corruptly, it did, under the heading of "Conclusions of Law," find that said acts were done fraudulently, willfully, or corruptly. The statute requires the trial court to separately state the findings of fact and conclusions of law, but it is often very difficult to distinguish between an ultimate fact and a conclusion of law; and it is held by very respectable authority that, where there is a commingling of findings of fact with conclusions of law, a judgment will not be reversed for that reason, where all of the material issues are found. *Burton v. Burton*, 79 Cal. 490; 21 Pac. 847. The remedy provided by section 7459, Rev. St., to rid the people of a dishonest or incompetent official, is a severe one, but effective; and it serves to stimulate officers to know their official duties and do them. The time has evidently come in this state when county commissioners must know their duties and do them. If they do not, something more effective than a mere appeal from their illegal orders will be resorted to. We have carefully considered all of the errors assign-

ed, and find no reversible error in the record, and the judgment of the court below must be affirmed, and it is so ordered. Costs of appeal are awarded to respondent.

HUSTON, C. J., and QUARLES, J., concur.

REEVES v. TERRITORY.

(Supreme Court of Oklahoma. June 30, 1900.)

HOMICIDE — INDICTMENT — ESCAPE — CONSPIRACY — PRINCIPALS — EVIDENCE.

1. Where an indictment for murder contains an averment "that Milton Jones was shot and killed by one of three escaping prisoners, but which one is to the grand jury unknown," and no evidence whatever upon the subject is offered by either the prosecution or the defendant, the verity of the averment of want of knowledge in the grand jury is presumed, and the burden is on the defendant to show that the grand jury, at the time the indictment was found, knew the name of the person described as unknown.

2. Homicide, under the statutes of this territory, is murder when perpetrated without any design to effect death, by a person engaged in the commission of a felony.

3. Under the laws of this territory it is a felony for any person who carries or sends into any prison anything useful to aid any prisoner in making his escape, and with intent thereby to facilitate the escape of any prisoner confined therein, where such prisoner is confined upon any charge or conviction of a felony.

4. Where several persons confederate together to commit a crime of a nature or under such circumstances as will, when tested by human experience, probably result in the taking of human life, if such necessity should arise to thwart them in the execution of their unlawful plans, it must be presumed that they all understood the consequences which might be reasonably expected to flow from carrying into effect their unlawful combination, and to have assented to the taking of human life if necessary to accomplish such unlawful act; and, if death happens in the prosecution of such a common design or object, all are alike guilty of a homicide.

5. Under the laws of this territory, all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must be indicted, tried, and punished as principals.

6. The court gave the jury the following instruction, over the objections of the defendant, and which is assigned as error: "You are further instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that on and prior to the said 30th day of June, 1895, William Christian, Robert Christian, and James Casey, named in this indictment, were confined as prisoners in the common jail and prison of and in the county of Oklahoma and territory of Oklahoma,—the said William and Robert Christian upon an order and commitment upon and after the conviction of the crime of manslaughter, and the said James Casey upon a commitment and indictment charging him, the said James Casey, with the crime of murder,—then the said William Christian, Robert Christian, and James Casey were lawfully imprisoned in said county jail and prison; and if you find from the evidence, beyond a reasonable doubt, that the defendant herein, John Reeves, did carry or place, or cause to be carried or placed, or in any manner aid or assist in carrying or placing, in the said jail, and in the possession of the said William Christian, Robert Christian, and James Casey, any pistols, revolvers, and ammunition, with the design

and intent that they, the said William Christian, Robert Christian, or James Casey, or either of them, should use or employ such pistols, revolvers, ammunition, or any of them, as a means and for the purpose of breaking out of said jail and prison and escaping therefrom, and if you further believe from the evidence, beyond a reasonable doubt, that the said William Christian, Robert Christian, and James Casey, acting conjointly and together, and with a common purpose to secure the liberty from such imprisonment of each of said prisoners, did break out of said jail and attempt to escape therefrom, and that they, the said William Christian, Robert Christian, and James Casey, or either of them, in breaking out of said jail, or in their immediate flight therefrom in escaping therefrom, did, with the said pistols and revolvers, or any of them, shoot and kill the deceased, Milton Jones, in manner and form as charged in this indictment, and in furtherance of their said design and purpose to escape from such imprisonment, then you will find the defendant, John Reeves, guilty of murder as charged in the third count of this indictment, although the jury may believe from the evidence that the fatal shot which killed him, the said Milton Jones, was not fired and discharged with premeditated design to effect the death of him, the said Milton Jones." *Held*, that no error was committed in giving this instruction, and that it clearly, fairly, and correctly states the law applicable to the case under consideration.

7. We have carefully examined the entire record, and we are clearly of the opinion that the evidence fully sustains the verdict of the jury, and that there is no prejudicial error in the record.

(Syllabus by the Court.)

Error from district court, Canadian county; John C. Tarsney, Judge.

John Reeves was convicted of murder, and brings error. Affirmed.

A. Green & Son, for plaintiff in error. J. C. Strang, Atty. Gen., for the Territory.

HAINER, J. The plaintiff in error, John Reeves, was indicted in the district court of Oklahoma county, charging him with the murder of one Milton Jones on the 30th of June, 1895. Upon application of the defendant, a change of venue was granted to Canadian county, where the defendant was tried and convicted of murder, as charged in the third count of the indictment, and acquitted on the first and second counts thereof, and his punishment was fixed by the jury at imprisonment in the territorial penitentiary for life, at hard labor. On the 15th day of February, 1897, the court sentenced the defendant, in accordance with the verdict of the jury, to imprisonment in the territorial prison at Lansing, Kan., for the term of his natural life, at hard labor.

The third count of the indictment, upon which the defendant was convicted, reads as follows: "That in Oklahoma county and territory there was from the 10th day of June, 1895, until the 30th day of June, 1895, confined in the jail of Oklahoma county, at Oklahoma City, Robert Christian and William Christian, Jr., on conviction for felony, to wit, the crime of manslaughter, which conviction had been had in the district court of the Third judicial district in the county of Pottawatomie, in said territory; and one

James Casey was confined in said jail during the same time as a prisoner, on indictment for murder returned against him in the county of Canadian, Second judicial district of said territory. That, while said persons were so confined in said jail, defendants William Carr, John Reeves, Tellus Welch, and Jessie Findlay, together, in conjunction with said prisoners, and by agreement among themselves, did furnish, send, and carry into said jail three pistols, commonly called 'revolvers,' and ammunition for the same, being useful to aid said prisoners in effecting their escape from said jail, with the intent on the part of all the defendants that said pistols and ammunition should be used by said prisoners in effecting their escape from said jail. That on the 30th day of June, 1895, said prisoners, their co-defendants not being present, did escape from said jail, and their escape and flight was then sought to be prevented by one Milton Jones, who was then and there a peace officer, when one of the said prisoners so escaped, but which one is to the grand jury unknown, did with one of the revolvers, in Oklahoma county and territory of Oklahoma, on the 30th day of June, 1895, shoot and mortally wound the said Milton Jones, as a means of preventing him, the said Milton Jones, from arresting the escape of said prisoners; and of said shooting and mortal wounding so done the said Milton Jones then and there died. Thereby all of said defendants, while engaged in the commission of a felony, and without any design to effect death, did, in the manner and form aforesaid, perpetrate the killing and murdering of him, the said Milton Jones, contrary to the form of the statutes in such cases made and provided, and against the peace and dignity of the territory of Oklahoma."

It is first contended by counsel for plaintiff in error that the allegations of the indictment, "that Milton Jones was shot and killed by one of three escaping prisoners, but which one is to the grand jury unknown," is a material averment of the indictment, and permitted from necessity, and that it must be proved by the prosecution in order to sustain a conviction; that if the grand jury, by asking any witness before them, or the exercise of reasonable diligence, could have ascertained the fact, it is fatal, and the defendant must be discharged. We do not think that this contention is sound or tenable. There was no evidence whatever offered, either on behalf of the prosecution or the defendant, that the person who shot and killed Milton Jones was known to the grand jury at the time of the finding of the indictment. We think that, in the absence of any evidence upon that subject, it is presumed that the grand jury had no such knowledge. We think that the better doctrine and true rule is that where there is an averment in the indictment that the person who committed the homicidal act is unknown to the grand jury, and no evidence is offered by either the prosecution or the defendant, the verity of the averment

of want of knowledge in the grand jury is presumed, and the burden is upon the defendant to show that the grand jury, at the time the indictment was found, knew the name of the person described as unknown. This is the rule laid down by the supreme court of the United States in the case of Coffin v. U. S., 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481. Mr. Justice White, in discussing this subject, said: "There was no evidence whatever upon the subject offered by either side, and nothing to indicate that there was knowledge in the grand jurors of the matter which the indictment declared to be to them unknown. The instruction was rightly refused. It presupposes that where there is an averment that a person or matter is unknown to a grand jury, and no evidence upon the subject of such knowledge is offered by either side, acquittal must follow, while the true rule is that, where nothing appears to the contrary, the verity of the averment of want of knowledge in the grand jury is presumed." The same rule has been laid down by the supreme court of Massachusetts in the case of Com. v. Thornton, 14 Gray, 41. In Guthrie v. State, 16 Neb. 670, 21 N. W. 457, the following rule was announced by the supreme court of that state: "While it is, perhaps, true at common law that, if it was shown that this particular allegation was untrue, — that the grand jury did know the parties whose names were omitted, — then that an acquittal must follow. But it by no means follows that this allegation, like those which are met by the presumption of innocence, must be proved by the state beyond a reasonable doubt. Upon the contrary, quite a different rule is to be applied, and the burden is on the defendant to show that the grand jury, at the particular time of finding the indictment, knew the names of the party described as unknown."

It is next urged by counsel for plaintiff in error that the evidence offered by the prosecution is wholly insufficient to sustain a verdict of guilty as charged in the third count of the indictment, and that the court erred in overruling the demurrer interposed to the evidence after the prosecution had rested its case. We have carefully examined the entire record, and we are clearly of the opinion that the evidence is sufficient to uphold the verdict of the jury. It was admitted on the trial of the cause that Robert Christian and William Christian were incarcerated in the Oklahoma county jail on conviction for manslaughter, pending the time for giving bond and obtaining supersedeas. It was also admitted that James Casey was confined in said jail, charged with the crime of murder. It further appears from the record that the defendant, John Reeves, and one John Fessenden and William Carr, had formed and entered into a plan and common design whereby they were to liberate from the jail Robert and William Christian; that this plan or common design had its first inception in Pottawatomie county, being about 45 miles from

Oklahoma City, and four or five days before the jail delivery, the jail delivery having occurred on Sunday evening, June 30, 1895. The plan was that Reeves and Fessenden were to carry certain pistols or revolvers to Oklahoma City, and to deliver the pistols to a gambler in Oklahoma City, and this gambler was to carry or deliver these revolvers to a prostitute, who was to carry them into the jail, to be delivered to Robert and William Christian for the purpose of aiding and assisting them in making their escape from said jail. It further appears from the evidence that, in furtherance of this common design or purpose, Reeves and Fessenden went to Oklahoma City, and delivered certain revolvers to one Jessie Findlay and Louie Miller, and that said Jessie Findlay and Louie Miller carried four pistols into the jail on Monday and Friday preceding the day of the jail delivery. It further appears from the evidence that the defendant, Reeves, and Fessenden were in the jail on Friday before the jail delivery, and had a long conversation, lasting probably an hour or an hour and a half, with Robert Christian and William Christian, and that about a half an hour thereafter certain revolvers were seen in the possession of Robert Christian and William Christian. It further appears from the evidence that four loaded pistols or revolvers and ammunition had been placed into the jail, and that a short time before the jail delivery James Casey had in his possession one of these revolvers. The evidence further tends to show that James Casey was acting in conjunction with Robert and William Christian, and with the defendant, Reeves, and Fessenden in procuring his liberation and escape from said jail.

J. C. Dowd, one of the witnesses on behalf of the prosecution, testified, in substance, as follows: "The plan was to get these boys out of jail, and to get guns into the jail,—you might say, getting them into the jail. They were going to get guns to parties into Oklahoma City, and the other parties was to get the guns into jail. * * * These guns were to be carried and turned over to the gambler, and the gambler would give them to the whore, and the whore would get them into the jail, and then John Reeves and John Fessenden were to stay around town until it came off."

Obe Cox, one of the witnesses on behalf of the prosecution, and who was confined in jail at that time, testified as follows: "Q. Do you know William Christian? A. I do. Q. Do you know Robert Christian? A. I do. Q. Do you know the defendant, John Reeves, here? A. Yes, sir. Q. State where you were during the month of June, 1895. A. In the Oklahoma county jail. Q. Do you know this man, James Casey? A. Yes, sir. Q. Now please state whether or not you ever saw the defendant, John Reeves, in that jail while the Christian boys and Casey were confined there. A. Yes, sir. Q. That is, the Oklahoma county jail? A. Yes, sir.

Q. Now, please state whether or not you ever saw any pistols in the possession of Robert and William Christian. A. I did. Q. Describe those you saw in the jail. A. There was two black-handled guns, gutta-percha handles, blue-steel barrels, forty-five Colts; and one white-handled gun with an eagle on it,—a forty-five. Q. What color was that one with the eagle's head on it? A. White-handled. Q. Please state when you first saw any of these guns in the jail. A. I don't remember the day of the month, but it was on Monday before the jail delivery, as near as I can recollect. Q. What day of the week did the jail delivery take place? A. Sunday. Q. You saw one there the Monday before that? A. Yes, sir. Q. Do you know who brought the gun in there? A. Jessie Findlay. Q. Who is Jessie Findlay? A. She is a girl that came in there to see Bob. Q. Was anybody else with her? A. Yes, sir. Q. State who. A. Mr. Christian was in there while she was in there, and Hank Watts at the same time. Q. Hank Watts? A. Yes, sir. Q. How long did you see this one gun in there before you saw any more? A. The Friday following. Q. One the Friday following? A. Yes, sir; the Friday evening following. Q. What was the description of the gun you saw there on Monday? A. Forty-five Colts, with gutta-percha handle, blue-steel barrel. Q. When did you see this one with the eagle beak on it? A. On Friday evening. Q. Who had it? A. Bob Christian. Q. At the time the defendant came into the jail there, who came with him, when you saw him there the first time? A. John Fessenden. Q. Just in your own way say what all those guns were doing there with the Christian boys. A. They came to the door, and asked Mr. Garver if they could come in and see the Christian boys. He told them to wait a few minutes, and a short time after that they came inside, and when they came in they commenced tussling with Bob, and we were all locked up in the cage except Bob and Bill and John Fessenden; and John Reeves and Bob and Bill went around behind the cage, I suppose for an hour and a half, probably, or two hours. Q. Was there any guns passed on that occasion? A. There was a steel cage between where I was and where they was, and there was square holes in the cage, and I could see some guns, but I could not see who was passing them. Q. Had you ever seen guns in there before Fessenden and Reeves came in? A. No, sir. Q. Were they there as soon as they went out? A. About a half an hour after they went out, Bill showed me a gun with a white handle,—a gun with an eagle head on it. About half an hour I saw both of them there. Q. In order that the jury may understand this, please describe the jail and the location of its cells,—what kind of building is that down there? A. I don't know the length. I guess it is twice as long as it is wide. Q. What kind of material? A. There is brick, and the front cells are of iron,

and the back cells are steel. Q. Were these cages right close to the jail room? A. No, sir; there is, I guess, about six feet all around the cage between that and the wall. Q. Now, while Reeves and Fessenden were in there, where were the rest of the prisoners? Were they in those cells? A. They were in the front cells. Q. Were they at liberty in there, or locked in? A. Locked in the cage. Q. Where were the Christian boys? A. On the outside, in this run-around; around the jail inside the brick wall. Q. Who put the prisoners in that shape? A. Garver, the jailer. Q. Describe to the jury where those steel cages were,—where they stand in the jail with reference to the front door at the back end of the jail room. A. The jail fronts to the east, and the front cage—the cage they were in—is next to the door. This steel cage is in the west end of the jail, and they were in the front cage; and they were behind both cages. Q. How long were they around there together? A. An hour and a half or two hours; I don't know exactly the length of time. Q. Could you hear what they were saying? A. No, sir. Q. How was their conversation, as to being in a low tone or an ordinary tone or a loud tone? A. Talking low. Q. It was while you were back there that you saw the guns being handled? A. Yes, sir; I was in the front cage, and was in the back cell of the front cage. Q. How could you see them,—through the bars? A. Yes, sir. Q. That, you say, was on Friday? A. Yes, sir. Q. What time Friday? A. In the evening. Q. Did you see them there any more after they went out that day? A. I believe they were back the next day,—came back to talk and speak to the boys, but never came in. Q. How long did they talk to the boys on Saturday? A. Just a few minutes. I don't remember whether they were there at all on Saturday. Q. You say they spoke to the boys? A. Bob and Will. Q. Bob and Will who? A. Christian. Q. Now, please state whether or not— Did these Christian boys stay there in the jail, how long after that? A. Went out on Sunday evening. Q. Describe the manner in which they got out? A. We were all out in the corridor next to the outside there, and the jailer told us to get inside, and Jim Casey didn't go in; and they all went in. I wasn't on the inside either; and they all went in except Jim Casey and I; and Bill pulled the door of the cage to, and Garver opened the outside door, and stepped into the corridor to lock the cage, and, as he went to lock the cage, Bill pushed the door open and grabbed the jailer. Q. State whether or not these Christian boys had any arms on when they grabbed the jailer. A. They did. Q. What did they have? A. A six-shooter apiece. Q. Did anybody else have any arms? A. Yes, sir; I had a gun, and Jim Casey had a gun. Q. Four of you had a gun? A. Yes, sir. Q. State what else was done after the jailer was grabbed. A. Jim Casey ran out of the

door, and Mrs. Garver stepped up to the door and hollered, and Jim Casey threw his gun up on her, and told her to get back. Q. That was Jim Casey? A. Yes; Bob and Will throwed Garver back up in the corner, and both went out of the door, and Bob closed the door after him. Q. Did you hear any shooting after they went out? A. Yes, sir; a very few minutes after they went out. Q. Much or little? A. Sounded like twelve or fifteen shots fired; we could not tell. Q. Can you tell the jury where those guns were kept from the time they came in there on that Friday up to that Sunday evening? A. In the stovepipe,—in the damper. There was two stoves in the jail. It was in the back stove. They unjointed the back pipe above the damper, and taken a piece of blanket, and pushed it down on the damper, and laid the guns on the top of it, and replaced the pipe. Q. Did you see those guns gotten out of there immediately before they went out? A. I did. Q. What did the boys do with them that Sunday evening, preparatory to going out? A. Why, they put on spurs. They were all in the corridor, Bob Christian and William Christian. Mackey and myself went around the cages to see, and, while we were about it, Jim got up and unjointed the stovepipe, and Bob taken the one with the white handle with the eagle head on it, and Jim took the black-handled gun, and I took the other. Q. They each took one? A. Yes, sir. Q. Please state what conversation you had with the boys in the jail as to the use that would be made of these guns, and what they were going to do with them. A. They said they were going out. Q. Who got Casey to go? A. He wanted to go. Q. Where was that arrangement made? A. In the jail. Q. Do you know whether that arrangement was made before Fessenden and Reeves came there? A. Yes, sir; he allowed to go all the time. Q. Please state whether this matter was all arranged before Fessenden and Reeves came there. A. They were. Q. I will ask you what, if anything, did they say, or had been saying, about the guns coming in, and how they were to get there. A. Well, they said their old guns were coming; some parties below were going to bring them up there. Q. Did you know these parties? A. I didn't at the time. Q. Did they mention them in the jail there? A. They did afterwards. Q. State whether or not you saw any ammunition in the jail there. A. Yes, sir. Q. How were these pistols as to being loaded or empty? A. They were all loaded.

* * *

C. H. De Ford, who was sheriff of Oklahoma county at that time, on direct examination on behalf of the prosecution testified as follows: "Q. Mr. De Ford, please state whether or not you ever had any conversation with the defendant with relation to any subject-matter of his being present at Mr. Ransberger's in the 'Pot' country, on this occasion spoken of by the witness. A. I have. Q. Tell the jury what he told you

about that transaction. A. He told me he was at Ransberger's, and he came over to Oklahoma City in company with John Fessenden. Q. What else, if anything, did he say on that subject? A. He told me that he left his revolver in a saloon in Oklahoma City, and that John Fessenden had the guns, and that John Fessenden delivered the guns to Louie Miller, and he was with Louie Miller and Fessenden at the jail, and Louie Miller put the guns in the jail." On cross-examination Mr. De Ford testified that the defendant, Reeves, told him that he (Reeves), Fessenden, and Miller went to the jail together, and Fessenden delivered the guns to Louie Miller, and the jailer stepped out, and Miller put the guns through the front door.

It further appears from the evidence that as soon as the prisoners Robert Christian, William Christian, and James Casey had broken out of the jail, and in their immediate flight therefrom, the prisoners James Casey and William Christian seized a horse and buggy belonging to one White, and while the deceased, Milton Jones, who was then marshal of the city of Oklahoma City, was attempting to arrest and capture the said Casey and the said William Christian at the crossing of Grand avenue and Broadway street,—a distance of about 300 feet from the jail,—Jones was shot and instantly killed by the said Casey.

It will thus be seen from the evidence that the defendant, John Reeves, carried or placed, or aided and assisted in carrying or placing, into the said jail, and in the possession of the said Robert and William Christian and James Casey, certain revolvers or pistols and ammunition, with the design and intent that they should be used or employed as a means and for the purpose of breaking out of the said jail, and effecting their escape therefrom; and we think that the evidence clearly shows that William Christian, Robert Christian, and James Casey, in furtherance of said common design and purpose, acted conjointly and together with the said defendant, John Reeves. It is true that the record shows that the original purpose and design of Reeves and Fessenden was to only liberate from jail Robert and William Christian, and when the plan was first entered into in Pottawatomie county, four or five days before the jail delivery, nothing was said in regard to the escape of Casey; but we think we are warranted in finding from the evidence that, before the scheme or plan was finally consummated, Casey had full knowledge of the common purpose and design, and was acting in conjunction with the defendant, Reeves, and Robert and William Christian. There was no evidence offered on behalf of the defendant.

Under the provisions of our Criminal Code, all distinction between accessory before the fact and a principal, and between principals in the first and second degree, in the cases of felony, are abolished, and all persons concerned in the commission of a felony, wheth-

er they directly commit the act constituting the offense, or aid and abet in its commission, though not present, must be indicted, tried, and punished as principals. *Drury v. Territory*, 9 Okl. 398, 60 Pac. 101. Section 1979 of our Criminal Code provides: "That every person who willfully or by any means whatever, assists any prisoner confined in any prison to escape therefrom, is punishable as follows: First. If such prisoner was confined upon a charge or conviction of felony, by imprisonment in the territorial prison not exceeding ten years. Second. If such prisoner was confined otherwise than upon a charge or conviction of felony, by imprisonment in the county jail not exceeding one year, or by fine not exceeding five hundred dollars, or both." Section 1980 reads as follows: "Every person who carries or sends into any prison anything useful to aid any prisoner in making his escape, with intent thereby to facilitate the escape of any prisoner confined therein, is punishable as follows: First. If such prisoner was confined upon any charge or conviction of felony, by imprisonment in the territorial prison not exceeding ten years. Second. If such prisoner was confined otherwise than upon a charge or conviction of felony, by imprisonment in the county jail not exceeding one year, or by a fine of five hundred dollars, or both." It will thus be seen that it was a felony for John Reeves to aid and assist the Christian brothers and James Casey to escape from the said jail. It was also a felony for Reeves to carry or send into the said jail any pistols or revolvers for the purpose of aiding or assisting the Christian brothers and James Casey, who were confined in said jail, in making their escape. Section 2078 of the Criminal Code is as follows: "Homicide is murder in the following cases: First. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being. Second. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. Third. When perpetrated without any design to effect death by a person engaged in the commission of any felony."

In *People v. Brown*, 59 Cal. 352, it was held that, "Where men confederate together to commit crimes of a nature, or under such circumstances, as will, when tested by human experience, probably result in the taking of human life, if such necessity should arise to thwart them in the execution of their unlawful plans, it must be presumed that they all understood the consequences which might be reasonably expected to flow from carrying into effect their unlawful combination, and to have assented to the taking of human life if necessary to accomplish the object of the conspiracy." In *Lamb v. People*, 96 Ill. 73, the supreme court of Illinois

laid down the following doctrine: "If the unlawful act agreed to be done is dangerous or homicidal in its character, or if its accomplishment will necessarily or probably require the use of force and violence which may result in the taking of life unlawfully, every party to such agreement will be held criminally liable for whatever any of his co-conspirators may do in furtherance of the common design, whether he is present or not." In *Brennan v. People*, 15 Ill. 511, it was held: "Where several persons conspire to commit a felony, and death happens in the prosecution of the common object, all are alike guilty of the homicide; that the act of one is the act of all, although some are not present when the crime is committed. * * * The prisoners may be guilty of murder, although they neither took part in the killing nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide. The act of one of them, done in furtherance of the original design, is, in consideration of law, the act of all." The same doctrine is recognized, with approval, in *Hanna v. People*, 86 Ill. 243, where, in passing upon one of the instructions given for the people, the court said: "The instruction given in behalf of the people is not subject to the criticism made upon it. It states correctly that, if the defendant and those indicted with him had a common design to do an unlawful act, then, in contemplation of law, whatever act one of them did in furtherance of the original design, is the act of all, and all are equally guilty of whatever crime was committed." In *State v. Shelledy*, 8 Iowa, 477, it was held that if two or more persons conspire together to do an unlawful act, and in the prosecution of the design an individual is killed or death ensue, it is murder in all who enter into or take part in the execution of the design. If the unlawful act be a felony, or be more than a mere trespass, it will be murder in all, although the death may happen collaterally or besides the original design. In volume 6 of the *American and English Encyclopedia of Law* (2d Ed.) pp. 870, 871, the rule is laid down as follows: "When individuals associate themselves in an unlawful enterprise, any act done in pursuance of the conspiracy by one of the conspirators is, in legal contemplation, the act of all. And this mutual coequal responsibility of each conspirator for the acts of his associates, done pursuant to and in furtherance of the common design, extends, as well, to such results as are the natural or probable consequences of such acts, even though such consequences were not specifically intended as part of the original plan."

It is next contended that the court erred
61 P.—53

in giving the following instruction to the jury: "You are further instructed that if you believe from the evidence in this case, beyond a reasonable doubt, that on and prior to the said 30th day of June, 1895, William Christian, Robert Christian, and James Casey, named in this indictment, were confined as prisoners in the common jail and prison of and in the county of Oklahoma and territory of Oklahoma,—the said William and Robert Christian upon an order and commitment upon and after the conviction of the crime of manslaughter, and the said James Casey upon a commitment and indictment charging him, the said James Casey, with the crime of murder,—then the said William Christian, Robert Christian, and James Casey were lawfully imprisoned in said county jail and prison; and if you find from the evidence, beyond a reasonable doubt, that the defendant herein, John Reeves, did carry or place, or cause to be carried or placed, or in any manner aid or assist in carrying or placing, in said jail, and in the possession of the said William Christian, Robert Christian, and James Casey, any pistols, revolvers, and ammunition, with the design and intent that they, the said William Christian, Robert Christian, or James Casey, or either of them, should use or employ such pistols, revolvers, ammunition, or any of them, as a means and for the purpose of breaking out of said jail and prison and escaping therefrom, and if you further believe from the evidence, beyond a reasonable doubt, that the said William Christian, Robert Christian, and James Casey, acting conjointly and together, and with a common purpose to secure the liberty from such imprisonment of each of said prisoners, did break out of said jail and attempt to escape therefrom, and that they, the said William Christian, Robert Christian, and James Casey, or either of them, in breaking out of said jail, or in their immediate flight therefrom in escaping therefrom, did, with said pistols and revolvers, or any of them, shoot and kill the deceased, Milton Jones, in manner and form as charged in this indictment, and in furtherance of their said design and purpose to escape from such imprisonment, then you will find the defendant, John Reeves, guilty of murder as charged in the third count of this indictment, although the jury may believe from the evidence that the fatal shot which killed him, the said Milton Jones, was not fired and discharged with premeditated design to effect the death of him, the said Milton Jones." We think that this instruction correctly states the law, and no error was committed in giving it to the jury. We have also examined all the instructions offered by the defendant and refused by the court, and we are of the opinion that they were properly refused. The instructions, as a whole, which were given by the court, in our judgment clearly, fully, fairly, and correctly state the law.

Error is also assigned on the ground that

the court erred in admitting certain incompetent evidence offered on behalf of the prosecution over the objections of the defendant. We have examined each of these assignments of error, and we are clearly of the opinion that they are not well taken. We have examined with great care the entire record, and considered each of the 31 errors assigned by counsel for plaintiff in error, and, in our opinion, no prejudicial error was committed by the trial court. The judgment of the district court of Canaan county is therefore affirmed. All the justices concurring.

(37 Or. 392)

GARDNER v. WASCO COUNTY.

(Supreme Court of Oregon. July 9, 1900.)

HIGHWAYS — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — STATUTE — CONSTRUCTION.

1. Sess. Laws 1893, p. 141, providing that parties having no knowledge of the defective condition of a highway may recover damages from the county for injuries caused thereby, merely expresses the common law; and knowledge of the defective condition does not preclude recovery, where the injured party used care commensurate with the danger.

2. An icy road ran down a steep hill along a gulch, making a sharp turn out around a point of rock about 50 yards from the bottom. As plaintiff was driving down the road with a heavy load, his horses slid on the ice, but were kept on the road up to the turn, where they were precipitated into the gulch with their load. *Held*, in an action against the county, that the question whether a negligent construction and maintenance of the road was the proximate cause of the damage should have gone to the jury.

3. An icy road ran down a steep hill along a gulch, making a sharp turn about 50 yards from the bottom. As plaintiff, who knew its condition, was driving down the road with a heavy load, his horses slid on the ice, and were precipitated into the gulch with the load. His harness had no breeching, and his horses were unshod. *Held*, that the question whether plaintiff was guilty of contributory negligence should have been submitted to the jury, since it was incumbent on him to exercise only that degree of care commensurate with the danger.

Appeal from circuit court, Wasco county; W. L. Bradshaw, Judge.

Action by Henry Gardner against Wasco county. From a judgment for defendant, plaintiff appeals. Reversed.

J. F. Moore, for appellant. W. H. Wilson, for respondent.

WOLVERTON, O. J. This is an action to recover damages for an injury alleged to have been caused through the faulty and negligent construction and repair of a county road. The road in question runs along the course of a gulch at a steep incline, and was constructed by grading along the north and northeast side of a hill. From the foot of the hill the road runs up comparatively straight for 50 yards or more, where it makes a sharp turn around a point of rock, and thence continues on a slight curve for some three or four hundred yards. In going down the grade, the point of rock makes it

necessary to turn slightly to the right, and, when it is reached, to turn sharply to the left, and from this straight ahead to the foot of the hill. The roadbed at the point consists chiefly of solid rock, is from six to eight feet in width, and slopes toward the gulch; the inner side being some five to seven or eight inches higher than the outer edge. Above the point some thirty or forty yards, and at or near a turnout in the road, ditches for draining had been dug diagonally across it some time previous to, and probably within the year of, the accident, but no attempt had been made to construct a ditch next to the bank to carry away the water coming from the hillside. Aside from the fact that the grade had been washed more or less by the fall rains, which may have affected its lateral slope somewhat, the road had been practically in the condition indicated for many years, of which the defendant had ample notice. The plaintiff had lived in the neighborhood some four or five years, had passed over the road frequently, and was well acquainted with its general condition. A few days before the accident occurred, the ground in the vicinity was covered with ice, which rendered the surface very slippery; but on the Sunday night and Monday morning previous thereto it had disappeared generally, but, by reason of the road being on the north side of the hill, the ice thereon had not entirely thawed out. On Wednesday morning the plaintiff, accompanied by his wife, started to The Dalles from Mr. Haverly's place, in a wagon loaded with some 1,200 pounds of barley, drawn by two horses, weighing about 1,050 pounds each. In attempting to descend the hill, he unexpectedly encountered the ice, some two or three hundred yards above the rock point, and his horses began to slide. By strenuous effort he was enabled to hold them in the road until he passed the point of rock about forty feet, when they left it, precipitating the outfit into the gulch, whereby the injuries were received of which the plaintiff complains. The horses were unshod, the harness was without breeching or holdback straps, and the brake failed to respond when plaintiff attempted to apply it from the time he encountered the ice. In testifying in his own behalf, he said: "I was coming down the hill, and struck the ice, and tried to stop; but, just as quick as my horses' feet struck the ice, they commenced sliding on down the hill, and the load itself pushed them right down. I held them into the road till I got to that point of rock that was mentioned, and turned over. They couldn't make the turn. The wagon forced them on down off the grade. * * * They went off the grade about forty feet below the point of rocks." When questioned about the brake, he further stated: That "the brake wouldn't hold any on the wagon. The wheels would slide on it. Wasn't any use whatever. That it wouldn't work." That, had it not been for the ice, he would have gone along all right,

—and attributed the difficulty to the ice. When he had concluded his evidence, the defendant moved for a nonsuit, which was granted, and, judgment having been entered accordingly, the plaintiff appeals.

Preliminarily, it is urged that the road in controversy was not shown to be a legal highway. But there was sufficient evidence in the record to go to the jury upon that subject, and the inquiry should have been left to them.

And, again, it is urged that, plaintiff having had knowledge of the condition of the road, he is expressly precluded by the statute from pursuing the remedy given against a county for the recovery of damages incurred while traveling upon a defective highway. The evident purpose of the statute is to give a right of action against a county for compensatory damages in like and similar cases as it exists ordinarily against individuals or private corporations. The clause of the statute, "not having been warned of the defect or the danger by notice or otherwise" (Sess. Laws 1893, p. 141), simply expresses the common-law condition upon which recovery may be had, and must be interpreted by the rules as they are thereby ascertained and settled.

The question for determination is whether the nonsuit was properly granted. The burden of proof is upon the plaintiff to establish the alleged negligence of the defendant. The defendant contends that the plaintiff has not only failed in this regard, but has shown such contributory negligence as will also prevent his recovery. It must be conceded the testimony tends to show that the road passing the point where the accident occurred was not as skillfully constructed, nor in as good and suitable repair, as it might have been. The point of rock requiring the sharp turn in the driveway, the steep descent, the narrowness and the lateral slope of the road, rendered it more or less unsafe at that particular locality. It had been traveled for more than 20 years, however, during all which time it had been in much the same condition as at the time of the accident, barring the accumulation of ice in the roadbed. It was sought to be shown, and there is some evidence tending in that direction, that the accumulation of ice in the road was caused by the faulty construction and bad repair thereof, and, therefore, it is argued, the injury was attributable to the negligence of the defendant in allowing the road to remain in such condition. Generally speaking, mere slipperiness, arising from a smooth surface of ice or snow upon a highway, is not such a defect as will render a municipality liable for injuries sustained on account thereof. *Beach, Contrib. Neg.* (3d Ed.) § 272; *Stanton v. City of Springfield*, 12 Allen, 566; *Pinkham v. Topsfield*, 104 Mass. 78. If, however, by reason of some structural defect in the highway, ice is caused to accumulate thereon so as to render it unsafe for use or travel, quite a

different question is presented. It depends, then, upon which may be considered the proximate cause of the injury. Where the formation is smooth and level, and injury results, the authorities seem to be divided as to which to attribute the proximate cause, —whether to the structural defect or to the ice formation. Where it is attributed to the ice, it is held to proceed from a natural cause for which the municipality is not responsible; but, upon the other hand, when it is attributed to the structural defect, liability is held to attach. *Chamberlain v. City of Oshkosh* (Wis.) 54 N. W. 618, 19 L. R. A. 513; *Adams v. Chicopee*, 147 Mass. 440, 18 N. E. 231. Where, however, there is a faulty construction or neglect of repairs conducive to the accumulation of ice in the highway, and both the defect and the ice concur in contributing to the injury, the cause may be ascribed to the defect, provided the injury would not have resulted but for it, although the presence of the ice may be a contributing cause, also. A rule applicable to such condition has been adopted in New York, and is stated by Mr. Justice Earl, in *Ring v. City of Cohoes*, 77 N. Y. 83, as follows: "When two causes combine to produce an injury to a traveler upon a highway, both of which are in their nature proximate,—the one being a culpable defect in the highway, and the other some occurrence for which neither party is responsible,—the municipality is liable, provided the injury would not have been sustained but for such defect." It is stated in a slightly different form in *Searles v. Railway Co.*, 101 N. Y. 661, 5 N. E. 66, viz.: "When the fact is that the damages claimed in an action were occasioned by one of two causes, for one of which the defendant is responsible and for the other of which it is not responsible, the plaintiff must fail, if his evidence does not show that the damage was produced by the former cause. And he must fail, also, if it is just as probable that they were caused by the one as by the other, as the plaintiff is bound to make out his case by the preponderance of evidence." And it finds illustration in a still later case. *Taylor v. City of Yonkers*, 105 N. Y. 202, 11 N. E. 642. It was alleged therein that ice had formed on a sidewalk, sloping towards the curb, and the complainant received injuries while attempting to walk thereon. The learned judge who wrote the opinion was led to remark, in view of the rule, that "if that slope was one concurring cause of the fall, without which the accident would not have happened, the city is liable." It was held, however, that the rule had been erroneously applied in that case, by ascribing the primary or proximate cause to the structural defect of the sidewalk; but the following comment elucidates the appropriate application: "The plaintiff slipped upon the ice. That by itself was a sufficient, certain, and operating cause of the fall. No other explanation is needed to account for what happened. It is possible that the slope of the

walk had something to do with it. It is equally possible that it did not. There is not a particle of proof that it did. To affirm it is a pure guess and an absolute speculation. Are we to send it to a jury for them to imagine what might have been? The great balance of probability is that the ice was the efficient cause. There is no probability, not wholly speculative, that the slope was also such. Its descent was slight, —not quite an inch in a foot, and not more than constantly occurs in the streets of a city. No knowledge or intelligence can determine or ascertain that such a slope had any part or share in the injury, and to send the question to the jury is simply to let them guess at it, and then upon that guess to sustain a verdict for damages." The rule appears to be founded upon reason, and has impressed us as the proper one to adopt in the present case, thereby making the solution of the controversy practical and easy. The evidence tends to show that the road was faulty in construction around the point of rock, and out of repair; that it was steep, narrow, and sloping from side to side at an unusual angle, with a sharp turn around the point; that it was so constructed or illy repaired, as to cause or permit the ice to form upon its surface; and that all these conditions combined to contribute to the accident of which the plaintiff complains. Now, if it can be said that the narrowness, the slope, the sharp turn in the road, and the lack of proper drainage, constituted the one concurring cause of the accident, without which it would not have happened, then the county would be liable. Unlike the case of *Taylor v. City of Yonkers*, supra, it might reasonably be inferred that the slope at the point of rock, the narrowness of the road, the sharp turn in it, and the lack of proper drainage, constituted the primary and efficient cause of the accident, while the ice formation may have been also a contributory cause. It was therefore a proper question for the jury to determine, under all the conditions and circumstances, whether the county was negligent in the construction and repair of the road in question, and, if so, whether such negligence contributed to plaintiff's injury, as the proximate cause.

This brings us to the inquiry whether the plaintiff has been guilty of such contributory negligence that the court will say, as a matter of law, will preclude his recovery. He was acquainted with the structural condition of the road, for he had traveled it for several years, had hauled wheat over it the preceding fall, and passed over it shortly prior to the accident. He must be charged, therefore, with knowledge of its faulty character and bad repair. This fact, however, does not restrain his use of it to such an extent as to relieve the county of liability. He may yet exercise his privilege of traveling upon it, but, if he would recover for any damages sustained, he must exercise a degree of care commensurate with the dan-

ger. *Beach, Contrib. Neg. (3d Ed.) § 249.* This must be such as common prudence and reason would dictate, and whether he is negligent in the exercise of such care and prudence is ordinarily a question for the jury to determine under all the attendant and surrounding facts and circumstances. The fact was established that his horses were unshod, his harness was without suitable appliances for holding the wagon with its load, and that his brake would not respond when he attempted to apply it, and it is argued that these deficiencies were sufficient to preclude a recovery. He attributes the failure of the brake to take hold solely to the agency of the ice, and, but for its presence, he thinks he would have passed down safely. This latter is his opinion, only, and constitutes a conclusion which should not be considered in ascertaining the cause. "It is the general rule," say the authors of *15 Am. & Eng. Enc. Law (2d Ed.) 474*, "that one is not precluded from recovery for injuries caused by a defective highway by the fact that defects in the vehicle or harness, or vices in the horse, contributed also to the accident, provided these defects were not actually or constructively known to him." One may infer that the defect in the brake was unknown to the plaintiff, and it is probable he was without knowledge of the presence of the ice until he actually encountered it, when it was too late for him to retrace his steps. These were conditions for which he was not responsible or accountable, and would not, therefore, under the rule, preclude a recovery, and hence may be eliminated from the consideration of the inquiry whether, as a matter of law, he was negligent. Of course, if he had known of the defective brake, quite another question would have been presented, as it would have added another and perhaps fatal element in the matter of contributory negligence. The plaintiff was aware, however, of the condition of his harness and horses; and the inquiry now turns upon the question whether these defects alone, combined with the plaintiff's knowledge of the faulty condition and repair of the road, constitute negligence per se upon his part in essaying to travel upon it under such circumstances. "To constitute contributory negligence," says *Beach*, "there must be a want of ordinary care on the part of the plaintiff, and a proximate connection between that and the injury." *Beach, Contrib. Neg. (3d Ed.) § 7.* These two elements are necessary, and must concur in producing the result. They are illustrated by the two questions, "Did the plaintiff exercise ordinary care under the circumstances?" and, "Was there a proximate connection between his act or omission and the hurt he complains of?" So it is here. We must be able to say, first, whether the plaintiff could, with ordinary care and prudence in the preparation of his team and tackle for the trip, have avoided the accident, in view of the load he designed to carry and

the condition of the road. Would a man of reasonable prudence and foresight have entered upon the journey with his team and harness in the condition herein described, knowing that he would have to make use of a faultily constructed and illy repaired road, such as lay in the course of his travel? And, secondly, was the want of common prudence in this respect, if such it be found to be, the proximate contributing cause of the injury? Upon the proposition thus stated it is apparent that reasonable minds may differ; that is, the conclusion that he did not use ordinary care under the circumstances and conditions, or that such want of prudence, if such it was, was the proximate contributing cause, does not necessarily follow. In such a case, there being a reasonable doubt upon the subject, the question, as we understand it, is always for the jury. We have, in our analysis of the subject, eliminated the fact of the condition of the brake and the presence of the ice in this latter phase of the case, because they were matters unknown to the plaintiff, under the evidence as it now stands, or at least the preponderance of it; but the question of his foreknowledge of these facts is ordinarily one for the jury, also, and, of course, if he had such knowledge, then the matter of his want of care would become much graver. If, indeed, it would not preclude his recovery as a matter of law. Being of the opinion that the questions touching the proximate and primary cause of the injury and the fact of contributory negligence were for the jury, the judgment of the court below will be reversed, and the cause remanded for a new trial.

FARMERS' & TRADERS' NAT. BANK v. WOODELL.

(Supreme Court of Oregon. July 9, 1900.)

CONTRACT—ASSIGNMENT—SET-OFF—DAMAGE—EXPERT EVIDENCE—ADMISSIBILITY—EXPERT WITNESS—COMPETENCY—PRELIMINARY EXAMINATION—ORDER OF PROOF—REVIEW—MISLEADING INSTRUCTION—REFUSAL TO INSTRUCT—ERRONEOUS INSTRUCTION—HARMLESS ERROR.

1. Where the preliminary examination of an expert witness showed that he cultivated sugar beets in 1898, and observed their growth in 1899, a ruling that he was competent to state when they should be thinned, and how many tons could be raised per acre, was not error, since the extent of the examination necessary to qualify him was within the discretion of the court.

2. Under Hill's Ann. Laws, § 682, providing that a witness "can testify of those facts only which he knows of his own knowledge," except as otherwise provided; and section 706, subd. 9, declaring that he may express an opinion on questions "of science, art, or trade, when he is skilled therein,"—expert evidence is admissible as to when sugar beets should be thinned, and as to the number of tons that can be raised per acre.

3. Under Hill's Ann. Laws, § 830, providing that "the order of proof shall be regulated by the sound discretion of the court," error in ad-

mitting expert evidence before competency was established was cured by subsequent testimony showing competency.

4. Where a witness' examination showed that he had two years' experience raising sugar beets, that he had known defendant's farm for thirty-five years, and that he knew the part planted to sugar beets, he was competent to testify that it was suitable for such use.

5. Where the charge as an entirety was not misleading, a single instruction that plaintiff's claim was subject to all offsets and defenses existing against his assignor was not ground for reversal for failure to specify that they must have existed before notice of the assignment.

6. Where plaintiff's assignor contracted to raise sugar beets, as directed by a third party, plaintiff's request for an instruction, in an action for the contract price, that the jury could find a substantial compliance with the contract, if they believed that the third party made no objection, was properly refused, since it did not require a precedent finding that the third party knew the manner in which the work was performed.

7. Where plaintiff's assignor contracted to raise defendant's crop of sugar beets, plaintiff's claim for an installment of the contract price was subject to a set-off of defendant's damage, existing at the maturity of the installment, and caused by the assignor's failure to properly care for the crop.

8. Where an improper instruction, contradicting prior correct instructions, did not mislead the jury, it was not ground for reversal.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Action by the Farmers' & Traders' National Bank against William Woodell. Judgment for defendant, and plaintiff appeals. Affirmed.

J. D. Slater, for appellant. T. H. Crawford, for respondent.

MOORE, J. This is an action to recover an installment alleged to be due under a contract entered into March 20, 1898, between the defendant and Yee Sing & Co., by the terms of which he agreed to plow, put into a good state of cultivation, and seed 100 acres of suitable land in Union county, Or., to sugar beets, and, as soon as they were up and ready for cultivation, to surrender the premises to Yee Sing & Co. who, in the proper season, were to furnish sufficient labor to care for said crop in a good and husbandmanlike manner, as directed by the agricultural superintendent of the Oregon Sugar Company, causing the beets to be properly thinned, weeded, and cultivated while growing, to top them when matured, and load them upon wagons to be furnished by the defendant, who, in consideration thereof, agreed to pay them \$1.15 per ton for all the beets grown on said land, as follows: \$5 per acre at the expiration of six weeks after entering upon the performance of the work, \$2.50 per acre September 1, 1898, and the remainder when the beets were delivered and weighed at Lagrande. It is alleged in the complaint that Yee Sing & Co. took possession of said land, and entered upon the performance of their part of the contract, about May 1, 1898, and within six weeks

from that time they assigned the first installment due under the agreement to the bank, plaintiff herein, which on June 23, 1898, notified defendant thereof, and on July 8, 1898, demanded of him the payment of \$500 due under the contract, but that he neglected to pay any part thereof. The defendant, after denying the material allegations of the complaint, set up separate defenses, in substance, as follows: (1) That when the beets were up and ready for cultivation he tendered the possession of said land to Yee Sing & Co., who for more than 10 days thereafter refused to enter upon the performance of their agreement, and that after taking possession of said premises they neglected to furnish sufficient laborers to care for said crop in a good and husbandmanlike manner, or as directed by said superintendent, in consequence of which the first payment of \$5 per acre never became due or payable to plaintiff's assignor. (2) That in order successfully to grow sugar beets, or as required by the terms of said contract, it is necessary that the young plants should be thinned not later than 10 days after they are out of the ground, and for 6 weeks from that time they must be constantly hoed and weeded, requiring one laborer to each 2 acres of land; that about May 18, 1898, defendant had growing, ready for thinning and weeding, 100 acres of sugar beets, on which day he so notified Yee Sing & Co., to whom he tendered, but they refused to take possession of said premises, and did not enter upon the performance of their contract until May 28, 1898, and thereafter they refused, though requested to do so, to furnish a sufficient number of laborers to properly care for and cultivate said crop, in consequence of which the beets were injured, and the quantity thereof curtailed at least four tons to the acre, to defendant's damage in the sum of \$1,200. (3) That on June 22, 1898, Yee Sing & Co. abandoned said contract, and permitted their employes to quit; whereupon defendant was compelled to engage laborers, and to pay them the sum of \$500, to cultivate the crop, so as to avoid an entire failure thereof, and that, in consequence of the neglect of Yee Sing & Co. in this particular, he was damaged in the sum so expended for labor. (4) That about June 23, 1898, and prior to the service upon defendant of any notice of said assignment, the employes of Yee Sing & Co. informed him that unless they were paid weekly for their labor they would abandon the cultivation of said beets; whereupon he entered into a contract with them, with the consent of Yee Sing & Co., by which he agreed to pay said employes for the labor they had theretofore performed, and that which they might thereafter render, until the beets were thinned, weeded, and cultivated, not exceeding the amount of said first payment, and that in pursuance of such agreement he paid said laborers the sum of \$500. The reply having put in issue the allegations of

new matter in the answer, a trial was had, resulting in a judgment for the defendant in the sum of \$1, and the plaintiff appeals.

It is contended by plaintiff's counsel that the court erred in permitting defendant, over their objection and exception, to express an opinion concerning a subject-matter of which he had no superior knowledge or practical experience, and upon which the jury, as ordinarily intelligent men, were capable of forming a correct judgment without such assistance. The defendant, appearing as a witness in his own behalf, having testified that he had had no experience in raising sugar beets until 1898, and that his knowledge of the cultivation of these plants in 1890 was derived from observation, was asked, "From your observation, when should the thinning of beets commence, in order to get the best results, with reference to the growth of the beet and the number of leaves and the size of the leaves?" to which he replied: "As I understand from what little experience I have had, when the fourth leaf on the plant is started, it is ordinarily large enough to thin; and that starts pretty young,—quite small. Q. From your observation and knowledge of growing beets last year and this, if your beets there, upon that place, in 1898, had been thinned, weeded out, hoed, and properly cultivated by Yee Sing & Co., in accordance with the terms of their contract, how many tons of beets to the acre would you have had? A. I would have had at least seven tons to the acre, according to my estimation." The statute provides that a witness can testify concerning those facts only which he knows of his own knowledge, except that he may give an opinion respecting a question of science, art, or trade, when he is skilled therein. Hill's Ann. Laws Or. § 682; Id. § 706, subd. 9. The admissibility of expert testimony is a question of law, which the court must determine by considering whether the subject-matter to which it relates is one of science, art, or trade, and therefore beyond the common experience of ordinary men, and its conclusion thereon, if erroneous, is reviewable on appeal. Rog. Ev. (2d Ed.) § 9; 12 Am. & Eng. Enc. Law (2d Ed.) 423. The rule is general that opinion evidence respecting a subject-matter about which persons of common knowledge, having no peculiar training or special study, are capable of forming accurate opinions and deducing correct conclusions, is inadmissible. *State v. Anderson*, 10 Or. 448; *Fisher v. Railway Co.*, 22 Or. 533, 30 Pac. 425, 16 L. R. A. 519; *Johnston v. Railway Co.*, 23 Or. 94, 31 Pac. 283; *Hahn v. Assurance Co.*, 23 Or. 576, 32 Pac. 683; *Nutt v. Pacific Co.*, 25 Or. 291, 35 Pac. 653; *State v. Robinson*, 32 Or. 43, 48 Pac. 357. Whether a witness offered as an expert possesses the necessary qualifications to render him competent as such is a question of fact which the court must determine from a preliminary examination concerning his knowledge, experience, or skill respecting the subject-mat-

ter in relation to which his opinion is desired, and, if it reasonably appear therefrom that he is so qualified to form an intelligent opinion, he is competent; but the range and extent of such examination, however, is not subject to review on appeal, except in case of an abuse of discretion. *Pottery Co. v. Kern*, 30 Or. 328, 47 Pac. 917; *City of Ft. Wayne v. Coombs*, 107 Ind. 75, 7 N. E. 743; *Fayette v. Chesterville*, 77 Me. 28; *Perkins v. Stickney*, 132 Mass. 217; *Manufacturing Co. v. Phelps*, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035. The defendant's preliminary examination disclosed that he cultivated sugar beets in 1898, and observed their growth in 1899, and, the plaintiff having offered no testimony tending to show that his examination revealed a want of such qualification, no error was committed in holding him competent.

This conclusion brings us to a consideration of the more important question, as to whether the stage of development at which the cultivation of sugar beets should be commenced, and the effect of a failure to thin, weed, and hoe such plants within a certain time after the leaves appear above the surface of the ground, are matters of science, art, or trade, and hence beyond the common intelligence of ordinary men. If it be conceded that sugar beets demand the same care and attention that the edible variety requires, and that the cultivation of the latter kind is generally understood by farmers, it cannot be assumed that the men composing the jury were all engaged in tilling the soil. An ordinary farmer, though he may never have grown sugar beets, might know from analogy when their cultivation should be commenced, but, unless he has raised or had an opportunity to observe the growth of the saccharine variety, we think it safe to say that he could not know how many tons could be raised on an acre if the land had received the greatest care, and the plants the closest attention; so that opinion evidence respecting the quantity of sugar beets that might be raised on a certain area of land would be necessary, and hence admissible, to enlighten even a jury composed of farmers, unless the members thereof had experience in raising or observing the growth of such plants. In *Zachary v. Swanger*, 1 Or. 92, damages were sought to be recovered for the violation of an agreement to sow to wheat and rye a farm which the tenant permitted to produce a volunteer crop of oats, and in speaking of the method of ascertaining the damages thus sustained Mr. Chief Justice Williams says: "Farmers acquainted with the land in question can tell about how much it would produce with proper cultivation, and there is no greater danger of mistake here than in any other case where an exercise of judgment is necessary in the estimation of damages." In *Young v. O'Neal*, 57 Ala. 566, a farmer, on his preliminary examination touching his qualification as an expert, testified that he had used "soluble

Pacific guano," a fertilizer, for which the defendant gave a promissory note for the collection of which the action was instituted; that he had experimented with it on all kinds of garden and field plants and crops, and had closely and critically watched its effects and results; but was not permitted to express an opinion concerning the proper methods of using it, or what would prevent it from acting beneficially; and it was held that the court erred in this respect. In *Phillips v. Terry*, 3 Abb. Dec. 607, an action was brought to recover damages for injuries resulting from backing water on a meadow, and the plaintiff, having testified in regard to the injury sustained thereby, was asked, "Taking that hay as it stood there, what would it yield to the acre?" and, having been permitted to answer the question, it was held that no error was thus committed, the court saying: "The farmer, acquainted with the subject-matter of such an inquiry as this under consideration, is an expert, and, unless the witness has the peculiar knowledge which constitutes him an expert, his opinion would be excluded." In *Harpending v. Shoemaker*, 37 Barb. 270, a witness who was then a merchant, but had been engaged in farming, having testified respecting the quantity of buckwheat grown on certain land; that he had examined the straw after the grain was threshed, and that he thought it was not threshed clean,—was not permitted to answer the question, "How much less buckwheat was there than there would have been if the same had been properly threshed?" and it was held that an error was thereby committed. In *Seamans v. Smith*, 48 Barb. 320, it was held that, a witness being a farmer, his experience as such rendered him competent to answer the question, "What portion of the buckwheat the defendant's horses destroyed in the fall of 1861," and that an objection to such interrogatory was properly overruled. In *Barnum v. Bridges*, 81 Cal. 604, 22 Pac. 924, it was held that no error was committed in permitting a witness, who, as a farmer and logger, had ordinary knowledge of timber land, to state what, in his judgment, it would cost to clear off such land, though he might never have actually cleared any land just like that in question. In *Isaacs v. McLean*, 106 Mich. 79, 64 N. W. 2, an action of trover for a quantity of hay which had been cut from a given acreage, but not weighed at the time of the conversion, it was held that a witness who had shown himself competent might be asked to state the average crop per acre for that season upon the premises in question. So, too, in *Buffum v. Harris*, 5 R. I. 243, it was held that a farmer who testified that he had been engaged in draining lands for the purpose of rendering them cultivatable was competent as an expert, and might express an opinion that the land in controversy required draining to fit it for cultivation. We think it is apparent from these excerpts that the testimony of the defendant respecting

the time when the cultivation of the sugar beets should have been commenced, and the quantity which could have been raised on his land, properly cultivated, was admissible.

W. G. Hunter, appearing as defendant's witness, testified that, having been acquainted with the latter's farm for 35 years, he knew that part of it which was planted to beets in 1898, and that it was difficult to say what the character of such land was for beet raising, except by experience. He was then asked, "From your experience in raising sugar beets in Grande Ronde valley?" An objection to this interrogatory, on the ground that the witness had not proven himself competent to express an opinion on the subject-matter, having been overruled, he answered, "I should judge that it was a good quality of land for beet growing." The witness having thereafter said that he had two years' experience in raising sugar beets, the court refused to strike out such testimony, and the plaintiff excepted to its action in this respect. It is contended that the court erred in permitting the witness to express an opinion concerning the suitability of defendant's land for raising sugar beets, and in refusing to take from the consideration of the jury his testimony respecting his experience in raising such vegetables. The preliminary examination of this witness had not disclosed, at the time the objection to the question was interposed and overruled, that he was competent to express an opinion respecting the character of defendant's land for raising sugar beets, and the question is whether such testimony could be supplied after the opinion had been expressed. That the competency of the witness should have been established before he testified concerning the character of the land must be admitted. *Rog. Ev.* (2d Ed.) § 15. But, having thereafter proven that he was qualified to answer the question, the opinion which he had expressed became relevant, and, as the order of proof is regulated by the sound discretion of the court (*Hill's Ann. Laws Or.* § 830), any error originally committed by permitting the witness to express an opinion was subsequently cured by the introduction of testimony tending to show his competency.

It is argued, however, that Hunter was not a chemist, who, having analyzed the soil, was competent to express an opinion as to its elements, but that, having had only two years' experience in raising sugar beets, he was not qualified to express an opinion regarding the character of the land in question. "An expert," says Mr. Rogers in his work on testimony of that character (2d Ed. § 1), "is one who is skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same." To the same effect see *Pendleton v. Saunders*, 19 Or. 9, 24 Pac. 506. According to this definition, Hunter was not an expert, and could not be allowed to express an opinion upon the testimony of other witnesses,

nor in answer to a hypothetical case, but he could, from his own personal knowledge of the facts, express an opinion, when it became necessary to do so by reason of his inability to so describe the facts as to enable the jury to draw an intelligent conclusion therefrom. *Rog. Ev.* (2d Ed.) § 3. The rule is well settled that witnesses, except upon questions of skill and science, are not allowed to give their opinions as evidence when they have no personal knowledge of the facts of the case. *Zachary v. Swanger*, *supra*. In *Sickles v. Gould*, 51 How. Prac. 22, which was an action of trespass for the destruction of corn by defendant's cattle, a witness having testified that he was well acquainted with the land in question, which he had known for 35 years, having lived within one-half mile of it, and knew what it would produce, his knowledge being derived from what he observed as a neighbor living near it, he was permitted to answer the following question, "How many bushels of corn would there have been on the place that was damaged?" and it was held that no error was thereby committed, the court saying: "A knowledge derived from observation, if of the requisite degree to enable a witness to speak intelligently, would be sufficient."

It is insisted that Hunter's testimony did not disclose that his experience in raising sugar beets was limited to soil similar in character to defendant's, nor that such experience was confined to the vicinity in question. The preliminary question propounded to this witness related to his experience in Grande Ronde valley, in which defendant's farm is situated, and, as he testified that he had known the latter's land about 35 years, we think the point insisted upon without merit.

Hunter may not have been able to make a chemical analysis of the constituent elements of the soil which form the surface of the defendant's farm, but he undoubtedly knew from his long personal observation, and from having cultivated sugar beets two years, that it was suitable to the growth of such plants, and no error was committed in permitting him to express an opinion concerning such fact.

Plaintiff's counsel assigned other alleged errors relating to the competency of witnesses and the admissibility of testimony of like character, but we think the legal principles insisted upon have been examined, and such alleged errors will not be further considered.

The court instructed the jury that "the plaintiff in taking an assignment of the contract, if it was assigned, takes it subject to the offsets and defenses that existed, or could have been pleaded, against Yee Sing & Co.," and, an exception having been taken thereto, it is contended that such instruction was improper.

The statute regulating such transfers provides that, in the case of an assignment of a

thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing at the time of or before notice of the assignment. Hill's Ann. Laws Or. § 28. An examination of the instruction complained of will disclose that the court did not limit the time of interposing such offsets and defenses as the defendant might invoke against Yee Sing & Co. to the time of or before notice of the assignment. Considering the charge of the court in its entirety, however, it is evident that the jury were not misled by this instruction; the rule being that whenever the instructions, considered as a whole, are substantially correct, and could not have misled the jury, the judgment will not be reversed because some instruction, considered alone, may be subject to criticism. *State v. Anderson*, 10 Or. 448; *Wellman v. Railway Co.*, 21 Or. 530, 28 Pac. 625; *State v. Hansen*, 25 Or. 391, 35 Pac. 976, 36 Pac. 296; *Matlock v. Wheeler*, 29 Or. 64, 40 Pac. 5, 43 Pac. 867; *State v. Bartness*, 33 Or. 110, 54 Pac. 167.

It is insisted that the court erred in giving the following instruction, to which an exception was saved, to wit: "But if Yee Sing & Co. did not take possession of said land for ten days after the beets were ready to cultivate and thin, or during said forty-two days after entering upon the said work Yee Sing & Co. failed to furnish sufficient men to do the work in the proper time and manner, or failed to enter upon the work at the proper time for the best results, then, for such default by Yee Sing & Co., defendant is entitled to set off against the first payment of the contract price any damage that he suffered by reason thereof." It is argued that this instruction is faulty, in that it does not make any reference to the work having been done under the direction of the agricultural superintendent of the Oregon Sugar Company. It will be remembered that the contract entered into between the defendant and Yee Sing & Co. required the latter to furnish sufficient labor to care for the sugar beets in the proper season in a good and husbandmanlike manner, as directed by the agricultural superintendent of the Oregon Sugar Company. If the instruction complained of did not fully state the hypothetical facts involved, or clearly explain the legal principle applicable thereto, it was incumbent upon the party objecting to that portion of the charge to prepare an instruction which would meet these requirements, and request the court to give the same to the jury. *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *Nickum v. Gaston*, 24 Or. 380, 33 Pac. 671, 35 Pac. 31; *Schoellhamer v. Rometsch*, 26 Or. 394, 38 Pac. 344. Plaintiff's counsel, attempting to comply with this rule, requested the court to give the following instruction: "If you believe from the evidence that Yee Sing & Co. performed the work under the direction of the agricultural superintendent of the Oregon Sugar Company, and that he during the performance of their work made

no objection to the manner of doing the same, you have the right to consider that the work was done in substantial compliance with the contract." The court having refused to give this instruction, an exception was saved, and it is contended that an error was committed in this respect. It is argued that plaintiff is entitled to have the jury instructed upon its theory of the case, whenever there is admitted at the trial evidence tending to prove such theory. The bill of exceptions states that testimony was introduced tending to show that the agricultural superintendent of the Oregon Sugar Company and the defendant complained to Yee Sing & Co. that they were not furnishing a sufficient number of employes to cultivate the sugar beets properly, and requested that more laborers be furnished. It is also stated that testimony was introduced tending to show that said laborers entered upon the performance of the contract, and continued the cultivation of the crop, under the direction of said superintendent, until July 2, 1898, without complaint or objection by the defendant. A party to an action who has given evidence tending to sustain the issues on his part is entitled to have the jury instructed on his theory of the case. *Fiore v. Ladd*, 25 Or. 423, 36 Pac. 572; *Barnhart v. Earhart*, 33 Or. 274, 54 Pac. 195. It will thus be seen that, if the instruction so refused embodies all the hypothetical facts demanded, error could probably have been successfully predicated upon the court's action in the matter. An examination of such instruction will show that it does not require the jury to find, as a condition precedent, that the agricultural superintendent of the Oregon Sugar Company was aware of the manner in which Yee Sing & Co. were performing the work under their contract with defendant. Unless the superintendent knew how the crop of beets was being cultivated, his silence could not be construed into an approval of the conduct of Yee Sing & Co. The failure to make objection when work is being done which does not comply with the terms of a contract is in the nature of a ratification of the change in the agreement, but there can never be a ratification without full knowledge (*Whart. Ag. § 72*), and, the proposed instruction being faulty in this respect, no error was committed in refusing to give it.

The court gave the following instructions: "If Yee Sing & Co. performed the terms of the contract substantially in the manner of the work and the time of its performance, prior to the maturity of the said first payment, then I instruct you that defendant Woodell cannot claim credit or offset in this action for any payments made by him to Yee Sing & Co., or its agents or employes, after he had notice of the assignment of the said first payment to plaintiff." "Nor can defendant, Woodell, claim credit or offset for any payments made by him after notice of such assignments, if any, unless it was necessary

for him to make such payments in order to get the work done, as contemplated by the terms of the contract. But if Yee Sing & Co. did not substantially comply with said contract prior to the maturity of said first payment, either in the manner of the work or the time of its performance, then Mr. Woodell had a right to have the work done himself, and is entitled to offset in this action any moneys necessarily paid for that purpose." Exceptions having been taken to these instructions, it is maintained that they were erroneously given.

The bill of exceptions states, in effect, that testimony was introduced at the trial tending to show the following facts: That on May 18, 1898, the said sugar beets were up and growing on 100 acres of defendant's land, and should have been thinned and weeded within ten days from that time, to accomplish which required from 40 to 50 laborers daily; that Yee Sing & Co. took possession of said land about May 28, 1898, with 22 laborers, and from that time until July 1, 1898, there were not less than 11 nor more than 32 laborers daily employed in cultivating said beets, which was not completed until about July 21, 1898, and that, in consequence of the failure of Yee Sing & Co. to comply with the terms of their contract in these respects, the defendant was damaged from \$500 to \$1,000; that plaintiff advanced money to Yee Sing & Co., taking as security therefor an assignment of the first payment due under the contract entered into between them and the defendant, who on June 23, 1898, was notified by plaintiff's agent that said installment of \$500 had been assigned to his principal; that on July 2, 1898, the laborers employed by Yee Sing & Co. quit work, refusing longer to continue cultivating defendant's beets unless they were paid for their labor, whereupon the defendant, in order to save his crop from being destroyed, was compelled to guaranty to said laborers the payment of \$250 for the labor which they had performed, and to assume the payment of \$250 for the work which they might thereafter render, and in consideration of such guaranty and assurance said laborers resumed work, and completed the cultivation of defendant's crop, for which he paid them, with the consent of Yee Sing & Co., the sum of \$500, after having received notice of the assignment to plaintiff by Yee Sing & Co. of that amount.

It is contended by plaintiff's counsel that the defendant, having been notified of the assignment by Yee Sing & Co., could not thereafter make payments to their employes to plaintiff's prejudice; while defendant's counsel insist that Yee Sing & Co. could not transfer any greater interest in the chose in action than they possessed, and that the defendant, having been compelled to pay to said laborers the sum of \$500 in consequence of the failure of Yee Sing & Co. to keep their contract, is entitled to offset his damage against plaintiff's demand. It is admitted

that, if the defendant had made the payment directly to Yee Sing & Co. after he was notified of the assignment, such payment would not relieve him from liability to the plaintiff. 2 Am. & Eng. Enc. Law (2d Ed.) 1077; Andrews v. Beecker, 1 Johns. Cas. 411; Sanders v. Soutter, 186 N. Y. 97, 32 N. E. 638; Eastman v. Wright, 6 Pick. 316; Parker v. Kelly, 10 Smedes & M. Ch. 184. So, too, if Yee Sing & Co. had earned the first installment at the time they assigned it, and defendant had notice thereof, he could not thereafter pay any portion of the sum so due to the employes of Yee Sing & Co., to the prejudice of the plaintiff. McCloskey v. City of San Francisco, 66 Cal. 104, 4 Pac. 1002. In Fiske v. Iron Works, 86 Mich. 199, 49 N. W. 133, the defendant, having entered into a contract with the city of Detroit for the construction of a bridge, sublet the building of the piers thereof to one Esson, agreeing to pay him monthly 85 per cent. of the work done or material furnished, and the remainder of the contract price upon the completion of the work; reserving the right, however, to refuse at any time to make payments to Esson until he should have presented full releases or waivers of claims or liens by all persons supplying material to, or performing labor for, him. Esson having commenced the construction of the piers, plaintiff loaned him \$5,500 to enable him to complete his subcontract, taking as security therefor an assignment of the 15 per cent. of the contract price to become due on the completion of the piers. The defendant, having been notified of such assignment, refused to pay plaintiff any part of the drawback, amounting to the sum of \$4,385.77; whereupon an action was instituted to recover the same, at the trial of which the defendant sought to show that the work done and material furnished by Esson under the contract amounted to \$26,580.57, on account of which there had been paid the sum of \$24,700,—a part thereof having been paid after notice of the assignment,—and that there yet remained about \$7,000 due to stonecutters and other persons for work done on Esson's contract; but the court, having rejected the testimony so offered, directed the jury to return a verdict for plaintiff in the full amount demanded, and, judgment having been rendered thereon, the defendant appealed. In reversing the judgment, Mr. Justice McGrath, speaking for the court, says: "It did not appear just when this \$24,700 was paid out by defendant, nor did it appear just what portion of that sum, if any part, was paid after notice of the assignment. It was admitted, however, that this sum had been paid out by defendant, and, if so, it left but \$1,880.57 of a balance in defendant's hands, under the Esson contract, irrespective of the question as to whether or not defendant was entitled to retain that sum until Esson should produce releases for all claims due his subcontractors for labor and material. It appeared that defendant had required from Esson certificates

of the correctness of the amounts paid out by it to third parties for labor and material, and the court held that payments made under such certificates were equivalent to payments to Esson. Plaintiff was in no better position than if Esson's contract had been assigned to him, and he had brought suit thereon, and defendant was entitled to set up in defense any matter which it might have availed itself of had suit been brought under the contract, except, perhaps, voluntary payments to Esson since the notice of the assignment. The fact that defendant, as a further protection to itself, in making payments to third parties, required Esson's certificate of the correctness of the amounts, would not, of itself, preclude defendant from offsetting such amounts, if it was shown that such payments became actually necessary in the conduct of the work. The very object of this reservation of 15 per cent. was defendant's protection, and it was entitled to avail itself of this reserve to do what was actually necessary for the completion of Esson's contract, and its own protection. Its lien upon that reserve was prior to that of plaintiff. Plaintiff did not take the assignment of the contract, and had not chosen to assume its control, but had left that with Esson. Defendant was not bound to protect the reserve at its own expense. Defendant should have been allowed to show when, and under what circumstances, the payments by it were made, and, so far as they were properly made, it was entitled to offset them against the amount of Esson's work." In *James v. Railway Co.*, 2 Disn. 261, it is held that, if the subject-matter of the contract be left within the power and under the control of the assignor, the risk of its being impaired or destroyed, so as to defeat the performance, is assumed by the assignee, the court saying: "The defense is, in substance, a want of ability on the part of one of the contracting parties to comply with the terms of the contract. If this want of ability had been caused by the defendant, after notice of the assignment, then the assignee might justly complain of such an act as a fraud upon his rights. But how can it be claimed that the assignment and notice devolved upon the defendant the duty of so supervising and controlling the acts of the assignor that a continued ability to perform should exist? It would be for the assignee, and not the defendant, to protect and secure rights depending upon the conduct of the assignor." The plaintiff, as assignee of Yee Sing & Co., stands in the place of the assignor, and may recover what the latter would have recovered but for the assignment, and no more. *Sanders v. District of Columbia*, 20 Ct. Cl. 337. In a note to the case of *Bradley v. Thompson Smith's Sons* (Mich.) 57 N. W. 576, 23 L. R. A. 305, it is said: "The assignment of a contract is generally held to be subject to

the equities, including set-off, growing out of the contract itself, regardless of when they mature." See, also, *Smith v. Wall*, 12 Colo. 363, 21 Pac. 42; *Newton v. Lee*, 69 Hun, 90, 23 N. Y. Supp. 536. The contract in this case was entire as far as it related to the first payment to be due thereunder, an assignment of which could not so sever the installment as to compel the defendant to apportion a part thereof to the labor performed when the assignment was made, if he sustained any damage as the result of the default of Yee Sing & Co. Their employes refused longer to work for them, and defendant, not being able to secure other laborers, was compelled to take active measures to prevent the failure of his crop; and having discharged the duty which devolved upon the plaintiff, if it sought to recover under the assignment, he should be entitled to an offset against its demand to the extent of the damages resulting from the failure of its assignors to keep their agreement.

The court, at plaintiff's request, gave the following instruction: "I instruct you that if you find from the evidence that the first payment to become due under the contract made by defendant with Yee Sing & Co. was assigned to the plaintiff, and that notice of such assignment was given by plaintiff to defendant, he (defendant) could make no agreement with the said Yee Sing & Co., or the employes of said company, whereby any part of the wages theretofore earned and due from Yee Sing & Co. to their employes should be paid by defendant." It is insisted by plaintiff's counsel that this instruction is inconsistent with those given by the court of its own motion, and invoking the rule announced in *Morrison v. McAtee*, 23 Or. 530, 32 Pac. 400, it is argued that for this reason the judgment should be reversed. In the case to which attention is called the instructions were inconsistent and contradictory, but each was predicated on the assumption that, if the jury found for the plaintiff, they might adopt different methods of computing the amount due him, and, having so found, it was impossible to say which portion of the charge had been obeyed, thereby necessitating a reversal of the judgment. In the case at bar the instructions given by the court of its own motion correctly stated the law applicable to the facts involved, while that given at plaintiff's request was improper; but, as the jury found for the defendant under the instructions given upon the court's motion, it is evident that they were not misled by the instruction last above quoted, and, this being so, the inconsistent instruction furnishes no ground for the reversal of the judgment. 2 *Thomp. Trials*, § 2401; *Smithson v. Southern Pac. R. Co.* (Or.) 60 Pac. 907.

There are other alleged errors assigned, but, deeming them unimportant, the judgment is affirmed.

McMANUS v. SMITH et al.

(Supreme Court of Oregon. July 23, 1900.)

PARTNERSHIP—NEWSPAPER—CHATTEL MORTGAGE—PARTNER'S IMPLIED AUTHORITY—DISSOLUTION—RECEIVER—CLAIMS.

1. Where a partnership is formed to publish a newspaper, a note and chattel mortgage covering all the property of the firm, made by one partner without special authority from the other, are void, such acts not being within the implied authority of a partner in a nontrading partnership.

2. Where one of the members of a firm about to be renewed assumed all its debts, and it appeared on the face of a claim filed with the receiver of the partnership as renewed that the claim accrued before the renewal, it was error to direct payment by the receiver as a debt of the firm, but it should be paid out of the share of the partner who had assumed it.

3. Where defendant filed a claim with the receiver of a partnership, on a note made by one of the partners, with the collateral security of the deposit of a note made by the other partner, and an arrangement that the net profits of the firm should be paid to defendant monthly, and the receivership proceedings prevented such payment, but there was money on hand to pay all claims against the firm and the partners, it was proper to order payment of the claim as one of the debts of the partnership.

Appeal from circuit court, Umatilla county; S. A. Lowell, Judge.

Action by J. P. McManus against D. G. Smith and others. From a decree in favor of plaintiff, defendants Smith and Miller appeal. Modified.

This is a suit to dissolve a partnership, to set aside a chattel mortgage of the partnership property, and for an accounting. The transcript shows: That on January 9, 1899, the plaintiff, J. P. McManus, in consideration of \$400 in money and a promissory note for \$500 executed by the defendant D. G. Smith, sold and delivered to the latter an undivided one-half interest in a newspaper published in Pendleton, Or., known as the Pendleton Republican, including the machinery, presses, type, and material belonging thereto, whereupon a partnership was entered into between the parties, under the name of the Republican Company, for the publication of said newspaper, and it was stipulated that neither party should mortgage his interest in said property without the consent of the other; that McManus would pay the outstanding debts, and on the 1st of each month the net profits accruing from the business should be divided equally, and if McManus should, during any month, draw out more than his share of such profits, the excess should be credited upon Smith's note. McManus, at the time the partnership was formed, was indebted to several persons, and, to obtain the money with which to pay them, he and Smith borrowed from Mary A. Murphy \$600, giving a note therefor, payable in two years, with interest at 5 per cent. per annum, and assigned to her, as collateral security, Smith's \$500 note. That on February 21, 1899, Smith gave the defendant Clarence Miller his promissory note for \$1,700, payable one

day thereafter, and gave him a chattel mortgage on all said partnership property as security therefor, which mortgage was filed in the office of the county clerk of Umatilla county on the day it was executed. Three days thereafter McManus, having discovered that said mortgage had been given and filed, instituted this suit, alleging that Smith conspired with Miller, to whom he is related, to so manage the partnership business as to deprecate the value of the property thereof and to defraud plaintiff and the partnership creditors, and that said note and mortgage were without consideration, and accepted, with knowledge of said partnership agreement, by Miller, who threatens to foreclose his pretended security. McManus having been the editor of the Pendleton Republican, the court appointed him, upon the filing of the complaint, receiver of the partnership property, which enabled him to continue the publication of said newspaper. The defendants Smith and Miller filed separate answers, denying the material allegations of the complaint, and averring that said note and mortgage were executed as evidences of indebtedness, upon which Miller paid the Republican Company the sum of \$1,700; and the promissory note being due, and no payment having been made on account thereof, Miller prayed that said mortgage be foreclosed. Mary A. Murphy, having been permitted to become a party defendant, filed an answer denying the material allegations of the complaint, and averring that on January 9, 1899, McManus and Smith were partners and insolvent, and on that day, a suit having been brought against them, a receiver was appointed, who took possession of all their property; that, to secure the discharge of such receiver and to pay their debts, she loaned them the sum of \$600, under an agreement that they would not mortgage said property, and that the net proceeds arising from publishing said paper should be paid to her monthly, in pursuance of which agreement other and further articles of partnership were subscribed by McManus and Smith; and that the mortgage executed by the latter was without consideration, and executed for the purpose of defrauding the creditors of the Republican Company. Replies having put in issue the allegations of new matter in the answers, a trial was had, resulting in a decree as prayed for, and Smith and Miller appeal.

A. D. Stillman, for appellants. C. H. Carter, for respondent.

MOORE, J. (after stating the facts). It is alleged in the complaint that Smith and Miller are related, but that the degree of consanguinity was unknown to the plaintiff; and this averment is not denied in their answers, it being generally understood that they are half-brothers. Testimony was introduced at the trial tending to show that on January 9, 1899, McManus and Smith

owed Miller \$50, which they paid him that day from the loan secured from Mary A. Murphy, and, having received that sum, it was all the money that he then possessed. If Miller loaned Smith any money, no part of it was used to pay the firm debts; for, after executing the chattel mortgage, Smith immediately left Pendleton, and two days thereafter wrote Miller the following letter: "Spokane, Wash., Feby. 23, '09. Dear Clarence: I got here at five minutes past twelve Thursday night. I met with quite a loss with that money we got from you. I think I will come home Sunday or Monday. How is everything at Pendleton? There were snow and ice on the ground when I got here, and it began to snow yesterday about 5 p. m., and is still snowing hard at 11 o'clock to-day. I like Spokane very well, but I have little faith now in mining, although there is no doubt some are making good money of it. Yours, truly, D. G. Smith. Write me, gen. delivery, Spokane, Wash." Charles A. Maskrey, plaintiff's witness, testified, in substance, that about two weeks prior to the trial, in the absence of Miller, he had a conversation with Smith, who said that the proceedings adopted were not the result of his judgment, but they had been pursued, on the advice of his attorneys, to secure the money which he had paid. The plaintiff and Mary A. Murphy having introduced their testimony and rested, Miller's counsel moved the court for a decree of nonsuit, so far as his answer sought a foreclosure of the chattel mortgage; neither Smith nor Miller having been called as witnesses, though present at the trial. It is contended by appellants' counsel that, the complaint having been predicated upon the ground of fraud, the burden was upon the plaintiff to prove such averments; but not having offered any testimony tending to show that the note and mortgage, copies of which were introduced in evidence, were executed without consideration, the defendants Smith and Miller were not required to introduce any testimony, the presumption that a promissory note was given for a sufficient consideration (Hill's Ann. Laws Or. § 776, subd. 21) supplying the necessary proof. Plaintiff's counsel insist, however, that the publication of a newspaper, the business in which the firm was engaged, being a non-trading partnership, neither partner had implied authority to execute in the name of the firm a promissory note or mortgage, and that, the defendant Miller having dealt with Smith in matters outside the scope of the usual partnership business, the burden was upon them, in order to render the firm liable, to show that Smith possessed special authority to execute in the name of the firm the note and mortgage in question, but not having done so, and a copy of the partnership agreement having been introduced in evidence, showing that neither partner without the other's consent could mortgage his interest in the firm property, the said note

and mortgage should be canceled. The general rule is that each partner has implied authority to bind all the partners by his contracts entered into in the firm name with third persons who have no knowledge of any limitation of his apparent power, when such agreements relate to the performance of the business in which the firm is engaged. 17 Am. & Eng. Enc. Law, 987. When, however, a third person enters into a contract with a partner in the firm name, relating to a subject-matter outside of and beyond the scope of the firm's usual business, before such party can charge the firm he must show that the partner who assumed to act for all the partners possessed special authority so to consummate the agreement relied upon. T. Pars. Partn. (4th Ed.) § 85. A partner in a firm conducting a general commercial business has implied authority to enter into any contract in the name of the firm that usually pertains to the transactions in which such firm is engaged, and as a result of this principle he may sell the partnership property, incur debts, borrow money, and execute promissory notes on account of the partnership. But a partner in a nontrading firm does not possess such general power, and has no authority, as a general rule, to contract debts or issue commercial paper; and a third party who has entered into such a contract, in order to hold the firm liable therefor, must affirmatively show that the partner who acts for the firm possessed the power which he assumed. 17 Am. & Eng. Enc. Law, 993. In *Pooley v. Whitmore*, 10 Helsk. 629, it was held that a firm engaged in the publication of a newspaper at Memphis, Tenn., was a nontrading partnership, and not liable to a bona fide holder for value and before maturity of a promissory note made by one of the parties for his own benefit, who indorsed the firm name thereon for his accommodation. In *Bays v. Conner* (Ind. Sup.) 5 N. E. 18, a promissory note having been given by a partner in the name of the Central Printing Company, a firm of which he was a member, and it having appeared that said company was in no sense a trading or commercial partnership, it was held that one partner cannot, in the absence of express authority, bind the firm or his co-partner by a note executed by him in the firm name, in a transaction wholly outside the apparent and actual scope of the partnership business, although it may appear that the consideration for the note was applied to the payment of a firm debt. The publication of the Pendleton Republican did not make the firm engaged therein a trading or commercial partnership, and, this being so, before Miller could establish the liability of the Republican Company the burden was upon him to show that Smith possessed authority to execute the note given to him. He was present at the trial, and might have made this proof if in his power, but he neglected the opportunity; and, having done so,

no error was committed in decreeing a cancellation of the note and mortgage, for if the note was executed without authority, and falls on that account, the mortgage, which is but an incident of the note, must fall also.

The court on March 13, 1899, appointed Lot Livermore joint receiver, who took possession of the partnership property, collected from various sources the sum of \$824.77, and paid out on account of expenses \$821.52; and having sold the newspaper, machinery, presses, type, etc., realizing therefrom the sum of \$950, he reported that he had on hand for distribution the sum of \$953.25, against which the following claims had been presented, to wit: Pendleton Republican, printing notice to creditors, \$5; Ed Switzler, rent, \$100; H. N. Richmond Paper Company, \$42.70; J. P. McManus, services as editor, \$200; First National Bank, note and interest, \$159.18; Charles A. Maskrey, services, \$38; California Ink Company, \$17.15; Herald Engraving Company, \$6.90,—and that he was entitled to the sum of \$134, compensation as receiver. Objections having been made to various items in said report, the court disallowed the sum of \$124.40 paid to McManus, included in the account of expenses, refused to allow any sum for publishing the notice to creditors, cut down Switzler's bill for rent to \$45, and McManus' bill as editor to \$152, and approved the report in all other respects, directing Livermore to pay the respective claimants the several sums so found to be due them. The court also having found that McManus on January 10, 1899, paid Mary A. Murphy the sum of \$325, and that there was due on her note for \$600 the sum of \$280.80, directed the receiver to pay the same to her; thus leaving \$201.92 in the hands of the receiver, who was ordered to pay the costs of the suit, exclusive of the compensation of the receivers, paying the remainder equally to the plaintiff, J. P. McManus, and to the defendant D. G. Smith. It is contended that the court erred in the allowance of many of these claims. The California Ink Company on December 2, 1898, wrote the following letter to the Republican Company: "We inclose herewith statement of your account. As this account is some five months past due, we have to-day drawn on you at three days for the amount of the account, \$17.15, and must ask you to honor the draft." This letter has indorsed thereon a statement that: "The above claim is correct, and remains unpaid. California Ink Co., per H. C. Angell. June 10, 1899. Subscribed and sworn to before me this 10th day of June, 1899. Lot Livermore, Notary Public for Oregon." The partnership dissolved by the decree herein was not formed until January 9, 1899, and, McManus having agreed to pay all outstanding debts, it is evident that he, and not the firm, is chargeable with this item.

We have carefully examined all the other items to which objection was made, and find them correct, but the claim of Mary A. Mur-

phy requires consideration. It will be remembered that she held McManus' note for \$600, payable in two years from January 9, 1899, upon which he paid the sum of \$325, and that she also held, as collateral security therefor, Smith's note given to McManus for \$500, evidencing a part of the consideration of his purchase, which was payable on or before two years from that date. The testimony shows that, notwithstanding these notes were not due, it was mutually agreed by all the parties that Mary A. Murphy should be paid monthly the net proceeds derived from the publication of the Pendleton Republican. The sale of the newspaper defeats the performance of this agreement, and, as the money on hand is sufficient to meet the payment of all claims against the firm and the partners thereof, no error was committed in directing the receiver to carry out the agreement of the parties. The amount so reported on hand will be increased by the said \$5 for printing notice to creditors, and by the claim of the California Ink Company for \$17.15 being taken from the list of claims and added to the assets, making the sum of \$241.22 to be distributed in the manner specified in the decree; but, before paying McManus the sum so due him, the receiver is directed to pay therefrom the sum of \$17.15 to the California Ink Company. The decree will therefore be modified as herein indicated.

(37 Or. 439)

SWANK et al. v. SWANK.

(Supreme Court of Oregon. July 23, 1900.)

DEEDS — DELIVERY — AGENCY — INSTRUCTIONS — GRANTOR'S CAPACITY — APPEAL — FINDINGS — CONSIDERATION.

1. The giving of a deed by the grantor, after signature and acknowledgment, to one employed by the grantee to prepare it and take the acknowledgment, without suggestion or direction by any party thereto regarding its custody or disposition, constituted a sufficient delivery thereof, though not given to the grantee till after the grantor's death, since such employment by the grantee constituted the person employed his agent, and delivery to such agent was delivery to the principal.

2. Evidence that a grantor's physician on the day a deed was executed considered his mind remarkably clear for one who had suffered so long, and a clergyman who visited and talked with him frequently prior to such execution and until his death thought him always perfectly rational, and that such grantor's wife signed the deed at his request while she was feeling as well as usual, in order to stop his worrying, shows mental capacity and knowledge of the transaction in hand, rendering such parties competent to execute the deed, though for over two months prior to its execution such grantor had suffered much pain, to relieve which morphine had been frequently administered, and his wife was much exhausted by watching and nursing him.

3. Where neither the complaint nor the answer alleged an intention of the parties that a deed and bill of sale sought to be set aside and canceled should be considered as mortgages securing certain payments, but the complaint was predicated on assumptions of mental incapacity to execute and failure to deliver the deed, findings against which were supported by the evidence, a claim that such intention existed will not be considered on appeal.

Appeal from circuit court, Linn county; H. H. Hewitt, Judge.

Suit by Mary E. Swank, individually and as administratrix of J. R. Swank, deceased, and others, against Phillip Swank. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

This is a suit to remove an alleged cloud from the title to real property, to set aside a deed thereto, and to cancel a bill of sale of personal property. The facts are that on November 21, 1897, Jay R. Swank was accidentally wounded by a gunshot, and on February 3, 1898, having been informed by his physician that he would probably not survive the injury, and advised that if he had any business that needed settlement he ought to give it attention, he on the next day signed a bill of sale, and, with his wife, the plaintiff Mary E. Swank, signed, sealed, and acknowledged a deed purporting to transfer and convey to his father, the defendant, Phillip Swank, all the real and personal property of which he was seised or possessed. Jay R. Swank having died intestate February 8, 1898, his widow was appointed administratrix of his estate; and, having duly qualified and entered upon the discharge of her trust, the following claims against said estate were presented to and allowed by her, to wit: Dr. J. P. Wallace, \$137; W. E. Chandler, \$465; Dr. J. A. Lamberson, \$535; Mayer Bros., \$11.50; Hiram Baker, \$37.53; Dalgleish & Everett, \$35.90; and A. Tenney, \$195. The administratrix, having no means of paying any part of these claims, obtained from the county court of Linn county an order in pursuance of which she, individually and as administratrix of the estate and guardian ad litem of the minor heirs, instituted this suit, alleging, in substance, that Jay R. Swank died seised and possessed of said real and personal property, which is of the probable value of \$4,000; that at the time of his death he was indebted in about the sum of \$6,500, and that the funeral expenses and costs of administration had not been paid; that at and prior to the time said deed and bill of sale were signed her husband was sick, and she was exhausted from sitting up with and nursing him, in consequence of which they were weak in body and mind; that defendant, without any consideration therefor, prevailed on Jay R. Swank to sign a bill of sale, and induced him and plaintiff to sign, seal, and acknowledge a deed purporting to transfer and convey to him all the real and personal property of which her husband was seised or possessed; that said pretended deed and bill of sale were never delivered, but were left in the possession of one S. M. Garland, of Lebanon, Or., who retained them until after Jay R. Swank's death, when the defendant got possession of them, and without authority caused the deed to be recorded; that the pretense upon which the signatures to said deed and bill of sale were so procured was that in case of Jay R. Swank's

death, and not until then, said instruments were to be delivered to the defendant, who would thereupon claim title thereunder and take possession of the property, pay the debts of his said son, and distribute the proceeds of his estate according to the law of descent; that since the death of Jay R. Swank defendant has secured the possession of 1,400 bushels of wheat, the property of said estate, of the value of \$1,000, and threatens to take possession of all other property belonging thereto and to retain the same as his own, refusing to pay the debts of his said son or to make any other disposition of the property of his estate for the benefit thereof, claiming title to the said real estate under said deed, which claim is a cloud upon plaintiff's title thereto. The defendant denies the material allegations of the complaint, and avers in substance that said deed and bill of sale were executed in payment of the sum of \$100 which his son owed him, and in consideration of his agreement to pay the sum of \$3,196 to Jacob Kees, evidenced by a promissory note executed by Jay R. Swank as principal and himself as surety, and also to pay P. Kester and the board of school-land commissioners the sums of \$324 and \$2,240 due each, respectively, from his said son; that the value of the property so transferred and conveyed does not exceed the sum of \$4,775, while the amount assumed and agreed to be paid therefor is \$5,860; that defendant, upon the execution of said conveyance and bill of sale, took immediate possession of the property, and in pursuance of his agreement has paid Jacob Kees on account of said note the amount demanded, and has also paid the interest on the other debts, the payment of which he had assumed. The allegations of new matter in the answer having been denied in the reply, a trial was had, resulting in a decree dismissing the suit, and plaintiffs appeal.

H. C. Watson, for appellants. J. K. Weatherford, for respondent.

MOORE, J. (after stating the facts). It is contended by plaintiffs' counsel that the testimony shows that it was the intention of the parties that the deed and bill of sale should not be delivered except in case of Jay R. Swank's death, thus evidencing his purpose to retain control of the deed, but that the defendant, without any authority therefor, secured its possession and caused it to be recorded, thereby casting a cloud upon the title to the premises, and hence the court erred in dismissing this suit. The delivery of a deed is a prerequisite to its validity, and, while no particular formalities are essential to constitute such delivery, it is necessary that the grantor should expressly or impliedly consent that the deed should irrevocably pass from his control. *Fain v. Smith*, 14 Or. 82, 12 Pac. 365; *Shirley v. Burch*, 16 Or. 83, 18 Pac. 331; *Allen*

v. Ayer, 26 Or. 589, 39 Pac. 1; Hoffmire v. Martin, 29 Or. 240, 45 Pac. 754; Payne v. Hallgarth, 33 Or. 430, 54 Pac. 102. A properly executed deed, when found to be in the possession of the grantee, creates a disputable presumption that it was delivered to him, and the grantor or his privies who controvert such presumption assume the burden of showing that it was not delivered. 1 Devl. Deeds, § 294; Filint v. Phipps, 16 Or. 437, 19 Pac. 543.

The testimony shows that S. M. Garland, at defendant's request, went to the house in which Jay R. Swank was staying and took his acknowledgment and that of his wife to the deed, which he took to his office and impressed his notarial seal thereon. Garland, having been called as a witness for plaintiffs, testified in his cross-examination in relation to the deed and bill of sale as follows: "Q. You say you took the papers and laid them away, did you? A. Yes, sir. Q. At Jay's suggestion? A. No sir. Nobody suggested it. Q. Where did you put them? A. I put them in my office, in the place where I generally kept deeds. Q. You took the papers over to your office for the purpose of putting your seal on them, now, didn't you? A. I took them for the purpose of keeping them safe in case Jay wished to recall them. Q. Did Jay direct you to do that? A. No, sir." On further cross-examination the witness, in answer to the question, "Did some one request you to hold these papers, and, if so, who?" said, "I don't remember, but it seems to me something was said about that by Mr. Perry, but I won't be sure." The person to whom the witness referred is the plaintiff's brother, who is undoubtedly interested in her welfare; but, not being a party to the deed, any suggestions or directions by him to Garland respecting the instruments which the latter had in his possession were unavailing. While the testimony shows that Garland did not give the deed to the defendant until after Jay R. Swank's death, we think the instrument was delivered at the time it was signed, sealed, and acknowledged, and that Garland took the deed to his office to attach his seal thereto, and not to hold it subject to the will of the grantors; for, having been engaged by the defendant to prepare the deed and to take the grantor's acknowledgement, he was the defendant's agent, so that a delivery to him was in effect a delivery to his principal.

It is contended that the court erred in finding, in effect, that Jay R. Swank and his wife possessed sufficient mental capacity to execute the deed in question. The testimony shows that he suffered much pain from the effects of his wound, and to relieve his distress his physician frequently administered morphine, but we do not think the pain he endured or the remedy resorted to for its alleviation affected his mind to such an extent as to incapacitate him from entering into a contract; for his physician, Dr. J. A. Lamberon, admits that he told a person on the

day the deed was executed that Jay R. Swank's mind was remarkably clear for one who had been sick so long, and H. B. Ellworthy, pastor of the Methodist Episcopal Church at Lebanon, Or., who frequently visited and conversed with him for a week or 10 days prior to his death, testified that he always thought him perfectly rational. Mrs. Swank was undoubtedly very much exhausted by her nightly vigil at her husband's bedside, and by her daily care in nursing him and ministering to his comfort, but that she did not have sufficient mental capacity to execute the deed is not borne out by the testimony; for in answer to the question, "What was your condition a week or so before your husband's death?" she said, "I was as well as common,—as well as ever I am." In explaining how she came to sign the deed, she testified: "My husband asked me if I would not sign the papers, and I said 'Yes, Jay; I will do anything to stop worrying you;' and I signed because I thought he might stop fretting." It has been repeatedly held in this state that neither old age, sickness, debility of body, nor extreme distress incapacitates a party from disposing of his property, if he has possession of his mental faculties and understands the business in which he is engaged. Clark's Heirs v. Ellis, 9 Or. 128; Chrisman v. Chrisman, 16 Or. 127, 18 Pac. 6; Luper v. Werts, 19 Or. 122, 23 Pac. 830; Franke v. Shipley, 22 Or. 104, 20 Pac. 268; In re Clute's Will, 24 Or. 175, 33 Pac. 542; Carnagle v. Diven, 31 Or. 366, 49 Pac. 831. Under the rule thus settled, we think the testimony shows that Jay R. Swank and his wife were fully competent to execute the deed, and knew the nature and effect of the business in which they were engaged.

It is contended by plaintiff's counsel that the answer in effect avers, and that the evidence shows, that the deed and the bill of sale were executed to secure the defendant on account of his liability as surety for Jay Swank on the Kees note, and that, construing the deed most favorably in the defendant's interest, the property described therein should be impressed with a lien to secure the payments he has made, and that the court erred in holding, in effect, that the deed and bill of sale were absolute. It is not alleged in the complaint, and we fail to find in the answer any averment, that the parties intended that the deed and bill of sale should be considered as mortgages to secure the payment of any sum whatever. The complaint is predicated upon the assumption that Jay R. Swank and his wife were mentally incapacitated to execute a valid contract, and that the deed was never delivered. The trial court found against the plaintiffs on both these grounds, which we think was fully warranted by the testimony; and, the answer not having alleged that the deed or bill of sale was intended as a mortgage, it is now too late to claim that such was the intention of the parties, and the decree is affirmed.

WHEELER v. LACK et al.

(Supreme Court of Oregon. July 23, 1900.)

PARTNERSHIP—WHAT CONSTITUTES—EQUITY—JURISDICTION—INSOLVENT DEFENDANTS—PARTIES—AMENDMENT IN LOWER COURT.

1. Where defendant agreed with plaintiff to divide commissions with him in case plaintiff should furnish any customers to whom defendant might sell mining property, and there was no division of losses or expenses, the agreement did not constitute a partnership.

2. Equity has jurisdiction of a suit against insolvent defendants to restrain a bank, also made a party, from paying money claimed by plaintiff to such defendants, since a judgment at law would be uncollectible.

3. Plaintiff sought to recover in equity of defendant L. for half of the commissions to be paid to L. as brokerage by purchasers of property, under a contract between plaintiff and L. for a division thereof. The purchaser required a bond of L. to protect him against liability for any further commissions, which bond was signed by W. as surety, and the check for the commissions was deposited with him to secure him. *Held*, that the failure to make W. a party to the suit was ground for the reversal of the decree in favor of plaintiff, and remand to the lower court that he might be brought in.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Suit by John Wheeler against F. S. Lack and others for the recovery of money. From a decree dismissing the complaint as to some of the defendants, and in favor of plaintiff against defendants Lack and Conde, said Lack and Conde appeal. Reversed on conditions.

This suit was commenced on the 18th of April, 1899, against F. S. Lack, P. A. Conde, the Eastern Gold-Mining Company, the First National Bank of Baker City, R. O. Deming, Charles E. Whitaker, and Butcher & Eastham. The complaint alleges, in substance, that prior to the 10th day of September, 1897, plaintiff entered into a partnership agreement with defendant Lack, who was at that time a mining broker at Baker City, to the effect that, if he should produce any party or parties to whom Lack might effect a sale of mining property, all commissions and brokerage earned by Lack on account thereof should be divided equally between them; that, under and by virtue of said agreement, large commissions have been earned; that no accounting has been had between plaintiff and Lack, but Lack has ignored the plaintiff's rights, and has endeavored, and is now endeavoring, to appropriate all the commissions so earned to his sole and exclusive use; that plaintiff, in pursuance of said agreement, procured and induced one Zwickey and one Van Zandt to go to Baker City to examine mining property with a view to purchasing for their principal, the defendant Whitaker, and gave them a letter of introduction to Lack, who, at the request of Zwickey and Van Zandt, procured from Deming, the owner of the Balsley-Elkhorn mine, an option thereon for \$60,000, it being understood and agreed that the brokerage and commission to be paid Lack for the use and benefit of himself and plaintiff should be the sum of \$6,000; that thereafter Whita-

61 P.—54

ker caused the defendant the Eastern Gold-Mining Company to be organized, with himself, Zwickey, and Van Zandt as the principal stockholders, and assigned and transferred to such corporation all his rights under the option mentioned; that, since making the agreement with the plaintiff, Lack has formed a co-partnership with the defendant Conde, and, as plaintiff is informed and alleges, transferred or sought to transfer some alleged right, title, or interest in and to the commission or brokerage due under the compact of sale to the defendant W. F. Butcher, of the firm of Butcher & Eastham, and that Conde and Butcher have each conspired and colluded with the defendant Lack to cheat, wrong, and defraud the plaintiff out of his interest in such commission; that the sale of the mining property by Deming to the Eastern Gold-Mining Company has been fully completed, and the purchase price paid; that there is due to the plaintiff herein from Deming, Whitaker, and such company the sum of \$3,000, as his share of such commission, but, with full knowledge of his rights, they have attempted to pay the entire commission to the defendants Conde and Lack, by giving them a draft on an Eastern bank or party, to plaintiff unknown, which they have placed with the defendant bank for collection, and it intends to and will turn over the proceeds thereof to Conde and Lack, both of whom are impecunious and insolvent and unable to respond in damages, and against whom a judgment would be wholly worthless and uncollectible; that plaintiff has demanded of the defendants payment of his share of such commission, but they have each and all wrongfully refused to recognize him in connection therewith, and, unless restrained, the defendant First National Bank and its co-defendants will pay to Conde and Lack the full amount of such commission; that, at the time of the transfer of the mining property, it was stipulated and agreed between Deming and Whitaker that each was to pay one-half of the commission due Lack for making such sale, wherefore the plaintiff demands a judgment against Lack for \$3,000, and an order restraining the defendants Conde and Lack, or either of them, from receiving or accepting any part of such amount from any of the other defendants, and that the other defendants be restrained from paying the same to them. The defendants Lack, Conde, the Eastern Gold-Mining Company, the First National Bank, and Butcher & Eastham were served with process, and answered jointly, denying the allegations of the complaint. Upon the trial the court found that the agreement between plaintiff and Lack did not constitute a partnership, but that a court of equity had jurisdiction to determine and ascertain the interest of the respective parties in the commission earned by Lack, and thereupon entered a decree dismissing the suit as to the First National Bank, Butcher & Eastham, Whitaker, and the Eastern Gold-Mining Com-

pany, and against the defendants Conde and Lack for \$1,250, being one-half of the amount paid by Deming and Whitaker as a compromise for commissions. From this decree Conde and Lack appeal.

W. F. Butcher, for appellants. James A. Fee and J. J. Balleray, for respondent.

BEAN, C. J. (after stating the facts). The evidence shows: That some time in the winter of 1896 or 1897 the plaintiff and defendant Lack entered into an arrangement whereby it was agreed that, if plaintiff should furnish Lack with a customer or customers to whom he should be able to sell mining property, they would divide the brokerage. That a short time thereafter, at the Seven Devils, in Idaho, the plaintiff met Zwickey and Van Zandt, who had been sent out by defendant Whitaker to look for mining property for him. At his solicitation and upon his request they were induced to and did go to Baker City; the plaintiff giving them a letter of introduction to Lack, and at the same time advising him by private letter that they would soon be over to Baker, and suggesting that he show them such property as he might have for sale. Upon their arrival in Baker, Zwickey and Van Zandt called upon Lack, presented their letter of introduction from the plaintiff, and were shown the Baisley-Elkhorn mining property by him, although he had no option or contract for its sale from its owner. After examining the property, they reported to their principal, Whitaker, who resided in Connecticut, and advised him to come West and examine it for himself. This he did, but, being dissatisfied with the terms and conditions upon which it was offered for sale, as stated by the resident agent of the owner, declined to make the purchase and returned home. Some time during the following summer, however, he met Deming, the owner, by request, in New York, and an agreement was entered into between them for the sale of the mine for \$60,000, which contains a stipulation that the parties thereto are to equally pay Lack whatever commissions may become necessary upon account of the sale, although there was no previous contract or agreement of the parties to pay him any commission whatever. Afterwards, and within the life of the contract, the defendant the Eastern Gold-Mining Company was organized, and Whitaker transferred all his rights under the contract with Deming to such company, and on the 19th of September, 1898, Deming conveyed to it the mining property in question for \$60,000, and received the consideration therefor. Lack immediately or soon thereafter demanded of Deming a commission or brokerage for the sale of the property, and, after considerable correspondence and negotiations, it was arranged in April, 1899, as a compromise, that Lack should be paid \$2,500 in full settlement of his claim. In pursuance of this

agreement, two drafts for \$1,250 each, one on Deming and the other on Whitaker, were drawn by the Baisley-Elkhorn Mining Company in favor of the defendant the First National Bank in payment of such amount, and Whitaker was so advised by wire. These two drafts were delivered by Lack to one Waterman, "to take care of" or "hold until called for," who deposited them with the defendant bank for collection on his own account on the 15th of April. Whitaker, preferring, however, to make the settlement of his portion of the commission through Mr. Johns, his attorney, at Baker City, forwarded him by mail a draft on New York for \$1,250, with directions to pay Lack upon satisfactory arrangements being made to protect him from any further claim for commissions, and at the same time notified his local bank to return without payment the draft dated April 15th, drawn on him by the Baisley-Elkhorn Mining Company. The draft from Whitaker was received by Mr. Johns on the 24th of April, and upon the same day he drew upon Deming, who resides in Kansas (the former draft having been returned unpaid), his personal draft for \$1,250, being the half of the commission to be paid by Deming, and deposited it, together with the Whitaker draft, with the defendant bank to his own credit. Before paying out the money on account of the commissions, Johns required of Lack a bond indemnifying his clients against any further liability on account thereof, which was given, with Waterman as surety. As a condition to becoming surety, Waterman required the amount coming to Conde and Lack for commissions to be delivered to him to indemnify him against liability. Johns thereupon, by consent of Lack, drew his personal check on the defendant bank, dated April 24th, for \$2,400, in favor of Waterman, who on the same day deposited it with such bank to the credit of Waterman & Schmitz, and the finding of the court below is that such commission was in Waterman's hands at the time of taking evidence in the suit. Upon this state of facts, the principal question is one of jurisdiction.

It is argued that a court of equity has jurisdiction because the agreement between the plaintiff and Lack constituted them partners as between themselves. A partnership has been defined to be a contract of two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, and to divide the profit and bear the loss in certain proportions. A mere community of interest is not sufficient, nor will an agreement to divide the gross earnings constitute individuals partners. There must be an interest in the profits as profits, and such profits must be shared as the result of the adventure or enterprise in which both are interested, and not simply as a measure of compensation. *Cogswell v. Wilson*, 11 Or. 371, 4 Pac. 1130; *Flower v. Barnekoff*, 20 Or. 132, 25 Pac. 370, 11 L. R.

A. 149. Whether two or more persons are partners as between themselves depends chiefly upon their intention as legally ascertained. Now, when we look at the testimony in this case, we find it clearly shows that the relationship between plaintiff and Lack did not have any of the elements of a partnership. The plaintiff, testifying in relation to the agreement, says: "It was just a little casual conversation we had when writing some letters for him on the typewriter in my room,—just a casual conversation. * * * It was in the winter of '96-7, I guess you would call it, in my room at the Washauer Hotel. Just a casual conversation while writing a letter for Mr. Lack. It was that, if I sent a customer to him who bought any property through him, that we would divide brokerage,—an agreement to that effect. * * * I don't know whether it emanated from myself or Mr. Lack. I know that he had some customers for a mining property at that time, and I know that I was figuring on bringing somebody out here; and it was something like this: That if we happened to send any one to each other, and any sale was made, that we would simply divide the brokerage." The defendant Lack denies this conversation or agreement in toto; but there is other evidence in the case abundantly sufficient to show that he understood plaintiff was to have some part of whatever was received as brokerage on account of the sale of the Balsley-Elkhora mine, and, indeed, such is the admission of his counsel in their brief. Giving to the testimony of the plaintiff, however, its most favorable interpretation, the agreement did not impose upon him the duties, nor clothe him with the powers, of a partner. There was no joint ownership, according to the intention of the parties. The plaintiff was in no event to participate in the business then being conducted by Lack, or to share in his losses therein. It amounted to nothing more than an agreement that, in the event plaintiff should furnish a customer or customers to whom Lack might make a sale of mining property, they would divide the brokerage, which, as we understand it, would be a division of what might remain after the expenses incident to the transaction were deducted, and not, as the court below seems to have thought, one-half of the gross amount paid as commission. It appears in evidence that Lack was at considerable expense in earning and collecting the commission, and was compelled to pay and agreed to pay a part of it to other parties in order to collect it at all; and it would be manifestly unfair to require him to bear all such expenses out of his half, and pay to the plaintiff, who was at no expense whatever, the other half. We conclude, therefore, that the allegations of the complaint that plaintiff and Lack are partners are not sustained by the testimony, and hence that he is not entitled to an accounting for that reason. *Salter v. Ham*, 31 N. Y. 321.

But there is another ground upon which

the jurisdiction of a court of equity may be sustained. The complaint alleges and the evidence shows that Conde and Lack are both insolvent and unable to respond to a judgment at law, so that, if the money in payment of the commission in question ever reaches their hands, it will probably be impossible for the plaintiff to enforce the payment of any claim he may have thereon. The fund is now, or was at the trial, on deposit in the defendant bank; and, as such bank was a party to this suit, the court had sufficient jurisdiction of the specific fund to ascertain and adjust the rights of the several persons entitled to participate therein, and this is a familiar ground for equitable interference. See 1 Pom. Eq. Jur. (2d Ed.) § 186.

But there is an insurmountable objection to proceeding to a final decree at this time. Waterman, to whom the commission was in fact paid, and who deposited it in the bank, and who, perhaps, has some claim or interest therein, is not a party; and, where a proceeding in equity concerns the disposal of a specific fund, a person claiming the fund is an indispensable party. 15 Enc. Pl. & Prac. 622; *Williams v. Bankhead*, 19 Wall. 563, 22 L. Ed. 184. Now, as a general rule, a bill in equity will not be dismissed for want of parties unless they were omitted in bad faith, or unless it would be dismissed if they were before the court; but, however and whenever the objection is raised, the bill will ordinarily be allowed to stand over upon terms, in order to afford the complainant an opportunity of bringing in the necessary parties. 15 Enc. Pl. & Prac. 600. And section 41 of our statute is intended to cover such an emergency. It provides: "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court shall cause them to be brought in." Hill's Ann. Laws Or. § 41. Under a similar statute, it has been held that, when a complete determination of the controversy cannot be had without the presence of other parties, it is the imperative duty of the court to direct that they be brought in; and this although the defect of parties appears upon the face of the complaint, and the defendants fail to demur or raise the objection in their answer. *Shaver v. Brainard*, 29 Barb. 25. Mr. Pomeroy, in discussing the question, says: "If there are other persons, not parties, whose rights must be ascertained and settled before the rights of the parties to the suit can be determined, then the statute is peremptory. The court must cause such persons to be brought in. It is not a matter of discretion, but of absolute judicial duty. The enforcement of this duty does not rest entirely upon the parties to the record. If they should neglect to raise the question and to apply for the proper order, the court, upon its own motion, will supply the omission, and will

either directly bring in the new parties, or remand the cause in order that the plaintiff may bring them in." Pom. Rem. & Rem. Rights, § 419. There could be no question, therefore, about the proper practice, if we were sitting as a court of original jurisdiction; and there seems to be abundant authority for an appellate court to reverse a cause for want of necessary parties, and remand it to the court below in order that they may be brought in. 15 F. & Pl. & Prac. 692; 1 Beach, Mod. Eq. Prac. § 78; King v. Commissioners' Court, 10 Tex. Civ. App. 114, 30 S. W. 257; Morgan v. Blatchley, 33 W. Va. 155, 10 S. E. 282; Jones v. Vantress, 23 Ind. 533; Webber v. Taylor, 58 N. C. 36; Shaver v. Brainard, *supra*. But such an order should not be made in this case, except on payment by the plaintiff of the costs of this appeal. The plaintiff was apprised early in the trial that Waterman had or claimed some interest in the fund, and was therefore an indispensable party to the suit, but made no application to have him brought in. Upon payment by the plaintiff of defendants' costs on this appeal within 60 days, the decree will thereupon be reversed, and the cause remanded to the court below, with leave to the plaintiff to apply to that court for permission to amend his complaint by making Waterman, or any other person or persons who may have or claim some interest in the fund, a party, and for such other or further proceedings as may be proper; otherwise, the complaint will be dismissed without prejudice.

BAER et al. v. BALLINGALL et al.

(Supreme Court of Oregon. July 16, 1900.)

MORTGAGES — DOWER — ASSIGNMENT BEFORE SALE — INFANT'S NOTE — PAYMENT — SUBROGATION.

1. Defendant executed to R. and W. a deed purporting to convey to them her dower estate, under an agreement that, if her son should convey to them certain other land, they would convey such dower estate to him. The son having conveyed as agreed, R. and W. executed a quitclaim deed to him. The son testified that the deed was made to secure him in the payment of his mother's debts. *Held*, that this evidence, in connection with the character of the instrument itself, was sufficient to establish that the instrument was intended merely as a mortgage, which the son was to hold as security for the debts paid by him.

2. Defendant's son, while an infant, signed a note as joint maker with her to secure a mortgage, and, having become of age, paid it, and took an assignment of the mortgage. *Held*, that since the son, being an infant, was not liable on his contract as maker, the payment by him after becoming of age entitled him to be subrogated to the rights of the mortgagee.

3. Where a widow's dower estate is decreed to be subject to the payment of her debts, it should be admeasured and assigned before being sold under execution, since the uncertainty existing before assignment would greatly affect the price obtainable at such sale.

Appeal from circuit court, Baker county; Robert Eakin, Judge.

Suit by S. L. Baer and others against Ada J. Ballingall and others to subject the named defendant's dower estate to the payment of a judgment. From a decree dismissing the suit, plaintiffs appeal. Reversed.

This is a suit to subject an unassigned dower interest in real property to the payment of a judgment rendered against the doweress. The transcript shows that, one Lewis Hart having died intestate about August, 1888, seised of certain real property in Baker county, Or., leaving surviving him the defendants Ada J., his widow, and Seth, Lotta, Jesse, and Rosa Hart (now Rosa York), his children and heirs, Frank Clark was appointed administrator of his estate, which he settled without selling any of the real property thereof. Mrs. Hart thereafter married R. F. Ballingall, but remained with her children upon said real property, her dower interest therein never having been assigned or admeasured; and, being indebted to Rosa E. Robinson and Davis Wilcox in the sums of \$700 and \$300, respectively, she executed a deed purporting to convey said dower right to them, under an agreement that if her son Seth, who was a minor, should, upon becoming 21 years old, convey to them 200 acres of land which he owned in his own right, they would convey said dower interest to him, and, he having done so, they executed to him a quitclaim deed thereof. Prior to January 21, 1898, the plaintiff and S. Ottenheimer were partners. On that day the latter died intestate, and plaintiff, having been appointed administrator of the partnership estate, recovered a judgment against Mrs. Ballingall March 16, 1898, for the sum of \$247.80, which was entered on that day in the judgment docket of said county, and an execution, having been issued thereon, was returned nulla bona, whereupon this suit was instituted; the plaintiff alleging that Mrs. Ballingall's deed was intended by the parties thereto as a mortgage to secure the payment of a sum unknown to the plaintiff, which had been fully paid, but, for the purpose of hindering, delaying, and defrauding her creditors, she caused a deed of her dower interest to be executed to her son, and praying that said deeds be decreed mortgages and canceled, and that commissioners be appointed to admeasure her dower in said real property, and that the same be sold to satisfy plaintiff's judgment. At the trial, the complaint was amended by adding a statement thereto that the deed executed by Mrs. Robinson and Mr. Wilcox to Seth Hart was in effect a satisfaction of Mrs. Ballingall's mortgage, of which plaintiff had no notice or knowledge until said deed was filed for record, prior to which his judgment had been secured in good faith, and was a lien on said dower interest. The answer admits that Mrs. Ballingall's deed was intended to secure the sum of \$1,000, which was paid by Seth Hart, whereupon the dower interest was conveyed to him in pursuance of the

original agreement of the parties, in payment of that sum, as the value of the land so conveyed by him. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree dismissing the suit, and plaintiff appeals.

J. B. Messick and W. H. Packwood, Jr., for appellants. Clarence Cole, for respondents.

MOORE, J. (after stating the facts). The decree is predicated upon the theory that Mrs. Ballingall's deed of her dower right was intended as a mortgage to secure the payment of the sum of \$1,000 which she owed Rosa E. Robinson and Davis Wilcox, and that such interest was conveyed to them in trust for Seth Hart, to whom it was to be conveyed when he became 21 years old, upon executing to them, in payment thereof, a deed for 200 acres of land, the title to which he secured from his grandfather. The answer does not allege that Mrs. Ballingall's deed was intended by her as a conveyance of her dower interest in trust for her son, and, if it had been so averred, we think the testimony was insufficient to warrant a finding to that effect. Seth Hart, in testifying with respect to the agreement entered into with his mother concerning the conveyance of her dower interest and his payment of her debts, was asked the following question, "What was the occasion of making that agreement?" and said: "The occasion was that I wanted to be secure for paying this debt." "Q. Isn't it a fact that your mother secured the payment of these debts by giving her deed to her dower interest in the land described? A. She secured me so I would sign my deed. Q. Then, in other words, you were paying her debts? A. Yes, sir. Q. What was the consideration,—what were you paying her debts for? What advantage did you get out of it? A. The advantage was, I would be secured for paying her debts." We think this testimony clearly shows that Mrs. Ballingall and her son intended that, when he paid her debts to Mrs. Robinson and Mr. Wilcox, their deed, which was in fact a mortgage, should be assigned to him as security therefor.

It is argued by plaintiff's counsel that Seth Hart was jointly liable with his mother to Mrs. Robinson and to Mr. Wilcox, and that when he paid their demands, and secured a conveyance of said dower interest, the mortgage was thereby satisfied. Mrs. Robinson's demand was evidenced by a promissory note executed by Mr. and Mrs. Ballingall, and assigned to her; and notwithstanding Seth Hart, when he agreed to pay his mother's debt, about December 18, 1896, was only 10 years old, which fact was well known to all the parties, he, to signify his willingness to keep his engagements, appended his name to said note, and also executed to Mrs. Robinson and Mr. Wilcox a deed purporting to con-

vey the 200 acres of land of which he was seised, in pursuance of which the grantees therein immediately took, and thereafter continuously held, possession thereof. His signature affixed to his mother's note was only an evidence of his good faith that he would pay Mrs. Robinson the amount due thereon and take an assignment thereof. This was the consideration for his signature, and, having satisfied his agreement by executing a confirmatory deed after he became 21 years old, he was entitled to be subrogated to the rights of Mrs. Robinson, and to hold the note and security which his mother had given her. The claim of Davis Wilcox was founded on an account for groceries and supplies sold to Mrs. Ballingall, and used by her in supporting her family, for which her son Seth, then a minor, was not liable, but, having paid for them after attaining his majority, he is entitled to hold the security which his mother gave Wilcox therefor. Believing, as we do, that the conveyance of the dower interest was intended as a security for the sum of \$1,000 when held by Seth Hart, and that Mrs. Ballingall had an equity of redemption in the premises which, in equity, should be subject to the lien of plaintiff's judgment, the mortgage given by her, and equitably assigned to her said son, will be foreclosed, and he will be entitled to receive, upon a sale of her dower right therein, the sum of \$1,000, with interest thereon from December 18, 1896, the time when Mrs. Robinson and Mr. Wilcox took possession of his land under the original deed thereof. The complaint having alleged that Mrs. Ballingall occupied all the land subject to her dower, her son Seth is not chargeable with any rent arising therefrom.

This brings us to a consideration of the mode of enforcing the decree. The rule is well settled that, unless otherwise regulated by statute, a mere right of dower before an assignment thereof to the dowress is only a chose in action, and not such an interest or estate in real property as can be levied upon and sold under an execution against her property. 4 Kent. Comm. *61; 1 Washb. Real Prop. *251; Leonard v. Grant, 8 Or. 276; Rayner v. Lee, 20 Mich. 384; Nason v. Allen, 5 Greenl. 479; Blain v. Harrison, 11 Ill. 384; Summers v. Babb, 13 Ill. 483; Gooch v. Atkins, 14 Mass. 378; Shield's Heirs v. Batts, 5 J. J. Marsh. 12; Waller v. Mardus, 29 Mo. 25; Petty v. Maller, 15 B. Mon. 591; Torrey v. Minor, 1 Smedes & M. Ch. 489. In Tompkins v. Fonda, 4 Paige, *448, a judgment having been rendered against a widow, whose only property consisted of an unassigned dower interest in a farm of which her husband died seised, and of which she was in possession with his heirs, the judgment creditor instituted a suit for the appointment of a receiver to assign her dower, and the relief prayed for was granted. Mr. Chancellor Walworth, in speaking of the widow's retaining posses-

sion of the premises subject to her dower, without demanding an assignment thereof, thus defeating the enforcement of a judgment, said: "She has no right, therefore, in conscience or in equity, to deprive her creditors of the benefit of her right of dower for the satisfaction of their debts, by continuing in possession with the heirs, and neglecting to ask for a formal assignment, which assignment, and entry under it, would enable the creditors to reach it by execution. The right of dower of the defendant in this case is such an interest as may be reached by the aid of this court, and applied to the satisfaction of the complainant's judgment." At common law, the heir or tenant of the freehold possessed the power, and it was his duty, to assign the widow's dower, but, if he neglected or refused to do so within the period of quarantine, she could maintain an action at law against him to determine her right, and to recover damages for withholding her dower; and, if she recovered judgment therein, a writ of seisin was issue thereon, in pursuance of which the sheriff, after notifying the adverse parties, admeasured her dower by metes and bounds. 7 Enc. Pl. & Prac. 169. In the reign of Elizabeth, however, courts of equity began to assume jurisdiction in aid of the common-law courts in enforcing rights of dower. Pom. Eq. Jur. § 1380; 2 Scrib. Dower (2d Ed.) 145. The auxiliary jurisdiction thus originally undertaken has expanded until it is now the general rule in the United States that courts of equity exercise concurrent jurisdiction with courts of law in admeasuring dower in legal estates. 10 Am. & Eng. Enc. Law (2d Ed.) 173; 1 Story, Eq. Jur. § 624; Brooks v. Woods, 40 Ala. 538; Herbert v. Wren, 7 Cranch, 370, 3 L. Ed. 374; Powell v. Manufacturing Co., 3 Mason, 347, Fed. Cas. No. 11,356. The legislative assembly has invested the county courts of this state with power to admeasure dower, when the widow's right thereto is not disputed (Hill's Ann. Laws Or. § 2961); but the statute conferring such authority does not in express words deprive a court of equity of its jurisdiction over the subject-matter, and, this being so, such power remains in the court of equity unaffected by the statute (Owen v. Slatter, 26 Ala. 547, 62 Am. Dec. 745). In that case Mr. Chief Justice Chilton, in speaking of the power of a court of equity to admeasure dower, notwithstanding a statute of Alabama conferring authority on the probate courts of that state to do so, says: "The rule is that, although the statute may confer jurisdiction upon another court over subject-matter of which the chancery court had jurisdiction, the jurisdiction of the latter court remains unimpaired unless, by the language of the statute, they are forbidden to proceed in such cases." See, also, upon this subject, Phipps v. Kelly, 12 Or. 213, 6 Pac. 707; Fleischner v. Investment Co., 25 Or. 119, 35 Pac. 174. In Strong v. Clem, 12 Ind. 37, it was held that a widow's dower interest in

the real property of her deceased husband was assignable, and that the right, under the statute of Indiana, might be enforced by the assignee in his own name. Mr. Justice Perkins, speaking for the court in deciding the case, says: "The first question arising in this case is whether a dower interest accruing to the widow in the real estate of her deceased husband, by virtue of the marriage, is assignable; and we think it is. Upon the death of the husband, the previous inchoate right of the wife becomes consummate,—a vested right; lying, it is true, in action, but still vested. It is a right, a chose in action, arising, not out of tort, but contract. Such rights of action and such interests were assignable in equity, at common law, so as to enable the assignee to recover upon them in a suit in his own name in chancery, but not at law. The assignment transferred the equitable, not the legal, title. * * * This right of the widow, then, being equitably assignable, may be enforced, under our present Code, in the name of the assignee; for, while our statute may not have enlarged the common-law right as to equitable assignments, it has invested the equitable assignee with the right to sue in his own name, as he might formerly in chancery." So, too, in Payne v. Becker, 87 N. Y. 153, it is held that the dower interest which a widow has in lands of which her deceased husband had been seised, although not admeasured, is assignable as a right in action, and is liable in equity for her debts. Mr. Justice Danforth, in deciding the case, says: "It must now be deemed settled that, upon the death of her husband, a widow has an absolute right to dower in the lands of which he had been seised, and that this right or interest, although resting in action, is liable in equity for her debts. In the cases above cited (Tompkins v. Fonda, supra, and Stewart v. McMartin, 5 Barb. 438), the action for its admeasurement was required to be brought in the widow's name, but, since the Code, that cannot be necessary." Mr. Justice Scott, in Waller v. Mardus, supra, in speaking of the necessity of admeasuring dower before the widow's right to the premises is sold, says: "If the dower interest is permitted to be sold under execution before it is assigned, and the purchaser shall be compelled to go to law in order to have it allotted to him, the uncertainty whether it would ever be assigned would inevitably cause a diminution of price, which would not occur if the dower was assigned before the sale took place. To sell the right of dower at public auction, and then have it assigned, the purchaser taking the risk whether it will be assigned or not, would generally cause a sacrifice of it. The creditor should have the dower actually assigned before it is sold."

It is apparent, therefore, that Mrs. Ballingall's dower interest in the real property of which her former husband died seised should be assigned before it is sold, in order that a reasonable sum may be bid therefor, and, this

being so, the cause will be remanded to the court below with directions to appoint, upon notice to the adverse parties (Hill's Ann. Laws Or. § 331), three discreet and disinterested persons, authorizing and requiring them to set off by metes and bounds, to the use of the assignee of Ada J. Ballingall, during her natural life, one-third part of the lands described in the complaint, that being the interest to which she was entitled upon the death of her former husband (Id. § 2954), and, having done so, that her interest in the premises so admeasured be sold under this decree, as upon execution, and from the money arising therefrom there be paid—First, the expense of such sale and the costs incurred in this court; second, the amount so decreed to the defendant Seth Hart; third, the amount of plaintiff's judgment; and, fourth, the remainder, if any, to Mrs. Ballingall. If it shall appear, however, to the satisfaction of the court, from the report of the referees or otherwise, that said dower interest cannot be set off by metes and bounds without injury to the estate and great prejudice to the owners, then to order a sale of the whole premises, and apply the money arising therefrom to the costs of such sale, and from the remainder to set off to the account of Mrs. Ballingall the value of her dower, estimated upon her life, at the time of such sale, upon the principles for ascertaining the present value of life annuities (2 Scrib. Dower, 2d Ed., 171, 653, et seq.), and from the sum so set off to her to pay the several sums to the parties in the order hereinbefore stated; the portion of the sum realized from the sale of said real property, not set apart to the account of Mrs. Ballingall, to be paid to the heirs of Lewis Hart or to those entitled to the same. The decree will therefore be reversed, and a decree entered here as indicated.

HILTS v. HILTS.

(Supreme Court of Oregon. July 16, 1900.)

REFORMATION OF DEEDS—LANDS ALREADY BELONGING TO GRANTEE.

Where the evidence showed that lands taken in plaintiff's name were purchased for defendant with her money, a deed from plaintiff conveying such lands to defendant will not be reformed on the ground that other lands were intended to be conveyed, since the lands mentioned in the deed already belonged to defendant.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Action by J. M. Hilts against Rachel Hilts. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is a suit to reform a deed. The complaint alleges that prior to December, 1898, C. W. Ladd and wife conveyed to the plaintiff a farm of 160 acres in Union county, and certain town property in the city of La-grande, by separate deeds; that in December, 1898, plaintiff and defendant made and entered into an agreement by the terms of

which plaintiff was to convey to defendant the town property, but, by mistake of the parties and the scrivener, conveyed the farm instead; that plaintiff discovered the mistake in March, 1899, and, in order to correct it and carry out the agreement, he made, executed, and delivered to her a good and sufficient deed conveying the town property, and then and there requested and demanded of her a reconveyance of the farm, which she refused and still refuses to make. The answer admits the conveyance by C. W. Ladd and wife to the plaintiff of the farm and town property, the execution by plaintiff of the deed conveying the farm to defendant, and the execution and delivery to her in March, 1899, of the deed conveying the town property, and alleges that in 1896 the plaintiff, who was then the husband of defendant, did, as her agent, and acting for her, purchase the farm, but wrongfully and without her knowledge or consent took the conveyance thereof in his own name; that such lands were purchased and paid for with the money of defendant, and should have been deeded to her; that at the time the land was conveyed to plaintiff it was mortgaged for \$1,200, which the defendant assumed and agreed to, and did afterwards, pay; that on the 29th of December, 1898, the defendant demanded of plaintiff that he convey the farm to her, together with other land standing in his name, but which actually belonged to her, and in pursuance of such demand he did make, execute, and deliver to her the deed to the farm, but failed and neglected to deed any of the other land mentioned until on or about March 18th, when he deeded the town property to her. The reply put in issue the allegations of the answer, and upon the issues thus joined trial was had, resulting in favor of the defendant, from which plaintiff appeals.

B. F. Wilson and J. W. Knowles, for appellant. J. D. Slater, for respondent.

BEAN, C. J. (after stating the facts). The questions involved in this case are purely questions of fact. The evidence shows that at the time of the marriage of the parties hereto, some time prior to 1896, the plaintiff was without property or means, but the defendant owned considerable property; that, subsequent to the marriage, plaintiff looked after, and to some extent managed, his wife's property, and the proceeds therefrom and all moneys received by her were deposited in the bank to the joint account of both, or at least were subject to check by either; that the purchase price of the farm in controversy was \$100 in cash, some mules valued at \$300, and an agreement to discharge a mortgage thereon of \$1,200; that the \$100 in cash was paid from the defendant's funds, and a joint note of plaintiff and defendant given for the purchase price of the mules; that after the purchase of the farm the income thereof was deposited in the bank to the joint account of the parties, and the

note given for the mules was paid by draft thereon. The mortgage was paid by defendant after the commencement of this suit. So it quite clearly appears that, although the deed to the farm was taken in plaintiff's name, it was paid for by, and in fact belonged to, defendant, so that when plaintiff made the deed of December, 1898, he was simply conveying to defendant what already belonged to her. Some questions of law are discussed in the briefs, but, in the view we have taken of the testimony, they are wholly immaterial and require no consideration. It follows that the decree of the court below must be affirmed, and it is so ordered.

LOMBARD v. WADE et al.

(Supreme Court of Oregon. July 16, 1900.)

EQUITY—MORTGAGES—RECEIVERS—DISTRIBUTION—LACHES—DISCHARGE—NUNC PRO TUNC ORDER.

1. One of the defendants in suit to foreclose a mortgage was injuriously affected by a decree which was erroneously entered on a mandate from the appellate court. She neglected, however, to apply to the supreme court for correction of the mandate for ten months after the receiver had been directed to distribute the rents and profits in his hands, and for eight months after confirmation of the sale under the decree. After the decree had been corrected, she applied for an order vacating the distribution of rents formerly made by the receiver and for a redistribution, and for an order directing the receiver to place her in possession. *Held*, that the motion was properly denied on the ground of her laches; the former order directing payment by the receiver having been acquiesced in by her for nearly a year, during which the receiver had distributed the funds in accordance with the order of the court, and another party having taken peaceable possession.

2. Where an order was made in a foreclosure suit confirming the receiver's report, and directing him to make certain payments of the funds in his hands, taking vouchers therefor, and that on filing such vouchers he be discharged, and the receiver made such payments, except to one party, who refused to accept her share, and, with the acquiescence of all parties, ceased to collect rents from the premises or to exercise any control over them, such order, though informal, will have the effect to discharge the receiver.

3. Where the court made an order and directed it to be entered nunc pro tunc as of a date 18 months earlier, there being nothing to show that it was an order made at that time which by accident had not been entered, such order is beyond the authority of the court and void.

Appeal from circuit court, Umatilla county; S. A. Lowell, Judge.

Action by S. L. Conklin against Mattie A. La Dow and others. From an order denying a motion to set aside the distribution of rents by the receiver, and for a redistribution thereof, and from an order directing the receiver to place the defendant Lewis McArthur La Dow in possession, defendant Lombard appeals. Modified.

The facts out of which this litigation arose are stated at length in Conklin v. La Dow, 33 Or. 354, 54 Pac. 218. For a proper understanding of the questions now before

the court, it is only necessary to add that, after the termination of the proceedings in the probate court and the execution of the mortgage to the plaintiff's assignor, the defendant Mrs. Lombard purchased a portion of the mortgaged premises, known as "No. 301 Court Street, Pendleton, Oregon," from the successors in interest of Frank E. La Dow and Charles B. Isaac, and was in possession thereof at the time of the commencement of the suit, and so remained until the 10th of February, 1897, when, upon the application of the plaintiff and over the objection of the defendants, C. B. Wade was appointed receiver of the mortgaged property. Thereafter the suit was tried upon the issues presented by the separate answers of Lewis McArthur La Dow and Mrs. Lombard, and a decree rendered declaring plaintiff's mortgage void as to the undivided half of the property inherited by the defendant Lewis McArthur La Dow. But, notwithstanding the fact that Mrs. Lombard claimed to have succeeded to the interest of Lewis McArthur La Dow in 301 Court street by purchase, made presumably on the faith of the regularity of the proceedings in the probate court, and that no issue was made or could have been made for trial between her and her co-defendant as to the validity of her title, the court decreed that Lewis McArthur La Dow was the owner in fee of an undivided half of the mortgaged premises, which included, of course, the undivided half of 301 Court street claimed by her. Upon appeal the decree of the court below was affirmed, except as to the part thereof decreeing Lewis McArthur La Dow to be such owner. By mistake, however, the entry of the decree of this court showed that the decree from which the appeal was taken was in all things affirmed, and, upon receipt of the mandate issued thereon, a decree of the circuit court was entered September 1, 1898, in accordance with its provisions, decreeing that Lewis McArthur La Dow was the owner in fee of an undivided half of the entire mortgaged property. On September 20, 1898, the final report of the receiver was examined and approved, and it was thereupon decreed that he pay to S. L. Conklin the sum of \$532.70, to Lewis McArthur La Dow \$296.90, and to Mrs. Lombard \$61.09, and "that he take vouchers therefor, and that upon the filing of such vouchers the said receiver be discharged without further order of this court." On November 5, 1898, the undivided half of the property described in the mortgage, formerly belonging to Frank E. La Dow, was sold under the decree of foreclosure to the plaintiff, and the sale was confirmed on the 19th of the month. Nothing further was done by Mrs. Lombard in the matter until the 19th of July, 1899, when she applied to this court for an order recalling the mandate, so that its decree might be made to conform to the opinion and actual decision of the court. This motion was allowed, and upon the return of the mandate

the court on the 2d of January, 1900, made an order correcting the decree accordingly; and, a mandate issued on the amended decree having been filed in the court below on the 16th of the month, a decree was there entered in accordance therewith. On February 6th and 24th Mrs. Lombard filed motions in the court below to vacate the order of distribution of September 20, 1898, and for an order redistributing the net profits in the receiver's hands, and also for an order requiring him and the defendant Lewis McArthur La Dow to pay her all the rents and profits of the premises 301 Court street up to the time of the sheriff's sale hereinbefore referred to, and of an undivided half thereof since such sale, less the proportion thereof due on the dower right of Mattie A. La Dow. Upon the hearing of these motions, after notice to all the parties, the court, on March 3d, made the following order: "It appearing to the court that the receiver has long since been, to all intents and purposes, discharged, and that such money as may be due to said Letitia Lombard is not in the hands of such receiver, except that portion allotted to her by the court, and which she refused to accept, to wit, \$61.09, and it also appearing that, under the decision of the supreme court last handed down, the court did err in said distribution order, it is hereby ordered that plaintiff S. L. Conklin and defendant Lewis McArthur La Dow, the parties overpaid in such distribution, do pay to said Letitia Lombard such sum as shall make such distribution equitable to the date of such distribution, to wit, said Conklin \$48.71, and said La Dow \$53.85, making total distributive portion going to said Letitia Lombard \$161.65. And it also appearing that said petition also asks that said Conklin and La Dow do account for rents and profits of the premises herein involved during such time as they have been in possession since said distribution, and that the court place said Lombard in possession of that portion of said premises claimed by her, and upon that prayer it appearing that the receiver, under order of this court, upon the first opinion of the supreme court herein, as it then understood the same, and upon entering judgment on the mandate, surrendered all of said property on the 20th day of September, 1898, and has since had nothing to do with it in any manner whatsoever, and that at that time the said receiver distributed the funds in his hands according to the order of this court so far as he was able to do so, and was in all things discharged upon filing vouchers (which he was unable to do because of the refusal of said Letitia Lombard to accept and receipt for the proportion directed to be paid to her), and that therefore since said entry of judgment on the mandate this court has had no possession of or jurisdiction over any part of said property, it is ordered that the petition asking accounting and possession be, and the same is, denied, and said Letitia

Lombard directed to proceed in the usual manner for an accounting between joint tenants." On the 20th of March Mrs. Lombard served a notice of appeal from the order of March 3, 1900, upon the attorney for plaintiff, and on the 24th of the month on the receiver and the attorney for Lewis McArthur La Dow. Upon the 22d of March the court below, apparently upon its own motion, and without notice to or upon the application of any of the parties to the suit, directed an order to be entered "nunc pro tunc as of the 20th of September, 1898," of which the following is a copy: "Now, on this day, it appearing that mandate of the supreme court herein has been filed, and judgment and decree taken and entered thereon, and therefrom it further appearing that the decree of this court in this cause is in all things confirmed and affirmed, and that therefore such decree is final, and it also appearing that under said decree the premises herein involved have been sold as by statute in such cases provided, and that there are no further duties for the receiver therein, Charles B. Wade, to perform, it is ordered that said receiver do forthwith surrender possession of all property herein involved, and in pleadings described, to plaintiff S. L. Conklin, the purchaser at said sale, and Lewis McArthur La Dow, defendant, who is declared by said decree to be the owner of one undivided half interest, subject to widow's dower, in all of said property."

Raleigh Stott, for appellant. J. J. Balleray and Chas. H. Carter, for respondents.

BEAN, C. J. (after stating the facts). The motion of Mrs. Lombard, made in February, 1900, for an order of redistribution of the funds collected by the receiver, and for the delivery to her of the undivided half of 301 Court street, was properly denied on account of her laches, if for no other reason. The original order of distribution and for the discharge of the receiver was made in September, 1898, at which time the receiver's accounts were examined, settled, and approved. At that time no request was made of the court, so far as the record discloses, for an order directing the receiver to turn over the property to any one. No appeal has been taken from such order, nor was any objection made thereto by Mrs. Lombard until almost a year later, when the petition was filed in this court for an order recalling the mandate. It seems to us that under these circumstances she is not now in a position to insist that the order of September 20, 1898, be modified or disturbed. It was made in obedience to the mandate of this court, without objection by any of the parties, so far as we are advised; and the fund has been distributed in accordance therewith, except the amount apportioned to the defendant Lombard. It would, no doubt, have been proper for the court, at the time it made the order discharging the receiver, to have di-

rected him to deliver possession of the property to the party entitled to it; but no objection was made on account of its failure to do so, either to the court below or by appeal, and it is now too late to question the validity of such order.

It is argued that it did not operate to discharge the receiver, because it was conditioned upon his subsequently filing receipts from the distributees, which he was unable to do, because Mrs. Lombard refused to receive and receipt for the portion directed to be paid to her. But, with the acquiescence of all the parties, the receiver ceased to exercise any control over the property and ceased to collect the rents and profits thereof, so that, while the order may in some sense be informal, yet its effect was to discharge the receiver and exonerate him from any further liability as such; and if Lewis McArthur La Dow wrongfully obtained possession of the property, as Mrs. Lombard claims, it was due largely to her own negligence.

The alleged nunc pro tunc order of March 22d is, however, clearly void, and cannot affect the rights of the parties in any way. There is no finding that such an order was in fact made on September 20, 1898, and that the entry thereof was inadvertently omitted by the clerk. But it seems to be an order made on the 22d of March, 1900, which the court directs to take effect as of the 20th of September, 1898; and, clearly, the court had no power or authority to make any such an order. It was apparently an attempt to amend the order of September 20th. And Mr. Black says: "The power of courts to order the entry of judgments nunc pro tunc is not to be used for the purpose of correcting errors, omissions, or mistakes of the court. It cannot direct a proper judgment to be thus entered, when the fault is that the first judgment is one which should not have been entered in the case, or is imperfect or improper. * * * Hence the court cannot at a subsequent term change its judgment to one which it neither rendered nor intended to render, nor supply an order which it might or ought to have made, but wholly omitted to make." 1 Black, Judgm. § 132. The order of March 3, 1900, will therefore be affirmed, but the nunc pro tunc order of March 22d will be vacated and held for naught. This conclusion, however, to be without prejudice to any further proceedings by Mrs. Lombard for an accounting or to assert her claim to the property in controversy; neither party to recover costs on the appeal.

(97 Or. 433)

BREDDING v. WILLIAMS.

(Supreme Court of Oregon. July 23, 1900.)

SCHOOL ELECTION—GENERAL ELECTION—VOTERS—CHALLENGE—DUTIES OF JUDGES OF ELECTION.

Where a voter at a school election is challenged, he must furnish evidence to establish his right of suffrage if he insists on voting; for, since such elections are neither general

nor special elections, the provisions of 2 Hill's Ann. Laws, p. 1169, c. 14, tit. 1, § 2, making it the duty of judges of election at general or special elections to take active measures to determine the qualifications of challenged voters, are not applicable thereto.

Appeal from circuit court, Umatilla county; S. A. Lowell, Judge.

Action by Christ Bredding against James Williams to contest the alleged election of defendant to the office of school director of school district No. 69, Umatilla county, Or. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

This is a proceeding to contest the alleged election of the defendant to the office of school director of school district No. 69, Umatilla county, Or. It is averred, in effect, that at the annual meeting of said district held March 1, 1897, the plaintiff and defendant were qualified electors of said district, and candidates for said office, receiving 6 and 9 votes therefor, respectively, whereupon the latter was declared duly elected; that 8 other qualified electors of said district, whose names are given in the notice of contest, tendered to the judges of said election their ballots in writing, expressing their choice of plaintiff for said office, but the judges unlawfully refused to receive them, or any of them, though the electors were ready and willing to take the necessary oath respecting their qualifications; and that, if they had been permitted to vote, plaintiff would have received a majority of all the votes cast. The answer, having denied the material allegations of the notice of contest, averred that neither of the persons so named therein was an elector of said school district, stating wherein each was disqualified. The reply having put in issue the allegations of new matter in the answer, a trial was had, without the intervention of a jury, resulting in a judgment dismissing the proceedings, whereupon plaintiff appealed, and, it appearing that the court below failed to make the necessary findings of fact, the judgment was reversed on such appeal, and a new trial ordered. *Bredding v. Williams*, 33 Or. 391, 54 Pac. 206. The cause having been remanded, the court, in pursuance of the stipulation of the parties, made its findings from the testimony theretofore taken, and, having again dismissed the proceedings, plaintiff appeals.

S. A. Newberry, for appellant. J. J. Balleray and T. G. Hailey, for respondent.

MOORE, J. (after stating the facts). The court found, in effect, that there were at said school meeting 22 qualified electors, 6 of whom cast their ballots for the plaintiff and 9 for the defendant; that G. Eichner and G. Selvers were legal voters, and in favor of the election of plaintiff, but, being under the impression that they would be required to swear that they were citizens of the United States, and not having fully completed their naturalization, neither of them offered to vote; that J. Richmond, D. Richmond, H.

Fanning, C. Thornton, and Mrs. J. Dand, qualified electors, tendered their respective ballots to the judges of the election, but, having been severally challenged, neither of them insisted upon voting, or offered to be sworn respecting his qualification, whereupon said ballots were rejected, but, if they had voted, each would have cast his ballot for plaintiff; that there was a general and honest misunderstanding and lack of knowledge on the part of the directors and electors present at the annual meeting respecting the qualifications of the latter, and in case of doubt upon that subject a challenge was interposed, but that each of the persons whose ballots were rejected had the privilege of making oath to his qualifications, but neglected to do so, because he did not know whether, under the law, he was entitled to vote. The election having been held prior to the amendment of section 2609, Hill's Ann. Laws Or. (Laws 1898, p. 22), it is contended by plaintiff's counsel that, the electors having been challenged as disqualified, it forthwith became incumbent upon the chairman of the school meeting to administer to each an oath that he would truly answer all questions propounded to him touching his place of residence and qualifications as an elector at said meeting, and upon taking which to interrogate him respecting his citizenship in this state, his age, residence in the district immediately preceding the meeting, and whether he had property in the district upon which he paid a tax, or, if he had no property therein, whether he had children of school age to educate; and if, after answering such questions, the challenge was not withdrawn, to administer to each elector an oath in substance as follows: "You do solemnly swear (or affirm) that you are a citizen of this state; that you are twenty-one years old; that you have resided in this school district thirty days immediately preceding this meeting; that you have property in the district upon which you pay a tax; or (if the elector have no taxable property therein) that you have children of school age to educate." But the chairman having failed to perform his duty in these particulars, and the court having found that said electors were duly qualified, and that, if they had voted, they would have cast their ballots for the plaintiff, whereby he would have received a majority of all the votes cast, it erred in not directing that a certificate of election be issued to him, and in dismissing the proceedings. This contention is based upon the method of determining the qualifications of electors at general elections, as prescribed by section 11 et seq., tit. 1, c. 14, of the general election laws of the state (2 Hill's Ann. Laws Or. p. 1169), which provides that it shall be the duty of any elector to challenge any person offering to vote whom he shall know or suspect is not qualified, whereupon the chairman of the judges of election shall administer to the person so challenged a voir dire oath, and propound such interrogatories as may be nec-

essary to test his qualification, and if he refuse to answer fully any question concerning his qualification as an elector his vote shall be rejected; and after such examination, if such challenge is not withdrawn, to administer to him a final oath, the form of which is prescribed. It will thus be seen that when a challenge is interposed to an elector at a general election the duty of determining his qualification devolves upon the chairman of the judges, who, it would seem, must take active measures, and immediately try the issue raised by the challenge. An examination of the statute to which attention has been called will disclose that the method prescribed therein applies only to general and special elections held in the several election precincts of the state. Id. §§ 1, 9, 10. The general elections are held on the first Monday in June, 1892, and biennially thereafter (Const. Or. art. 2, § 14; 2 Hill's Ann. Laws Or. p. 1172), and on the Tuesday next after the first Monday in November in every fourth year succeeding every election of the president and vice president of the United States (Rev. St. U. S. § 131); while special elections to fill vacancies in the legislative assembly or in the office of representatives in congress are held at such times as the governor, by his writ authorizing the same, may appoint (Const. Or. art. 5, § 17; Hill's Ann. Laws Or. § 2556). But annual meetings for the election of school officers in all organized districts containing less than 500 qualified voters are held on the first Monday in March, while in school districts containing 500 or more qualified voters such election is held on the second Monday in that month (Hill's Ann. Laws Or. § 2590), thus showing that school elections are not general, and, not being held in pursuance of the governor's writ, they are not special; hence the rule invoked does not apply to the question involved. Thus, in *State v. Mahaey*, 19 Mo. App. 210, it was held that the chairman of a meeting of the qualified voters of a school district was not subject to the pains and penalties inflicted by the criminal law for rejecting the vote of an applicant for suffrage. So, too, in *Marion v. Territory (Okla.)* 32 Pac. 116, it was held that the provisions of the general election law, known as the "Australian System," was not applicable to an election held in pursuance of the provisions of the school laws of Oklahoma territory, to determine whether separate schools should be established for colored people. In *Kreitz v. Behrensmeier*, 125 Ill. 141, 17 N. E. 232, 8 Am. St. Rep. 349, it was held that the voter who knows that his ballot was not accepted must insist upon his rights, and furnish the evidence required by the statute, to entitle his vote to be received. In *Blanchard v. Stearns*, 5 Metc. (Mass.) 298, it was held that, to enable a qualified elector to maintain an action against the selectmen for refusing to receive his vote or for omitting to put his name on the list of voters, he must allege and prove that he furnished them sufficient

evidence of his having the legal qualifications of a voter, and requested them to insert his name on the list of voters, before they refused to receive his vote or omitted to insert his name on such list. To the same effect, see *Lombard v. Oliver*, 7 Allen, 155. In the absence of a statute the duty devolves upon the elector whose vote is challenged to produce the necessary evidence to establish his right of suffrage, if he insists upon its exercise. The legislative assembly has made no special provision respecting the determination of the qualification of electors at school meetings, and, the statute relating to general elections being inapplicable thereto, the judges of the election at said meeting could not be placed in default, so as to authorize the votes of these electors to be counted for the person of their choice, until they had done or offered to do all things necessary to prove their qualifications; but, said electors having failed to make or offer any proof, no error was committed in dismissing the proceedings. *Darragh v. Bird*, 3 Or. 229. There are other alleged errors assigned, but they are not argued in appellant's brief, and, deeming them unimportant, the judgment is affirmed.

(22 Utah, 51)

LEWIS v. SILVER KING MIN. CO.

(Supreme Court of Utah. May 5, 1900.)

MOTION FOR NONSUIT—SPECIFICATION OF OBJECTIONS—SUFFICIENCY.

1. A party moving for nonsuit should, in the motion, lay his finger on the exact point of his objection.¹

2. A motion for a nonsuit "on the ground of a fatal variance between the pleadings and the proof, and also upon the ground that the evidence fails to show any negligence or carelessness whatever on the part of the defendant company," is too general to be considered.

(Syllabus by the Court.)

Appeal from district court, Summit county; A. G. Norrell, Judge.

Action by Mary Ann Lewis against the Silver King Mining Company. Judgment for defendant. Plaintiff appeals. Reversed.

Richards & Allison and W. I. Snyder, for appellant. Dickson, Ellis & Ellis, for respondent.

BASKIN, J. This is an action in which the plaintiff seeks to recover damages for the death of her son, alleged to have been caused by the negligence of the defendant. The complaint, in substance, alleges that while John A. Lewis, the son of plaintiff, was, on the 18th day of July, 1898, engaged, as a servant of the defendant, in making an excavation under the direction of defendant, for a mill site in Woodside canyon, in Summit county, Utah, the defendant carelessly and negligently, and without the knowledge or fault of the deceased, caused large rocks to be hauled and unloaded at a point on a steep hillside above the place where the deceased

was so engaged, and carelessly and negligently let one of the rocks roll down the hillside and strike and injure the deceased, thereby causing his death. The answer denied the alleged negligence. At the close of the plaintiff's testimony the defendant moved for a nonsuit "on the ground of a fatal variance between the pleadings and the proof, and also upon the ground that the evidence fails to show any negligence or carelessness whatever on the part of the defendant company." The party moving for a nonsuit should, in the motion, lay his finger on the exact point of his objection. The motion does not state in what particulars there was a variance between the pleadings and the evidence, nor on what particular points the evidence failed to show negligence on the part of the defendant. If this had been done, it may be that the trial court would have permitted the pleadings to be amended so as to conform to the evidence, and have permitted the plaintiff to supply the defects in the evidence which the motion pointed out, and the plaintiff might have been able to have done so. In the cases of *Frank v. Mining Co.*, 19 Utah, 35, 56 Pac. 419, and *McIntyre v. Mining Co.*, 20 Utah, —, 60 Pac. 554, we held that a party moving for a nonsuit ought to be required to specifically state the grounds upon which he bases his motion, and thereby call the court's attention and that of the opposite party to the point on which he relies. This rule is well established by the decisions of the courts. *Killer v. Kimbal*, 10 Cal. 268; *Sanchez v. Neary*, 41 Cal. 487; *People v. Banvard*, 27 Cal. 474; *Coffey v. Greenfield*, 62 Cal. 608; *Miller v. Luco*, 80 Cal. 261, 22 Pac. 195; *Belcher v. Murphy*, 81 Cal. 39, 22 Pac. 264; *Shain v. Forbes*, 82 Cal. 582, 23 Pac. 198; *Jacobs Sultan Co. v. Union Mercantile Co.*, 17 Mont. 61, 42 Pac. 109. There are numerous other authorities to the same effect. In the last case cited the grounds of the motion for the nonsuit were that the plaintiff had failed to prove the allegations of the complaint, and had failed to prove any consideration or promise, or that any promise had been made by defendant as alleged in the complaint. In the case of *Jackson v. Traction Co.*, 59 N. J. Law, 26, 35 Atl. 754, the ground of the motion was that the plaintiff had not established the liability of the defendant. The court, in the opinion, said: "This vague statement left the mind of the trial judge unenlightened as to defendant's claim. Whether it was that the evidence failed to prove that the death of plaintiff's intestate was caused by the trolley car, or that the motorman was negligent, or that the motorman was in defendant's employ, so that the maxim respondeat superior would apply, was not disclosed. Upon error, a bill of exceptions which does not show that the precise point of which a review is sought was made by counsel presented to the mind of the court, and decided, will not be considered. *Insurance Co. v. Barraciff*, 45 N. J. Law, 543. The same reason applies to the review of such rulings of the trial judge by

¹*Frank v. Mining Co.*, 56 Pac. 419, 19 Utah, 35; *McIntyre v. Mining Co.*, 60 Pac. 554, 20 Utah, —.

rules to show cause." In *People v. Banvard*, 27 Cal. 474, the court said: "Most, if not all, the considerations upon which it has been held that a party objecting to the introduction of testimony should state precisely the grounds of his objection are equally applicable to show, when a nonsuit is moved for at the trial, that the attention of the court and of opposite counsel should be particularly directed to the supposed defects in the plaintiff's case. We not only understand such to be the rule, but consider its observance a matter of much practical consequence."

The grounds of the motion in this case were too general to be considered. I have, however, examined the evidence, and am of the opinion that the testimony of the plaintiff tended to show negligence on the part of the defendant, and was sufficient to support a verdict in favor of the plaintiff. It is ordered that the judgment of the lower court be reversed, and the case remanded for a new trial, and that the respondent pay the costs.

BARTCH, C. J., and MINER, J. We concur as to the insufficiency of the motion for nonsuit, and therefore in reversing the judgment for that reason.

STATE v. MASON.

(Supreme Court of Montana. July 23, 1900.)

CRIMINAL LAW—APPEAL—RECORD—SUFFICIENCY.

The court in a criminal prosecution charged the jury that they were the exclusive judges of the evidence and its weight, and the credibility of the witnesses, and that they, on considering the evidence, might reject all or any testimony not supported or corroborated by other worthy and credible evidence. *Held*, that on appeal from the judgment, on the judgment roll, such instruction could be reviewed, though the record contained no evidence, since it was erroneous under any and every conceivable state of facts.

Appeal from district court, Silverbow county; William Clancy, Judge.

John J. Mason was convicted of robbery, and appeals. Reversed.

John W. Kirk, for appellant. C. B. Nolan, Atty. Gen., for the State.

WORD, J. On the 2d day of February, 1899, in the district court of Silverbow county, the defendant was found guilty of the crime of robbery, and thereafter was sentenced to the state prison for a term of 20 years. No motion for a new trial was made, nor does the record contain any bill of exceptions; and what evidence the record did contain, upon motion, has been stricken out. The appeal is from the judgment, on the judgment roll. It appears from the judgment roll that witnesses were called, and testimony was given in behalf of defendant.

The appellant complains of the following instruction, which it is agreed was given by the court below of its own motion: "The court instructs the jury that they are the sole

and exclusive judges of the evidence given in this case, and the weight of the evidence, and the character and appearance of the witnesses giving evidence on the witness stand, and also may consider the interest they have in the event of the case; and if, after so considering and weighing all such evidence and fully considering the same, may reject all or any such testimony, where it is not supported or corroborated by other worthy and credible evidence." Counsel for the state on the hearing of the cause admitted that the giving of the instruction was manifest error, but contended that under the rulings of this court, in the absence of all evidence from the record, error in giving or refusing instructions cannot be considered on appeal. It needs no critical examination to detect the error in this instruction of which appellant complains. In it the court, in effect, tells the jury that, no matter how relevant or competent or pertinent the testimony given in defendant's behalf may be,—no matter if they believe every word of it to be true,—they are at liberty to reject such testimony, unless it is supported or corroborated by other competent and credible evidence. This is not the law. The instruction complained of is clearly erroneous, and the presumption is that it was prejudicial to the defendant. It cannot be correct under any supposed state of facts, and so is wrong in the absence of all evidence, as it would be were the evidence before us.

With the record in this case in the condition stated above, the question is, can this instruction be reviewed? It is to be remembered that under section 2176 of the Penal Code "the written charges and instructions, with the indorsements showing the action of the court, form part of the record, and any error in the decision of the court thereon may be taken advantage of on appeal, in like manner as if presented in a bill of exceptions," and that section 2229, *Id.*, provides that the judgment roll in a criminal case shall include, among other things, "(3) the charges given or refused, and the indorsements thereon." Sections 2176, 2229, *supra*, are practically the same as sections 1176 and 1207 of the Penal Code of California, adopted in 1872. In the case of *People v. King*, 27 Cal. 507, 514, the court said: "It is proper, however, to add, in this connection, that in the absence of any statement or bill of exceptions embodying the evidence, or declaring its purport or tendency, so far as may be necessary to point the exception, we must presume in favor of the action of the court below, upon the principle that the party who alleges error must show it. This, however, must be taken with the qualification that, where the action of the court below is manifestly erroneous under any and every conceivable state of facts, this court will review it, notwithstanding the evidence may not have been brought up." *People v. Levison*, 16 Cal. 98, where the defendant was indicted for receiving stolen goods knowing them to be stolen,—a lending case, cited in *People v. King*, *supra*,—furnishes an illustra-

tion of the qualification above stated. The court below had charged the jury to this effect: "That a guilty knowledge on the part of the defendant is essential to the constitution of the offense. This may be shown either directly, by the evidence of the principal offender, or circumstantially, by proving that the defendant bought them very much under their value, or denied their being in his possession, or the like." The court, in reviewing this instruction, the giving of which was the only error assigned, say: "We understand that the court asserted, as a conclusion of law, that 'the purchase of goods at a great undervalue by defendant is sufficient proof of the knowledge by him that the goods were stolen.' This is not true. Besides, the charge makes a denial by the defendant that the goods were in his possession, whether the denial was truly made or not, proof, and sufficient proof, of the defendant's guilty knowledge. It also leaves the inference that the unsupported testimony of the thief is sufficient to establish the defendant's guilt. * * *

In this case the jury might well believe the court instructed them, that, if the defendant bought the goods much below their value, this was sufficient to convict him, or, if he denied that he had the goods, this was enough, or, if the thief swore he so received them, this was sufficient. It is true, there is no statement in this case. But, when the instructions are erroneous under any and every state of facts, then this court will review them. For it follows as necessarily in such a case that the court erred to the prejudice of the defendant, when there is no statement, as when one exists. If, however, the instructions may be correct under any supposed state of facts, as the appellant must show affirmative error, we presume in favor of the judgment below, and will not reverse the judgment when no statement appears." In the case of *People v. Dick*, 34 Cal. 663, for the giving of an instruction wrong under every conceivable state of facts, the court, upon the authority of the cases cited *supra*, granted a new trial. And in *Carpenter v. Ewing*, 76 Cal. 487, 488, 18 Pac. 432, the court again announces the rule as follows: "None of the evidence being brought up in the record, and there being nothing to show its purport or tendency, it will be presumed that it was such as to justify the instructions, and that they were properly given. The settled rule is that where the record contains no part of the evidence the judgment will not be disturbed on account of instructions alleged to be erroneous, unless it appears that such instructions would have been erroneous under every conceivable state of facts." In the following cases, among others, this qualification of the general rule is recognized and applied: *People v. Torres*, 38 Cal. 141; *People v. Padilla*, 42 Cal. 535; *People v. Donahue*, 45 Cal. 321; *People v. Brotherton*, 47 Cal. 388; *People v. Smith*, 57 Cal. 130; *People v. Gilbert*, 60 Cal. 108; *People v. Travers*, 88 Cal. 233, 26 Pac. 88; *People v. Donguli*, 92 Cal. 607, 609,

28 Pac. 782; *Thompson v. People*, 4 Neb. 531; *McKay v. Friebele*, 8 Fla. 21.

Counsel for the state, in support of his contention that, in the absence of all evidence from the record, errors in the giving or refusing of instructions cannot be considered on this appeal, cites the following cases: *Territory v. Bell*, 5 Mont. 562, 6 Pac. 60; *Gum v. Murray*, 6 Mont. 10, 9 Pac. 447; *State v. Gill*, 21 Mont. 151, 53 Pac. 184; and *State v. Gawith*, 19 Mont. 48, 47 Pac. 207. In *Territory v. Bell* the court very properly held that it was not possible to say whether the verdict was contrary to the law and the evidence, or whether the instructions given or refused were applicable or inapplicable to the evidence, since the evidence was not before the court. In *Gum v. Murray* it was held that the statement upon motion for a new trial could not be considered because of the absence of any motion, and of any notice of motion, for a new trial. The record did contain what purported to be an exception to all the instructions given by the court to the jury, for the reason that the same did not state the law applicable to the case and were calculated to mislead the jury. The court held that this exception was not a bill of exceptions, as contemplated by section 294, div. 1, Rev. St., and therefore was not a part of the judgment roll. In *State v. Gill* counsel for the defendant assigned as error the giving and the refusal of the court to give certain instructions set out in full in the opinion. In passing upon this alleged error the court say: "This action of the court is assigned as error. Whether such action of the court was erroneous or not depends necessarily upon what the evidence was. It is impossible for us to determine whether or not the court erred in this particular, without an examination of the evidence, and there is not a syllable of evidence in the record." It appears further from the opinion that the attorney general practically conceded in his argument that the evidence, if before the court, would show that the district court erred in giving and refusing the instructions complained of, and suggests that the proper course for the defendant to pursue was to appeal to the executive of the state. The court announced itself as in accord with this view, and concluded by saying that, "at any rate, the record is in such condition that we are unable to consider the error assigned in the giving and refusing of the instructions in question." In *State v. Gawith* the court held, for reasons stated in the opinion, that the bill of exceptions which contained the evidence could not be considered, and that the absence of all evidence from the record made it impossible for the court to review the alleged error of the lower court in refusing to instruct or advise the jury to acquit the defendant on the ground that the evidence was insufficient to warrant a conviction. Next, taking up the error alleged to have been committed by the court in instructing the jury, attention is called to the fact that

the ground designated in the notice of motion for a new trial in the case was that "the verdict was contrary to the law and evidence," and the court held that, so far as the motion pertained to the evidence, it must be disregarded at once, as the evidence in the case could not be considered. The question remaining in the case was this: Could the court review the instructions on an appeal from the judgment, or from an order denying a motion for a new trial, where the only designation of the ground upon which the motion for a new trial was made was that the verdict was contrary to law? In deciding this question the court seems to assume that a motion for a new trial is the only way to bring up for review errors committed by the court in instructing the jury, and that upon such a motion the instructions cannot be considered, where the sole ground of the motion is that the verdict is contrary to law. Nowhere in the opinion is it said that when an appeal is taken upon the judgment roll alone, without a statement or bill of exceptions, an instruction cannot be reviewed which is manifestly erroneous under any and every conceivable state of facts. And we do not find in the decisions of this court any adjudication upon this precise question, more especially since the adoption of our present Code. In the cases of *Barber v. Briscoe*, 8 Mont. 214, 19 Pac. 589, and *Kleinschmidt v. McDermott*, 12 Mont. 300, 30 Pac. 393, and in the concurring opinion of De Witt, J., in the latter case, the question now presented is referred to, but, not being raised, was not decided. It may be said that in the case of *State v. Gawith*, supra, the court must have passed upon the question. But, admitting this to be so, yet it is only inferentially, since the court nowhere in the opinion directs its attention to the consideration of the instructions, except in connection with the motion for a new trial. The case of *State v. Gawith*, supra, is overruled in so far as it is held therein that on an appeal from the judgment, in the absence of a statement or bill of exceptions, the instructions cannot be reviewed; and we approve of and follow the rule as announced in *People v. Levison*, supra, and the cases cited in support thereof. For the giving of this instruction complained of by appellant, which does not state the law, and which must be presumed to have been prejudicial to the defendant, the judgment is reversed, and the cause remanded for a new trial. Reversed and remanded.

BRANTLY, C. J., and PIGOTT, J., concur.

MONROE v. CANNON.

(Supreme Court of Montana. July 16, 1900.)
TRESPASS—UNFENCED PASTURE—HERDING OF ANIMALS.

Where defendant caused his sheep to be herded on what he knew to be plaintiff's pasture, though the same was unfenced, an action will lie for the value of the grass destroyed by

the sheep, notwithstanding Pol. Code, § 3258, providing that, if an animal break into any fenced inclosure, the owner of the animal shall be liable for damages sustained, since such statute, permitting recovery only where the land is fenced, applies to trespasses committed by animals running at large without the knowledge of the owner, and not to a case where one knowingly and willfully appropriates the use of another's land.

Appeal from district court, Lewis and Clarke county; S. H. McIntire, Judge.

Action by Burt Monroe against Henry Cannon. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This was an action in assumpsit, brought in the district court of Lewis and Clarke county by Burt Monroe, to recover of the defendant, Henry Cannon, the sum of \$600, alleged to be due plaintiff for pasturage, in that for about 10 days, ending on or about the 8th day of December, 1895, defendant herded and pastured his sheep, to the number of about 2,300, upon the land and pasture of plaintiff described in the complaint. The facts of the case, as shown by the pleadings and proof, were substantially as follows: At a time long prior to the bringing of this action, the appellant and his predecessors in interest inclosed by a fence something like 10 sections of land in Cascade county. Part of this land so inclosed belonged to appellant, and a portion thereof was a part of the public domain. To 120 acres of this public land so inclosed by appellant's fence the plaintiff acquired title. During the spring and summer of 1895, plaintiff built ditches to this land and irrigated it, and the testimony shows that, at the time the sheep of the appellant were driven and pastured thereon, this land of plaintiff had upon it about 60 tons of blue-joint grass, of the value of from four to five dollars per ton. While it is true that, at the time of the injury complained of, plaintiff's land was unfenced, yet it appears from the evidence that its boundaries were marked by post holes, by ditches, and by stakes placed at intervals along the exterior limits of the land. It further appears from the evidence that the band of sheep which were herded and pastured on plaintiff's land were at that time in charge of a herder in the employ of the appellant, and that the herder knew the boundaries of plaintiff's land, and admitted that he had been repeatedly asked, and finally had been ordered, by plaintiff's agents, to keep the sheep in his care off of and away from the premises of plaintiff. This the herder refused to do, saying that he had been told to herd upon plaintiff's land by one Morgan, foreman of defendant. The result was that the grass upon plaintiff's land was eaten up and destroyed. It further appears from the evidence that when the defendant, Cannon, was informed by plaintiff of the acts of his herder and of the damage done, the defendant approved of such acts on the ground that the land was unfenced. Trial was by jury. Verdict for

plaintiff for \$300. Defendant appeals from the judgment, and from the order denying his motion for a new trial.

M. Bullard, for appellant. Stranahan & Stranahan, for respondent.

WORD, J. (after stating the facts). Appellant concedes the respondent's ownership of the land, the appellant's ownership of the sheep, and the value of the pasturage. That respondent's land was unfenced is undisputed.

To appellant's objection that the complaint is insufficient, it is enough to say that the complaint contains all the averments necessary to the creation of a legal liability on the part of the appellant. It alleges ownership of the land in the respondent, ownership of the sheep in the appellant, the fact that they were herded and pastured on respondent's land during a stated period of time, and that such pasturage was worth the amount stated in the complaint. From these facts, if proved, the law creates an implied promise and a legal liability, although the appellant's cattle were wrongfully on the respondent's land. *De La Guerra v. Newhall*, 55 Cal. 21; *Fratt v. Clark*, 12 Cal. 89; *Roberts v. Evans*, 43 Cal. 380.

The main contention of appellant is that no action lies, and no damages can be recovered, for trespass by animals on unclosed lands; and in support of his position appellant cites the cases of *Smith v. Williams*, 2 Mont. 195, *Fant v. Lyman*, 9 Mont. 61, 22 Pac. 120, and many others of like tenor from other states. It is to be observed that most, if not all, of the decisions to which appellant directs our attention, rest upon statutory provisions the same as, or similar to, section 3258, Pol. Code, which is as follows: "If any cattle, horse, mule, ass, hog, sheep, or other domestic animal break into any inclosure, the fence being legal, as hereinbefore provided, the owner of such animal is liable for all damages to the owner or occupant of the inclosure which may be sustained thereby. This section must not be construed so as to require a legal fence in order to maintain an action for injury done by animals running at large contrary to law." The question now arises: To what extent have statutes like the one just cited limited the right of an owner, or of one in possession, of real property, to recover for trespasses committed upon it? "Every unwarrantable entry on another's soil the law entitles a trespass by breaking his close; the words of the writ of trespass commanding the defendant to show cause,—*Quare clausum querentis fregit*." For every man's land is, in the eye of the law, inclosed and set apart from his neighbors; and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such

entry or breach of a man's close carries necessarily along with it some damage or other; for if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz. the treading down and bruising his herbage." 3 Bl. Comm. 209. "A man is answerable for not only his own trespass, but that of his cattle also; for if, by his negligent keeping, they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbor's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages." Id. 211, 212. While admitting that such would be the rights of respondent under the common law, appellant contends that the provisions of section 3258, Pol. Code, which makes the owner of any animal named therein liable for all damage such animal may do by breaking into an inclosure surrounded by a legal fence, negative the right to sue for damages where the premises are not inclosed by a legal fence; and that, in order to maintain an action, it is necessary to allege and prove that the premises upon which the trespass was committed were inclosed by a lawful fence. If, in the case now under consideration, the damage sustained by respondent had resulted from trespasses committed by cattle or sheep, or other animals named in the statute, lawfully at large and not under the direction or control of their owner, then appellant's contention would be sound. But the evidence in this case presents a different question. Under the conditions disclosed by the record, what rights had respondent? If appellant is right in his contention, the respondent, although his grass had been destroyed by the deliberate act of appellant, was without remedy; silent acquiescence was all that was left to him. If appellant is correct, no man whose field, or pasture, or garden is not inclosed by a legal fence, is entitled to any protection under the law from the trespasses of any man who may desire to drive or herd his cattle or sheep upon it. If this is true in this case, it is true in any case where a man's land is not protected by a legal fence. Take the case of a field in cultivation, or of a garden adjacent to a home. It may be that the fence around each had for years served to keep all animals out, and yet was not as high or as strong as the law required. Can it be possible that any man is at liberty to tear down such a fence, drive his sheep or cattle within, that they may feed upon the contents, and escape all liability on the ground that no man has any right to complain of such injuries whose premises are not protected by a legal fence? Such, in our opinion, is not the law. And we are of opinion that under the evidence in this case the respondent's right to recover for the damage sustained by him is as clear as could be that of one whose fence had been torn down by another, and the fruits of his labor de-

stroyed. If a man has the right to drive his sheep or cattle upon the uninclosed land of another, and to pasture them there, against the will and wishes of the owner, it follows that he would have the right to go upon the same land, to mow the grass growing thereon, and appropriate it to his own use. The mistake appellant makes is in concluding that the statute providing for and defining a lawful fence, and giving damages for the trespass of certain animals upon premises inclosed by such a fence, does not modify, but abrogates, the rights existing under the common law.

Such was the contention in the case of *Harrison v. Adamson*, 76 Iowa, 338, 41 N. W. 34. In the opinion the court observed: "The allegations of the petition are to the effect that the defendant knowingly and willfully caused his cattle to be driven and kept upon plaintiff's land. Surely, the owner of uninclosed prairie land is not deprived of his rights in it by any statute of the state in regard to fences, or which authorizes another to use it for pasturage against the owner's will. If he may so use it, why may he not use it for cultivation? There is nothing to be found in the statutes of this state, or the decisions of this court, depriving the owner of uninclosed land of the profits of the grass and pasture thereon, and exempting one who, against his consent, appropriates the grass or pasture, from liability therefor to the owner. The laws of the state provide that trespass is not committed when cattle which are running at large enter upon uninclosed land. But it is quite a different thing when cattle not running at large, but in the charge and under the control of a herdsman, the employé and agent of their owner, are driven and kept upon uninclosed land against the will of the landowner, and with full knowledge of the owner of the cattle. In that case the trespasser takes and appropriates the use of the land for pasture, and is held by the law liable therefor. In the other case, where the cattle, being at large without the act or knowledge of the owner, go upon the land, the owner is not liable, for the reason that he committed no trespass, and has not knowingly appropriated the use of the land." A like contention as to the necessity of a fence, in order to give a right of action, was made in the case of *Powers v. Kindt*, 13 Kan. 74, an action of trespass to recover for injuries committed by defendant's cattle to growing crops of plaintiff. The court, in an opinion by Brewer, J., say: "It is insisted that, because the findings show that Kindt had no legal fence or inclosure around his premises, he was not entitled to recover. But the court also finds that Powers' cattle were driven and herded upon the premises of Kindt against his wishes and consent, and, while so driven and herded, destroyed the property as alleged; and, as a conclusion of law from the various facts found, that Powers was guilty of a wanton and willful want of care. This brings the case within the

rule laid down in *Larkin v. Taylor*, 5 Kan. 433, 448. It is claimed that because the plaintiffs in error employed herders to watch their cattle, and keep them off from other parties' crops and premises, they could not be liable where they would not have been liable if they had simply turned them loose, and they had roamed upon Kindt's premises, and done the damage complained of. This ignores the fact that the court finds that these cattle were driven and herded upon Kindt's premises, which brings in the element of gross negligence or wanton and willful want of care." The case of *Lazarus v. Phelps*, 152 U. S. 81, 14 Sup. Ct. 477, 38 L. Ed. 303, an appeal from the circuit court for the Northern district of Texas, was much like the one now under consideration. The defendant in that action (as did the defendant in this) requested the court to charge that "the law is that the owner of stock is not required to keep them in an inclosure, or to prevent them from ranging on the land of others, and that the owner of land trespassed upon by cattle cannot recover from the owner of the cattle damages for the trespass, unless his land is fenced"; and, further, "that to entitle the plaintiff to recover in this suit you must believe from the evidence that the plaintiff's lands were fenced from those leased by defendant. If there was a common inclosure around the lands of plaintiff and those leased by defendant, and no fence separating such lands, then the plaintiff cannot recover." The court, in its opinion in the case, said: "The object of the statute [requiring the fencing of lands] is manifest. As there are, or were, in the state of Texas, as well as in the newer states of the West generally, vast areas of land over which, so long as the government owned them, cattle had been permitted to roam at will for pasturage, it was not thought proper, as the land was gradually taken up by individual proprietors, to change the custom of the country in that particular, and oblige cattle owners to incur the heavy expense of fencing their lands, or be held as trespassers by reason of their cattle accidentally straying upon the land of others. It could never have been intended, however, to authorize cattle owners deliberately to take possession of such lands, and depasture their cattle upon them, without making compensation, particularly if this were done against the will of the owner, or under such circumstances as to show a deliberate intent to obtain the benefit of another's pasturage. In other words, the trespass authorized, or rather condoned, was an accidental trespass caused by straying cattle. If, for example, a cattle owner, knowing that the proprietor of certain lands had been in the habit of leasing his lands for pasturage, should deliberately drive his cattle upon such lands in order that they might feed there, it would scarcely be claimed that he would not be bound to pay a reasonable rental. So, if he lease a section of land, adjoining an uninclosed section of another, and stock his own section

with a greater number of cattle than it could properly support, so that, in order to obtain the proper amount of grass, they would be forced to stray over upon the adjoining section, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance. The ordinary rule that a man is bound to contemplate the natural and probable consequences of his own act would apply in such case,"—citing the following cases: *Cattle Co. v. Vaught*, 1 Tex. Civ. App. 388, 890, 20 S. W. 855; *Kerwhaker v. Railroad Co.*, 3 Ohio St. 172; *Railway Co. v. Rollins*, 5 Kan. 167, 177; *Larkin v. Taylor*, Id. 433; *Delaney v. Erickson*, 11 Neb. 533, 10 N. W. 451; *Otis v. Morgan*, 61 Iowa, 712, 17 N. W. 104; *Willard v. Mathesus*, 7 Colo. 76, 1 Pac. 690; to which may be added *Erbes v. Wehmeyer*, 69 Iowa, 85, 28 N. W. 447; *Bedden v. Clark*, 76 Ill. 338; and *Norton v. Young*, 6 Colo. App. 187, 40 Pac. 156. A number of the cases cited by appellant refer to the distinction pointed out in *Lazarus v. Phelps*, supra, and recognize the rule there laid down. See *Nuckolls v. Gant* (Colo.) 21 Pac. 41; *Walker v. Bloomingcamp* (Or.) 43 Pac. 175; *Chase v. Chase*, 15 Nev. 250, 268; *Larkin v. Taylor*, 5 Kan. 434; *Bileu v. Paisley* (Or.) 21 Pac. 934. The case of *Smith v. Williams*, 2 Mont. 195, is not at variance with the views herein expressed. That was an action in the nature of trespass to recover damages alleged to have been suffered by reason of the cattle of defendant breaking into the inclosure of plaintiff and destroying his grain. The evidence in the case was not properly before the court, and was not considered. Upon the theory that the cattle were lawfully at large, and were not driven or herded upon the premises of plaintiff by defendant, the ruling of the court in this case can be upheld. The case of *Fant v. Lyman*, 9 Mont. 61, 22 Pac. 120, seems to conflict with the views of the court in the present case. We find, however, that the court in that case used the following language: "Section 1119 of the fifth division of the Compiled Statutes subjects the owners of animals to liabilities for any damage done by them by breaking into the lands of another inclosed by a lawful fence. This section negatives the liability of the owner when animals lawfully at large, as in this instance, stray on uninclosed lands in quest of food or pasturage." If the facts in the case were as indicated in that part of the opinion just given, then *Fant v. Lyman*, supra, is in accord with the conclusions reached herein.

In the case before us, the complaint was amended so as to charge that the defendant "willfully and maliciously" herded and pastured his sheep upon plaintiff's land. While there was enough evidence of willfulness and malice on the part of the defendant to go to the jury, yet exemplary damages were not asked, and it is admitted that a verdict for the actual damages only was returned. We may say, further, that the action being in contract, the tort having been waived, the

original complaint was sufficient, and the amendment made thereto unnecessary. The judgment and order appealed from are accordingly affirmed. Affirmed.

BRANTLY, C. J., and PIGOTT, J., concur.

GROVES et al. v. GROVES et al.

(Supreme Court of Wyoming. Aug. 1, 1900.)
APPEAL AND ERROR—BILL OF EXCEPTIONS—
EVIDENCE—REVIEW—MOTION FOR
NEW TRIAL.

1. A finding of the trial court based on evidence taken at the hearing will not be reviewed when the bill of exceptions does not contain the evidence.

2. Affidavits and an agreed statement as to certain facts, attached to a petition in error, but not embraced in the bill of exceptions, are not a part of the record, and cannot be considered on appeal.

3. Where the bill of exceptions does not show that a motion for a new trial was filed or that it was overruled, or that an exception was reserved at the time to such ruling, such motion cannot be considered on appeal, though the petition in error states that a motion for a new trial was filed, and refers to a paper annexed to it as an exhibit as such motion which is certified to by the clerk of the court as the motion for a new trial.

Error to district court, Converse county; Richard H. Scott, Judge.

Elizabeth Lashley and John Groves contested the right of Emma Groves to the estate of her deceased husband, Samuel D. Groves. From an order awarding the estate to the widow, contestants bring error. Dismissed.

W. F. Mecum, for plaintiffs in error.
Charles F. Maurer and Burke & Fowler, for defendants in error.

POTTER, C. J. Defendants in error move to dismiss the proceedings in error herein. The grounds of the motion are that there is no petition in error, no transcript of the record, and no proper bill of exceptions; that the motion for a new trial is not incorporated in a bill of exceptions; and that the purported bill of exceptions does not show that it contains all the evidence.

We do not think that the objection that there is no petition in error is well taken. The petition recites the various proceedings had in the cause anterior to the judgment complained of. While it was unnecessary for the petition in error to rehearse those matters, they can be treated as surplusage. It sets forth the final order complained of, and assigns the same as error on the grounds that it is not in accordance with the facts or law, and assigns as error the overruling of a motion for a new trial.

Upon the ground that the evidence and the motion for a new trial are not embraced in a bill of exceptions, the motion must be sustained. Plaintiffs in error seek the review and reversal of an order made January 9, 1900, adjudging that Emma Groves, one of the defendants in error, is entitled to the

whole of the estate in Wyoming of her deceased husband, Samuel D. Groves. It seems that the right of the widow to the estate was contested by Elizabeth Lashley and John Groves, sister and brother, respectively, of the deceased. The contest was made and the order or judgment entered in the proceedings in probate for the settlement of the estate of said decedent. From the final order, it appears that the matter of the contest was heard upon the petitions of the widow and administrator, and the answers of John Groves and Elizabeth Lashley. The court found that the estate within the state of Wyoming, and subject to the jurisdiction of the court, did not exceed in value the sum of \$10,000; and the whole thereof, left in the hands of the administrator, was awarded to the widow, pursuant to the provisions of section 4858, Rev. St. Inconsistency between the findings and judgment is not charged, but the complaint is that the judgment is not supported by the law or the facts. The objections urged by counsel for plaintiffs in error in their brief all relate to the finding of the court as to the value of the estate. That finding is embraced in the order complained of, which shows that a hearing was had upon evidence. The evidence is not preserved by bill of exceptions,—the only method provided by law for preserving it for consideration on error. There is a paper attached to the petition in error called a "bill of exceptions," but it contains none of the evidence, although upon its face it shows that there was evidence given at the hearing. An attempt is made to bring up the evidence in another manner. Several affidavits, and a stipulation as to certain facts, and permitting the use of the affidavits instead of depositions, are attached to the petition in error as exhibits; and we understand from the petition in error that it is intended to allege that they were used upon the hearing in the court below, but it is not stated anywhere in any of the papers that the transcript embraces all the evidence. But the evidence cannot be preserved for consideration on error in any such manner. The affidavits and agreed statement as to certain facts do not belong in the record proper, and, to become part of the record, must be embraced in a bill of exceptions. No motion for a new trial is embraced in the bill of exceptions, nor does the bill refer to such a motion in any way. The petition in error states that a motion for a new trial was filed and overruled, and refers to a paper annexed to it as an exhibit as the motion so filed, and the paper is certified to by the clerk of court as the motion for a new trial. Under oft-repeated decisions of this court, and its rules of long standing, a motion for a new trial, to be of any avail on error, must be embraced in, and the exceptions based thereon preserved by, a bill of exceptions. If the motion be not contained in the bill, the effect in this court is the same as if no motion had been made.

The motion to dismiss must, therefore, be

sustained—First, because the bill of exceptions does not contain the evidence given at the hearing in the court below, and, in the absence of a bill containing all the evidence, the petition in error presents no question which we can consider; second, because nothing is presented which could not have been properly assigned as ground for a new trial, and it does not appear by the bill of exceptions that a motion for new trial was filed, or that it was overruled, or that an exception was at the time reserved to such ruling, and none of these matters are embraced in the bill. Dismissed.

CORN and KNIGHT, JJ., concur.

BLILER v. BOSWELL.

(Supreme Court of Wyoming. July 16, 1900.)

On petition for rehearing. Denied.

For former opinion, see 59 Pac. 798.

POTTER, C. J. The defendant in error applies for a rehearing in this case. But one point is urged, viz. that the court wrongfully held the cause of action to have arisen in Colorado, instead of Wyoming, within the meaning of section 3464, Rev. St., which provides that, "if by the laws of the state or country where the cause of action arose the action is barred, it is also barred in this state." Counsel erroneously assumes that our decision goes to the extent of holding that in all cases a cause of action, within the meaning of that section, arises where the debtor resides at the time when an action can first be brought; and it is argued that such a construction would take many cases out of the provisions of section 3463, which stays the operation of the statute during the concealment or absence from the state of the debtor, and cause them to fall within the provisions of section 3464, and thus unjustly prevent a recovery. But the decision was based upon the peculiar facts of this case, which are that although the notes were dated at a place within this state, and were conceded to have been executed within the state, neither of the parties then or at any time subsequently resided here; but both maker and payee were at the time of the execution of the notes residents of Colorado, and both of them continued to reside there until the maturity of the notes and for a long time afterwards, and neither of them at any time became a resident of Wyoming. Under those circumstances, and upon those facts, we held that the cause of action arose in Colorado, and it was not intended that our decision should go further than that. Whatever may be the proper construction of our statutes upon facts differing from those in the case at bar need not be considered or decided at this time. We are satisfied with the conclusion already announced, as founded upon the facts of the case, and believe them to be sound

upon principle and sustained by authority. As now explained, it is hardly possible that the decision will be misapprehended. Rehearing denied.

CORN and KNIGHT, JJ., concur.

(9 Kan. App. 339)

KANSAS STATE BANK v. FIRST STATE BANK et al.

(Court of Appeals of Kansas, Southern Department, W. D. July 30, 1900.)

INSOLVENCY—TRUST FUND.

The case of Insurance Co. v. Caldwell, 52 Pac. 440, 59 Kan. 156, cited and followed.

(Syllabus by the Court.)

Error from district court, Marion county; O. L. Moore, Judge.

Proceedings by the Kansas State Bank against the First State Bank and others. Judgment for defendants, and plaintiff brings error. Affirmed.

W. H. Carpenter, for plaintiff in error. King & Kelley, for defendants in error.

DENNISON, P. J. This proceeding is commenced in this court to procure a reversal of the judgment of the district court of Marion county, Kan., in refusing to direct the receiver of the First State Bank of Marion, Kan., to pay to the plaintiff in error its claim against said First State Bank as a trust fund. The plaintiff in error was the owner of a check for \$1,400 drawn by H. M. Thorp upon the Bank of Commerce, payable to the order of J. H. Winkley, and indorsed to said Kansas State Bank of Peabody, Kan. The check was sent by the plaintiff in error, through its Kansas City agent, the Citizens' National Bank of Kansas City, Mo., to the First State Bank of Marion, Kan., for collection. The said First State Bank presented said check to the Bank of Commerce, and accepted as payment therefor its cashier's check given the day before for checks drawn upon it, and for the checks that day drawn upon it and paid by said Bank of Commerce. Said First State Bank failed to make a remittance of the amount of money called for by the \$1,400 check, and shortly after was closed by the state bank commissioner, and S. Burkholder was appointed receiver of said bank. The main question for our consideration is whether the proceeds of the check became a trust fund, and passed into the hands of said receiver impressed with the trust. The First State Bank received the check for collection, and it was clearly its duty to present the check to the Bank of Commerce and demand the payment thereof, and, if payment had been made, to remit the amount to the Kansas City Bank, and, if payment had been refused, to protest the same for nonpayment. The relation between the parties was that of principal and agent, and not of debtor and creditor. Neither the Kansas State Bank nor the Kansas City Bank willingly became the creditor of the First State Bank. The First

State Bank wrongfully paid its own debts with the check, instead of demanding the money. Applying the doctrine laid down in *Peak v. Ellicott*, 30 Kan. 156, 1 Pac. 499, *Myers v. Board of Education*, 51 Kan. 87, 32 Pac. 658, and *Hubbard v. Manufacturing Co.*, 53 Kan. 637, 36 Pac. 1053, 37 Pac. 625, the estate is liable for the payment of this claim as a trust for the reason that the trust fund "had been mingled with the general funds of the bank, and used in the ordinary course of its business and the payment of its debts." However, if we consider the judgment of the trial court as a finding of all the facts in favor of the defendants in error, then there is a finding that the check was used in the payment of debts, and that the estate which went into the hands of the receiver was not bettered or augmented thereby. Applying the doctrine laid down in *Insurance Co. v. Caldwell*, 50 Kan. 156, 52 Pac. 440, to the facts in this case as shown by the above finding, we must hold that the estate is not liable for the payment of the trust fund. It is there said: "The mere saving of the estate by the discharge of general indebtedness otherwise payable out of it, or by the payment of the current expenses of the business, is not an augmentation or betterment of the estate, within the meaning of the rule. If the estate has not been increased by specific additions to it, or if what previously existed has not been improved or rendered more valuable, it has not been impressed with the trust claimed." The judgment of the district court is affirmed.

LAWTON et al. v. EAGLE et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

APPEAL AND ERROR—WRIT OF ERROR—DISMISSAL—DEFECT OF PARTIES—RECORD—CONTENTS—SUFFICIENCY.

1. Under Gen. St. 1897, c. 95, § 228, providing that any number of garnishees may be embraced in the same affidavit and summons, but, if a joint liability is claimed against any, it shall be so stated in the affidavit, otherwise the several garnishees shall be deemed severally proceeded against, where five parties were summoned as garnishees, and on judgment in their favor a petition in error was filed against three of them, and the record did not contain the garnishment affidavit, or show whether they were proceeded against jointly or severally, a motion to dismiss the petition in error for defect of parties will not be considered, since it is impossible to tell from the record whether the garnishees omitted were necessary parties to the petition in error.

2. Where a petition in error did not contain the pleadings or the evidence introduced at the trial, nor a substantial statement of the same, assignments of error for overruling a motion for a new trial on the ground of errors of law occurring at the trial, and because the order and judgment were not supported by sufficient evidence, will not be considered, since it is impossible to tell from the record whether such errors were made.

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Lyndon C. Lawton and Richard

C. Hall, partners as the Duck Brand Company, against George M. Eagle and C. E. Curry, partners as Eagle & Curry, in which Cornelia H. Curry and others were summoned as garnishees. Issues were joined on the answers of the garnishees, and from a judgment in their favor, and an order denying a new trial, plaintiffs bring error. Affirmed.

W. H. Cowles, for plaintiffs in error. J. A. Rosen and Isenhardt & Alexander, for defendants in error.

PER CURIAM. Lyndon C. Lawton and Richard C. Hall, partners doing business in the name of Duck Brand Company, on December 14, 1897, brought an action in the district court of Shawnee county against George M. Eagle and C. E. Curry, partners as Eagle & Curry, on an account for goods sold and delivered. At the same time plaintiffs filed their affidavit for garnishment proceedings against Cornelia H. Curry, Margaret Harding, John M. Cleveland, the First National Bank of Topeka, and Edwin Lange, claiming that they had in their possession property belonging to the defendants Eagle & Curry. The parties in the garnishment proceedings filed separate answers. The answers of Cornelia H. Curry, Margaret Harding, and John Cleveland were unsatisfactory, and plaintiffs served notice that they desired to take issue upon the same. Afterwards on May 17, 1898, judgment was rendered for plaintiffs against Eagle & Curry for \$435.60. On June 6, 1898, a hearing was had upon the issues joined upon the answer of the garnishees last named. The plaintiffs introduced their evidence and rested. The garnishee defendants demurred to plaintiffs' evidence. Upon consideration the court sustained the demurrer to the evidence as to the garnishees Cornelia H. Curry and Margaret Harding, and the same was overruled as to Cleveland. Thereafter Cleveland offered his testimony and rested. The court found the issues in favor of Cleveland, and rendered judgment accordingly. The plaintiffs filed their motions for a new trial. The motions are not set out. The record states, however, that they were on the grounds of "(1) errors of law occurring at the trial; (2) the order and judgment are not sustained by sufficient evidence, and are contrary to law." The plaintiffs, as plaintiffs in error, prepared their case-made, and present the same to this court for review. The defendants in error object to the sufficiency of the record, and move to dismiss the petition in error upon various grounds,—among others, that there is a defect of parties.

In the original proceeding there were five parties proceeded against as garnishees. There are only three of them here in court. The First National Bank and Edwin Lange are not made parties. If the proceeding in garnishment was a joint proceeding, these parties are necessary parties. The record fails to show whether they were proceeded against as joint or several parties. The affi-

davit for garnishment is not set out in the record, nor are the answers. Under section 228, c. 95, Gen. St. 1897, it is provided "that any number of garnishees may be embraced in the same affidavit, and summons hereinafter provided for; but if a joint liability be claimed against any it shall be so stated in such affidavit, and the garnishee named as jointly liable shall be deemed jointly proceeded against, otherwise the several garnishees shall be deemed severally proceeded against." We are therefore unable to determine whether the First National Bank and Edwin Lange are necessary parties to the proceedings in this court or not.

The only assignment of error set out in the petition in error is that the court erred in overruling the motion for a new trial. The only questions, therefore, which could be presented for consideration, upon the record, are (1) error of law occurring at the trial; (2) that the order and judgment are not supported by sufficient evidence and are contrary to law. The record does not contain the pleadings, proceedings, nor the evidence taken upon the trial, nor a substantial statement as to what were all the pleadings, proceedings, or evidence. We are therefore unable to determine, as contended for by plaintiffs in error, from the record as presented to this court, that any errors of law prejudicial to plaintiffs in error were committed during the trial of the case, or as to whether the order and judgment are supported by sufficient evidence. And, further, as to what proceedings were had on the hearing of the motions for a new trial, we are not informed, other than that the motions were duly heard and overruled. The evidence offered thereon, if any, is not preserved. We are unable to say that the court erred in overruling the motion for a new trial. The judgment is affirmed.

(10 Kan.App. 38)

KNIGHT v. RHOADES et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

ATTACHMENT—SALE—RIGHTS OF ADVERSE CLAIMANT.

In an action to recover money, wherein attachment is levied on land, and after judgment and sale of the land, the district court has jurisdiction, under section 532 of the Code (Gen. St. 1889), to entertain a motion by a stranger to the suit, holding title to such land, to release the land from the levy and set aside the sale.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by W. W. Knight against J. H. Rhoades. Verdict for plaintiff. Order of sale under execution, and Mary A. Rhoades and Fred Koehr intervened. Judgment for interveners, and plaintiff brings error. Affirmed.

Valentine, Godard & Valentine, for plaintiff in error. Fred C. Slater, for defendants in error.

MAHAN, P. J. This is a proceeding in error to reverse an order discharging certain land from the lien of a levy under a writ of attachment. The attachment issued at the suit of the plaintiff in error, Knight, against J. R. Rhoades. There was service by publication against him, and a finding of the amount due, with an order to sell the attached property. An order of sale was issued to the sheriff of Shawnee county, and pending the proceedings under that order Mary A. Rhoades and Fred Koehr came into the case by motion to discharge the levy of the defendant as to this land for the reason that Mary A. Rhoades was the owner, and Fred Koehr her mortgagee. The motions were that the lien of the attachment be discharged, and a sale which had been made under the order issued to the sheriff should be set aside. The motions were sustained, and the land discharged from the attachment lien, and the sale under the order set aside.

It is contended that the court had no jurisdiction to entertain this motion after the judgment in the case, and in support of this contention is cited section 228 of the Code. This section applies exclusively to the defendant. Upon the authority of *White-Crow v. White-Wing*, 3 Kan. 276, *Harrison v. Andrews*, 18 Kan. 535, and *Long v. Murphy*, 27 Kan. 375, we hold that section 532 of the Code authorizes the action of the court in this case. This was an application for an order, addressed to the court by one interested in the subject-matter, and affected by the proceedings in the case. Surely, if this is sufficient authority to justify a district court in entertaining a motion to vacate the levy of an execution upon land, it is sufficient to confer jurisdiction upon the court in this case. As decided by the cases above referred to, the order is not conclusive upon the rights of the parties, and entertaining the motion rested largely in the discretion of the court. We are of the opinion that the court did not abuse its discretion herein. If it should be ultimately decided, in a suit brought for the purpose of determining the right of the creditor to appropriate the land to the payment of his judgment, that he had no such right, it would be doing the defendant in error Mary A. Rhoades a great injustice not to hear her upon this motion. Nor does it harm the plaintiff in error, nor prejudice him in any manner, should he wish to prosecute such a suit. The legal title to the land is in Mary A. Rhoades.

It is next contended that inasmuch as the deed to Mary A. Rhoades was first drawn and delivered to the husband, J. H. Rhoades, and after delivery his name stricken out as grantee, and the name of Mary A. Rhoades inserted therein, the title is in fact in J. H. Rhoades; that the deed has no vitality as a conveyance to Mrs. Rhoades. The fact as to whether it was first made and delivered to J. H. Rhoades, or whether the change was made by arrangement of the grantor with the grantee before delivery, was one of the questions presented to the district court under the

motion. Upon the evidence, he must have held to the latter conclusion. There is evidence in the record to sustain this finding. This is not denied by the plaintiff in error. The rule that this court will not review the evidence to determine its weight, if it is conflicting, applies to this class of cases as well as to trials upon issues made under pleadings in a case. The judgment is affirmed.

SHEPARD v. DOTY et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

APPEAL AND ERROR—CASE-MADE—NOTICE—SERVICE—SUFFICIENCY.

Where plaintiff sued several defendants for specific performance against each of them of a contract executed by them, and, on judgment for defendants, failed to give a part of them notice of the presenting and settling of a case-made, and did not serve the case-made on all the defendants, the petition in error will be dismissed.

Error from district court, Wahaunsee county; William Thomson, Judge.

Action by D. S. Shepard against Patience Doty and others. From a judgment in favor of defendants, plaintiff brings error. Motion by defendants to dismiss the petition in error. Motion sustained.

Case & Case and Waters & Waters, for plaintiff in error. J. T. Pringle, for defendants in error.

PER CURIAM. This is an action by the plaintiff in error against the defendants in error, and other parties to the suit, to compel a specific performance of a contract concerning real estate, and for an injunction pending the suit to restrain the defendants from disposing of the property in violation of the terms of the contract, and in such a manner as to prevent the plaintiff from deriving all the benefits to accrue to her under the conditions thereof. At the beginning of the suit a temporary injunction was allowed. The defendants in error Patience Doty, Abner Doty, M. R. Doty, and William True moved a dissolution of the injunction upon the ground that the petition did not state facts sufficient to constitute a cause of action against them. At the same time they filed verified answers denying the allegations of the petition, and pleading a former adjudication of the rights of the parties under the contract. The motion to dissolve the injunction was heard and sustained. At the same time a motion for judgment for these defendants upon the pleadings filed was presented and sustained, and judgment rendered against the plaintiff and in favor of all the defendants for costs. Time was, on application of the plaintiff, given her to make and serve a case-made. A case-made was prepared and served upon Patience Doty, Abner Doty, M. R. Doty, and William True. This case-made is the record upon which the petition in error is based. The contentions are that the court erred in holding that the

petition did not contain facts sufficient to constitute a cause of action against the defendants, and for that reason dissolving the temporary injunction; and, second, that the court erred in awarding judgment upon the pleadings to the defendants.

The defendants in error Patience Doty, Abner Doty, M. R. Doty, and William True move the court to dismiss the petition in error upon four grounds: First, that the case-made does not contain a sufficient statement of the proceedings to present the errors complained of; second, that no notice of the presenting and settling of the case to some of the defendants who are necessary parties to this petition in error was given; third, that the case-made itself was not served upon some of the defendants who were necessary parties to a review of the judgment; fourth, that there was a final judgment in the cause before the plaintiff filed her petition to review the order dissolving the injunction. This fourth ground assumes that the plaintiff in error is seeking alone to reverse the order dissolving the temporary injunction. In this they are mistaken. The petition in error seeks to have reviewed not only this order, but the final judgment in the cause. There is sufficient in the case-made to enable the court to review the questions presented by the assignments of error in the petition. The defendants who were not served with a case-made, and who were not notified of the time it would be presented for settlement, are necessary parties defendant in error to give this court jurisdiction to review the order and judgment. A specific performance is sought against each of the defendants. They are all parties to the contract. No decree could be rendered in the case upon the petition that would not materially affect their rights and interest in the land, as appears by the allegations of the petition itself. We are compelled to sustain the motion to dismiss upon the second and third grounds.

(10 Kan.App. 56)

NORTH AMERICAN RY. CONST. CO. v. PATRY.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

SEPARATE TRIAL—DISCRETION OF COURT—ACTION FOR NEGLIGENCE—INJURY TO EMPLOYEE.

1. Section 268 of the Code of 1889, providing for a separate trial between the plaintiff and any one or all of the several defendants, is permissive, and not mandatory. It is entirely within the discretion of the trial court to allow or refuse a severance; and the action of the court in that regard will not be reversed unless it clearly appears that the court abused its discretion.

2. Where P. brings an action against R. C. and C. C. for personal injuries alleged to have been caused by the concurrent wrongful acts, negligence, and carelessness of the defendants, the action is joint and several; the defendant C. C. has no just cause of complaint that the court sustained the demurrer of R. C. to the evidence.

3. An employer, in every instance, is under

legal obligation to use ordinary care to prevent injury to its employes while engaged in extra-hazardous work.

(Syllabus by the Court.)

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by George Patry against the North American Railway Construction Company and the Metropolitan Street-Railway Company. Demurrer to the evidence by the railway company was sustained. Verdict for plaintiff against the construction company, and it brings error. Affirmed.

This action was brought in the trial court by George Patry, as plaintiff, against the North American Railway Construction Company, a corporation, and the Metropolitan Street-Railway Company, a corporation, for damages sustained on account of personal injuries. The defendants each filed separate answers. The North American Railway Construction Company answered: (1) A general denial; (2) contributory negligence; (3) that the plaintiff assumed, as one of the incidents of the service, whatever risk there was incident to the performance of his duties; (4) that the accident which caused the injury was due to the act of a fellow servant. The Metropolitan Street-Railway Company answered: (1) A general denial; (2) contributory negligence; (3) that, if the plaintiff received any injury, such injury was caused by the carelessness and negligence of plaintiff's co-employees. The plaintiff's reply to each of the answers was a general denial. The case was called for trial on March 16, 1899, at which time, before the jury was impaneled, the Metropolitan Street-Railway Company requested that a severance of the cases be granted as between the two defendants; that defendant railway company be granted a separate trial, for the reason that the acts of negligence charged against it are not the same acts as charged against the defendant construction company; because the interests of the two defendants are not identical, but are opposite; because it would be prejudicial to the rights of the railway company to try the case in conjunction with its co-defendant; and that, under the pleadings, the railway company should have a separate trial. This request was refused. The construction company also made a similar request on the same grounds, which was refused. The defendants excepted to the ruling of the court. A jury was impaneled. The plaintiff, in his opening statement to the jury, read the petition as a part of his statement. At the conclusion of this statement, the construction company objected to the introduction of any evidence under the petition, for the reason that plaintiff's statement shows that it was absolutely necessary to start the wagon; that the wagon barely left the track in time to escape being struck; that the injury was caused by the negligence of the railway company, and not by the construction company. The objection was overruled, and the defendant excepted. At the

conclusion of the evidence, the railway company interposed a demurrer, which was sustained, and judgment was rendered in its favor. Thereafter the plaintiff introduced additional evidence and rested, whereupon the construction company demurred, which demurrer was overruled. The trial proceeded, and a verdict was returned for plaintiff below, upon which judgment was rendered. The defendant construction company, as plaintiff in error, presents the record to this court, asks a reversal of the judgment, and assigns error in the proceedings of the trial court, as follows: (1) In refusing the defendant a separate trial; (2) in sustaining the railway company's demurrer to the evidence; (3) in overruling the defendant's objection to the introduction of any evidence; (4) in excluding evidence offered by the defendant; (5) in overruling the defendant's demurrer to the evidence; (6) in refusing instructions asked by defendant; (7) in instructing the jury; (8) in refusing to permit counsel for defendant to comment on the allegations of the petition; (9) in refusing to permit defendant's attorney to read to the jury plaintiff's amended petition, and comment thereon; (10) in overruling defendant's motion for a new trial.

Amos H. Kagy and Hutchings & Keplinger, for plaintiff in error. Alden, McFadden & Alden, for defendant in error.

McELROY, J. (after stating the facts). That the court erred in refusing the plaintiff in error a separate trial: Section 268 of the Code of 1889 provides: "A separate trial between the plaintiff and any one or all of the several defendants may be allowed by the court wherever justice will thereby be promoted." An examination of the pleadings and record in the case at bar leads us to the conclusion that this case was one in which it would have been perfectly proper for the court to have granted the request for a severance and separate trial. However, the language of the statute in question is permissive, and not mandatory. We think it is a matter entirely within the discretion of the trial court to allow a severance, when, in its judgment, it will result in the promotion of justice. The court committed no reversible error in denying the request for a separate trial.

That the court erred in sustaining the demurrer of the Metropolitan Company: The plaintiff, under the allegations of his petition, had a right to proceed against either of the defendants separately, or against them jointly. We are unable to understand how the action of the court in sustaining the demurrer of the railway company could directly concern the construction company. The case against the latter must succeed or fall upon the merits of the case as presented to the court and jury. If the pleadings, evidence, and the law authorize a recovery as against it, such recovery was inevitable, and would accrue to the plaintiff. This contention is argued by the plaintiff in error upon the presumption that this court must assume that

the jury, when the railway company was out of the case, acted under the influence of prejudice and passion. No such presumption would necessarily follow. The defense of each defendant was separate, individual, and independent, and in no manner dependent upon that of the other co-defendant. The defense of the construction company was not in any manner dependent upon the defense or rights of its co-defendant. The plaintiff was, under the law and the instructions of the court, required, before he could recover, to establish his case to the satisfaction of the jury, by a preponderance of the evidence. The action of the court in this regard is not a matter of which plaintiff in error can complain as a matter of right.

That the court erred in overruling the plaintiff in error's objection to the introduction of evidence and demurrer to the evidence: The plaintiff's petition stated a cause of action against the construction company: at least, there is no fatal omission pointed out. Under the testimony offered by plaintiff at the trial, he made a *prima facie* showing for a recovery. The objection to the introduction of any evidence, and the demurrer thereto, were properly overruled.

That the court erred in rejecting competent testimony offered by defendant upon the trial: The contention here is that certain questions propounded to various witnesses should have been answered, as tending to show it was the rule and custom for the driver not to start the team until notified by the men on the tower wagon. Such rule or custom could not, in any event, answer the charges of negligence or carelessness alleged in the petition or shown by the evidence. We think the court properly excluded the testimony.

That the court erred in refusing instructions asked by the plaintiff in error (defendant below): These instructions were drawn and requested upon the theory of the defendant that it could not be said, as a matter of law, that the construction company was under any legal obligation to use any precaution whatever to prevent the railway company from running its cars against the tower wagon upon which plaintiff was working. Whatever may have been the obligation of the railway company, the defendant construction company was also in every instance under obligations to use ordinary care to prevent injury to its employes while engaged in an extrahazardous work. The plaintiff was required in his employment to stand upon a tower wagon upon the track of the railway company, about 20 feet high, while performing his work. The construction company, in whose employ he was performing these services, was certainly under obligation to use ordinary care in protecting him from injury. The tower wagon, at least, should have been protected, so that it would not have become necessary to remove the same while he was occupied in his work, without notice or warning. The railway company was using its track,

and the tower wagon had to be removed every few minutes to allow the cars to pass. The plaintiff, if he had given attention to the movement of the cars, could have accomplished little, if any, service for his principal. It was evident, from the very nature of his work, that the plaintiff was not expected to keep a lookout for the movement of the tower wagon. These instructions were properly refused.

That the court erred in instructing the jury: Herein complaint is made particularly as to the ninth and tenth instructions submitted by the court. These instructions were not necessarily misleading, in view of the completeness of the instructions as a whole.

The next two assignments of error are based upon the same ruling of the trial court,—that the court erred in refusing to permit counsel, in his argument to the jury, to comment upon the allegations of the petition; that is, all that portion of the petition which sets forth the averments of plaintiff as against the railway company: After the demurrer of that defendant was sustained, it was out of the case; the averments and allegations of the petition, as against it, would certainly be immaterial in the determination of the rights of the other parties. The pleadings are not part of the evidence, unless offered and introduced as any other matters are brought before the court and jury. The court committed no error in this respect.

There is nothing presented in the argument as to the overruling of the defendant's motion for a new trial, except what has already been noted. The motion for a new trial was therefore properly overruled. The judgment must be affirmed.

AMERICAN BONDING & TRUST CO. OF BALTIMORE, MD., v. SCOTT.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

CONTRACT—BREACH—DAMAGES—APPEAL AND ERROR.

1. Assignments of error based on the reception and rejection of evidence and the refusal to give instructions will not be considered on appeal, where the evidence and instructions are not preserved in the record.

2. Where, after trial and verdict, plaintiff was permitted to amend his petition by adding a new item of damages, and the evidence in support of this item was received without objection from defendant, the action of the court in permitting the amendment will not be reversed.

3. An assignment "for sundry other errors committed by the court at the trial, and excepted to by this plaintiff in error," is not an assignment of error, and will not be considered on appeal.

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by William Scott, agent for the stockholders of the First National Bank of Larned, against the American Bonding & Trust Company of Baltimore, Md., for breach of contract. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

John V. Abrahams, for plaintiff in error. Bissington, Smith & Histed, for defendant in error.

PER CURIAM. This was an action in the district court of Shawnee county by William Scott, as agent of the stockholders of the First National Bank of Larned, Kan., against the plaintiff in error, to recover damages for breach of contract. It is alleged in the petition that, for a consideration paid in hand, the plaintiff in error agreed to sign a bond in behalf of the stockholders of the bank and Scott, as agent to the comptroller of the currency, in the sum of \$15,000, to enable the stockholders, through their agent, to obtain possession of the assets of the bank and discontinue the expense of a receiver; that they had paid the consideration to the plaintiff in error, who partially carried out its contract, and then refused to go further, whereby they were put to great expense in procuring other surety upon the bond, and additional expense of the receiver and his employes, and an additional expense of having the agent of the treasury department come from Washington to check the assets over and deliver them to the agent in behalf of the comptroller of the currency. The making of the contract was not denied, but the defendant claims in its answer that it was induced to sign the bond and enter into the contract as surety by reason of the false representations of the stockholders and their agents regarding material matters of inducement upon which they relied in making the contract. There was a trial to a jury, a verdict and special findings for the plaintiff, and a judgment thereon for \$500 against the plaintiff in error.

The first and second assignments of error are based upon the receiving and rejection of evidence by the court, and do not conform to the rules of this court, in that the evidence received and rejected is not set out as required. Because of this omission, we decline to notice them.

The third assignment of error is that the court overruled the defendant's demurrer to the evidence of the plaintiff. There was no error in this. There was sufficient evidence to warrant a verdict.

The fourth and fifth assignments of error are founded upon the court's refusing to give instructions and giving instructions to the jury. The rule of this court is not complied with in regard to these assignments, and we decline to consider them.

The sixth assignment of error is that the court erred in permitting the plaintiff to amend the petition after trial and verdict. The evidence was offered and received without objection in support of the item of damage covered by this amendment. The court was not guilty of any abuse of discretion therein.

The seventh assignment of error is that the court erred in overruling the motion of plaintiff in error for judgment upon the special findings notwithstanding the general ver-

dict. This contention is without merit. There is nothing in the special findings that would have warranted the court in disregarding the general verdict.

The ninth assignment of error is, "For sundry other errors committed by the court at the trial, and excepted to by this plaintiff in error." This is not an assignment of error. It points nothing out. It directs our attention to nothing, and does not challenge our attention.

The tenth assignment of error is that the court denied the plaintiff in error a new trial. Nothing has been pointed out by counsel that sustains this contention. It may be that, had the matter been properly presented to the trial court, by proper objections and exceptions, it could be said that the verdict was somewhat in excess of the just claim of the plaintiff under the evidence. However, the judgment is sustained by evidence, and the matter affords no ground for awarding a new trial or a reversal of the judgment. The judgment is affirmed.

BROUGHAN et al. v. BROUGHAN.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

ADVERSE POSSESSION—EVIDENCE—DECLARATIONS OF CLAIMANT.

1. In an action to recover land, evidence of defendant's that they had mortgaged the land and insured improvements in their own name was incompetent to establish adverse possession against the plaintiff.

2. Evidence of defendants that they had told their neighbors that they owned the land was inadmissible to show adverse possession.

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by Thomas Broughan against Lawrence Broughan and Cornelia Broughan to recover land. From a judgment entered on a verdict for plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

J. A. Smith, for plaintiffs in error. Alden, McFadden & Alden, for defendant in error.

PER CURIAM. This was an action to recover real estate, brought by the defendant in error. Plaintiffs in error claimed title by adverse possession. There was a trial to a jury, and a judgment and verdict for the plaintiff.

The principal assignment of error is that the court denied the motion of the plaintiffs in error for a new trial. Under this assignment it is contended that the court should have sustained the motion because it rejected competent and proper evidence offered by them. They sought to prove by their own evidence that they had made declarations in their own interests. It was not competent for them to support their claim of adverse possession by showing they had told their neighbors that they owned the land. Nor were the facts, if facts they were, that they

had mortgaged the land or insured the improvements thereon in their own name, competent against the plaintiff to establish an adverse possession.

The second assignment of error is that the court admitted incompetent evidence in behalf of the plaintiff. The rule of this court is not complied with in this assignment. We have, notwithstanding, examined the record. The evidence was entirely competent, as explanatory of matters testified to by the defendants.

The third assignment of error is that the court refused instructions prayed by the defendants. There is no pretense in this assignment of a compliance with the rule of this court in relation thereto. The same objection exists as to the fourth assignment, which is that the court erroneously instructed the jury. We do not feel it incumbent upon us to go in search of these alleged errors. An examination of the record as an entirety has convinced us that the verdict of the jury and the judgment of the court are eminently just, and that nothing occurred on the trial of which the defendants could rightfully complain. The judgment is affirmed.

MENGER v. NORTH BRITISH & MERCANTILE INS. CO. et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

NEW TRIAL—SUMMONS—MISTAKE OF CLERK—MOTION FOR NEW TRIAL—NECESSITY—PETITION FOR A NEW TRIAL—SUFFICIENCY.

1. The fact that the clerk of the court, in issuing a summons, by mistake required defendant to answer in less time than required by law, which necessitated the issuance of an alias summons to bring defendant into court, is not ground for granting plaintiff a new trial, since the error was cured by the alias, and in no way affected the rights of plaintiff at the trial.

2. A petition for a new trial, which alleged that the court adjourned for the term on the same day the decision was rendered, whereby plaintiff was prevented from filing a motion for a new trial within the term, does not state facts sufficient to warrant a new trial, since it does not aver that plaintiff's counsel was not present when the decision was rendered, or that he requested the court to remain in session until he could prepare and file a motion for a new trial.

Error from district court, Douglas county; Samuel A. Riggs, Judge.

Action by Anna G. M. Menger against the North British & Mercantile Insurance Company and another. From a judgment sustaining defendants' demurrer to plaintiff's petition for a new trial, plaintiff brings error. Affirmed.

McHale & Learnard and L. H. Menger for plaintiff in error. Fyke, Yates, Fyke & Snider, for defendants in error.

PER CURIAM. This proceeding is prosecuted to reverse the judgment of the trial court, in sustaining the defendants' demurrer to plaintiff's petition for a new trial, in an action for a recovery of the amount due on

an insurance policy. The plaintiff alleged in her petition, in substance: That at the regular February, 1897, term of the district court of Douglas county, on the 26th day of February, 1897, in an action pending, wherein the above-named Menger was plaintiff and the above-named insurance company was defendant, the court having said cause under advisement, in open court, on that date, made its findings of fact and conclusions of law, and rendered judgment against the plaintiff for costs. That the judgment is erroneous, and should be vacated and set aside, for the reasons: First, for mistake, omission, and neglect of the clerk of the district court. The plaintiff then sets out her cause of action against the defendant insurance company; the filing in due time of her petition and præcipe for summons; that the clerk issued a summons in due form, except that the same required the defendant to answer in less time than that prescribed by law, in consequence of which the summons and service were set aside; that afterwards, and within 60 days, other summons was issued, and served; and that defendant answered in due time. The only mistake of the clerk, therefore, complained of, is that the first summons issued by him required the defendant to answer in less time than that prescribed by law. Second, for unavoidable casualty and misfortune preventing the said plaintiff from duly prosecuting her said action. That upon the date when the judgment was rendered, to wit, upon the 26th day of February, 1897, and immediately upon the making and filing of the findings of fact and conclusions of law, the court adjourned without day, whereby the plaintiff was prevented from filing a motion for a new trial within the term of court at which the judgment was rendered. That afterwards the plaintiff filed her motion for a new trial: (1) That the decision is not sustained by the evidence; (2) that the decision is contrary to law; (3) for errors of law occurring at the trial. That the motion was overruled, for the reason that the same was filed after the adjournment of the term of court at which judgment was rendered. The defendant in error filed a demurrer to the petition for a new trial: (1) That the petition was not filed within the time prescribed by law; (2) that the petition does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and judgment rendered against the plaintiff for costs. The plaintiff, as plaintiff in error, presents the record to this court for review, and alleges that the court erred in sustaining the demurrer.

There is no special merit in the first contention set out in the petition for a new trial. The act of the clerk in making the summons answerable within less time than prescribed by law was a mistake, omission, or neglect of the clerk. This mistake, however, was cured by the issuing of an alias summons, which, in due course of procedure, brought defendant into court. It cannot be said that this mistake, omission, or neglect of the clerk

prevented plaintiff in any manner from preserving all her rights upon the trial, nor from filing a motion for a new trial, so as to have the action of the trial court reviewed.

As to the second contention, we must hold against the plaintiff in error. The petition for a new trial does not state facts which show unavoidable casualty or misfortune preventing the plaintiff from prosecuting her action. It shows negligence, only, on the part of her attorney, Mr. Steele. No reason is shown why he did not file a motion for a new trial immediately, or ask the indulgence of the court for time to prepare such motion before the adjournment. The case was tried two days before the court filed its findings of facts and conclusions of law, and announced the judgment. The attorney, as a reasonable precaution, should have been prepared with his motion for a new trial in the event that the findings or judgment were not satisfactory. The only unavoidable casualty or misfortune complained of is that the court adjourned on the same day the case was decided, immediately after filing the findings of fact and conclusions of law. It is nowhere alleged in the petition for a new trial that plaintiff's counsel was not present when the case was decided; that he did not know that it was decided on that day; that he did not have time to prepare and file his motion for a new trial before the adjournment of court; that he asked or requested the court to remain in session until he could prepare and file his motion. Neither does any sufficient reason appear why the motion for a new trial was not filed before the adjournment of court. The petition did not state a cause of action. The demurrer was properly sustained. The judgment is affirmed.

LONGFELLOW v. SMITH.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

APPEAL—REVIEW—MOTION FOR NEW TRIAL.

Errors occurring at trial are reviewable only after motion for new trial presented and overruled, and on the taking of exceptions.

Error from court of common pleas, Wyandotte county; William G. Holt, Judge.

Action by Martha A. Smith against J. W. Longfellow, sheriff. Judgment for plaintiff, and defendant brings error. Dismissed.

J. A. Smith, for plaintiff in error. T. P. Anderson and Geo. W. Littick, for defendant in error.

PER CURIAM. This is an action in replevin brought by Martha A. Smith, defendant in error, for the recovery of the possession of certain described personal property, consisting of several head of cattle, alleged to have been unlawfully detained from her by J. W. Longfellow, the plaintiff in error. The plaintiff's petition was in the usual form. The answer was a general denial, except an

admission that defendant was in possession of the property. A trial was had, and the jury returned a verdict and findings for the plaintiff and against the defendant. The defendant's motion for a new trial was overruled, and he prepared his case-made, and presents the record to this court for review.

The defendant in error interposes her motion to dismiss the petition in error. The assignments of error are (1) that the court erred in excluding competent testimony; (2) in instructing the jury; (3) in admitting incompetent testimony; (4) in overruling his motion for a new trial; (5) in refusing to set aside the verdict and in refusing a new trial. It will be observed that all of the assignments of error are alleged errors occurring at the trial. Errors occurring at the trial are reviewable only after a motion for a new trial has been presented to the trial court, overruled, and exceptions taken to the action of the court thereon. The defendant in the trial court did not save an exception to the ruling of the court on his motion for a new trial. Hence there is nothing before the court for review. Within the authority of *Dulgenan v Claus*, 46 Kan. 275, 26 Pac. 699, the petition in error will be dismissed.

(10 Kan.App. 40)

TOPEKA CAPITAL CO. v. MARCH.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

NOTE OF CORPORATION—PLEADING—ESTOPPEL.

1. A petition that alleges the agency of one who executes a note purporting to be the note of a corporation, and avers further "that on the 1st day of September, 1896, at Topeka, Shawnee county, Kansas, the said defendant Topeka Capital Company made, executed, and delivered to the plaintiff its certain promissory note in writing of that date," states a cause of action. An allegation that a corporation made and executed its promissory note is sufficient.

2. A corporation cannot retain property under a transaction ultra vires, and at the same time repudiate its obligation under the same transaction. It cannot accept and retain borrowed money, and plead ultra vires to a suit for its recovery. The law interposes an estoppel.

(Syllabus by the Court.)

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by H. T. March against the Topeka Capital Company. Judgment for plaintiff. Defendant brings error. Affirmed.

This proceeding in error is prosecuted to reverse a judgment of the district court of Shawnee county. The material facts necessary to a proper understanding of the case are stated in the pleadings. The petition, in substance, was as follows: "That at the time hereinafter mentioned the defendant The Topeka Capital Company was a corporation duly organized and existing under and by virtue of the laws of the state of Kansas, and that defendant Dell Kelzer was on the 1st day of February, 1896, for a long time prior thereto, and for a long time thereafter, business man-

ager and agent of defendant the Topeka Capital Company, in the operation and conducting of its business; that on the 1st day of February, A. D. 1896, at Shawnee county, Kansas, the said defendant Topeka Capital Company made, executed, and delivered to plaintiff its certain promissory note in writing of that date, agreeing by the terms thereof to pay to the order of plaintiff, March 1, 1896, the sum of five hundred dollars, with interest after due at the rate of ten per cent. per annum until paid." The note reads: "\$500. Topeka, Kansas, February 1st, 1896. March 1, after date, for value received, we jointly and severally, as principals, promise to pay to the order of H. T. March five hundred dollars, with interest after due at ten per cent. per annum until paid. Interest payable annually. Defaulting interest to draw the same rate of interest as principal. The makers, sureties, indorsers, and guarantors of this note agree to pay a reasonable attorney's fees if suit is brought hereon, and severally waive presentment for payment, notice of nonpayment, protest, notice of protest, and diligence in bringing suit against any party thereto, and consent that time of payment may be extended without notice. Payable at office of March & Co. Due ——. The Topeka Capital Co. Dell Kelzer, B. Mgr. No. 280." Indorsed on back: "Demand and protest waived. Dell Kelzer. Interest paid to Feb'y 1, 1897." The defendant interposed a general demurrer upon the grounds that the petition did not state a cause of action against the defendant. The demurrer was overruled. The defendant answered in substance as follows: "First. That said defendant denies each and every allegation in said petition contained. Second. For a second and further defense herein, said defendant states that said Topeka Capital Company was organized as a corporation under the laws of Kansas on the 6th day of June, 1890, and ceased to do business as such corporation on or about the 1st of November, 1895. Third. For a third and further defense herein, said defendant states that said Topeka Capital Company was organized as a corporation under the laws of the state of Kansas on June 6th, and had at all times a board of six directors, and that the alleged note which purports to be set out in plaintiff's petition herein never was executed by said company, and was never authorized by the board of directors of said company, nor by a majority of said directors, nor by a quorum, nor by a majority of a quorum, of said directors, and this defendant is not indebted to said plaintiff on account thereof in any sum whatever. Fourth. For a fourth and further defense herein, said defendant states that the alleged note which purports to be set out in the petition herein was made for a loan by private persons, and that no loan was ever made or authorized by said Topeka Capital Company. Wherefore this defendant asks to be dismissed hence with all costs." The answer was verified by the oath

of Harrison, as attorney, as follows: "I, T. W. Harrison, being duly sworn, say that I am the attorney for the Topeka Capital Company herein; that I have been one of the directors of said Topeka Capital Company ever since it was organized as a corporation under the laws of Kansas, in June, 1890, and am familiar with the records of said company; that I have read the third division of the above and foregoing answer, and know the contents thereof; and that the facts stated therein are true, as I believe." The plaintiff for his reply set out: (1) A general denial. (2) For "further reply, plaintiff alleges that the note set out in plaintiff's petition was executed and delivered to plaintiff February 6, 1896, as alleged in plaintiff's petition, and was so executed and delivered in renewal of a certain note made, executed, and delivered by the Topeka Capital Company long prior to November 1, 1895, for a loan of \$500, lawful money of the United States of America, which said money was borrowed and received for the purpose of, and used by the Topeka Capital Company in, conducting its business at Topeka, Kansas, and that said money was borrowed, received, and used, and notes made, executed, and delivered therefor, by the Topeka Capital Company; that said sum of money, or no part thereof, has ever been paid to plaintiff." A trial was had before the court and jury. When plaintiff rested, the defendant interposed its demurrer to plaintiff's evidence, and motion for judgment thereon, which were overruled. The jury found the issues in favor of the plaintiff, and returned a verdict against the defendant for \$585.41. The defendant's motion for a new trial was overruled. The defendant, as plaintiff in error, presents the record to this court for review, and alleges error in the proceedings of the trial court.

Keeler & Hite and T. W. Harrison, for plaintiff in error. W. F. Schoch, for defendant in error.

McELROY, J. (after stating the facts). There are 19 formal assignments of error, but we deem it unnecessary to comment upon them all separately. The facts disclosed by the record are as follows: The Topeka Capital Company was organized as a Kansas corporation in 1890 for the purpose of printing and publishing a daily and weekly newspaper at Topeka. About November 19, 1895, John R. Mulvane took possession of the newspaper plant under a chattel mortgage. The corporation was not dissolved, and the former employes of the company continued to conduct the business of the newspaper. The corporation from the time of its organization up to the time of the commencement of this action had a board of six directors. During all the time of its existence as a corporation, Dell Kelzer was its secretary and business manager, duly elected by the directors. It was provided in the charter and by-laws of

the corporation, by article 9, "that the business manager shall have control of the business details of the corporation, under the direction of the president and board of directors. It shall be his particular business to receive the moneys; make daily deposits in such bank as the board may designate; to pay all bills of \$1.00 or more by check signed by himself and president; to keep an accurate set of books, showing all money received and disbursed; to have charge of the mechanical work of the paper; employ all labor outside of the editorial and reportorial force; the purchasing of supplies; making advertising contracts; circulating the daily and weekly; and attending to all business matters not otherwise provided for, for the success of the corporation, including insuring plant, payment of taxes, and making of all needed repairs to maintain the efficiency of the paper and protect the property; to make a sworn monthly statement showing the amount of business done, money received and paid out, and net gain or loss." In the year 1895 the corporation was compelled to borrow money for the purpose of conducting its business. This money was borrowed by Dell Kelzer, its business manager, and expended in conducting the general business of the corporation. The note sued upon in this case was executed by Kelzer, as business manager, in renewal of a note given for a loan of \$500, which money was used in conducting the business of the corporation. The note in question, and all other notes executed by Kelzer for borrowed money for the corporation, were executed in the same manner. The president and some of the directors of the corporation knew the manner in which Kelzer was conducting the business, and no objection was made thereto by any officer of the corporation. The note set out was due and unpaid when the action was brought. The plaintiff in error complains that the trial court erred in overruling its demurrer to the petition, and cites in support thereof *Topeka Capital Co. v. Remington Paper Co.* (Kan. Sup.) 57 Pac. 504; *Id.*, 59 Pac. 1062. The case at bar differs from that of the *Remington Paper Co.* case, in this: that the petition affirmatively alleges the agency of Kelzer. The allegations of the petition in the case at bar are as follows: "That on the 1st day of September, 1896, at Topeka, Shawnee county, Kansas, the said defendant the Topeka Capital Company made, executed, and delivered to plaintiff its certain promissory note in writing of that date." An allegation that the corporation made, executed, and delivered its promissory note is sufficient. 5 Enc. Pl. & Prac. p. 92. The petition states a cause of action, and the demurrer was properly overruled.

The principal contention seems to be that the court admitted incompetent testimony. Kelzer was permitted, over the objection of defendant, to testify, in effect, that he was in the habit of issuing notes in the name of the company; that this was known to the

president and some of the directors. This testimony was offered for the purpose of showing the methods of doing business by the company and Keizer. We take it that the testimony was not offered so much as showing Keizer's authority, as it was for the purpose of showing a ratification by the officers of the company of Keizer's acts. After a corporation has accepted the benefits of a contract made in good faith with its regular agent and manager, it is no more than fair that every reasonable presumption should be indulged to hold the transaction binding upon the company. Under such circumstances, it takes very slight evidence to bind a corporation for the payment of obligations incurred by the managers of its business. *Getty v. Milling Co.*, 40 Kan. 281, 19 Pac. 617.

It is also contended that the court erred in permitting the plaintiff to show that the Capital Company was obliged to borrow money, and what evidence of indebtedness it gave. It is insisted that there was no issue before the jury except the question of the authority of Keizer to execute the note. It seems to us that the issue in this case involved further inquiry. It may be that Keizer had no legal authority to borrow the money or to execute the note in the first instance. However, he did borrow the money, and the corporation used it and accepted the fruits of the contract, and now seeks to avoid repayment of the money. A corporation has power to borrow money on the credit of the corporation, not exceeding its authorized capital stock, and may execute bonds or promissory notes therefor. Section 15, par. 1172, Gen. St. 1889. In the constitution and by-laws of the Topeka Capital Company no authority is granted to any officer of the company to borrow money, unless it is the business manager, and contained in these words: "And attending to all business matters not otherwise provided for, for the success of the corporation."

Complaint is further made that the court permitted the plaintiff to offer in evidence a copy of the constitution and by-laws of the defendant corporation, without proof of the loss or destruction of the original. This testimony was not objected to upon this ground in the trial court. The objection simply went to the competency of the testimony. There was no objection made that it was not the best evidence. The testimony was properly admitted.

A corporation cannot retain property under a transaction *ultra vires*, and at the same time repudiate its obligations under the same transaction. It ought not to be allowed to retain borrowed money, and plead *ultra vires* to the suit for a recovery thereof. The trial court committed no error prejudicial to the plaintiff in error in the admission of evidence. The motion for a new trial was properly overruled. The judgment is affirmed. All the judges concurring.

RICHTER v. EAGLE LIFE ASS'N.

(Supreme Court of Montana. July 24, 1900.)

APPEAL AND ERROR—ORDER AFTER JUDGMENT—NOTICE—TIME FOR APPEAL—UNDERTAKING—TWO APPEALS—SUFFICIENCY.

1. An appeal from an order made and entered on January 8th denying a motion to vacate a judgment will be dismissed, where notice thereof was not served until March 10th, since such appeal was not taken within 60 days from the making and entry of the order, as required by Code Civ. Proc. § 1723.

2. An undertaking on appeals from a judgment and an order made thereafter, denying a motion to vacate the same, conditioned for the payment of damages and costs of appeal, without specifying to which appeal it applies, is insufficient.

Appeals from district court, Lewis and Clarke county; Henry C. Smith, Judge.

Action by Jennie Richter, individually and as guardian of Harry Richter and others, against the Eagle Life Association. From a judgment in favor of the plaintiff, and from an order denying a motion to vacate the same, defendant appeals. Appeals dismissed.

E. D. Weed, for appellant. R. R. Purcell, for respondent.

PER CURIAM. The plaintiff recovered a judgment by default against the defendant for the sum of \$2,445, together with costs, which judgment was entered on the 28th day of June, 1899. On the 8th day of January, 1900, the court below made and caused to be entered an order denying the defendant's motion to vacate and set aside the judgment. On the 10th day of March, 1900, the defendant filed and served its notice of appeal from the judgment and from the order of January 8th; and on the 13th day of March, 1900, it filed an undertaking, in which the sureties, after reciting that the defendant is about to appeal to this court from the judgment and from the order, undertake and promise on the part of the defendant that it will pay all damages and costs which may be awarded against it on the appeal or on a dismissal thereof, not exceeding the sum of \$300. The plaintiff now moves to dismiss the attempted appeal from the order of January 8th upon the ground that it was not taken within 60 days after the entry of the order. The motion will be granted. Section 1723 of the Code of Civil Procedure provides, among other things, that an appeal may be taken from any special order made after final judgment within 60 days after the order is made and entered in the minutes of the court or filed with the clerk. More than 60 days elapsed between the entry of the order and the giving of the notice of appeal therefrom.

The plaintiff moves that the attempted appeal from the judgment be also dismissed for the reason that the undertaking is void. The supposed appeals are from a judgment and a special order made thereafter, other than an order granting or refusing a new trial.

The undertaking is in the sum of \$300, and is conditional for the payment of the damages and costs of the appeal, without specifying to which of the appeals the undertaking applies. Upon the authority of *Creek v. Waterworks Co.*, 22 Mont. 327, 56 Pac. 362, *Murphy v. Railway Co.*, 22 Mont. 577, 57 Pac. 278, and *Copper Co. v. Hickey*, 23 Mont. 319, 58 Pac. 866, the principles of which are approved and reaffirmed, the motion must be granted. The appeals are therefore dismissed. Dismissed.

WADE v. LEWIS AND CLARKE COUNTY.

(Supreme Court of Montana. July 23, 1900.)

COUNTIES—COUNTY SURVEYOR—MILEAGE—STATUTE CONSTRUED.

Act March 4, 1897 (Laws 1897, p. 71) § 13, enacts that a county surveyor shall receive \$5 a day as full compensation for the performance of his duties. Pol. Code, § 4590, enacts "that members of the legislative assembly, state officers, county officers, township officers, jurors, witnesses and other persons who may be entitled to mileage," shall be entitled to collect 10 cents per mile for the distance actually traveled, "and no more." *Heid*, that a county surveyor is not entitled to mileage, since the purpose of the section was not to create a right to mileage, but simply to fix a uniform rate of mileage, and, besides, the phrase "who may be entitled to mileage" does not only limit the phrase "other persons," but refers back and qualifies "county officers" as well.

Appeal from district court, Lewis and Clarke county; S. H. McIntire, Judge.

Action by John W. Wade against Lewis and Clarke county to recover mileage as county surveyor. Judgment for defendant, and plaintiff appeals. Affirmed.

Stranahan & Stranahan, for appellant. C. B. Nolan, Atty. Gen., for respondent.

PIGOTT, J. By "An act to define the powers and duties of county surveyors, and to provide for their compensation, and to abolish the office of road supervisor," approved on the 4th day of March, 1897, and found at page 71 of the Laws of that year, the duty of laying out, constructing, and repairing roads was confided to the county surveyor. The plaintiff was such officer of the county of Lewis and Clarke, and between the 1st day of June, 1897, and the 31st day of December, 1898, he actually and necessarily traveled in the prosecution of road work 3,320 miles, for which he presented a claim to the board of commissioners for \$332, charging at the rate of 10 cents a mile. The claim having been disapproved by the county auditor and disallowed by the board of commissioners, the plaintiff appealed to the district court of the county, where judgment was entered to the effect that the plaintiff recover nothing from the defendant, and that the defendant recover costs from the plaintiff. This appeal is from the judgment.

The sole question in this case is whether the plaintiff is entitled to collect mileage. Section 13 of the act of March 4, 1897, provides that "the county surveyor of each county shall re-

ceive as full compensation for the performance of his duties as county surveyor, in connection with the roads and otherwise, the sum of five dollars per day." It is conceded that this statute does not authorize the plaintiff to receive mileage, but he contends that section 4590 of the Political Code confers upon him that right. Section 4590 is as follows: "That members of the legislative assembly, state officers, county officers, township officers, jurors, witnesses and other persons who may be entitled to mileage, shall be entitled to collect mileage at the rate of ten cents per mile for the distance actually traveled and no more." If the phrase "who may be entitled to mileage" qualifies the words "county officers," in the earlier part of the section, then the plaintiff is not entitled to mileage. If the phrase does not qualify "county officers," the plaintiff is entitled to collect mileage, unless mileage is compensation. For the purposes of this case, we assume, but do not decide, that mileage is not compensation, and that the expression "the distance actually traveled" sufficiently defines that for which the rate of mileage is prescribed. The principal argument advanced by the plaintiff in support of his contention rests upon the omission of a comma after the words "other persons." He asserts that because of such omission the phrase "who may be entitled to mileage" qualifies "other persons" only, and therefore that members of the legislative assembly, state, county, and township officers, jurors and witnesses, are entitled to collect mileage at the rate of 10 cents per mile for the distance actually traveled, and that such other persons as may be entitled to mileage by force of statutory authority elsewhere found shall likewise be entitled to collect it at the same rate. Whether or not qualifying phrases in a statute apply to the last antecedent only, depends upon the intent of the legislature. In our opinion, the intent of the legislature was to fix a uniform rate at 10 cents a mile, to be collected by those entitled to mileage under the law, and not to create the right to mileage. The very language of the section itself strongly supports this view. The omission of the comma after "persons," while injecting an element of obscurity into the meaning of section 4590, is by no means conclusive evidence of the intent of the assembly to limit the application of the phrase "who may be entitled to mileage" to "other persons." In *Ewing v. Burnet*, 11 Pet. 41, 9 L. Ed. 624, the supreme court of the United States said that punctuation "is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail, but the court will first take the instrument by its four corners, in order to ascertain its true meaning. If that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it." The words "who may be entitled to mileage," being general, and occurring at the end of the enumeration of officers and other persons, in our opinion apply to and qualify each, and

relate to such county officers only as are by other statutes entitled to mileage, and to other persons likewise so entitled. Moreover, the emphatic inhibition contained in the words with which the section ends were doubtless inserted *ex industria*, and for the purpose of voicing further the legislative will that the statutes then in force which prescribed a rate of mileage in excess of 10 cents were no longer operative. It may also be observed that the omission of the conjunctive particle "and" between the word "jurors" and the word "witnesses" is somewhat significant of the purpose of the assembly. Had the intention been to provide by section 4590 for the payment of mileage to all county officers, jurors, and witnesses, the assembly would not have been likely to include them in the same class with "other persons," and then employ the phrase "who may be entitled to mileage." There is no setting apart of county officers from other persons who may be so entitled. If the section read that "members of the legislative assembly, state officers, county officers, township officers, jurors and witnesses and other persons who may be entitled to collect mileage, shall be entitled to collect mileage at the rate of ten cents per mile for the distance actually traveled and no more," the position of the plaintiff would be stronger; for then, disregarding other statutes which serve to evince the intention of the assembly in passing the section, and looking to its language only, the argument might plausibly be made that the phrase "who may be entitled to mileage" qualifies "other persons" only, and that county officers fall within a class distinct from the class comprising such other persons. But it is not necessary to place the decision wholly upon the grounds already suggested. Conceding that section 4590 is obscure, and its language susceptible of more than one interpretation, it is apparent upon examination of other provisions of the statutes that the assembly in enacting section 4590 did not intend to create the right to mileage, but merely to provide that when allowed by law it should be computed at the rate of 10 cents per mile; the design being, as we have said, to make a uniform rate. At the time the section became law, members of the legislature, the lieutenant governor, the president of the senate, and the speaker of the house received 20 cents for each mile of travel to and from their residences and the capital of the state. Sections 220, 221, and 391 of the Political Code. By section 4644, *Id.*, jurors were allowed 15 cents a mile for travel to and from their residences and the county seat. By section 4660, *Id.*, county commissioners were to receive 15 cents for each mile necessarily traveled in going to and returning from the county seat and their places of residence. Sheriffs and constables received 15 cents for each mile actually traveled in serving papers. Sections 4634, 4643, *Id.* Witnesses attending before courts of record were allowed mileage at the rate of 10 cents for each mile. Section 4648, *Id.* Ac-

cording to the interpretation of section 4590 for which the plaintiff contends, every state, county, and township officer, and every juror and witness, is thereby entitled to collect mileage for the distance actually traveled. Thus, if the plaintiff's theory be correct, the superintendent of public instruction would be entitled to mileage, notwithstanding the state is by section 1716, *Id.*, required to pay the traveling expenses necessarily incurred in the discharge of his duties, and that official, in addition to such expenses, would receive mileage as so much profit at the state's expense. Before the repeal of section 502, *Id.*, by the act of March 4, 1897 (*Laws 1897*, p. 105), the state examiner, according to plaintiff's argument, would have been entitled to receive mileage in addition to his salary, despite the provision of section 502 that the salary was for all services rendered in any capacity whatever, including office and traveling expenses; and since the act of March 4, 1897, he would, upon the same theory, be entitled to collect mileage in addition to his traveling expenses. With respect to the commissioner of labor and some other officers, the like conditions exist. Upon the same theory, public administrators and county assessors—indeed, all public officers—are entitled to mileage. Again, jurors and witnesses in courts not of record were prohibited from collecting, or at least were not allowed to receive, mileage (sections 4647 and 4652 of the Political Code); but they would be permitted to collect it under the plaintiff's interpretation of section 4590. It is not to be presumed that the assembly by section 4590 intended to bring about results such as would necessarily follow upon the plaintiff's interpretation of the section, and nothing in the statute requires such meaning to be given to its language. Subdivision 8 of section 4681 of the Political Code provides that the contingent expenses necessarily incurred for the use and benefit of the county are county charges. We are of the opinion that this provision of the statute is foreign to the case at bar. The statutes have imposed on counties the duty of paying certain expenses and charges, but have not said that mileage to county surveyors is an expense or charge incurred for, or to be paid by, the county. What is not by the law imposed as expenses upon a county is not a charge against it. *Sears v. Gallatin Co.*, 20 Mont. 462, 52 Pac. 204, 40 L. R. A. 405. The judgment is affirmed. Affirmed.

BRANTLY, C. J., and WORD, J., concur.

NOLAN v. MONTANA CENT. RY. CO.

(Supreme Court of Montana. July 19, 1900.)
APPEAL AND ERROR — BOND — AMENDMENT —
APPEAL FROM JUDGMENT — APPEAL FROM
ORDER DENYING NEW TRIAL — BONDSMEN —
LIABILITY.

1. The certificate to the transcript on appeal required of the clerk of the district court by Code Civ. Proc. § 1739, that an undertaking in due form has been filed, may be amended if defect-

ive, and, when so amended prior to the submission of the motion to dismiss, the motion will be overruled.

2. An undertaking for an appeal from a judgment for plaintiff, and an appeal from an order denying a new trial, stating that the undersigned promise that the defendant will pay all damages and costs which may be awarded against it on the appeal, or dismissal thereof, not exceeding \$300, was not objectionable in not stating whether the bond was for the appeal from the judgment or for the appeal from the order denying a new trial, since the bondsmen were liable for any damages and costs to which the defendant might become entitled under either appeal.

Appeal from district court, Silverbow county; John Lindsay, Judge.

Action by Timothy Nolan against the Montana Central Railway Company. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Motion by plaintiff to dismiss the appeal. Motion denied.

A. J. Shores, for appellant. Geo. Haldom, for respondent.

PER CURIAM. The respondent moves a dismissal of the appeal from the judgment in his favor, and the appeal taken at the same time from an order denying the appellant's motion for a new trial. The grounds of the motion are (1) that this court has no jurisdiction of either of the appeals, because the certificate of the clerk of the district court to the transcript does not state that an undertaking on appeal in due form was properly filed, as by section 1739 of the Code of Civil Procedure the clerk is required to certify; and (2) that the undertaking filed is void for ambiguity and uncertainty, because the sureties, after reciting that the appellant is about to appeal to the supreme court from the judgment entered against it, and from the order entered denying the defendant's motion for a new trial, "undertake and promise on the part of the appellant that the said appellant shall pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding three hundred dollars," wherefore it cannot be ascertained to which appeal the undertaking applies.

1. Since the filing of the motion the appellant has obtained an order of this court permitting the clerk of the court below to amend his certificate to the transcript in the particular referred to; and the transcript is now accompanied with the certificate of the clerk of that court, filed here before the submission of the motion, to the effect that an undertaking on appeal in due form was properly filed. This ground of the motion is therefore untenable.

2. After reciting that the defendant is about to appeal from the judgment and the order denying the defendant's motion for a new trial, the undertaking proceeds: "Now, therefore, in consideration of the premises and of such appeal, we, the undersigned residents and freeholders of the city of Great Falls,

county of Cascade, and state of Montana, do hereby jointly and severally undertake and promise on the part of the appellant that the said appellant will pay all damages and costs which may be awarded against it on the appeal, or on a dismissal thereof, not exceeding three hundred dollars." The respondent argues that this court has no jurisdiction of either of the appeals, because the undertaking is void for ambiguity and uncertainty, in not specifying which appeal the sureties undertake to be responsible for. The same question was presented and argued in *Watkins v. Morris*, 14 Mont. 354, 36 Pac. 452, the opinion in which does not disclose the contents of the undertaking, the motion to dismiss in that case being as follows: "Because it appears from the notice of appeal on file herein that the said plaintiffs have attempted to take two appeals (that is, an appeal from the order overruling their motion for a new trial, and an appeal from the judgment), and only one bond has been filed for costs, and that in the sum of only three hundred dollars; and it does not appear, nor can it be ascertained from the papers on file herein, for which appeal the said bond was intended and filed." The undertaking was, in substance and form, identical with the one in the case at bar. In support of the motion counsel in that case cited, as do counsel in this, *Mathison v. Leland*, 1 Idaho, 712; *McCoy v. Oldham*, Id. 465; *Eddy v. Van Ness*, 2 Idaho, 93, 6 Pac. 115; and *Cronin v. Mining Co.*, 2 Idaho, 1146, 32 Pac. 53,—as well as other cases. Although *Watkins v. Morris* was decided before the enactment of the provision of section 1731 of the Code of Civil Procedure, permitting an appeal from a judgment and from an order granting or refusing a new trial, when taken at the same time, to be made effectual by the filing of one undertaking in the sum of \$300, yet the court, because of the universal practice in that regard, nevertheless held such an undertaking sufficient, where the appeals were consolidated in one record. The change, if any, wrought in the practice by that provision of section 1731, consists in restricting the right to support the appeals by an undertaking in the sum of \$300 to cases where such appeals are taken at the same time. In that case this court did not in the opinion expressly decide the identical question here raised, but the court did by necessary implication determine it, and held that the undertaking was neither imperfect nor void. It further held, impliedly but necessarily, that the sureties on such an undertaking would be answerable for any damages and costs to which the respondent might become legally entitled by reason of either appeal; otherwise, the decision cannot be justified, for, if the sureties became bound for the costs and damages of but one of the appeals, the undertaking would have been imperfect, because affording insufficient security to the respondent, and, if it was impossible to ascertain to which appeal the undertaking was referable, it would have been not

merely imperfect or insufficient, but wholly void. The Watkins Case decided that the legal effect of the contract made by executing an undertaking (given to satisfy a statutory requirement) in the form of the one given in that case was to subject the sureties to the payment of all damages and costs which might be awarded against the appellant on the appeals, or on either of them, or on a dismissal thereof. Sureties subsequently executing undertakings in the same form must, in legal contemplation, have known and adopted, or be deemed to have consented to, the interpretation theretofore placed upon the language employed, and their contract will be so construed. Upon the authority of *Watkins v. Morris*, supra; *Ramsey v. Burns*, 24 Mont. —, 61 Pac. 129; *Reduction Co. v. Lynch*, 24 Mont. —, 61 Pac. 1134; *Boucher v. Barsalou*, Id.; *Mahoney v. Hardware Co.*, Id.; and *Teague v. John Caplice Co.*, Id.—this ground of the motion to dismiss must be overruled. The motion is therefore denied. Denied.

(24 Mont. 330)

STATE ex rel. BAKER v. SECOND JUDICIAL DIST. COURT OF SILVERBOW COUNTY et al.

(Supreme Court of Montana. July 23, 1900.)
EJECTMENT—APPEAL—STAY OF EXECUTION—AMOUNT OF SECURITY—MINING CLAIM.

1. Code Civ. Proc. § 1732, authorizing a stay of execution pending an appeal from a judgment directing the delivery of possession of real estate, applies in case of an appeal by defendant in ejectment involving an unpatented mining claim.

2. When an appeal has been dismissed without prejudice because it was improperly taken, the order fixing the amount of the first undertaking for stay of execution was *functus officio*, and on the taking of a second appeal it was the duty of the court to again fix the amount of the undertaking for stay of execution.

3. Where defendant in ejectment was adjudged to be in wrongful possession, and no writ had been issued to put plaintiff in possession, and defendant appealed, and is ready to furnish security for stay of execution, the amount of security should be fixed, whether defendant was in possession or not.

Action by the state, on the relation of B. L. Baker, against the Second judicial district court of Silverbow county and another, for certiorari. Application dismissed.

J. E. Healy, for relator. Wm. H. De Witt and T. Bailey Lee, for respondents.

BRANTLY, C. J. In this cause the relator seeks by certiorari to have this court review and annul the action of the district court of Silverbow county in making an order fixing the amount of an undertaking on stay of execution pending an appeal from a judgment in the case of Baker against the Butte City Water Company. Upon the affidavit filed in this court the writ was issued. The record returned by the district court discloses the following proceedings had in said cause: On July 31, 1899, the relator obtained a judgment against the Butte City Water Company,

a corporation, in a cause wherein the relator was plaintiff and the said corporation was defendant. The action was in ejectment, and by the judgment the plaintiff was declared to be the owner and entitled to the possession of the Keystone (unpatented) quartz lode-mining claim, situate in the Highland mining district, Silverbow county. A motion for a new trial was made by the defendant corporation, which was denied. Appeals from the order and judgment were then taken to this court. Upon motion by the relator these appeals were dismissed because of a defective undertaking on appeal. *Baker v. Water Co.*, 24 Mont. —, 60 Pac. 488, 817. An undertaking on stay of execution pending these appeals was filed with the clerk of the district court, the court having fixed the amount of the same at \$250, conditioned as required by statute. Upon the dismissal of these appeals, the order being made without prejudice, the defendant appealed again from the judgment; and, upon application to the district court, that court, by the Honorable John Lindsay, one of its judges, fixed the amount of the undertaking on stay of execution pending the appeal at \$1,500, which was thereupon filed. The complaint is now made that this order was in excess of jurisdiction, for the reasons (1) that the statute (Code Civ. Proc. § 1732) authorizing a stay of execution pending an appeal from a judgment directing the delivery of possession of real estate does not apply to unpatented mining claims; (2) that the court had no power to fix the amount of an undertaking for stay upon a second appeal from the same judgment, because its power was exhausted under the first appeal; and (3) that at the time the amount of the undertaking was fixed it was made to appear to the district court that the mining claim in controversy was not then, and for a long time had not been, in possession of the defendant. We are of the opinion, after a consideration of the questions presented, that the writ was improvidently granted, and that it should be set aside and the application dismissed.

1. Neither the statutes nor the courts in this state recognize any distinction between possessory rights to mining claims upon public lands, and real estate held under other titles. While recognizing the United States as the paramount proprietor, the legislature and the courts have always treated the claimant under a perfected location as the owner of the fee. Indeed, the location operates as a grant from the government; and the estate acquired under it is a vested right to the fee, which becomes absolute upon the performance of the required conditions. It can be lost only by abandonment, or by forfeiture and location by another. It is property, in every sense of that term, and, except in the particular just noted, it has all the attributes of real estate. It may be transferred by sale, as other real estate; it may be mortgaged; it may descend to the heir, or be held by the administrator or executor as assets to pay debts; it may be made liable to the payment

of taxes; it is subject to statutory liens; in some instances it may be subject to the claim of homestead; and it is subject to levy and sale as other lands for the satisfaction of judgments. Hence the legislature has classified this species of property as real estate (Pol. Code, § 16; Civ. Code, § 4662; Code Civ. Proc. § 3463), and has provided the same remedies for the protection and enforcement of rights pertaining to it, with the same forms of procedure, as it has provided for the protection and enforcement of rights pertaining to other real estate. The same actions are as appropriate to the one as to the other. The same form of judgment is entered in both cases. It is enforced in the same way, subject to the right of appeal, with a stay pending final review, under the provisions of the Code of Civil Procedure. These matters are all so familiar to the profession in this state that it is unnecessary to more than mention them. There is no provision anywhere making any exception in case of mining claims. Therefore we conclude that the court, in making the order complained of, was acting within its jurisdiction, in pursuance of the provisions of section 1732, supra, and accorded to defendant a right granted by statute. Under the provisions of this section, any right established by plaintiff in his action in the district court was suspended by the undertaking given, pending the appeal. *Shepherd v. Tyler*, 92 Cal. 552, 28 Pac. 601. The case is in no wise altered by the fact that the plaintiff is kept out of possession in the meantime, and that there may be difficulty in the way of preserving the title which he may finally establish by doing the necessary representation work. Any such difficulty is more apparent than real. Doubtless, by suitable proceedings in the trial court, the right of entry upon the claim for this purpose can be obtained, and resort to force will not be necessary.

2. The order dismissing the appeals in *Baker v. Water Co.* was made without prejudice. The appeals having been held not properly taken, the result was that the defendant was left with all the rights it would have had if it had not attempted to appeal. The fixing of the first undertaking was a mere nugatory act. From it the defendant derived no benefit. When the appeal from the judgment was finally taken and perfected as provided by statute, it was the duty of the court, upon application of defendant, to fix the amount of the undertaking on stay, so that the defendant might be left in possession of the disputed property until its rights could finally be determined. Upon a compliance with section 1732, supra, it was entitled to a stay, and it would have been an arbitrary act on the part of the court to deny it by refusing to fix the amount of the undertaking. The order was therefore properly made. The fixing of the amount of the first undertaking in no wise affected the power or duty of the court to fix the amount of the second.

3. From the statements contained in the affidavit and brief of counsel, it seems that, at the time defendant applied to the district court for the order fixing the amount of the undertaking, there was some sort of showing made, or attempted to be made, as to whether the defendant was in possession of the claim in controversy. This was wholly foreign to the matter then considered. The defendant had been adjudged to be in wrongful possession. No writ had issued to put plaintiff in possession. The defendant had appealed, and was ready to furnish the security for a stay until the appeal should be determined. Whether, as a fact, the defendant was in possession, was no reason why the amount of the security should not be fixed. If the plaintiff in the meantime had taken peaceable possession, he was not disturbed by the order, for it went no further than to name the penalty of the undertaking to be furnished. The writ having been improvidently issued, it is vacated and set aside, and the proceeding is dismissed. Dismissed.

PIGOTT and WORD, JJ., concur.

STATE ex rel. CORNUÉ v. LINDSAY, Judge.
(Supreme Court of Montana. July 30, 1900.)

DISMISSAL BY PLAINTIFF—RECEIVER'S FEES—
PAYMENT—PARTITION—ANSWER—AFFIRMATIVE RELIEF.

1. Under Code Civ. Proc. § 1004, subd. 1, authorizing dismissal of an action by the plaintiff before trial, by entry in the clerk's register, provided affirmative relief is not sought by defendant's answer, plaintiff in a partition suit could not dismiss his action after answer filed setting up defendant's interest in lands in question, since such answer sought affirmative relief.

2. Under Code Civ. Proc. § 1004, subd. 1, authorizing dismissal of an action by plaintiff before trial, by entry in the clerk's register, on payment of costs, where a receiver had been appointed plaintiff could not dismiss his action until payment of such receiver's compensation, since such expense is a taxable cost on the losing party.

Application for a writ of prohibition, on relation of Ellen S. Cornue, against John Lindsay, judge of the district court of Silverbow county. Denied.

An alternative writ of prohibition was issued out of this court commanding the Honorable John Lindsay, as judge of the district court of Silverbow county, to desist from further proceedings in an action pending in that court wherein Ellen S. Cornue, the plaintiff in the present suit, is the plaintiff, and Henry A. Root, Andrew J. Davis, and others are the defendants. By answer to the petition and alternative writ the defendant has pleaded facts which he asserts to be a sufficient showing of cause why a peremptory writ of prohibition should not issue, and the plaintiff has replied. From the pleadings the facts appear to be these: On the 8th day of February, 1898, the plaintiff commenced an action in the district court of Silverbow county

for the partition of certain real property, alleging, among other things, her ownership of a certain undivided interest in the property sought to be partitioned, and that each of the defendants had a certain undivided interest therein. On the 26th day of February, 1898, upon the ex parte application of the plaintiff, without notice to any of the defendants in the action, the court appointed a receiver of the property described in the complaint, and the receiver took possession, and has remained in charge thereof to the present time. Certain of the defendants answered on the 15th day of November, 1898, among them Andrew J. Davis, as trustee, who alleged that he and his co-defendant, Palmer, jointly, as trustees, held the undivided interest which the complaint stated they owned, and set forth also the origin and source of the title of himself and Palmer as trustees, and denied that the plaintiff had any title to the property. He demanded that the interest in said real property owned by himself and Palmer as trustees be adjudged and preserved, and set apart and delivered to them in case partition thereof should be made in the action. Thereafter, and on the 3d day of July, 1899, the plaintiff caused to be filed with the clerk of the district court her præcipe, directing that officer to enter upon the register of actions the dismissal by the plaintiff of the action, paying to the clerk at the same time the sum of \$5 as and for the costs incurred by the defendants therein. The clerk on the day last mentioned made upon the register of actions a notation that the præcipe for dismissal had been filed. On the 25th day of November, 1899, the court fixed the compensation of the receiver at the sum of \$2,250, and upon a stipulation made between counsel for the plaintiff and the receiver, but without notice to or consent of the defendants, ordered that all costs should be paid out of the "trust fund." On the 23d day of December, 1899, the plaintiff brought on for hearing a motion to dismiss the action, which motion was based upon the theory that the præcipe for dismissal and the entry by the clerk on November 25th, coupled with the payment then made, was a dismissal, which ousted the jurisdiction of the district court to proceed further than formally to recognize the dismissal. Upon the hearing of the motion the defendant Davis as trustee, and all of the other defendants who had answered, appeared and objected to the dismissal of the action. Unless prohibited from so doing, the defendant in the present proceeding will retain jurisdiction of and try the cause.

Clayberg & Gunn, Toole, Bach & Toole, and Corbett & Lee, for relator. E. W. Harwood, for respondent.

PIGOTT, J. (after stating the facts). The plaintiff contends that at the time she filed the præcipe for dismissal she paid all the costs of the defendants in the action, and that neither of the answers stated a counterclaim or sought affirmative relief, and that therefore the action was dismissed, and the

court was thereafter without jurisdiction. Section 1004 of the Code of Civil Procedure is as follows: "An action may be dismissed or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself, at any time before trial, upon payment of costs: provided, a counterclaim has not been made or affirmative relief sought by the answer of the defendant. If a provisional remedy has been allowed, the undertaking must thereupon be delivered by the clerk to the defendant, who may have his action thereon. (2) By either party upon the written consent of the other. (3) By the court, when the plaintiff fails to appear on the trial, and the defendant appears and asks for the dismissal. (4) By the court, when upon the trial and before the submission of the case the plaintiff abandons it. (5) By the court, upon motion of the defendant, when upon the trial the plaintiff fails to prove a sufficient case for the jury. * * * The dismissal mentioned in the first two subdivisions is made by entry in the clerk's register." It is apparent that a counterclaim is not interposed; but we are of the opinion that affirmative relief is sought by the answer of Davis, trustee. Under the provisions of chapter 4, tit. 10, pt. 2, Code Civ. Proc., which treats of actions for the partition of real property, the defendant is not required to plead facts sufficient to constitute a counterclaim in order to obtain affirmative relief. In actions brought for partition the plaintiffs must set out specifically and particularly, so far as may be known to them, the interests of all persons in the property, and the defendants must set forth in their answers fully and particularly the origin, nature, and extent of their respective interests. The rights of all parties may be put in issue, tried, and determined. An answer stating the matters required to be pleaded by the statute will, when established, entitle the defendants to full relief. While the rule ordinarily applicable to actions in general is that a defendant will not be granted affirmative relief unless he pleads and proves facts constituting a counterclaim, actions for partition comprise an exceptional class. In *McClaskey v. Barr* (C. C.) 48 Fed. 130, a suit for partition, the court said that "when the defendants have an interest in the property as co-tenants, it is incumbent on them, by their answer, to disclose the nature and extent of such interest as fully as the plaintiff, in his complaint, is required to disclose the nature and extent of his interest. They become, as it were, plaintiffs seeking affirmative relief, and bound by all the rules of pleading to exhibit the facts upon which alone that relief can be properly extended,"—which is quoted from the text of section 499, *Freem. Co-ten.* The opinion in the case just cited, as well as section 499 of Mr. Freeman's treatise, approves the following extract from *Morenhout v. Higuera*, 32 Cal. 290: "An action for partition under our statute is to some extent *sul generis*. The parties named in the complaint, whether as plaintiffs or defendants, are all

actors, each representing his own interest. Whether plaintiffs or defendants, they are required to set forth fully and particularly the origin, nature, and extent of their respective interests in the property. This having been done, the interest of each or all may be put in issue by the others; and, if so, such issues are to be first tried and determined, and no partition can be made until the respective interests of all the parties have been ascertained and settled by a trial." Parties to an action in partition are all actors or plaintiffs, each against each and all others. *Senter v. De Bernal*, 38 Cal. 637. A plaintiff may dismiss or discontinue an action where no judgment other than for costs can be recovered against him by the defendant; but when, under the pleadings and evidence relevant thereto, such other judgment may be recovered, the plaintiff will not be permitted, as of course, to dismiss or discontinue. *McKesson v. Mendenhall*, 64 N. C. 286. See, also, *Estell's Ex'rs v. Franklin*, 29 N. J. Law, 264.

Nor do we think that the plaintiff complied with the requirement of subdivision 1 of section 1004, *supra*, that he must pay costs as a condition to a dismissal by himself before trial. The compensation of a receiver is taxable costs. *Hutchinson v. Hampton*, 1 Mont. 30; *Ervin v. Collier*, 2 Mont. 605. The compensation of a legally appointed receiver, while primarily chargeable to and payable out of the property or funds in his hands, as was held in *Hutchinson v. Hampton*, *supra*, is nevertheless (in the absence of exceptional facts) ultimately taxable to the losing party, whose wrong occasioned the appointment, as was declared in *Ervin v. Collier*, *supra*. The receiver in *Cornue v. Root et al.* was appointed upon the application of the plaintiff, who sought thereafter to dismiss the action without paying the amount of the costs chargeable against the defendants' interests in the real property. Indeed, it is not admitted that the plaintiff has any interest therein. The attempted dismissal by the plaintiff, without payment of the costs occasioned by her acts, was ineffectual. At the common law neither a discontinuance nor a dismissal could be entered, except by order of the court or of the chancellor. Subdivision 1 of section 1004 alters the common-law and equity rule by permitting the plaintiff himself, upon condition that he pay the costs, to dismiss his action (in the absence of a counterclaim pleaded or affirmative relief sought) at any time before trial by entry in the clerk's register. Without the performance of this condition the attempted dismissal is ineffectual. It is true that a plaintiff may not infrequently be unable to ascertain the amount of the costs at the time that he desires to dismiss the action. This is a penalty which he must suffer as a consequence of the mistake or error committed by him in bringing the action, which he impliedly admits should not have been commenced. We cannot, of course, on application for a writ of prohibition, determine whether the defendant or the district court

erred in the amount allowed to the receiver. There was jurisdiction to allow compensation and fix its amount. The defendant, as the judge of the court over which he presides, has jurisdiction of the action. Let judgment be entered setting aside the alternative writ of prohibition, denying a peremptory writ, and dismissing the proceedings. Judgment for the defendant.

BRANTLY, C. J., and WORD, J., concur.

CROSSEN v. OLIVER.

(Supreme Court of Oregon. July 30, 1900.)

EJECTMENT—UNRECORDED DEED—NOTICE—JUDGMENT LIEN—EXECUTION—ALTERATION—EVIDENCE—PRIORITY—TRIAL—INSTRUCTIONS.

1. An instruction in ejectment that, "in order to give defendant's judgment lien priority over plaintiff's unrecorded deed, the former must have been taken in good faith, without notice or knowledge of the latter," is defective, in that it does not define the notice or the manner in which it may be obtained.

2. The fact that an erasure appeared in a sheriff's return did not render the return inadmissible in evidence, where it was shown that the erasure was in the sheriff's handwriting, and made before the return was filed.

3. Where it appeared on the face of a sheriff's return that certain erasures therein had been made by the sheriff before the return was filed, a memorandum of sales kept by him was not admissible to impeach the return by showing that the erasures had been made after filing.

4. In ejectment the court charged, "If you find from the evidence that O. had a valid and subsisting claim against C., and he obtained judgment thereon in good faith, and without notice or knowledge of the execution of this unrecorded deed from C. to plaintiff, then I instruct you that entering and docketing this judgment before the recording of this deed would make such judgment a valid lien upon the land, prior in time and right to this unrecorded deed, and you should find for the defendant." It also charged that the judgment offered in evidence in favor of O. was a valid and subsisting judgment as of the date of its entry and docketing, and became a lien on the land in question from that date, unless O. had notice or knowledge of the unrecorded deed. Held that, though the latter instruction omitted the condition that the judgment must have been based on a valid demand, the two instructions were not in conflict, when construed together.

5. An instruction in ejectment that: "The notice that will render a party a lienholder in bad faith must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted, with respect to the existence of a prior right, as to make it fraudulent in him afterwards to take and hold the property," is correct.

6. In the absence of evidence to the contrary, a deed will be presumed to have been delivered on the day it bears date.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Ejectment by M. S. Crossen against E. W. Oliver for the possession of land. From a judgment in favor of defendant, plaintiff appeals. Reversed.

This is an action to recover the possession of real property. The plaintiff claims under a

deed from Mrs. M. M. Caldwell, dated January 25, 1895, and recorded February 27, 1896; and the defendant claims title from the same party by sheriff's sale under an execution issued upon a judgment rendered in favor of Turner Oliver and against Mrs. Caldwell April 2, and docketed April 4, 1895. There were two trials in the court below. At the first the plaintiff had a verdict in accordance with the prayer of his complaint, and at the second the verdict was for the defendant, upon which judgment was rendered dismissing the action, and plaintiff appeals.

L. A. Esteb, for appellant. T. H. Crawford, for respondent.

WOLVERTON, J. (after stating the facts). The first assignment of error is based upon the action of the court in setting aside the first verdict and granting a new trial. The reason assigned by the court for such action is that the jury were imperfectly instructed relative to the sufficiency of the notice or knowledge of Turner Oliver in respect to Crossen's unrecorded deed to render his judgment inferior and subject thereto. The court instructed the jury that a judgment, in order to have precedence over an unrecorded deed, must have been taken in good faith and without notice or knowledge of such deed, but the method or the manner of the notice that would suffice to subordinate the judgment lien was not further or more particularly described or defined. The plaintiff argues that the instruction was favorable, rather than prejudicial, to the defendant, and therefore that he has no cause of complaint. But in this we cannot concur. For aught we know, the jury may have been induced to base a finding of notice upon slight circumstances, remotely disconnected from the subject, and wholly insufficient to warrant it. It is evident from the instructions contained in the record that there was an issue relative to the manner of notice requisite to the subordination of the judgment lien to the unrecorded deed, and the court very properly held that the jury should have been further instructed in the premises.

In the course of the second trial the defendant called G. W. Benson, the county clerk, and ex officio clerk of the circuit court, who identified the judgment roll in the case of Turner Oliver v. M. M. Caldwell, and the same was introduced in evidence. The witness was then shown the execution under which the land had been sold at sheriff's sale, with the accompanying return, which, on being identified, the defendant attempted to introduce in evidence, whereupon the plaintiff objected because it appeared from the paper that changes had been made in the return which had not been accounted for or explained. It was then shown by the witness that he knew and was familiar with the handwriting of J. F. Phy, the sheriff, and that the return was in his handwriting; that the name "Turner" had been erased, and the initials "E. W." inserted, so as to make it read, "E.

W. Oliver," instead of "Turner Oliver"; and that the change had been made prior to the filing of the return in his office. The execution and return were thereupon admitted in evidence over objection, and error is assigned. It is the duty of the sheriff to make the return and file it with the clerk, and in this instance it appears that it was so made and filed; that it was in the identical condition, as regards the erasure and change, when filed as when offered in evidence; and that the handwriting in which the change was effected was that of the sheriff who made the return. It is a reasonable presumption, under such conditions, that the change was made by the sheriff when making the return. At any rate, it appears that there has been no erasure or change made therein since it was filed, and hence it was competent as evidence, under section 788, Hill's Ann. Laws Or. See *Nickum v. Gaston*, 28 Or. 322, 42 Pac. 130. And a memorandum of sales made by the sheriff, subsequently offered for the purpose of showing that a change had been made in the return, was properly excluded. Such evidence would operate to impeach the return, and it was professedly not offered for that purpose. The return showed upon its face that a change had been made therein, but it was evidently made by the officer whose duty it was to prepare it, and the same was filed and became effective in that form, so that the proffer of the memorandum was irrelevant for the purpose designed.

M. S. Crossen, the plaintiff, took the stand in his own behalf, and testified, among other things, that Mrs. M. M. Caldwell executed a deed to him of the land in question, and that he received the same from her; that the consideration therefor was a year's labor and three cows, for which Mrs. Caldwell was indebted to him; and that she turned the land over to him for such indebtedness. The deed was handed to the witness and identified by him as the one which she had executed, whereupon it was offered in evidence. It was regularly and duly executed, dated January 25, 1895, and had indorsed thereon the recorder's certificate, showing that it had been recorded February 27, 1896. The witness further testified that he went into possession of the land in the spring of 1895, and remained in possession until the spring of 1897, when E. W. Oliver entered thereon. There was other evidence offered, with a view of showing that at the time Turner Oliver obtained judgment against Mrs. Caldwell he had either direct notice or had acquired knowledge of such pertinent and relevant facts as made it incumbent upon him to make further inquiry, which, if made, would have led to positive information touching the existence of Crossen's unrecorded deed. In view of the evidence thus adduced, the court gave instructions as follows: "(11) If you find from the evidence in this case that Turner Oliver had a valid and subsisting claim against M. M. Caldwell, and he obtained judgment thereon in good faith, and without notice or knowledge of the

existence of this unrecorded deed from her to the plaintiff here, M. S. Crossen, then I instruct you that entering and docketing this judgment before the recording of this deed would make such judgment a valid lien upon the land, prior in time and right to this unrecorded deed, and you should find for the defendant. (12) I instruct you that this judgment offered in evidence in favor of Turner Oliver is a valid and subsisting judgment as of the date of its entry and docketing, which is the 4th day of April, 1895, and that this judgment became a lien upon the land in question from the said date, prior in time and right to this unrecorded deed from M. M. Caldwell to plaintiff, Crossen, which was recorded February 27, 1896, unless you should further find that Turner Oliver, at or prior to the time he obtained and had docketed this judgment, had notice or knowledge of this unrecorded deed to Crossen. (13) The notice that will render a party a lienholder in bad faith must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted with respect to the existence of a prior right as to make it fraudulent in him afterwards to take and hold the property. In this case notice or knowledge that would bind Turner Oliver, and render his judgment subject to the unrecorded deed of Crossen, must be either actual knowledge of the existence of this deed, or actual notice of such facts and circumstances as would have enabled him, by following up such information, to have ascertained that Crossen held this deed and claimed this land. (14) I instruct you, gentlemen of the jury, that unless you find from the testimony that Turner Oliver had information that M. S. Crossen was the owner of the land in question at the time he took judgment against M. M. Caldwell, or at the time had information that put him on his inquiry, and that such inquiry, if pursued, would have developed the fact that Crossen was the owner, or claimed to be the owner, of the lands in question, you should find for the defendant. (15) The deed only takes effect as a conveyance of the land from the date that it was delivered to Crossen by Mrs. Caldwell. There is no presumption that a deed is delivered on the date of its execution. If it is not shown to have been actually delivered before the recording of it, it will be presumed to have been delivered at the time of the date of the recording. (16) If it is not shown by the proof to have been delivered prior to April 4, 1895, then there is no question of notice to Oliver to be considered by you."

A criticism is made that instructions 11 and 12 are conflicting, in that by the former the jury were told that Oliver had a valid and subsisting judgment lien, superior to Crossen's unrecorded deed, provided it was founded upon a valid and subsisting claim, and was obtained in good faith without notice of such deed, while by the latter they were instructed that Oliver's judgment was valid as of its purported date, which is prior in time and

right to Crossen's deed, unless prior thereto Oliver had notice or knowledge thereof, thereby eliminating the condition that the judgment must have been based upon a valid demand and obtained in good faith. What is contained in the latter instruction touching the prior notice or knowledge of the unrecorded deed sufficiently covers the question of good faith, when the instructions are construed in pari materia, as they ought to be. A judgment, when rendered in the regular course of judicial proceedings by a court of competent jurisdiction, is, in the absence of fraud or collusion, conclusive evidence against grantees claiming under the judgment debtor that the relation of debtor and creditor existed between the parties to the record, and of the amount of the indebtedness. *Pickett v. Pipkin*, 64 Ala. 520; *Swihart v. Shaum*, 24 Ohio St. 432; 12 Am. & Eng. Enc. Law, 86, 149d. The judgment not having been attacked for fraud or collusion, its validity was not in controversy. The latter instruction was therefore unobjectionable. The former went further than was necessary, but not to the injury of the plaintiff.

It is more seriously urged, however, that it was error for the court to inform the jury that: "The notice that will render a party a lienholder in bad faith must be something more than would excite the suspicion of a cautious and wary person. It must be so clear and undoubted with respect to the existence of a prior right as to make it fraudulent in him afterwards to take and hold the property." This language was approved in *Raymond v. Flavel*, 27 Or. 219, 246, 40 Pac. 158, and supported by *Bowman v. Metzger*, 27 Or. 23, 39 Pac. 3, 44 Pac. 1090. The doctrine, as it respects a purchaser in good faith, is fully discussed in these cases, and the proper rule in the premises ascertained and determined. It will be found from an examination thereof that the plaintiff had quite as favorable instructions upon the subject as he could reasonably ask, and he cannot, therefore, be heard to complain.

The next and last complaint is of the court's instruction touching the presumption that obtains where a deed is shown to have been delivered, and there is no evidence touching the date or time of its delivery, except what appears by the deed itself. The bill of exceptions does not show that there was any testimony introduced fixing the actual date upon which Caldwell delivered the deed to Crossen, and the matter was apparently left for ascertainment through the legal presumption that would follow when it is shown, without more, that the deed had been actually delivered. Where the deed and its acknowledgment bear the same date, the authorities are in perfect accord to the effect that where the deed is found in the possession of the grantee, or a delivery is shown, without fixing the date at which it is made, the presumption is that it was delivered at the time it bears date. There is a disagreement among the authorities whether the date

of the deed or of the acknowledgment should prevail, where they are not in accord. The presumption is disputable, however, and the date of its actual delivery may be proven allunde. 9 Am. & Eng. Enc. Law (2d Ed.) 152, 153; Kendrick v. Dellinger (N. C.) 23 S. E. 438; Ten Eyck v. Whitbeck (Sup.) 36 N. Y. Supp. 1013; Magee v. Allison (Iowa) 68 N. W. 322; Nichols v. Sadler (Iowa) 68 N. W. 709; Geiss v. Odenheimer, 2 Am. Dec. 407; Breckenridge v. Todd, 16 Am. Dec. 83; Hall v. Benner, 21 Am. Dec. 394. The date of acknowledgment of the deed in question is not shown, as we have not the instrument before us, but the date of the deed appears in the record; and, under this condition, the presumption ought to prevail that it was delivered at the date which it bears of its execution. The instruction touching the presumption that should obtain under the conditions stated was therefore erroneous. The sixteenth instruction is a logical sequence from the one under discussion, but it is not sound, in view of the rule as we have ascertained it to be touching the presumption that should apply as to the time of delivery. The true rule does not put the question of notice out of the case, as did the one adopted by the court below. These considerations reverse the judgment below, and it is so ordered.

STATE v. MIMS.

(Supreme Court of Oregon. July 23, 1900.)

CRIMINAL LAW—IMPEACHMENT—EVIDENCE—COMPETENCY—QUARRELSOME DISPOSITION—GENERAL REPUTATION—PROOF—NEGATIVE TESTIMONY—ADMISSIBILITY—OPINION OF WITNESS—UNFRIENDLY WITNESS—REMARKS OF COUNSEL—EVIDENCE TO SUPPORT COMPROMISE VERDICT—AFFIDAVIT OF DEFENDANT—SUFFICIENCY—NEWLY-DISCOVERED EVIDENCE.

1. R. testified that he heard defendant threaten to kill deceased, and defendant, for the purpose of impeachment, called several witnesses who testified that R., in a conversation with them and R.'s farm hand, said that he heard the deceased threaten to kill defendant; and the state, in rebuttal, called B., who testified that he was R.'s farm hand, and was present at the conversation referred to by the impeaching witnesses, and that R. in that conversation said he heard defendant threaten to kill deceased. Held that B.'s testimony was competent, since he was not called to corroborate R., but to show that the impeaching witnesses had misinterpreted R.'s language.

2. Where defendant claimed that he shot the deceased in self-defense, evidence that the deceased, in a quarrel with defendant a few weeks prior to the homicide, armed himself with an ice pick, was incompetent to show that the deceased was a quarrelsome and dangerous person, since it was a specific act in no way connected with the *res gestæ*.

3. Where evidence had been introduced that deceased was in the habit of arming himself whenever he had a quarrel, it was competent in rebuttal to allow a witness to testify that, to the best of his knowledge, the deceased never carried arms.

4. Where the details of the altercation had been described to the jury, showing the movements and positions of the respective parties from its inception until the fatal shot was

fired, evidence as to who had the advantage in the fight was inadmissible.

5. Where the state was compelled to call an unfriendly witness because he saw the encounter which resulted in the homicide, remarks of the counsel for the state in argument to the jury that the state did not claim that such witness told the truth, and that they had a right to judge for whom he was testifying, were not objectionable, as tending to impeach his own witness.

6. Where defendant claimed that he shot the deceased in self-defense, and that as a result of the encounter he had a bump on his head as big as a goose egg, and the deputy sheriff and others about the jail were not called as witnesses, remarks of counsel for the state to the jury that the deputy sheriff and everybody about the jail would have seen such a bump, had it been there, were not improper.

7. Where defendant shot the deceased in the latter's saloon in an encounter occasioned by a dispute over what a customer had said as to defendant cheating at the gambling table, remarks of counsel for the state in argument that the deceased had a right to protect his customers from those who cheated them were not improper.

8. Where defendant shot the deceased in a fight in the latter's saloon, and there was evidence that deceased on former occasions had removed persons from his saloon by taking them by the collar, a remark of counsel for the state in argument that it was his understanding that deceased took defendant by the collar to remove him from the room was a legitimate comment on the facts of the case.

9. An affidavit of defendant that the verdict of the jury convicting him was the result of a compromise to save the county expenses, and that nine jurors were willing at any time to return a verdict of not guilty, and three of them refused to find a verdict of guilty unless a recommendation of extreme mercy was added to the verdict, unsupported by any of the jurors, and which did not show from what source the information concerning their secret deliberations was obtained, was not sufficient to justify a new trial.

10. Where defendant, who was convicted of manslaughter, was frequently visited at the jail just after the homicide by a proposed witness, an affidavit of the latter that he would swear that the deceased, a week before the homicide, threatened to kill defendant, and that he repeated the threat on the night of the homicide, and an affidavit of defendant that he did not know of such testimony prior to the trial, are not sufficient to warrant a new trial because of newly-discovered evidence, since it is not probable that such evidence would change the verdict, and the truthfulness of defendant's affidavit was suspicious.

Appeal from circuit court, Umatilla county; S. A. Lowell, Judge.

Edwin L. Mims was convicted of manslaughter, and he appeals. Affirmed.

Jas. A. Fee and J. H. Raley, for appellant. H. J. Bean, Dist. Atty., and J. J. Balleray, for the State.

WOLVERTON, J. The defendant appeals from a judgment rendered against him upon conviction of the crime of manslaughter upon an indictment for murder, wherein it is alleged that he killed one J. Henry Miller. The facts will sufficiently appear as the opinion proceeds.

In the course of the trial the state called Ed Rush as a witness, who testified, among other things, that in the latter part of May

or the first of June preceding he was in Miller's saloon, that the deceased objected to Mims playing in his house, and that, as Mims was going out with some friends, he heard him say, "I will kill that son of a ——— some time if he don't let me alone." For the purpose of impeachment the following question was propounded on cross-examination: "I will ask you if, in a conversation that occurred in John Basye's office about Wednesday, October 18, 1890, in the presence of John Basye, H. L. Scott, W. D. Blitch, I. N. Davis, and a farm hand of yours, if you did not in that conversation state and say, in conversing about the Mims case, that you were present in Miller's saloon, and that you heard Miller say that, if Mims did not stay out of there, that he would have to kill the son of a ———, or words to that effect?"—to which he answered, "No, sir." He was further interrogated as follows: "Q. Were you in that office at any other time about that time? A. No, sir. Q. You were there for the purpose of settling a bill, were you not? A. Yes, sir." Subsequently the defense called Basye, Blitch, and Davis, whose evidence tended to show that Rush did make the statement imputed to him. John Beggy was called in rebuttal, and testified, substantially, that he lived in Pendleton, was a laborer engaged in farming and rail-roading, and was working for Rush at that time; that he recollected of being in the town of Helix on the day named in the impeaching question; that he went there with Rush, Basye, and a man from the warehouse, whom he afterwards recognized as Montgomery; that he stayed in Basye's office half an hour, when he went out into the store for about ten minutes, then returned again to the office, where he remained for something like three hours and a half, waiting for the train; and that the men referred to in the question were coming in and going out. He was then asked: "Did you hear Ed Rush, in that conversation, say that he had been down to Miller's saloon, here, and that he had heard Miller say that if the defendant here, Ed Mims, did not stay out of there, he would shoot the son of a ———? Did you hear Mr. Rush say anything like that?"—to which he answered: "I heard him say he heard Mims— Q. Heard Mims say? A. Heard Mims say that he would kill the son of a ———, Miller, the first chance he would get. That is all I heard then." He further testified that he heard no other conversation in which the language imputed to Rush was used. There was a motion to withdraw the testimony from the jury for the reason, among others, that it did not refer to the same conversation alluded to by the impeaching witnesses, which was denied, and the appellant complains of the ruling. The well-settled rule of law that evidence intended to show that the witness has on other occasions made statements out of court similar to such as he has testified to in the case is not admissible in corroboration, was invoked as fatal to the ruling. But we do not understand that this testimony was introduced for such pur-

pose, but with the view of showing that the witnesses called to impeach Rush were mistaken in their interpretation of his language. It was shown very clearly that Beggy was the farm hand alluded to in the impeaching question put to Rush, which makes him competent to testify respecting the conversation, so as to counteract the statements of the impeaching witnesses.

There was evidence introduced to the effect that the defendant was acting in self-defense when he shot the deceased, and, for the purpose of showing that he had reason for believing and fearing that the deceased would have killed him, if not resisted, or done him great bodily harm, he produced G. F. Stranahan to prove that he saw Miller have a difficulty in his saloon some two or three weeks previous to the encounter with Mims, and that Miller on that occasion armed himself with an ice pick and came out with the evident intention of settling the difficulty. The court refused to allow the testimony to go to the jury, and error is assigned. It was competent to show the reputation or the general character of the deceased as a quarrelsome, vindictive, or dangerous person; but such reputation cannot be established by proving specific acts of violence towards third persons, or single, isolated, or unlawful acts forming no part of the res gestæ. Underh. Cr. Ev. § 325; Jenkins v. State, 80 Md. 72, 30 Atl. 566; Ryan v. State (Tex. Cr. App.) 35 S. W. 288; State v. Peffers, 80 Iowa, 580, 46 N. W. 662; Thomas v. People, 67 N. Y. 218; People v. Druse, 103 N. Y. 655, 8 N. E. 733. The proffered evidence of Stranahan was of a particular act, and therefore obnoxious to the rule.

Thomas Millarkey, a witness for the state, being called in rebuttal, was asked: "Can you tell the jury whether or not he [Miller] was in the habit of arming himself on any occasion when he had any difficulty?"—to which he answered: "I never saw him have any arms at all whatever. I don't think he carried any. I am positive he didn't." The court denied a motion to withdraw the answer, and error is predicated upon the ruling. Some evidence had gone to the jury to the effect that the deceased was in the habit of arming himself whenever he became involved in difficulty. The question was intended to counteract such evidence, and the answer was apparently responsive, so far as the witness' knowledge went. The character of the inquiry involved in some measure the reputation of the deceased as being a dangerous person when in dispute, and the answer had a bearing upon the issue, so there was no error in allowing it to stand.

The state called T. J. Means as a witness, who narrated the circumstances of the encounter which resulted in the death of Miller. On cross-examination he was asked: "As a matter of fact, wasn't Mims as helpless as a child in that fight?"—to which he answered: "I don't think he could fight with Miller." He was then asked: "Did he stand

any chance at all to get away from him or to protect himself at all any sooner than he did get away?"—which question the court would not permit him to answer. Later in the trial, Gus Holloway, also an eyewitness to the altercation, was called by the defendant and asked: "Which one of the parties, up to the time that shot was fired, had the advantage in that fight?"—and the court refused to allow the question to be answered. The ground of the objection to both questions was that they called for the opinion of the witness touching a matter about which the jury was as competent to judge as they. The witness Holloway had detailed the facts and circumstances from the inception of the altercation up to the time the fatal shot was fired, and had described minutely the movements and positions of the respective antagonists leading up to the result, which gave the jury equal facilities for judging as to who had the advantage in the quarrel as the witness. The incident was susceptible of accurate and perfect description in detail, and there was no occasion for opinion evidence such as was called for. The jurors were able to determine the question of advantage from the delineation of the attending circumstances, and it was within their peculiar province to do so, unaided by the opinion of the witness. So it was with the question propounded to Means. They were enabled to judge from a delineation of the circumstances attending the encounter up to that particular period of the incident whether Mims had any chance to get away sooner than he did, and the opinion of the witness was incompetent for their further advisement.

One of the counsel for the state in his argument to the jury made use of the following language: "We put Mr. Means upon the stand because we had to, but we don't claim that he told the truth,"—to which objection was taken, and an exception saved. The counsel continued: "Gentlemen of the jury, you have a right to judge as to whose witness he [referring to Means] was, and who he was testifying for," and, after further objection: "I have a right to call your attention to the strenuous objection of Judge Fee to this statement of mine." The basis of the objection is that the statement of the counsel tended to the impeachment of the state's own witness. There were but two persons who witnessed the altercation from its inception to its termination. These were Means and Holloway. Cradick saw a good deal, but not all of it, and much that he did see was from a reflection in a mirror. The cross-examination of the witness Means developed a marked leaning towards the defendant, and much anxiety on his part to shield him from culpability. The argument of counsel was employed for the purpose of combatting this particular feature of the case. Was it permissible? The rule of law is well established that a party producing a witness impliedly represents that he is worthy of belief, but this rule is applicable to preclude impeach-

ment by direct methods alone; that is, the party producing the witness is not permitted to show that his reputation for truth and veracity is bad. The party may, however, put in proof any relevant fact which may have a tendency to establish his cause, and it matters not whether its effect is to corroborate, contradict, or impeach specific statements of any particular witness he may have produced. Thus, he may indirectly, if such is the tendency of the facts proven, impeach his own witness (Underh. Cr. Ev. § 234); and whatever is legitimate in proof is also a legitimate subject for remark or discussion before the court or jury. If witnesses disagree in their narration of material facts, it is a proper subject of comment as to which of them told the truth and which of them did not, although they may have all been produced by the party indulging in the comment. This we understand to be the purpose and effect of the remarks complained of. It sometimes occurs that a party is compelled by the exigencies of the case to call an unfriendly witness for the establishment of a fact or facts that he cannot otherwise prove, but this does not necessarily preclude such party as to all the witness may testify to. He may yet prove independent facts, although the proof thereof may contradict in some measure independent statements of his own witness. Such was the contention of the state at the trial, as counsel insisted, and the contention is not without relevancy, so that the remarks cannot be said to have operated injuriously to the defendant.

Other remarks of the counsel in his argument to the jury were excepted to, viz.: (1) "Do you think that the deputy sheriff and everybody about the jail would not have seen that bump as big as a goose egg upon the head of the defendant, if it had been there?" (2) "While I am not inclined to applaud Mr. Miller for running the kind of a house he did, yet he had a right to defend his customers from those who gambled there for the purpose of cheating or defrauding his regular customers." And: (3) "According to my understanding of it, Miller took Mims by the collar to remove him from the room." It is insisted that there was no evidence produced at the trial upon which to base the statement by way of inquiry, or either of the succeeding assertions. The inquiry was touching a physical fact which persons other than those called to prove it had ample facilities for observing. The fact that such persons were not also called was a proper subject for comment, and the allusion is to the inference which might reasonably have been drawn from the circumstance. As it relates to the second remark, there is some testimony in the record tending to show that the defendant had not demeaned himself with suitable or proper circumspection or fairness at the gambling table. This is indicated, if by nothing else, by the dispute which took place between him and the deceased relative to what one of the customers of the place had said about not

wanting to play with Mims, and which led directly to the physical encounter. The latter remark was evidently induced by the testimony to the effect that Miller had taken two other men by the collar on former occasions and ejected them from the saloon, and that it was inferable therefrom that Miller was proceeding in a similar manner with the accused when he was shot. It is often difficult to draw the exact line of demarkation between the legitimate deduction from a fact and the statement of fact itself. A statement of a fact not proven, or of counsel's individual opinion, should never be made or advanced before a jury; but all reasonable deduction or comment upon disputed facts is legitimate argument, and unless there is absolute disregard of professional propriety, to the prejudice of the defendant, there will not be a reversal on account of it. The argument, it seems to us, was a legitimate comment upon the facts in the case.

It is insisted that the verdict of the jury was the result of a compromise which was influenced in a measure by the action of the trial court. The question is raised by a motion for a new trial. The jury was instructed and retired at 5 o'clock in the evening of October 25th, and about 7 o'clock of the following evening went into court, where, according to the defendant's sworn statement, William Scott, the foreman, stated that they were unable to agree; that the trial of the cause was very expensive; that he was willing to do anything in his power to arrive at a verdict, but that he believed it would be impossible for them to do so; that the court then stated to the jury that if none of them were sick they would be required to return to the jury room for further deliberation. Thereupon two of the jurors signified their desire to be excused from taking supper at the expense of the county, one of them saying that he had been boarded at the expense of the county long enough. The defendant further stated, upon information and belief, that nine of the jurors were ready and willing at any time to return a verdict of not guilty; that six voted, "Not guilty," from the first until the compromise was reached whereby he was convicted; that three voted "Guilty," and refused to agree to a verdict unless the defendant should be convicted of manslaughter; that the other jurors insisted that, before they would consent to return such a verdict, there should be added a recommendation of extreme mercy; that the verdict returned was not the verdict of the jury, but that it was compelled thus to agree to save further expense to the county. The following was subjoined to the verdict: "We recommend the defendant to the extreme mercy of the court." The affidavit of the defendant constitutes the only evidence produced respecting the secret deliberations of the jury. None of the jurors came forward to sustain him in any particular, and it does not show from what source he derived his information. If such a showing, without other

proof, were to prevail, as constituting just cause for setting aside the verdict of a jury, every person convicted of crime could easily prevent the entering of a judgment upon such conviction. There is nothing in the court's manner or treatment of the jury in sending it out the second time which would indicate a desire to influence it to agree merely because the trial had proven expensive. What the two jurors may have said touching the cost of the trial does not appear to have influenced the court, nor should it be considered as influencing the deliberations of the jury, and the form of the verdict is not of such a nature as to lead to the conclusion that it was the result of a compromise. So that the showing is not sufficient in this particular upon which to grant a new trial.

It is also insisted that the court below erred in refusing to grant a new trial because of newly-discovered evidence material to the defense, as shown by the affidavits of the defendant and one William Lee. Lee avers that, if called as a witness, he would testify that he was in there about a week prior to the homicide, but that he had been barred by Miller from gambling in his saloon, and that he asked Miller if he intended to allow Mims to continue to gamble therein; that he said he did not, and that he would kill the son of a ——— if he did not remain away from there; that on the night of the 23d of August, a short time before the altercation, he went to the saloon, and, after he had passed a screen at the back entrance, he saw Miller standing at the slot machine; that Miller called him over and said, "You just watch the old man Miller lick that son of a ——— if he steps in this house to-night," or words to that effect; that he had never disclosed these threats to Mims or his attorney prior to the trial. Mims' affidavit shows that he made especial effort to ascertain whether any threats had been made against him by Miller, but without avail, until after the trial. The state produced affidavits of the sheriff and his deputies showing that Lee went to the jail two or three days after the arrest of the defendant, and was permitted to talk with him for the space of half an hour or more; that subsequently he continued to call, and was permitted to converse with the defendant four, five, or six times, all of which conversations were without the hearing of the affiants. In rebuttal, Mims deposed that he was suspicious of Lee, and, under the advice of his counsel, would not talk freely with him. There is much in the circumstance of the frequent visits of Lee with Mims, the first coming shortly after the altercation and being somewhat prolonged, to cast a shade of suspicion upon the truthfulness of the statement that the accused was not aware of the alleged newly-discovered testimony until after the trial. The opportunity for inquiry upon the part of Mims and for disclosure on the part of Lee was certainly ample, and it may reasonably be inferred that their relations were friendly and confidential,

rather than strained and reserved; but, however that may be, the evidence proposed to be adduced is not of such nature that we can say the court below has abused its discretion by denying the motion. The alleged threats had never been communicated to the defendant, and, if they had been, they could have no other tendency than to show the state of the defendant's mind, and to relieve him from blame in case he might infer therefrom, and from the previous character of the deceased, his demeanor towards him, and his acts upon the occasion of the shooting, that he was in imminent danger of great bodily harm. There was evidence touching the altercation tending to show that following a heated discussion the deceased struck the accused violently with his left hand on the side of the head or neck and knocked him back against a screen standing near the front door of the saloon, and continued the assault, forcing him back into the corner and kicking him, whereupon the accused used his pistol in his defense. Now, if this testimony was not sufficient to induce the jury to believe the defendant shot the deceased under the conviction that he was about to take his life or do him great bodily injury, it is not probable that the additional testimony touching the previous uncommunicated threats to injure or kill the accused would be effective to change its verdict. "It must appear to the satisfaction of the court," says Mr. Underhill, "that, if a new trial is granted, it is reasonably probable that on the introduction of the new evidence the accused will be acquitted. * * * Mere relevancy alone is not sufficient to admit the evidence, if it is incredible, cumulative, unconvincing, or otherwise unsatisfactory." Underh. Cr. Ev. § 520. This is unlike the case of *Price v. State* (Tex. Cr. App.) 43 S. W. 96. There the difficulty between the deceased and the accused occurred when no eyewitness was present, and the vital question was, who began the difficulty, or who was the aggressor? It was exceedingly important, therefore, to ascertain the feeling or ill will of the deceased towards the accused, so as to determine the probabilities respecting the matter, and whether the accused, in taking life, acted as a reasonable man would have done under like conditions. We are of the opinion that the court below exercised a reasonable discretion in denying a motion for retrial. These considerations affirm the judgment of the court below, and it is so ordered.

(36 Or. 222)

STATE v. O'DONNELL.

(Supreme Court of Oregon. July 30, 1900.)

LARCENY—SIMILAR CRIME—EVIDENCE—PREJUDICIAL ERROR.

Where, in a prosecution for larceny of a calf, the evidence showed that one jointly indicted with defendant had purchased from defendant the calf in question, together with two others, and afterwards sold all three, it was error to admit the testimony of a state's wit-

ness that one of the other calves had been stolen from him; it not appearing that the larceny of the second calf occurred in connection with the crime charged, or was committed at the same time or in the same locality.

Appeal from circuit court, Umatilla county; S. A. Lowell, Judge.

Thomas O'Donnell was convicted of larceny, and he appeals. Reversed.

T. G. Halley and John J. Balleray, for appellant. D. R. N. Blackburn, Atty. Gen., for the State.

MOORE, J. The defendant Thomas O'Donnell was jointly indicted with James Roach for the alleged larceny of a cow and a calf, the property of one Allen Rhodes, of the value of \$30 and \$12, respectively, committed in Umatilla county, Or., October 25, 1898; and, having been separately tried, he was found guilty thereof, and from the judgment which followed he appeals.

The testimony introduced at the trial tended to show that Rhodes owned a black muley cow and her black muley bull calf, which were missed about October 20, 1898, and three or four weeks thereafter the cow was found about 15 miles from his place, in the defendant Roach's inclosed stubble field, and the calf's hide near Pendleton, at the slaughter house of Swartz & Greulich, to whom Roach sold the calf, with three others, which he purchased, with said cow and other cattle, from the defendant O'Donnell. The state called one A. D. Rhonimus, who, over the defendant's objection and exception, was permitted to testify that, having visited said slaughter house, he found a red hide, which he recognized as having been taken from a calf which he had missed, and which was included in the sale so made by Rhodes to Swartz & Greulich, and that he had never sold the calf, or authorized any one to take, kill, or flay it.

It is contended that the defendant having been charged with the larceny of a cow and a calf, the property of Rhodes, the court erred in admitting testimony tending to show the commission of an independent crime. "The general rule," says Mr. Justice Bean in *State v. Baker*, 23 Or. 441, 32 Pac. 161, "is unquestioned that evidence of a distinct crime unconnected with that laid in the indictment cannot be given in evidence against the prisoner. Such evidence tends to mislead the jury, creates a prejudice against the prisoner, and requires him to answer a charge for the defense of which he is not supposed to have made preparation." The rule is well settled that evidence of the prisoner's participation in the commission of crimes wholly unconnected with that for which he is put upon trial is inadmissible. *Greenl. Ev. § 52; Dunn v. State*, 35 Am. Dec. 54; *Rosenweig v. People*, 63 Barb. 634; *Bonsall v. State*, 35 Ind. 460; *Coleman v. People*, 53 N. Y. 81; *People v. Gibbs*, 93 N. Y. 470; *Barton v. State*, 18 Ohio, 221. The rule that evidence of crimes other than that charged in the indictment is inadmissible is subject to a few exceptions,

speaking of which, Mr. Underhill, in his valuable work on Criminal Evidence (section 87), says: "These exceptions are carefully limited and guarded by the courts, and their number should not be increased." The author gives five exceptions to such rule, which may be summarized as follows: (1) If several similar criminal acts are so connected by the prisoner, with respect to time and locality, that they form an inseparable transaction, and a complete account of the offense charged in the indictment cannot be given without detailing the particulars of such other acts, evidence of any or all of the component parts thereof is admissible to prove the whole general plan. *State v. Roberts*, 15 Or. 187, 13 Pac. 896; *Phillips v. People*, 57 Barb. 353; *Hickam v. People*, 137 Ill. 75, 27 N. E. 88; *Turner v. State*, 102 Ind. 425, 1 N. E. 809; *Com. v. Robinson*, 146 Mass. 571, 16 N. E. 452; *People v. Foley*, 64 Mich. 148, 31 N. W. 94; *State v. Williamson*, 106 Mo. 162, 17 S. W. 172; *State v. Perry*, 136 Mo. 126, 37 S. W. 804; *Brown v. Com.*, 76 Pa. St. 310. Mr. Justice Agnew, in *Shaffner v. Com.*, 13 Am. Rep. 649, in commenting upon this exception, says: "To make one criminal act evidence of another, a connection between them must have existed in the mind of the actor, linking them together for some purpose he intended to accomplish." (2) When the commission of the act charged in the indictment is practically admitted by the prisoner, who seeks to avoid criminal responsibility therefor by relying upon the lack of intent or want of guilty knowledge, evidence of the commission by him of similar independent offenses before or after that upon which he is being tried, and having no apparent connection therewith, is admissible to prove such intent or knowledge, which has become the material issue for trial. *Yarborough v. State*, 41 Ala. 405; *People v. Sanders*, 114 Cal. 216, 46 Pac. 153; *Langford v. State*, 33 Fla. 233, 14 South. 815; *Stafford v. State*, 55 Ga. 591; *Anson v. People*, 148 Ill. 494, 35 N. E. 145; *Com. v. Bradford*, 126 Mass. 42; *People v. Henssler*, 48 Mich. 49, 11 N. W. 804; *Lindsey v. State*, 38 Ohio St. 507; *Goersen v. Com.*, 99 Pa. St. 388; *State v. Habib*, 18 R. I. 558, 30 Atl. 462; *Zoldoske v. State*, 82 Wis. 580, 52 N. W. 778. Mr. Justice Rapallo, in *People v. Corbin*, 15 Am. Rep. 427, speaking of this exception, says, "The cases in which offenses other than those charged in the indictment may be proved, for the purpose of showing guilty knowledge or intent, are very few." (3) If the facts and circumstances tend to show that the prisoner committed an independent dissimilar crime, to enable him to perpetrate or to conceal an offense, such evidence is admissible against him upon an indictment charging the auxiliary crime, when the intent to perpetrate or conceal such offense furnished the motive for committing the crime for which he is put upon trial. *State v. Watkins*, 9 Conn. *47; *Painter v. People*, 147 Ill. 444, 35 N. E. 64; *People v. Harris*, 136 N. Y. 423, 33 N. E. 65; *Templeton v. People*,

27 Mich. 501; *Pierson v. People*, 79 N. Y. 424; *Com. v. Ferrigan*, 44 Pa. St. 386; *People v. Stout*, 4 Parker, Cr. R. 71; *Crass v. State*, 31 Tex. Cr. R. 312, 20 S. W. 579; *Moore v. U. S.*, 150 U. S. 57, 14 Sup. Ct. 26, 37 L. Ed. 996. (4) When a crime has been committed by the use of a novel means or in a particular manner, evidence of the defendant's commission of similar offenses by the use of such means or in such manner is admissible against him, as tending to prove the identity of persons from the similarity of such means, or the peculiarity of the manner adopted by him. *Frazier v. State*, 135 Ind. 38, 34 N. E. 817; *Com. v. Choate*, 105 Mass. 451; *Brown v. State*, 26 Ohio St. 176. (5) When a prisoner is charged with any form of illicit sexual intercourse, evidence of the commission of similar crimes by the same parties is admissible to prove an inclination to commit the act for which the accused is put upon his trial. *Bish. St. Crimes*, § 679; *State v. Scott*, 28 Or. 331, 42 Pac. 1; *McLeod v. State*, 35 Ala. 395; *People v. Patterson*, 102 Cal. 239, 36 Pac. 436; *Lefforge v. State*, 129 Ind. 551, 29 N. E. 34; *State v. Williams*, 76 Me. 480; *Com. v. Nichols*, 114 Mass. 285; *People v. Skutt*, 96 Mich. 449, 56 N. W. 11; *State v. Marvin*, 35 N. H. 22; *State v. Pippin*, 88 N. C. 646; *Com. v. Bell*, 166 Pa. St. 405, 31 Atl. 123. An examination of these deviations from the general rule will show that the testimony objected to herein, if allowable, falls within the first exception hereinbefore noted. That the taking of the two calves, if it be assumed that the same person was guilty thereof, constituted similar criminal acts, must be admitted, but the testimony fails to show that they were taken at or near the same time, or from the same locality; for Rhonimus testified that he had not seen the calf which he lost for about four weeks prior to the time he missed it, and that the distance from Rhodes' place to that from which his calf was taken is about six or seven miles. In *Hall v. People*, 6 Parker, Cr. R. 671, the accused was tried upon an indictment charging him with burglariously entering in the nighttime the barn of one John Gaston, and feloniously taking therefrom a set of harness, a lap robe, net, blanket, whip, and umbrella, which property, the evidence showed, was found in his possession. The prosecution was permitted to prove, over objection and exception, that other property stolen from one Peter P. Shoonmaker two or three weeks prior to the burglary was found in the prisoner's possession, and it was held that the court erred in admitting such testimony. In *Gilbraith v. State*, 41 Tex. 567, the plaintiff in error was tried upon an indictment charging him with the larceny of a blue dun bull, the property of one W. J. Myers; and at the trial a butcher testified that he purchased from the prisoner the hide taken from said animal, and also, over the objection and exception of the accused, stated that at the same time he purchased from the latter the hide of a red steer which was identified as the

property of one Jack Russell, and it was held that the court erred in admitting the testimony so objected to. In *Ivey v. State*, 43 Tex. 425, it was held that on a trial for the theft of cattle the state cannot prove the possession by the accused of stolen cattle other than those described in the indictment, unless it be shown that they were taken at the same time and by the same persons. In *Beach v. State* (Tex. App.) 11 S. W. 832, the prisoner having been indicted for the larceny of cattle, it was held that the court erred in admitting evidence of the defendant's theft of a yearling which was not shown to have been committed at the same time and place as that charged in the indictment. To the same effect, see *Welhausen v. State*, 30 Tex. App. 623, 18 S. W. 300; *Schwen v. State*, 37 Tex. Cr. R. 368, 35 S. W. 172.

In the case at bar, the testimony not having disclosed that Rhonimus' calf was taken at the same time or from the same locality as the calf described in the indictment, and it having been possible to give a complete account of the latter crime without referring to other calves that may have been stolen, the court erred in admitting the testimony so objected to. Other alleged errors are assigned, but, believing that they are not likely to be repeated at a second trial, they will not be further noticed. The judgment is reversed, and a new trial ordered.

(36 Or. 291)

STATE v. TUCKER et al.

(Supreme Court of Oregon. July 16, 1900.)

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—INDICTMENT—INFORMATION—GRAND JURIES—BURGLARY—EVIDENCE—ACQUITTAL—DIRECTION—JOINT BREAKING—INSTRUCTIONS—CRIMINAL LAW.

1. Since indictment by a grand jury is not necessary to an accusation of crime or due conviction thereof, within Const. U. S. Amend. 14, declaring that no person shall be deprived of life, liberty, or property without due process of law, a conviction of a crime, charged by an information filed by the district attorney, as authorized and required by Act Feb. 17, 1899, was not in violation of such amendment.

2. Under Const. art. 7, § 18, regulating the selection and impaneling of grand juries, and presentments, authorizing the legislature to modify or change them, Act Feb. 17, 1899, empowering and requiring district attorneys to file informations charging crimes, and reserving to circuit courts the right to convene grand juries when deemed advisable, is not in contravention thereof, but was a proper exercise of the legislature's power.

3. Defendant lived about two miles from the granary from which two sacks of alfalfa seed were taken. The locks on the granary door had been broken with a punch secured from a shed, and from which boot tracks were traced, similar to tracks found between the granary and a barnyard gate from which tracks of two horses were traced through a field to a road and to a gate near where defendant lived. In the course of the horses' tracks a letter was found, addressed to defendant, and similar boot tracks were found at the outlet from the field to the road. A witness testified that shortly thereafter defendant and another tried to sell him alfalfa seed, while another witness testified that, three days after the taking,

defendant and such other sold him two sacks of alfalfa seed of the same character as that taken, the sacks being identified as those taken. Held, that it was not error to refuse an instruction to acquit, since the testimony was sufficient to justify an inference of guilt.

4. Where, in a prosecution for a burglary committed jointly with another, there was evidence that the lock on the door had been broken with a punch, that tracks of two horses led to the premises, and that shortly afterwards defendant was associating with another, and jointly engaged with him in disposing of the property stolen, it was not error to instruct that defendants, jointly charged with burglary, were guilty, if, while acting together in the commission of the crime, either one of them actually broke and entered the building.

5. It is not error, in a criminal prosecution, to refuse an instruction given in effect in the general charge.

Appeal from circuit court, Union county; Robert Eakin, Judge.

Harry Tucker was convicted of burglary, and he appeals. Affirmed.

T. H. Crawford and J. M. Carroll, for appellant. D. R. N. Blackburn, Atty. Gen., Saml. White, Dist. Atty., and John McCourt, for the State.

WOLVERTON, J. The defendant Harry Tucker was accused, by an information filed by the district attorney, of the crime of "burglary, not in a dwelling house," jointly with one Wilbur Fruit, and, upon conviction thereof, judgment was entered against him, from which he appeals. He complains that he was unlawfully accused, and therefore not duly convicted. This is based upon the contention that the act of the legislative assembly of February 17, 1899 (Sess. Laws 1899, p. 99), is in violation of section 18, art. 7, of the state constitution, which involves, also, the inquiry whether he has not been deprived of the privileges and immunities vouchsafed to every citizen of the land by the fourteenth amendment to the federal constitution, whereby it is declared that no state shall deprive any person of life, liberty, or property without due process of law. The inquiry has received consideration at the hands of the supreme court of the United States, and has been decided adversely to the defendant's position. The question came up in the case of *Hurtado v. People*, 110 U. S. 516, 4 Sup. Ct. 111, 28 L. Ed. 252, which involved the validity of a statute of California wherein it was made the duty of the district attorney, whenever a defendant was examined and committed as provided by the Criminal Code of that state, to file within 30 days thereafter in the superior court of the county an information charging the defendant with such offense; and it was distinctly announced, as a principle under the constitution, that the phrase "due process of law," as used in the amendment, "refers to that law of the land in each state which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,

and the greatest security for which resides in the right of the people to make their own laws and alter them at their pleasure." And further: "That any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law." From these premises it was concluded that although the grand jury was a tribunal known to and sanctioned by the common law, whose duty it was to make presentment of crime to the court, yet the preservation of the system was not essential to the perpetuation of those underlying principles of our civil and political institutions; that it constituted a preliminary proceeding, formal in character only, which could result in no final judgment, except as a consequence of a regular judicial trial; and that, as the defendant was yet entitled to all the rights and privileges of a regular trial subsequently to be had, the guaranty of the constitution had been amply conserved. This case has been subsequently cited by the same tribunal as authoritative, and has never, as we are aware, been departed from. See *In re Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519; *Hallinger v. Davis*, 146 U. S. 314, 13 Sup. Ct. 105, 36 L. Ed. 986; *McNulty v. California*, 149 U. S. 645, 13 Sup. Ct. 959, 37 L. Ed. 882. The significant trend of judicial utterance of the state courts is to the same purpose. Perhaps the leading case is *Rowan v. State*, 30 Wis. 129. The facts upon which it is founded illustrate very clearly the situation attending the present controversy. Originally it was declared by section 8, art. 1, of the constitution of Wisconsin, that "no person shall be held to answer for a criminal offense, unless on the presentment or indictment of a grand jury." In 1870 the clause was amended so as to read, "No person shall be held to answer for a criminal offense without due process of law." The contention was that the amendment did not change the effect of the original clause, and that by the words "due process of law" there was still reserved the right to require an accusation by a lawfully constituted grand jury before the offender could be put upon his trial. Mr. Justice Cole, who announced the opinion of the court, considered the question in connection with the fourteenth amendment of the federal constitution, and his cogent reasoning, although addressed more particularly to the bearing of the amendment, was intended to apply as well to the later declaration in the state constitution. He says: "The historical origin of the fourteenth amendment to the constitution of the United States is familiar to all persons in this country. Prior to its adoption there was a class of persons in the states, which on account of the state of public sentiment, were particularly exposed to oppressive and unfriendly local legislation. They were liable to be despoiled of their property, or to be de-

prived of their rights, privileges, and immunities, in an arbitrary manner, and without 'due process of law.' And the object of this amendment was to protect this class especially from any arbitrary exercise of the powers of the state governments, and to secure for it equal and impartial justice in the administration of the law, civil and criminal. But its design was not to confine the states to a particular mode of procedure in judicial proceedings and prohibit them from prosecuting for felonies by information, instead of by indictment, if they chose to abolish the grand-jury system. And the words 'due process of law,' in this amendment, do not mean and have not the effect to limit the powers of the state governments to prosecution for crimes by indictments, but these words do mean law in its regular course of administration according to the prescribed forms and in accordance with the general rules for the protection of individual rights. Administration and remedial proceedings must change from time to time with the advancement of legal science and the progress of society, and, if the people of the state find it wise and expedient to abolish the grand jury and prosecute all crimes by information, there is nothing in our state constitution as it now stands, and nothing in the fourteenth amendment to the constitution of the United States, which prevents them from doing so." So it was concluded that "due process of law" did not require the preservation and perpetuation of the grand-jury system, and that its abolishment was not an infraction of the sacred and inestimable rights, privileges, and immunities to which every citizen of the state or of the United States is entitled as of right. See, also, *In re Dolph* (Colo.) 28 Pac. 470; *In re Wright* (Wyo.) 27 Pac. 565, 13 L. R. A. 748; *In re Boulter* (Wyo.) 40 Pac. 520; *Bolin v. State* (Neb.) 71 N. W. 444; *State v. Sureties of Krohne* (Wyo.) 34 Pac. 3; *State v. Barnett*, 3 Kan. 250; *State v. Boswell*, 104 Ind. 541, 4 N. E. 675. The history and development of the grand-jury system will demonstrate that its functions have not been uniform; that while it is a body of very ancient origin, and has become inwrought as one of the permanent institutions of the common law, its offices were not always the same. At first it was a body which not only accused, but tried, public offenders. At a later period it became an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in special instances, be put upon trial. At times it stood in the country of its birth as a barrier against prosecution in the name of the sovereign, but at length it came to be regarded as an institution by which the subject was rendered sacred against oppression from unfounded prosecutions of the crown. "The institution," says Mr. Justice Field, "was adopted in this country, and is continued, from considerations similar to those which give to it its chief value in England, and is designed as a means not only of bringing

to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity." (Grand Jury, Mr. Justice Field's Charge, 2 Sawy. 667, Fed. Cas. No. 18,255. The insertion of the clause in the federal constitution expressly providing for a continuation of the grand-jury system in national jurisprudence is ascribed to such reasoning as this. The learned justice was still upon the bench, however, when *Hurtado v. People*, supra, was decided, and gave his unqualified assent to the doctrine thereof. It is evident, therefore, that, while the great jurist commended the wisdom of the system as adopted in the national constitution, he did not deem its perpetuation essential to the regular and orderly administration of justice in obedience to the behests and requirements of the "law of the land" or "due process of law." The grand jury continues to be an accusing body, but the number of which it may be composed varies in the several states. Its sittings and deliberations are in secret, and usually ex parte; hence lacking even the primary essentials of due process of law,—the right of notice or a day in court. But this right is reserved to the accused upon his final trial by a jury of his peers.

The greater stress, however, is laid upon the question primarily stated,—whether the legislature of the state is empowered, under the state constitution, to modify the grand-jury system, without abolishing it in toto. Section 18, art. 7, by which the matter is regulated, reads as follows: "The legislative assembly shall so provide that the most competent of the permanent citizens of the county shall be chosen for jurors; and out of the whole number in attendance at the court, seven shall be chosen by lot as grand jurors, five of whom must concur to find an indictment. But the legislative assembly may modify or abolish grand juries." The act complained of provides, among other things, that it shall be lawful for the district attorney of any judicial district in the state, and it is made his duty, to file in the proper circuit court an information charging any person or persons with the commission of any crime defined and made punishable by the laws of the state, and which shall have been committed in the county where the information is filed; that the information shall be substantially in the form prescribed in section 1269 of the Criminal Code, except the words "district attorney" shall be used instead of the words "grand jury" wherever the same shall occur, and the manner of stating the act constituting the crime shall be of like nature as required in the indictment. The act further provides that from the time the information is filed, and thereafter until and including judgment, it shall be construed to be in all respects an indictment, within the meaning of the present statutes of the state, and that the same proceedings shall be had, with

like effect, as in cases where indictments are returned by a grand jury. It empowers the district attorney to subpoena witnesses to appear before him to testify concerning the commission of crime in like manner as before a grand jury, and requires the name of each witness examined under oath or affirmation to be inserted at the foot of the information, or indorsed thereon, before the same is filed; otherwise, the testimony of such witnesses cannot be heard against the defendant at the trial. Section 7 provides, "This act shall not prevent the circuit court from convening a grand jury whenever in its opinion it is deemed advisable to do so." It is insisted that, so long as grand juries are not abolished, it is the constitutional right of every individual charged with crime to demand and require that the accusation against him be by indictment of a grand jury. In support of this position the chief reliance is founded on the case of *In re Lowrie*, 8 Colo. 499, 9 Pac. 489. That case involved the question of the constitutionality of an act of the legislature which provides, among other things, for the organization and maintenance of criminal courts within certain counties, which were to be courts of record; and it was further provided that the district attorney of the judicial district in which they were established should be the prosecuting officer thereof, that no grand jury should be summoned therein, but that the prosecution of all offenses should be by information, signed and verified by the district attorney, and filed therein. An information was filed against Lowrie, charging him with grand larceny under the statute, which he moved to quash upon the ground that a person charged with such an offense could only be prosecuted upon a presentment or indictment of the grand jury. The question presented had a twofold aspect or bearing, and was whether, in view of the constitution then prevailing, it was competent for the legislature to abolish the grand-jury system as it pertained to the criminal courts, and leave it in force in the district courts, which were in the exercise of general jurisdiction, or whether the system could be abolished within the territory in which the criminal courts happened to be established, and continued in force in other portions of the state, within the limitations of the federal and state constitutions. The fourteenth amendment of the federal constitution was alluded to, as were, also, sections 8, 23, and 25 of article 2, and section 28, art. 6, of the state constitution. Section 8 provides "that until otherwise provided by law no person shall for a felony be proceeded against criminally otherwise than by indictment"; section 23, among other things, that "hereafter a grand jury shall consist of twelve men, nine of whom concurring may find an indictment: provided, the general assembly may change, regulate or abolish the grand jury system"; and section 25, no person shall be deprived "of life, liberty or property without due process of law." The court en-

tertain the view, and so decided, that under these fundamental provisions it was competent for the legislature to change, regulate, or abolish grand juries, but that in view of section 28, art. 6, providing for uniform operation of the laws regulating courts, it must be so effectuated as to affect the whole community equally in respect to the same rights and immunities under similar circumstances; that is to say, it might abolish the entire system, or it might change it, but that whatever is done, in either event, must be so done as to operate uniformly over the entire state, and affect all classes of individuals alike, or otherwise many persons within the state may be deprived of the equal protection of the laws. Hence it was declared that the law providing for the prosecution of persons charged with a felony by information within certain prescribed portions of the state, and within certain courts of limited and peculiar jurisdiction, was unconstitutional and therefore void. The doctrine of the case would seem to be, not, as contended for by counsel, that the legislature must abolish in toto, or keep its hands off, but that whatever it does towards its abolishment, regulation, or change, the law promulgated for the purpose must have equal and uniform operation throughout the state. Such has been the interpretation thereof as distinguished in *Re Dolph*, supra,—a later case from the same state, wherein it was held that "general laws providing for indictments and information as concurrent remedies for the prosecution of criminal offenses throughout the state are not unconstitutional, when surrounded by proper regulations and safeguards, and made applicable to all persons and communities in the state, without discrimination." The above quotation is from the syllabus of the case. The doctrine as thus stated is supported by ample authority. See *In re Wright*, supra; *In re Boulter*, supra. The legislature by the late act has made prosecution by information concurrent with prosecution by indictment, which it was empowered to do by the authority vested in it under the constitution to "modify grand juries." The significance of the word "modify," as used in this section, was determined in *State v. Lawrence*, 12 Or. 297, 7 Pac. 116. Mr. Justice Lord, speaking for the court, says: "In a general sense, to 'modify' means to change or vary, to qualify or reduce; and unless there is something in the context, or special usage, the words are to be taken in their plain, ordinary, and popular sense. A power given to modify or abolish implies the existence of the subject-matter to be modified or abolished. When exercised to modify, it does not destroy identity, but effects some change or qualification in form or qualities, powers or duties, purposes or objects, of the subject-matter to be modified, without touching the mode of creation. The word implies no power to create or to bring into existence, but only the power to change or vary in some particular an already created or legally ex-

61 P.—57

isting thing. * * * The legislature may modify in various ways, by limiting or regulating their powers, duties, qualifications," etc. A fault is attributed to the law, that it is left to the will and caprice of the court or prosecuting attorney whether to pursue the one or the other method of prosecution, and therefore that its operation will not be equal and uniform; that it will not affect all individuals alike, and therefore some may be deprived of the equal protection of the laws. This idea gained currency from the opinion in the case of *In re Lowrie*, supra, but that portion of the opinion is mere dictum, and has never been followed as authoritative, even by the court that announced it. Indeed, the identical question, so far as the discretion of the court is concerned, was raised in the case of *In re Dolph*, supra, and expressly determined contrary to the criticism. In *Re Wright*, supra,—a comparatively late case from Wyoming,—it was suggested that it was a dangerous procedure to permit a prosecution by information of the prosecuting officer alone, without preliminary examination before a magistrate, and the suggestion has since led to the amendment of the statute. But in a later case (*State v. Sureties of Krohne*, supra), in an opinion rendered by the same justice, such an act was held to be valid, and not obnoxious to the constitutional guaranty that no person shall be deprived of life, liberty, or property without due process of law. See, also, *Territory v. Stroud* (Ok.) 50 Pac. 265. Section 11 of the bill of rights, embraced by article 1 of the constitution of the state, has secured to the accused the right of public trial by an impartial jury; to be heard by himself and counsel; to demand the nature of the accusation against him, and to have a copy thereof; to meet the witnesses face to face; and to have compulsory process for requiring the attendance of witnesses in his favor. This constitutes the chief palladium of civil liberty under the constitution. The manner of preferring the accusation is of preliminary import, and whether it shall be done by a grand jury or by a public prosecutor, or concurrently by both, has, whether wisely or not, been left to the wisdom of the legislature to determine. Such is the authority reserved to it under the power to abolish or modify grand juries; but it can never abridge the rights vouchsafed to every individual by the sacred and inestimable provisions of section 11 of the bill of rights, and in this is conserved to the accused very much of all there is of immunity from deprivation of life, liberty, or property without due process of law. He is entitled to bail, except he be guilty of murder or treason, and is protected against excessive bail and unnecessary rigor while in confinement. It may be a matter about which reasonable minds may differ, whether he should have a preliminary examination before being subjected to an accusation and public trial before a court of justice, or as to the appropriate steps to be taken before an

information may be preferred. But these matters are legislative in their import,—made so necessarily, under the constitution, by virtue of the power given to modify grand juries; and, while the wisdom of the law may be a subject of dispute, the authority to enact it cannot be gainsaid.

At the close of the state's testimony the defendant moved for an instruction to the jury to return a verdict of not guilty, which being overruled, he again asked a similar instruction when the evidence on both sides was concluded. This request was also denied, and such action of the court is assigned as error. Thus is presented the question whether the evidence produced at the trial was sufficient upon which to submit the case to the jury. It tended to show that the father of the defendant Harry Tucker lived about two miles from the residence of H. W. Lee, the alleged owner of the property taken; that Harry resided with his father; that Lee had in his granary on the night of January 30, 1899, seven sacks of alfalfa seed; that he locked the door of the granary at 9:30 o'clock in the evening, by means of a padlock and heavy staple; that on the following morning he found the door had been opened and two sacks of the seed taken away. The staple appeared to have been broken from its fastenings by means of a punch secured from Lee's shop, some 50 feet distant. Tracks, apparently made by a person wearing boots with small, high heels, were traced to and from the shop, which was entered through a hole in the rear thereof, and the punch was bent, indicating its use. Other tracks, apparently made by the same person, were found leading to and from a gate in the barnyard fence to the granary, about 20 feet distant. From the gate the tracks of two horses were traced out through a field, thence into and along a road leading to a gate within two or three hundred yards of the residence of the elder Tucker. Within about 50 yards of the gate by the granary, in the course of the horses' tracks, was found a letter, contained in a pocket, addressed to Harry Tucker; and at the outlet from the field to the road were found tracks of a person, similar to those discovered at the granary. A. W. Gellis testified, in effect, that in the latter part of January or the first of February the defendant and Wilbur Fruit tried to sell some alfalfa seed to him in Baker City, which they said had been raised on Lower Powder; that the boys gave their names; and that he talked directly with the defendant, but did not see the seed. Charles F. Palmer testified, in effect, that the defendant and Wilbur Fruit came over to his store, in Baker City, on the evening of February 1st, and talked with him concerning the sale of some alfalfa seed contained in two sacks, which he purchased from them the next morning; that they said it was grown on Lower Powder, on the Fruit ranch. The sacks in which the seed was contained were positively identified as the property taken from his granary, and the seed was of the

same character as that which he lost. The contention of the defendant is that there was no testimony connecting him with the commission of the crime of burglary, aside from the fact that the stolen property was recently found in the joint possession of himself and Wilbur Fruit, and that such possession was not sufficient to warrant the jury in drawing an inference of his guilt therefrom. The inference to be drawn from the possession of stolen property has been held by this court to be one of fact, which may be considered by the jury, in connection with all the other attending circumstances, in determining the guilt or innocence of the accused. Such inference is strong or weak according to the character of the property, the nature of the possession, and its proximity to the time of the theft. *State v. Pomeroy*, 30 Or. 16, 46 Pac. 797. Both of these parties were in possession of the seed, and both exercised ownership over it. The fact that such possession was not exclusive in the defendant could make but little, if any, difference in the weight of the circumstance, considered as an evidentiary fact. The rule touching the inference to be drawn from the fact of possession is the same in cases of burglary as in larceny, where the latter crime has been committed in connection with the former. *State v. Rivers*, 68 Iowa, 611, 27 N. W. 781; *State v. Frahm*, 73 Iowa, 355, 35 N. W. 451. And it should be, as in cases of larceny, considered by the jury in connection with all the other inculpatory as well as exculpatory facts adduced at the trial, in determining the guilt or innocence of the accused. The question for us to determine is whether the testimony adduced is sufficient from which the jury may reasonably infer the guilt of the defendant. His possession is not the only item of evidence inculcating him. The fact of the horses' tracks, leading directly from the granary towards the residence of the father, where the defendant lived, and the further fact of the letter addressed to him being found in the route on the line of the tracks, are circumstances of some weight to be considered in connection with the circumstances of his possession, and the exercise of ownership over the stolen property. 1 McClain, Cr. Law, § 514. The property could not have been stolen or carried away without the breaking, so that the testimony pertinent to the establishment of the larceny was also relevant to substantiate the crime of burglary; and, in our opinion, there was sufficient to go to the jury, and hence the request to instruct otherwise was rightly refused.

An exception was taken to the following instruction of the court: "Where two or more defendants are charged jointly with the commission of a crime, it is not necessary that it be shown that both of the defendants, or either one of them, when tried alone, actually broke and entered the building or took the property. It is sufficient if it be shown that the joint defendants were acting together for that purpose, and if either one of them,

while so acting together for that purpose, actually broke and entered the building with the intention of stealing therein, then all of the said defendants would be guilty of the crime, and either one of them may be prosecuted alone therefor." The ground of the exception is that there was no evidence introduced at the trial upon which to base the instruction touching the joint breaking. But in this the counsel are in error. The breaking was proven, and there was evidence tending to show that two persons were engaged in it. Further than this, the defendant and Wilbur Fruit were found associating together shortly afterwards, and jointly engaged in disposing of the fruits of the burglary.

An exception was taken, also, to the court's instruction No. 9. But what we have heretofore said upon the sufficiency of the testimony to go to the jury applies with equal force to this exception and instruction, so that it is unnecessary to discuss the matter further.

An exception was also saved to the court's refusal to give defendant's instruction No. 4. The effect of the instruction was given in the general charge, and no error can, therefore, be predicated upon the refusal. The judgment of the court below is affirmed.

(22 Utah 204)

In re LITTLE.

(Supreme Court of Utah. June 8, 1900.)

WILL OF HUSBAND—DISPOSITION OF PROPERTY—HOMESTEAD AND EXEMPT PROPERTY—RIGHT TO DISPOSE OF BY WILL—WIDOW'S DISTRIBUTIVE SHARE—HOMESTEAD DEDUCTED—PERSONALTY DISPOSED OF BY WILL—RENUNCIATION OF WILL BY WIDOW—CLAIM AS DISTRIBUTE—FIXED BY LAW.

1. Section 2731, Rev. St. 1898, gives a man absolute power to dispose of his real and personal property by will, except that, being a married man, he cannot legally devise away from his wife more than two-thirds of his legal and equitable estate in real property.

2. While section 2829, Rev. St. 1898, in terms gives absolutely property in the homestead and exempt personalty to the surviving husband or wife, yet by other terms of the section this power is limited, and the husband may by will dispose of the estate in excess of the homestead limit.¹

3. Under section 2826, Rev. St. 1898, the estate being solvent and out of debt, the value of such part of the homestead as may be set aside to the widow should be deducted from her distributive share provided for in such section. She cannot have both unless such design on the part of the testator clearly appears from the will.¹

4. A testator having exercised the right given him by section 2731, Rev. St. 1898, to dispose of his personal estate by will, and the widow having renounced the will, she cannot claim interest in the personalty as distributee, under section 2828.

5. A widow's renunciation of her right under a will does not nullify the will as to other bequests, nor take from the other legatees therein their rights thereunder. Except as to such widow, the will is operative and binding.

6. When a widow renounces her husband's will, the law fixes what estate she takes; and in this state, in such case, she is only entitled

to her distributive share of the real estate by succession, under section 2826, Rev. St. 1898.

Bartch, C. J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Appeal of Alice S. Little from an order refusing to allow her a homestead and one-third of the personalty of the estate of her husband, James T. Little. Affirmed.

Powers, Straup & Lippman, for appellant. Young & Moyle, for respondents.

MINER, J. It appears from the record that James T. Little died in 1898, leaving a will. The inventory shows that the estate consisted of about \$45,000 in personal property and \$40,000 in real estate. The estate was solvent and out of debt. By his will, James T. Little bequeathed to his four children \$10,000 each, and to other parties smaller sums, amounting in all to \$47,000. The balance of his estate, both real and personal, was devised and bequeathed to his wife and four children in equal parts, to share and share alike, after all other bequests and expenses were paid. All the personal property and furniture in the homestead occupied by the deceased was also bequeathed to his widow, without inventory and without charge. A child was born after the testator's death. The widow declined to accept under the provisions of the will, and before distribution filed her petition, asking that the household goods, one-third in value of all legal and equitable estate in the real property possessed by the deceased at the time of his death, one-third of all the personal property, and the homestead where the deceased resided, be set off to her. The court decreed to the widow one-third of all the legal and equitable real-estate property, but no personal property or homestead right. The widow appeals from this decree.

The question for determination is whether the widow is entitled to one-third of all of the personal property, in addition to one-third of the real estate allowed her by the decree, and also whether she is entitled to the homestead and the personal property situate therein. The question involves the construction of certain sections of the Revised Statutes of 1898, which differ materially from those of 1888. These provisions of the statute, so far as material here, read as follows:

"Sec. 2731. Who may Make a Will—Married Man Limited. Every person over the age of eighteen years, of sound mind, may, by last will, dispose of all his estate, real and personal, and such estate not disposed of by will is succeeded to as provided in chapter four of this title, being chargeable in both cases with the payment of all the decedent's debts as provided by law: provided, that a married man shall not devise away from his wife more than two-thirds in value of his legal or equitable estates."

¹ Knudsen v. Hannberg, 20 Pac. 749, 8 Utah, 203.

real property without her consent in writing."

"Sec. 2826. Wife's Interest in Husband's Real Property. One-third in value of all the legal or equitable estates in real property possessed by the husband at any time during the marriage, and to which the wife had made no relinquishment of her rights, shall be set apart as her property in fee simple if she survive him. * * * The value of such part of the homestead as may be set apart to the widow shall be deducted from the distributive share, provided for her in this section. In cases wherein only the heirs, devisees, and legatees of the decedent are interested, the property secured to the widow by this section may be set off by the court in due process of administration.

"Sec. 2827. When Widow to Elect between Will and Distributive Share. If the husband shall make any provision by will for the widow, such provision shall be construed to be in lieu of the distributive share secured by the next preceding section, unless it shall appear from the will that the decedent designed the testamentary provision to be additional to such distributive share, in which case the widow shall be presumed to have accepted both such testamentary provision and such distributive share. If, however, it does not appear from the will that its provision for the widow is additional, then the widow shall be conclusively presumed to have renounced such provision, and to have accepted her distributive share, unless within four months after the admission of the will to probate, or within such additional time before distribution as the court may allow, she shall, by written instrument filed with the clerk of the court, accept the testamentary provision, which acceptance shall be construed to be a renunciation of her distributive share. * * *

"Sec. 2828. Succession. When any person having title to any estate not otherwise limited by marriage contract, dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise expressly provided in this title, or in the Probate Code, subject to the payment of his debts, in the following manner: (1) * * * If the decedent leave a surviving husband or wife, and more than one child living, or one child living, and the issue of one or more children, one-third to the surviving husband or wife, and the remainder in equal shares to his children, and to the issue of any deceased child, by right of representation: * * * provided, that the share in the legal and equitable estates in real property of which an intestate husband died possessed, secured by this section to his widow, shall not be additional to the interest in such estates provided for her in section twenty-eight hundred and twenty-six.

"Sec. 2829. Homestead Exemption—Debts. A homestead consisting of lands and appurtenances not exceeding in value the sum of

two thousand dollars, and two hundred and fifty dollars additional for each minor child, together with all the personal property exempt from execution, shall be wholly exempt from the payment of the debts of the decedent, and shall be the absolute property of the surviving husband or wife and minor children, or of the minor children in case there be no surviving husband or wife, to be set apart on petition and notice, at any time after the return of the inventory: provided, that the homestead selected shall be subject to any incumbrances given for the purchase price or by the consent of both husband and wife, and to mechanics' liens. This section shall not be construed to prevent the disposition by will of the homestead and exempt personal property."

The provisions of the statute governing the descent, succession, and distribution of estates of deceased persons and homestead rights are, to a certain extent, enigmatical. Statutes enacted to supply rules for the distribution and succession of the property of the people of a state should be framed with less obscurity and doubt, and not be allowed to depend so much upon judicial interpretation. The question presented is a new one in this state, and our statutes are not sufficiently identical with those found elsewhere to make the adjudications of other courts of much assistance. In fact, no case is cited that bears directly upon the question in issue here. Our opinion is that section 2731 empowers the testator to dispose of all his real and personal property by will, except that, being a married man, he cannot legally devise away from his wife more than two-thirds of his legal and equitable estate in real property without his wife's consent in writing. In other respects the statute gives the husband absolute power over his real and personal property by will. This privilege to dispose of one's property by will is not a natural right, but depends upon positive law. The right is within the control of the lawmaking power. The legislature may give or take away the right to dispose of one's estate by will. In this case such right to devise his property by will was given by statute. *Evans v. Price*, 118 Ill. 593, 599, 8 N. E. 854. While section 2829 in terms gives absolutely property in the homestead and exempt personal property to the surviving husband or wife, yet by other terms of the section this power is limited, and the husband may dispose of it by will; and under section 2826 the value of such homestead set apart to the widow, if any, shall be deducted from the distributive share provided for her in that section. This right to dispose of such homestead property, however, by will, is limited to such estates as exceed the homestead limit in value, under the ruling of this court in *Knudsen v. Hannberg*, 8 Utah, 203, 30 Pac. 749. The statutes of this state have been materially changed in this respect since *Knudsen v. Hannberg*, supra, was decided; but, in respect to the point mentioned, the

opinion is still applicable to the statutes now in force. The syllabus in that case, however, is inaccurate. The word "solvent," in the third line from the bottom of the first paragraph, should read "insolvent." Under section 2825, if no will is made, the real and personal property passes to the heirs, subject to the control of the court and possession of the administrator, etc. Under section 2826, one-third of the legal and equitable estate in the property of the husband, in which the wife has made no relinquishment, must be set aside as her property in fee simple, if she survive him; but the value of such part of the homestead as may be set aside to the widow under section 2829 must be deducted from her distributive share of the real estate falling to her under section 2826, provided the estate is solvent and above the homestead allowance in value. But the homestead right would attach in favor of the widow and children if the estate was insolvent or below the homestead limit in value, as held in *Knudsen v. Hannberg*, supra. In this case the estate is solvent and out of debt. Hence the value of such part of the homestead as may be set aside to the widow should be deducted from her distributive share, as provided in section 2826.

The testator disposed of all his real and personal property by will. It does not appear from the will that the decedent designed the testamentary provision for the widow to be in addition to her distributive share under section 2826. Under the provisions of section 2827, the widow duly renounced the provision made for her in the will, and elected to take her share of the estate under the provisions of the statute providing for succession. Had no will been made, the widow, under section 2828, would have been entitled to one-third of the real and personal property; but as we have seen, the husband had an absolute right, under section 2731, to dispose of all of his property by will, except one-third of the real estate, as stated. Therefore she cannot claim as distributee of her husband's personal estate, when he has fully disposed of the same by valid will. The widow's election or renunciation of her right under the will does not nullify the will as to other bequests, nor take from the legatees named therein their rights thereunder. Except as to the widow, who renounces it, the will is operative and binding. Having renounced the provisions of her husband's will in her favor, the law determined and fixed what estate she would take. *Woerner*, Adm'n, pp. 269, 270; *Gullet v. Farley*, 164 Ill. 566, 45 N. E. 972; *In re Davis' Estate*, 36 Iowa, 24; *Smith v. Baldwin*, 2 Ind. 404; *In re Frost's Estate* (Sur.) 1 N. Y. Supp. 340.

Our conclusion is that, having renounced the will, the widow is not entitled to any of the bequests of personal property contained therein, nor to one-third of the personal estate, but should be allowed her distributive share of the real estate by succession, under section 2826, Rev. St. 1898, as decreed by

the district court. The judgment of the district court is affirmed, with costs.

BASKIN, J., concurs. BARTCH, C. J., dissents.

(22 Utah 296)

IRELAND v. MACKINTOSH.

(Supreme Court of Utah. July 13, 1900.)

STATUTE OF LIMITATIONS—BAR—WHEN COMPLETE—ENACTMENT EXTENDING PERIOD ON CONTRACTS ALREADY BARRED—NEW PROMISE—EFFECT—BAR OF STATUTE—VESTED RIGHT—WAIVER.

1. M. gave I. his promissory note dated January 2, 1892, due one day after date. At that time and up to March 20, 1897, the statute of limitations on notes, etc., was four years (section 3143, 2 Comp. Laws Utah 1888), but at said last-mentioned date the act of the legislature (Sess. Laws 1897, p. 264) changed the period of limitation to six years. August 30, 1898, action was commenced on the note. Defendant pleads in bar the four-years statute. Plaintiff contends that that statute was expressly and by necessary implication repealed by the amendatory act; that the bar previously existing was removed thereby, and the right of action on said note revived. *Held*, that the bar of the statute was complete at the expiration of four years from the maturity of the note; and *held*, further, that the subsequent passage of an act by the legislature increasing the period of limitation could not operate to affect or renew a cause of action already barred.¹

2. A new promise made after a cause of action is barred does not revive the former obligation, but creates a new one, which in its turn is subject to a bar by lapse of time as an original promise.²

3. Although the bar of the statute of limitations may be waived unless pleaded, yet, until the bar is waived by some act of the party in whose favor it has accrued, the right to interpose it as a defense exists; and, once having accrued, it becomes a vested right, which cannot be taken away by legislative enactment.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by Agnes D. Ireland, executrix of E. A. Ireland, against Richard Mackintosh. Judgment for defendant, and plaintiff appeals. Affirmed.

Zane & Rogers, for appellant. Bennett, Harkness, Howat, Sutherland & Van Cott, for respondent.

BASKIN, J. It appears that on the 2d day of January, 1892, the respondent executed his promissory note to E. A. Ireland for \$5,275, payable one day after date; that the said Ireland died on the 14th day of May, 1898, and the appellant on the 16th day of July, 1898, was duly appointed executrix of the will of the decedent; that on the 30th day of August following she, as such executrix, instituted this suit to recover of the respondent the amount of said note. The respondent answered that the cause of action set up in the complaint was barred by section 194 of

¹ *Kuhn v. Mount*, 44 Pac. 1036, 13 Utah, 113; *Anthony v. Savage*, 2 Utah, 466; *Gruenberg v. Buhring*, 16 Pac. 486, 5 Utah, 414.

² *Kuhn v. Mount*, 44 Pac. 1036, 13 Utah, 108. See, also, *Potter v. Mining Co.*, 57 Pac. 270, 19 Utah, 421.

the Code of Civil Procedure (2 Comp. Laws Utah 1888, p. 224, § 3143). The period of limitation under this section was four years. The trial court found that the action was barred, and rendered judgment against the appellant, as executrix, for the costs.

By an act of the state legislature (Sess. Laws 1897, p. 264) approved March 20, 1897, the aforesaid section was amended in the following manner, to wit: "Section 3143 of the Compiled Laws of Utah, 1888, is hereby amended to read as follows: * * * An action upon any contract, obligation, or liability founded upon any instrument in writing, except those mentioned in the preceding section, within six years." The exception referred to relates to judgments and decrees. Section 3141 of the same act, which contains the section so amended, provided that "the periods prescribed for the commencement of actions other than the recovery of real property are as follows." The period relating to promissory notes, which followed, was that prescribed in section 3143, and was four years after the cause of action had accrued. Section 5 of the amendatory act provides that "all acts and parts of acts in conflict herewith are hereby repealed." Appellant's counsel state in their brief that "the right to sue on the note was barred, under section 3143, from January 3, 1896, until March 20, 1897," but contend that said section was, expressly and by necessary implication, repealed by the amendatory act approved March 20, 1897, and that the bar which previously existed was thereby removed, and the right of action on said note was revived. In support of this contention, reliance was had mainly upon the decision of the supreme court of the United States in the case of *Campbell v. Holt*, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, in which it was decided that while "it may very well be held that in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law," yet no one has property in the bar of the statute as a defense to a promise to pay a debt, and that such a bar may be removed by the repeal of the statute. Justices Bradley and Harlan, in a dissenting opinion, held that when the statute of limitations gives a man a defense to an action, and that defense has absolutely arisen, it is a vested right in the place where it has accrued, and is an absolute bar to the action there, and is protected by the fourteenth amendment to the constitution from legislative aggression. While the majority opinion in that case is supported by a few of the state courts, a much greater number sustain the minority opinion. 13 Am. & Eng. Enc. Law (1st Ed.) 700; 1 Wood, Lim. §§ 11, 12. The question has not heretofore been raised in this court, but in the case of *Kuhn v. Mount*, 13 Utah, 113, 44 Pac. 1037, this court, in regard to the statute of limita-

tions, said: "In determining the question here presented, due regard must be given to the purpose and object of the statute. The law is wise and beneficial, and its objects ought not to be defeated by interpretation. It is entitled to the same respect as other statutes, and ought to be enforced, not only on the presumption arising from lapse of time that the debt has been paid, but because it is essentially a statute of repose. It affords protection against ancient demands, whether originally well founded or not, and serves as a warning against the consequences of laches."

In determining the question now under consideration, the object which the statute was passed to attain should be kept in view, and the construction which will most effectually accomplish the purpose of the statute should be adopted. The purpose of the statute is the same both in cases involving the title to tangible property, and in cases relating to the enforcement of the obligations of contracts. The object of the statute is attained by depriving the party having a cause of action of the right to recover thereon after a prescribed period has expired, and consequently furnishes the adverse party with a defense to the action. It is clear that unless this defense is a vested, permanent right, the statute of limitations cannot be one of repose, because it is by virtue of the permanency of this right that the ends of the statute are accomplished, both in cases relating to titles to property and those relating to contracts. In cases relating to the title of tangible property, upon the expiration of the period prescribed by the statute the legal title of the owner is divested and passed to the adverse party,—not, however, by purchase or grant, but by virtue of the fact that the adverse party, under the statute, is vested with a permanent defense which secures and renders absolute his possession, in which is merged the title to the property which is adversely held. Such a possession, in and of itself, is title of the highest order. 3 Washb. Real Prop. (5th Ed.) 144-176. The primary object of the statute is not the acquisition of titles, but, from considerations of public policy, to prevent the enforcement of stale claims. The acquisition of tangible property is simply an incidental result of the defense of the statute of limitations, only when the possession of tangible property is involved; but when the statute is applicable to contracts the defense accomplishes the purpose of the statute directly, by permanently barring the stale claim. Certainly it cannot be claimed with any show of reason or support of authority that the statute was intended only to bar such claims temporarily, because such a limitation, instead of remedying, would augment, the evil which the statute was passed to cure. It is therefore evident that it was the intention of the legislature to secure to adverse parties, not temporary, but permanent, repose in all actions to which the statute is applicable

after the expiration of the period prescribed; and, as it is firmly established that the legislature possesses the power to permanently bar such claims, in the absence of any provision showing a contrary design the acts of the legislature should be construed so as to carry out its intention, which, we are of the opinion, is clearly shown by the purpose of limitation laws.

In cases relating to the enforcement of contracts the question of adverse possession is not involved, and therefore in these cases no title to property can be acquired by virtue of the statutory defense; but it does not follow from that fact that the obligor acquires no vested right in the defense of the statute upon the expiration of the statutory period, for, as before stated, the object in no instance is the acquisition of titles, but in all cases, whether relating to tangible property or to obligations, the purpose of the statute and its provisions are the same. How, then, can any distinction as to the effect of the statute, regarding the question under consideration, be reasonably made? The decisions which make a distinction between the cases in which titles to property are acquired under the statute, and those relating to debts, base the distinction upon the ground that a vested interest in property is acquired, which the legislature is powerless to disturb. This ground is untenable, because the vested interest in the property acquired simply results from the adverse parties' vested right in the statutory defense. In the absence of such vested right, the acquisition of a title to property under the statute would be impossible. Where a particular cause of action is barred by the lapse of time, the statute in that instance has fully accomplished the purpose intended; and, in instances of debt, the obligor is thereby armed with a defense which, while it does not pay the debt, destroys the right of the obligee to recover, and also the legal, though not the moral, obligation of the obligor to pay. These results necessarily arise from the nature of both legal obligations and the statute of limitations.

In *Utah St. Const. § 471*, it is stated that: "The obligation of a contract is the law which binds the parties to perform their agreement. It is the means provided by law by which it can be enforced,—by which the parties can be obliged to perform it. The laws which exist at the time and place of making a contract determine its validity, construction, discharge, and measure of efficiency for its enforcement." This statement is sustained by the following authorities: *Black, Const. Law*, p. 524; *Cooley, Const. Lim.* (6th Ed.) 344; *Ogden v. Saunders*, 12 Wheat. 213, 6 L. Ed. 606; *Louisiana v. City of New Orleans*, 102 U. S. 203, 26 L. Ed. 132; *Walker v. Whitehead*, 16 Wall. 314, 317, 21 L. Ed. 357; *Edwards v. Kearzey*, 96 U. S. 595, 600, 24 L. Ed. 793. In *Louisiana v. City of New Orleans*, 102 U. S. 206, 26 L. Ed. 133, the court says: "The obligation of a contract, in the constitutional sense, is the means provid-

ed by law by which it can be enforced,—by which the parties can be obliged to perform it." In *Walker v. Whitehead*, 16 Wall. 317, 21 L. Ed. 358, it is said: "The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge, and enforcement. Nothing is more material to the obligation of a contract than the means of its enforcement." In *Ogden v. Saunders*, 12 Wheat. 281, 6 L. Ed. 620, Mr. Justice Johnson, in the opinion delivered by him, said: "Right and obligation are considered by all ethical writers as correlative terms." It follows from the foregoing definitions that whenever the legal remedy is barred by the statute the previous legal right and legal obligation no longer exist. Certainly, where there is no remedy there is no legal obligation, and, as legal rights and legal obligations are correlative terms, in the absence of one the other cannot exist. Judge Story, in *Le Roy v. Crowninshield*, 2 Mason, 172, Fed. Cas. No. 8,269, said: "I am not aware that in any exact legal sense a right can be said to subsist upon a contract where the law has taken away all power of enforcing its obligation by any remedy." In *Cooley, Const. Lim.* (6th Ed.) 454, it is said: "It is certain that he who has satisfied a demand cannot have it revived against him, and he who has become released from a demand by the operation of the statute of limitations is equally protected. In both cases the demand is gone, and to restore it would be to create a new contract for the parties,—a thing quite beyond the power of legislation." Therefore the note in question upon the expiration of the statutory period ceased to have any binding efficacy in this state, other than that moral obligation which, though it might constitute a sufficient consideration for a new promise, would not, in the face of the statute, support an action on the original obligation to pay. A new promise, however, does not revive the former obligation, but creates a new one; and no recovery can be had, except in an action based upon the new promise, instituted within the period prescribed by the statute. *Anthony v. Savage*, 2 Utah, 466; *Gruenberg v. Buhning*, 5 Utah, 414, 16 Pac. 486; *Kuhn v. Mount*, 13 Utah, 108, 44 Pac. 1036. This, as stated by Judge Story in *Le Roy v. Crowninshield*, 2 Mason, 170, Fed. Cas. No. 8,269, results, not from "a strict legal right in the creditor, which he may enforce against the will of the debtor, but upon the notion that there still exists, notwithstanding the statutable prescription, a moral obligation, binding in fore conscientiae, which, if recognized by the debtor, or discharged by him, repels any imputation that the transaction is a nude pact, without consideration. Payment, therefore, by the debtor, once made, cannot be recalled; for it is an equitable and honest act, and founded in moral obligation. But still there is not, strictly speaking, any right in the creditor to claim payment; for the law

has made the bar, if pleaded, an estoppel of the right. Such right is technically extinguished, in contemplation of law, by the presumption of extinction, until the debtor himself negatives the presumption by some act or admission. * * * It is plain, therefore, that when the remedy is said to be extinguished by a prescription, and not the right, we are not to understand the term 'right' in its technical sense, but merely as a moral obligation and claim in natural justice. In the common law, a right always supposes some mode by which it can be enforced."

It is conceded by counsel for the appellant that the right to sue on the note was barred from January 3, 1896, until March 29, 1897. If it be conceded that the legislature can remove the bar after it has existed for a period of that length, or any time after it has arisen, and thereby revive the action, it follows that it may do so at its pleasure at any time, however remote. "The common law [has] fixed no time as to the bringing of actions. Limitations derive their authority from statutes." *U. S. v. Thompson*, 98 U. S. 490, 25 L. Ed. 194. And in the absence of statutes "there can be no bar arising from lapse of time." *Hauenstein v. Lynham*, 100 U. S. 487, 488, 25 L. Ed. 628; 1 Wood, Lim. §§ 1, 2. Unless, therefore, the right to interpose the defense of the statute in the place where the bar has occurred be held to be a vested, permanent right, a stale claim which has remained barred for more than 20 years, if after that time the statute shall have been removed, may be enforced. It is true that the lapse of 20 years after a cause of action has accrued raises the presumption of payment, both in equity and at common law, but this presumption may be overcome by evidence. Its only effect is that the burden of rebutting it is cast upon the plaintiff. "This presumption of payment may be overcome by evidence which would be wholly insufficient as against the general statute of limitations, as if nonpayment is established by an admission of indebtedness, although such admission is accompanied by refusal to pay and denial of liability to pay, yet the presumption is defeated." 1 Wood, Lim. § 2; *Walker v. Robinson*, 136 Mass. 280; *Bentley's Executor's Appeal*, 99 Pa. St. 500. When the enforcement of stale claims had become a great public evil, and time had demonstrated that this presumption of payment was not an adequate protection against the evil, the statute of 21 Jac. I., as a measure of public policy, and "tending to the peace and welfare of society," was enacted, for the sole purpose of fixing a definite period at which claims should become stale, and an action based thereon should become absolutely barred. This bar, however, like other defenses, may be waived. Like the defense of a discharge from a debt in bankruptcy, the bar of the statute of limitations is waived if not pleaded; but, until the bar is waived by some act of the party in whose favor it has accrued, the right to interpose

it as a defense exists. Although the statute of 21 Jac. I. failed to mention actions of assumpsit, it was construed by the courts as embracing such actions by fair intendment, and as coming within the reason of the statute. 1 Wood, Lim. p. 50, § 16. This statute, in substance, has been enacted in all the states of the Union. The purpose of the statute of limitations is aptly stated in section 576, Story, Conf. Laws, in this language: "Laws thus limiting suits are founded in the noblest policy. They are statutes of repose, to quiet titles, to suppress frauds, and to supply the deficiency of proofs arising from the ambiguity and obscurity or the antiquity of transactions. They proceed upon the presumption that claims are extinguished whenever they are not litigated in the proper forum within the prescribed period. They take away all solid grounds of complaint, because they rest on the negligence or laches of the party himself." It is apparent that the construction contended for by counsel for the appellant is not consistent with that purpose, and would defeat the attainment of repose, in an action of assumpsit, however stale the claim might be. It is a rule of construction that statutes "are to be so construed as to have a prospective effect, merely, and will not be permitted to affect past transactions, unless such intention is clearly and unequivocally expressed; * * * but, upon the theory that the statute only relates to the remedy, it would seem that it is competent for the legislature to repeal the statute in toto, and make such repeal operate as to all existing claims upon which the statute has not run." 1 Wood, Lim. pp. 41, 42, § 11, note 3; *Suth. St. Const.* § 464; *Pitman v. Bump*, 5 Or. 17; *Potter v. Mining Co.*, 19 Utah, 421, 57 Pac. 270. The amendatory act of March 20, 1897, neither by its expressed terms nor by intendment shows that the legislature intended to revive causes of action which had before the passage of that act become barred.

We are clearly of the opinion—First, that it was not the intention of the legislature to revive causes of action on claims which had previously become stale, and against which the statute had fully run; and, second, that, when appellant's right of action on the note in question became barred under the previous statute, the respondent acquired a vested right, in this state, to plead that statute as a defense and bar to the action. Among the numerous authorities which sustain the latter view are the following: *Board v. Blodgett* (Ill. Sup.) 40 N. E. 1025; *McCracken Co. v. Mercantile Trust Co.*, 84 Ky. 344, 1 S. W. 585; 1 Wood, Lim. p. 36, § 11, et seq.; *Busw. Lim.* § 14; *Bish. Cont. (Ed. 1887)* § 1410; *Bish. St. Crimes*, § 265; *Suth. St. Const.* § 480. It is ordered that the judgment of the court below be affirmed, and that the appellant pay the costs.

BARTCH, C. J., and MINER, J., concur.

(22 Utah 65)

STATE v. BATES.

(Supreme Court of Utah. May 10, 1900.)

EVIDENCE—JUDICIAL NOTICE—PRIOR PROCEEDINGS—DECISION OF UNITED STATES SUPREME COURT—LAW OF THE CASE—ARREST—CRIMINAL LAW—JURY—JUDGMENT—VOID JUDGMENT—JEOPARDY.

1. Courts will generally take judicial notice of whatever ought to be generally known within the limits of their jurisdiction, and particularly will they take notice of the records and prior proceedings in the same case.

2. Where a state law, as to a certain class of cases, has once been held by the supreme court of the United States to be in contravention of the constitution of the United States or ex post facto, a state court will, whenever thereafter a case of such class comes before it, take notice of the decision of the federal court, and of the question respecting which the decision was made.¹

3. When a decision of the supreme court of the United States renders absolutely void convictions and judgments in certain cases which have never been appealed, on account of certain similar defects in procedure, a defendant released from sentence under such a void judgment may be rearrested and tried for the same offense; and the doctrine of the law of the case does not apply.

4. In a criminal case tried before an unlawful jury, all proceedings, after plea entered, are wholly void, because of a lack of jurisdiction in the court; and a sentence and judgment therein are mere nullities, and may be so treated by every one at any time.

5. An unlawful trial and a conviction therein, followed by an absolutely void judgment on such conviction, do not have the effect of putting a defendant once in jeopardy, and upon his release from custody under such void judgment he may be rearrested under the same indictment and upon the same charge; and no plea of once in jeopardy can be a bar to a lawful trial, notwithstanding his former conviction stands unreversed.

(Syllabus by the Court.)

Appeal from district court, Fourth district; John E. Booth, Judge.

George M. Bates was charged with murder. From a judgment dismissing the accused, the state appeals. Reversed.

A. C. Bishop, Atty. Gen., and W. A. Lee, Dep. Atty. Gen., for the State. J. W. N. Whitecotton and S. R. Thurman, for respondent.

BARTCH, C. J. In this case the defendant was charged by indictment with the crime of murder in the second degree. The offense was alleged to have been committed in the county of Tooele on September 22, 1895, and the indictment was filed on the 30th day of the same month in the district court of the Third judicial district of the territory of Utah, which district included that county. On October 1, 1895, the prisoner entered a plea of not guilty to the indictment. Thereafter, upon the territory being admitted into the Union as a state, the files and records in the case were transmitted to the clerk of the district court in and for Tooele county. On April 7, 1896, the defendant was tried before

a jury of eight men, as provided in the constitution and statutes of the state, and convicted, against the objections of the defendant to such a trial. Afterwards, upon the defendant being sentenced to the state prison for a period of 10 years, the case was appealed to the state supreme court, where the trial by a jury of eight men was held valid, and the judgment affirmed. On May 12, 1898, upon habeas corpus proceedings being instituted in the United States district court for the state of Utah, the defendant was released from imprisonment, but was immediately rearrested upon a warrant of arrest issued out of the district court of Tooele county. Then, upon motion of the defendant, a change of venue was granted, and the case removed to the district court of Utah county. There, upon motion in behalf of the prisoner, the cause was dismissed and the bail discharged on the ground that the court had no jurisdiction of the subject-matter or of the person of the defendant, or any authority to try the same. This appeal is from that judgment.

At the outset counsel for the respondent insist upon their motion to strike from the transcript an affidavit and some other documents attached thereto, relating to the proceedings on habeas corpus in the United States district court by which the prisoner was discharged from custody, and claim they were never settled in a bill of exceptions, and that they have not been certified to this court by the clerk of that court. We do not deem it important to rule upon this motion, because there appears to be nothing in the affidavit and documents referred to, material to this decision, of which we cannot take judicial notice. A court will take notice of the records and prior proceedings in the same case. Likewise, "courts will generally take notice of whatever ought to be generally known, within the limits of their jurisdiction." 1 Greenl. Ev. §§ 5, 6; *Brown v. Piper*, 91 U. S. 37, 23 L. Ed. 200; *State v. Bowen*, 16 Kan. 475; *Dawson v. Dawson*, 29 Mo. App. 521. So, where a state law, as to a certain class of cases, has once been held by the supreme court of the United States to be in contravention of the constitution of the United States, or ex post facto, a state court will, whenever thereafter a case of such class comes before it, take notice of the decision of the federal court which declared such law so ex post facto, and of the question respecting which the decision was made. This principle was recognized in *State v. Hart* (Utah) 57 Pac. 415, where Mr. Justice Miner, speaking for the court, said: "The cases of *State v. Bates*, 14 Utah, 293, 47 Pac. 78, 43 L. R. A. 33, and *State v. Thompson*, 15 Utah, 488, 50 Pac. 409, practically embraced the same questions involved in this case. In passing upon the latter case the supreme court of the United States, in *Thompson v. Utah*, 170 U. S. 343, 18 Sup. Ct. 620, 42 L. Ed. 1061, held that the provision of article 1, § 10, of the constitution of this state, providing for the trial of criminal cases, not capital, in

¹ *State v. Hart*, 57 Pac. 415, 19 Utah, 438; *State v. Bates*, 47 Pac. 78, 14 Utah, 293, 43 L. R. A. 33; *State v. Thompson*, 50 Pac. 409, 15 Utah, 488; *Thompson v. Utah*, 18 Sup. Ct. 620, 170 U. S. 343, 42 L. Ed. 1061.

courts of general jurisdiction, by a jury composed of eight persons, instead of twelve, is *ex post facto* in its application to felonies committed before the territory became a state." And the defendant, Morris, having committed his offense under the territorial government, we held that, in accordance with that decision, he could be tried in the state court by a jury of 12 men. Hence, following the decision in the Hart Case, we may look into that of the supreme court of the United States, rendered in the Thompson Case, to ascertain to what extent it affects the case at bar. The main question, therefore, remains to be considered,—whether, under the decision of the federal supreme court in the Thompson Case, and in view of the previous proceedings and judgment in this case in the state courts, the judgment of dismissal entered by the lower court herein was correct.

The appellant contends that the action of the court in dismissing the case for the want of jurisdiction was erroneous, and maintains that all the former proceedings, after the entry of the defendant's plea, and the conviction, were absolutely void, because the trial was conducted before an unlawful jury; that the judgment resulting therefrom, although affirmed by this court, was likewise null and void; and that, no lawful jury having been impaneled and sworn at that trial, the defendant was not in jeopardy. The respondent insists that as the district court held that it was lawful to try him before a jury of 8 men, and having been so tried and convicted, and as the judgment was affirmed by the supreme court, and the case never taken to or the judgment reversed by the supreme court of the United States, he cannot again be tried for the same offense, and invokes the doctrine of the law of the case. This position of the respondent, under the facts and circumstances of this case, cannot be regarded as sound. It is true, the case has been once tried by a jury of 8 men, and the state courts held that to be a lawful jury, and the cause was never removed to the federal supreme court, and hence never reversed by it; but the case of *State v. Thompson*, *supra*, which involved the identical question, respecting the validity of the state law providing for 8 instead of 12 jurors in the trial of this class of cases, was appealed to the federal supreme court, and that court in that case reversed the state courts, and held the state law *ex post facto* and void with respect to this class of cases,—felonies committed before the territory became a state. Mr. Justice Harlan, delivering the opinion of the court in the case, said: "In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is *ex post facto* in its application to felonies committed before the territory became a state, because in respect of such crimes the constitution of the United States gave the accused, at the time of the commission of his

offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury." The effect of that decision was to render absolutely void the conviction had and judgment pronounced under the state law in every case of felony, where the offense had been committed before statehood. Therefore, notwithstanding the fact that the case at bar, which is a felony shown to have been committed before the territory became a state, was not, in terms, reversed by the court of last resort, the effect upon it was just the same as if it had been so reversed. And this is the sense in which that decision was received and treated with respect to this case; for upon its rendition the respondent was released from imprisonment, and thereafter again arrested under the same indictment and upon the same charge. Under such circumstances, the doctrine of the law of the case does not apply. Can he, then, the judgment of the state courts, according to the decision of the supreme court of the United States, being absolutely null and void, be now tried by a lawful jury of 12 men? A void judgment is really no judgment. It leaves the parties litigant in the same position they were in before the trial. It leaves them in exactly the same position as if no trial had taken place. Such a judgment confers authority upon no one to enforce it. "A void judgment," says Mr. Black, "is in reality no judgment at all. It is a mere nullity. It is attended by none of the consequences of a valid adjudication, nor is it entitled to the respect accorded to one. It can neither affect, impair, nor create rights. As to the person against whom it professes to be rendered, it binds him in no degree whatever; it has no effect as a lien upon his property; it does not raise an estoppel against him. As to the person in whose favor it professes to be, it places him in no better position than he occupied before; it gives him no new right, but an attempt to enforce it will place him in peril. As to third persons, it can neither be a source of title, nor an impediment in the way of enforcing their claims. It is not necessary to take any steps to have it reversed, vacated, or set aside. But, whenever it is brought up against a party, he may assail its pretensions and show its worthlessness. It is supported by no presumptions, and may be impeached in any action, direct or collateral." Black, *Judgm.* § 170. In the present case all the proceedings of the trial court after the defendant had entered his plea were wholly void, because the court, in the absence of a lawful jury, had no jurisdiction to try the cause; and therefore its sentence and judgment were mere nullities, and the affirmance of the judgment by the supreme court could not make them valid. That judgment therefore could be held and treated as a nullity whenever, wherever, and by whomsoever used or relied upon as a valid judgment. As soon as it was shown that the defendant was tried by a court hav-

ing no jurisdiction, and that he was denied a right guaranteed him by the federal constitution, the judgment against him was not merely voidable, but absolutely void, and he at once became entitled to his discharge, and neither the trial nor the judgment had the effect even of putting the prisoner in jeopardy. As a consequence, upon his release from imprisonment, because of the void judgment, he was again subject to arrest under the same indictment and upon the same charge; and no plea of once having been put in jeopardy for the same offense can be a bar to a lawful trial, notwithstanding his former conviction stands unreversed. This is so because the former trial was conducted under a law which has since been declared by the court of last resort to be, as to such a case, in contravention of the constitution of the United States; the trial court thus having acted without jurisdiction. Therefore the respondent may now be tried before a lawful jury. "If a court has no jurisdiction over the offense, or derives its existence from an unconstitutional statute, or is holding a term not authorized, or is otherwise without authority in the premises, the defendant is not in jeopardy, however far the tribunal proceeds. In most or all of these circumstances the final judgment is not voidable, as mentioned in a previous section, but void, so that his unreversed conviction is not more a bar to another prosecution than his acquittal." 1 Bish. Cr. Law, § 1028; Black, Judgm. § 218; Brown, Jur. §§ 101, 102; Thompson v. Utah, supra; State v. Hart, supra; In re McClaskey, 2 Okl. 568, 37 Pac. 854; In re Terrill, 52 Kan. 29, 34 Pac. 454; Hill v. People, 16 Mich. 351; State v. Carman (Iowa) 18 N. W. 691; *Hilands v. Com.*, 111 Pa. St. 1, 2 Atl. 70.

We are of the opinion that the court erred in dismissing the case. The judgment is reversed, and the cause remanded, with directions to the court below to reinstate the case and proceed in accordance herewith.

BASKIN, J., and McCARTY, District Judge, concur.

NEWMAN v. FREITAS et al. (S. F. 1,446.) (Supreme Court of California. July 20, 1900.)
SPECIFIC PERFORMANCE—ADEQUATE CONSIDERATION—ATTORNEY AND CLIENT—CONTRACT TO SECURE A DIVORCE—CONTINGENT FEE—VALIDITY—PUBLIC POLICY.

1. Where defendant agreed in writing to pay an attorney a contingent fee of one-third of all community property he might secure in an action for divorce against her husband, and the court, with knowledge of the contract, allowed the attorney a fee of \$1,100, which was \$50 for each day actually employed, and the attorney assigned the contract to plaintiff, specific performance was properly denied, since the attorney had already received an adequate consideration for the contract.

2. Defendant agreed in writing to pay an attorney a contingent fee of one-third of all community property he might secure in an action for divorce against her husband, or by reason of any compromise or settlement thereof. The attorney assigned the contract to plaintiff,

who sued for specific performance. *Held*, that the contract was void and unenforceable, as against public policy.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Samuel Newman against Ada M. Freitas and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Robt. Y. Hayne, for appellant. Rodgers, Paterson & Slack, for respondent Ada M. Freitas. Samuel M. Shortridge, for respondent Manuel T. Freitas.

VAN DYKE, J. The appellant, as plaintiff, sues as assignee of a contract for contingent fees in a divorce suit. The contract in question is as follows: "I hereby retain and employ J. H. Long, Esq., as my attorney, to act for me in all matters arising or growing out of any divorce proceedings or separation with my husband, M. T. Freitas, or in regard to the settlement of my community property rights, or to act for me in regard to any settlement, compromise, or other disposition of any agreement or settlement which may take place between myself and my said husband. I am about to commence proceedings for absolute divorce or separation, and, whereas, I desire to secure my proper proportion of the community property, I hereby empower and authorize the said J. H. Long to do whatever he may see fit in the premises in connection with said divorce or separation, and obtaining of my portion of the community property; and I hereby agree to pay to the said J. H. Long one third (1/3) of all amounts recovered or received by me by reason of said or any action commenced in my behalf, or by reason of any settlement, compromise, compact, or agreement, or, in fine, by any reason whatsoever: provided, first, however, that no compromise or agreement can take place or be had in the premises without first obtaining the written consent of said parties hereto; and I further agree in no event to substitute any attorney in the place of said Long in said matters. In witness whereof, the said parties hereto have hereunto set their hands and seals this 24th day of October, 1893. Ada M. Freitas. J. H. Long." The court below found that the said James H. Long, one of the parties to the contract, at the time of making the same, was an attorney at law admitted to practice only in the superior court in and for the city and county of San Francisco, and never had been admitted to practice in the supreme court of the state; that under said contract said Long commenced an action in the superior court in and for said city and county of San Francisco, in the name of said Ada M. Freitas, against her husband, Manuel T. Freitas, for a divorce and a division of the common property; that he conducted the proceedings in said action during the period of about 15 months, mostly in taking testimony before the commissioner to whom the cause had been referred for that

purpose, and the taking of such testimony consisted of 24 hearings before said commissioner. The testimony so taken consisted of 1,279 typewritten pages of ordinary size, and at the end of said period, about April, 1895, the plaintiff in said action, Ada M. Freitas, became dissatisfied with her attorney, and, with the consent of said attorney, employed Messrs. Delmas & Shortridge, who were thenceforth associated with said Long in said cause; that thereafter the said Long, in conjunction with said Shortridge, of said firm, drafted an amended complaint in said cause, and thereafter participated in two hearings before said commissioner in the taking of testimony, but that he did not participate in any further hearing before said commissioner; that during the month of June, 1896, the cause was argued in the superior court by said Shortridge on the testimony taken before said commissioner, and said Long did not participate in said argument, and did not know that said cause was set down for argument, or that any argument was made therein, until everything was concluded and the compromise made, but that he never refused to render any services requested of him in the cause; that some 18 months after Delmas & Shortridge were associated in the case, and when the decree of divorce had been granted, a compromise as to the property rights was arranged between the plaintiff and defendant in said action; that by the terms of said compromise the defendant in said action conveyed and transferred to the plaintiff therein two pieces of real estate situated in the city and county of San Francisco, alleged to be of the value of \$10,000; household furniture, including a piano, of the value of \$1,500 and upwards, and the sum of \$1,600 in cash; that she was decreed \$50 per month as permanent alimony; and that during the pendency of the divorce case, by order of the court, said Long received as counsel fees the sum of \$1,100 from the defendant in said action. But it is found that this order was made with knowledge of the existence of the written contract in question for a contingent fee. It is also found that said Long, although not admitted to the supreme court, was at all times a reputable attorney, and competent to prosecute or manage any action before the superior court, and that he did not negligently or otherwise abandon the case of the defendant Ada M. Freitas, in the said superior court; that said Long, on or about the 20th of July, 1894, executed and delivered to the plaintiff an assignment and transfer of said contract between him and said Ada M. Freitas. Upon these facts the court found, as a conclusion of law, that the plaintiff was not entitled to recover in said action, and ordered judgment accordingly in favor of the defendants. An appeal is taken from the judgment so entered, and comes up on the judgment roll. The contention on behalf of the appellant is that, upon the facts found by the court, the judgment should have gone for the plaintiff. The judgment, however, is sustainable

upon several grounds, and for various reasons:

1. This is not an action at law to recover upon the contract, or for damages for a breach of the same, but is a case in equity for a specific performance of the contract in question. "Specific performance cannot be enforced against a party to a contract in any of the following cases: (1) If he has not received an adequate consideration for the contract. (2) If it is not as to him just and reasonable." Civ. Code, § 3391. In *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190, it is held that, while there was a consideration sufficient to support the contract at law, yet there was no adequate consideration, and that consequently a court of equity would not specifically enforce it; that, although before the Code the preponderance of authority was that the mere inadequacy of consideration, not amounting to evidence of fraud, was not ground for refusing specific performance, yet that, under the provisions of the Code, inadequacy of consideration is made a distinct ground for refusing specific performance. Mrs. Freitas did not receive an adequate consideration for her promise, and Long was fully compensated for the services he performed. It appeared there were 24 hearings which he attended before the commissioner in taking testimony, and that all the testimony taken was 1,279 typewritten pages, or about 50 pages at a session, which would not be a very hard day's work, to say the least. But, at the rate the services were performed, the compensation received amounted to nearly \$50 per day. It is found that the court, in making the allowance to Mrs. Freitas as compensation for Long as her attorney, knew of the existence of the contract. The inference, therefore, is that the court held the contract to be illegal and void; otherwise, the allowance was made squarely in the teeth of several decisions by this court. *Sharon v. Sharon*, 75 Cal. 1, 42, 16 Pac. 345; *Reynolds v. Reynolds*, 67 Cal. 176, 7 Pac. 480; *White v. White*, 86 Cal. 212, 24 Pac. 1030. In the *Sharon* Case there was a contract for a contingent fee, as in this case; and the court, without deciding whether such an agreement was valid and enforceable, says: "Conceding that the agreement cannot be enforced, in case, as the final result of litigation, the plaintiff shall realize a share or portion of the community property, the agreement was a fact which should have influenced the action of the court below. If it had appeared at the hearing of the motion that Mr. Tyler, actuated solely by a desire to vindicate justice and the good name of the plaintiff, had promised to prosecute the action without compensation, that he was fully competent and had prosecuted it, the circumstances would show that she had no necessity for money to pay counsel. The question is not whether, as between the parties, counsel ought to be paid, but whether the wife has need of money to prosecute her action. * * * If counsel had abandoned her cause, it might perhaps have been neces-

sary for the court to provide the plaintiff means for securing legal assistance." It is fair to presume, therefore, that, as the court below understood the matter, the allowance made to Long as the attorney of Mrs. Freitas was made as if no contract had existed. At any rate, it was a reasonable compensation for the services he had performed. In *Cooper v. Pena*, 21 Cal. 403, it is said: "Before the court will act, it must be satisfied that the contract is reasonable and equal in its operation. The rule, as stated by Chancellor Kent, is that unless the court be satisfied that the contract is fair and just and equal in all its parts, and founded on an adequate consideration, it will not by the interposition of its extraordinary power order it to be executed." In *Agard v. Valencia*, 39 Cal. 292, it is said: "Another well-established rule in courts of equity is that in a suit for a specific performance it must be affirmatively shown that the contract is fair and just, and that it would not be inequitable to enforce it. The court will not lend its aid to enforce a contract which is in any respect unfair or savors of oppression, but in such cases will leave the party to his remedy at law." See, also, *Bruck v. Tucker*, 42 Cal. 346; *Sturgis v. Galindo*, 59 Cal. 28; *Kelly v. Railroad Co.*, 74 Cal. 557, 16 Pac. 386; *Mathews v. Davis*, 102 Cal. 204, 86 Pac. 358. The plaintiff in this action seeks to recover not only one-third of the real and personal property and money payment, but also one-third of the allowance for permanent support ordered to be paid by the husband to the wife in the divorce suit, and asks that this court decree accordingly, and that said Manuel T. Freitas be ordered to pay over to the plaintiff the one-third of the \$50 per month, as the same becomes due. Aside from the objection that a specific performance should not be decreed in this case as to the permanent alimony, or, rather, support, and the personal property in question, Long having received a fair compensation for all the services he rendered to the plaintiff in the divorce suit, his assignee of the contract standing in no better position than he would, it would not only be inequitable, but unreasonable and unjust, to decree a specific performance in his favor.

2. But there is an objection to the enforcement of the contract more radical than the one just considered. The contract is in its nature against the policy of the law and contrary to good morals. The law does not favor divorce, and permits it only for approved causes, and on sentence from duly-established public authority. Therefore any agreement for divorce, or any collateral bargaining promotive of it, is considered unlawful and void. 2 Bish. Mar., Div. & Sep. § 696; Greenh. Pub. Pol. p. 490. Under our Code either husband or wife may enter into any agreement or transaction with the other, or with any other person, respecting property, which either might if unmarried. Civ. Code, § 158. Notwithstanding this freedom to enter into any contract between themselves or with

other persons, it has been held in this state repeatedly that an agreement between husband and wife, founded upon consideration, to withdraw or abandon a defense to a suit for divorce, or do anything to facilitate procuring the same, is illegal and void. *Beard v. Beard*, 65 Cal. 354, 4 Pac. 229; *Senter v. Senter*, 70 Cal. 619, 11 Pac. 782; *Loveren v. Loveren*, 106 Cal. 509, 39 Pac. 801. In the latter case the following from Phillips v. Thorp, 10 Or. 494, is quoted with approval: "The authorities are uniform in holding that any contract between the parties having for its object the dissolution of the marriage contract, or facilitating that result, such as an agreement by the defendant in a pending action for divorce to withdraw his or her opposition,—to make no defense,—is void, as contra bonos mores." The courts of other states have expressed themselves similarly in reference to such contracts. In *Hamilton v. Hamilton*, 89 Ill. 349, it is said: "The majority of the court, however, are of opinion that the contract set out in the declaration is in its essence and character against public policy, and it must be held invalid upon that ground. While divorces are authorized by law, they ought not to be encouraged. In this contract there is no express agreement that the husband would not resist the application for a divorce, or that he would consent to a divorce. Still it is thought that to permit such a contract as this to be enforced in the courts would open the door for the attainment of divorces by collusion, and upon this ground the decision of the court in sustaining the demurrer to the declaration ought to be sustained." In *Muckenburg v. Holler*, 29 Ind. 139, the court say: "The special contract for the payment of two hundred dollars was contrary to the policy of the law. It was so framed as to have effect only on condition that a divorce should be granted. Its direct tendency was to influence the present plaintiff in procuring a divorce, or in overcoming resistance to an effort by his wife directed to that end. The marriage relation is not thus to be tampered with, and the courts, by contracts of the parties, converted into mere registers of their agreement for separation from the bonds of matrimony. The law favors marriage, and cannot, therefore, sanction contracts intended to promote its dissolution, by lending itself to their enforcement. We know of no case in the books in which such an appeal to any court to compel the fulfillment of such a contract, or to award damages for its breach, has been successfully made." In *Schmiedling v. Doellner*, 10 Mo. App. 373, it is said "that any agreement entered into between husband and wife pending a suit for divorce, or in contemplation of such a suit, whose force and effect are in any way made dependent upon the result of the suit, will be held void, because of the motive or inducement which it offers for either a passive consent or active aid in promoting the consummation of a divorce. There may be no direct evidence of collusion for that specific purpose.

It is sufficient to vitiate the agreement if it be so framed that, in order to an enjoyment of its benefits by one party or the other, a decree must supervene. The law will sustain no act whose tendency, whether such be its purpose or not, is towards promoting dissolution of marriage."

The principle recognized in these and other like authorities applies with equal force to a contract between the wife and an attorney, where, as in the case of this contract, the enjoyment of its benefits by one party, to wit, the attorney, depends upon procuring the divorce. Several cases have been before this court in which there were contracts similar to the one under consideration,—for instance, *Reynolds v. Reynolds*, *Sharon v. Sharon*, and *White v. White*, *supra*. In none, however, was it necessary to determine the question whether or not such a contract between a married woman and an attorney, in contemplation of divorce proceedings, by which the attorney was to receive a share of what was recovered, was lawful. In at least one of these cases, however, it was intimated that such contract was considered invalid. But in some of the other states the question has been directly decided adversely to such contract. *Jordan v. Westerman*, 62 Mich. 170, 28 N. W. 828, was such a case. There the plaintiff, on the day she commenced the proceeding against her husband for divorce, entered into a written contract with defendants, who were attorneys, by which she retained them to prosecute the suit, and to pay the defendants, as compensation for their services and costs which they were to advance, whatever sum the husband should be compelled to pay by the court or otherwise. The husband, by himself and counsel, endeavored to effect a settlement and reconciliation; but the defendants, as plaintiff's counsel, resisted such efforts until the husband paid over to them, as costs, alimony, and expenses, the sum of \$4,500. The divorce was obtained, and the defendants paid to the plaintiff half of the sum received, and retained the balance under the terms of their contract. The plaintiff brought the suit in question to recover the balance of the money paid over by the husband to defendants. The supreme court of Michigan, in passing upon the contract in question, says: "Such contracts are against public policy for another reason: Public policy is interested in maintaining the family relation. The interests of society require that those relations shall not be lightly severed, and that families shall not be broken up for inadequate causes or from unworthy motives; and, where differences have arisen which threaten disruption, public welfare and the good of society demand a reconciliation, if practicable or possible. Contracts like the one in question tend directly to prevent such reconciliation, and, if legal and valid, tend directly to bring around alienation of husband and wife, by offering a strong inducement, amounting to a premium, to induce and advise the dissolution of the marriage ties

as a method of obtaining relief from real or fancied grievances, which otherwise would pass unnoticed." Contracts for contingent fees paid attorneys were not tolerated at all at common law, but in this and perhaps most of the states such contracts are allowed, if not favored. This is on the ground that otherwise a party without the means to employ an attorney and pay his fee certain, and having a meritorious cause of action or defense, would find himself powerless to protect his rights. In divorce cases, however, the law has taken care that the wife shall not be without assistance, in proper cases, either to prosecute or defend such actions. The court, in its discretion, may require the husband to pay as alimony any money necessary to enable the wife not only to support herself, but also to prosecute or defend the action, and is given ample power to enforce such order. The reason or necessity, therefore, does not exist in such cases, as in the others, for allowing contingent attorney's fees, and, where the reason ceases, the rule or law also ceases. By the contract in question the attorney was to have a portion of, or an interest in, the community property to be recovered, and a division of the community property could take place only upon a dissolution of the marriage. Civ. Code, § 146. This prospective share in the community property, being the greater interest, was the controlling consideration on the part of Long. Hence he was directly and greatly interested not only in preventing any reconciliation, but in bringing about a divorce. As he assigned this contract before the same had been performed on his part, the plaintiff also became interested with him. By a process of assignments this interest might be extended, as the exigencies of the case might require, so as to include many persons of means and influence who would lend their assistance in the accomplishment of the same purpose,—in other words, create a brokerage and form a syndicate in the business of contingent divorce contracts. We think the policy of the law is against all contracts of the kind, that they should be held illegal and void, and that the courts should refuse to aid their enforcement. Judgment affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

129 Cal. 188

LINFORTH v. WHITE et al. (S. F. 1,898.)
(Supreme Court of California. July 18, 1900.)
NOTICE OF APPEAL—SERVICE—SUFFICIENCY—
AFFIDAVIT.

Under Code Civ. Proc. § 1012, providing that service of notice of appeal may be made by mail, where the person making the service and the person on whom it is to be made reside or have their offices in different places, an affidavit of service of notice of appeal by mail, which fails to show that the person serving it and the person on whom it was served resided in different places, is fatally defective.

Department 1. Appeal from superior court, Mendocino county.

Action by Walter H. Linforth, substituted in place and stead of H. T. Fairbanks, against George E. White, James M. Costigan, and others. From an order setting aside so much of a sale under a decree of foreclosure and sale as embraced land included in the mortgage of defendant Costigan, plaintiff appeals. Appeal dismissed.

Seawell & Pemberton, for appellant. Geo. A. Sturtevant and J. Q. White, for respondent.

PER CURIAM. Respondent insists that the appeal in this case should be dismissed on the ground that there was no service of the notice of appeal. The appeal is taken from an order made by the superior court of Mendocino county September 21, 1897, setting aside so much of a sale under a decree of foreclosure and sale as embraced the land included in the mortgage of Costigan, and not included in the mortgage belonging to Linforth, on the ground that said sale, as to such portion, was grossly inadequate in price, and was made without the knowledge of Costigan or his attorneys, and without any notice to either. At the hearing of the motion in which said order was entered, Costigan, the moving party, was represented by Messrs. Seawell & Pemberton and Barclay Henley, as his attorneys, and Linforth, the plaintiff in said action and purchaser at the said sale, was represented by J. Q. White and George A. Sturtevant, as his attorneys. Linforth, as appellant, and Costigan, as respondent, are the parties to this appeal, and have appeared by the same attorneys who represented them in the court below at the hearing of the motion, wherein the order appealed from was entered.

The only proof of the attempted service on the respondent of the notice of appeal herein is contained in the following affidavit: "[Title of court and cause.] State of California, City and County of San Francisco—ss.: Lewis W. Martin, having been duly sworn, says that at all the times hereinafter mentioned I was a white male citizen and resident of the city and county of San Francisco, state of California, over the age of twenty-one years, not a party to or interested in the above-entitled action, and competent to be a witness upon the hearing of any proceeding therein; that at the city and county of San Francisco, state of California, on the 20th day of November, 1897, I personally served the notice of appeal of Walter H. Linforth, as plaintiff, and Walter H. Linforth, as purchaser, from the order made and entered in said action on the 21st day of September, 1897, granting the motion of the defendant Costigan to set aside the sale made by the sheriff on the 6th day of March, 1897, and setting aside said sale, upon Messrs. Seawell & Pemberton, attorneys for the defendant James M. Costigan, by personally depositing in the general post office of the United States at San Francisco, California, on said 20th day of November, 1897, a true and correct copy of said notice of appeal;

that said notice of appeal was inclosed in an envelope, with the postage thereon fully prepaid, and said envelope plainly addressed to Messrs. Seawell & Pemberton, attorneys at law, Ukiah, Mendocino county, California, and that at said time the office and residences of said Seawell & Pemberton were at the said town of Ukiah, county and state aforesaid; and that at said time there was a direct and daily communication by mail between the said San Francisco, California, and the said town of Ukiah." There is nothing in the affidavit showing any connection between affiant and appellant, or the attorneys of the appellant, or for whom or by whose authority he mailed the letter mentioned in the affidavit.

"An appeal is taken by filing with the clerk of the court in which the judgment or order appealed from is entered, a notice stating the appeal from the same, or some specific part thereof, and serving a similar notice on the adverse party or his attorney." Code Civ. Proc. § 940. Personal service of notice is made as directed in Id. § 1011. Substituted service is made as directed in the sections following. "Service by mail may be made where the person making the service and the person on whom it is to be made reside or have their offices in different places between which there is a regular communication by mail." "In case of service by mail the notice or other paper must be deposited in the postoffice addressed to the person on whom it is to be served at his office or place of residence, and the postage paid." Id. §§ 1012, 1013. In this case the respondent, Costigan, had appeared by attorneys, and in such case the notice was required to be served on them. Id. § 1015. The affidavit states that the respondent's attorneys, to whom the notice was mailed, resided in Ukiah, Mendocino county. And it does not appear but that appellant and his attorneys also resided there, where the case was tried and the order complained of made and entered. In fact, there is nothing to show where appellant or his attorneys resided. Service by mail is good only where the person making the service and the person on whom it is to be made reside in different places, between which there is regular mail communication; and the affidavit of service must show a strict compliance with these provisions of the statute, or otherwise the evidence is insufficient to establish the act of service. In *People v. Turnpike Co.*, 30 Cal. 182, it is said that the New York statute regulating the mode of serving notice and papers is the same as our practice, and that "the courts of that state have uniformly held that a party relying upon a service by mail, or otherwise than by actual service on the proper person, must show a strict compliance with the requirements of the statute"; citing a number of cases from that state. In *Moore v. Besse*, 35 Cal. 184, the affidavit of service was made by a third party, instead of the attorney for the appellant, as here, who mailed the notice at Santa Cruz, directed to respond-

ent's attorney at San Francisco; and the court say that the appellant's attorney, and not the party who mailed the notice, is "the person making the service," and that the fact that he (the attorney) resided there should have been shown by affidavit, under the rule that a party relying upon a substituted service must show a strict compliance with the requirements of the statute. See, also, *Cunningham v. Warnekey*, 61 Cal. 507. The appeal must be dismissed, and it is so ordered.

129 Cal. 180

HOOK v. LOS ANGELES RY. CO.
(L. A. 613.)

(Supreme Court of California. July 18, 1900.)

STREET RAILWAYS—TRACKS—INTERSECTION
—USE BY TWO COMPANIES.

In 1897 defendant constructed and has since maintained a street railroad in a city, under a franchise from it. Civ. Code, § 499, provides that "two lines of street railway operated under different managements may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by such railways jointly." *Held*, that plaintiff, having a like franchise from defendant, is entitled to intersect defendant's tracks and operate cars thereon jointly with defendant, upon payment to the latter of one-half of the value of the tracks and appurtenances at the time plaintiff is permitted to make use of them.

Department 1. Appeal from superior court, Los Angeles county.

Action by W. S. Hook, manager, etc., against the Los Angeles Railway Company, to obtain an order authorizing him to intersect defendant's tracks, and use the same and appurtenances jointly with the defendant. From a decree in favor of plaintiff, defendant appeals. *Affirmed*.

Bickwell, Gibson & Trask, for appellant.
E. H. Lamme, for respondent.

HARRISON, J. In March, 1897, the defendant, under and by virtue of a franchise granted to it by the city of Los Angeles, constructed, and has since maintained and operated by electricity, a double-track street railroad along several streets in said city, including a portion of Seventh street. In August of that year the plaintiff, to whom the city had previously granted a franchise to construct and operate a street railroad on certain streets therein, including four blocks, from Lake to Rampart streets, upon the portion of Seventh street occupied by the defendant, applied to the defendant for permission to intersect the tracks and appurtenances constructed by it on said portion of Seventh street, and to operate thereon cars along the tracks of the defendant, and tendered to the defendant the sum of \$1,867.50, as one-half of the cost of constructing the same along said portion of the street. The defendant refused to grant the request, and the plaintiff thereupon brought the present action to obtain an order authorizing him to make such intersection, and to use the tracks and appurtenances

jointly with the defendant, and that the court should determine the amount of money to be paid therefor to the defendant. The court found that the construction of that portion of the defendant's road which the plaintiff seeks the right to enter upon and use cost the defendant \$5,968.98; that the rails used in said construction were purchased by the defendant in the fall of 1895, and were not purchased especially to be used in the construction of this road, but were carried and held by it as a part of its stock of supplies to be used in connection with the street railroads belonging to it; that the material used by it in said construction would have cost if purchased at the time of the construction, to wit, in March, 1897, \$4,870.08. The only items upon which there was any variance between what they cost to the defendant when purchased by it, and what they would have cost if purchased by it at the time of the construction, were the rails, in which there was a difference in cost of \$920, and the ties, in which there was a difference in cost of \$79. Upon these facts the court held that upon payment to the defendant of the sum of \$2,435.04 the plaintiff had the right to intersect the defendant's road, and connect his own road therewith, and use the same jointly with the defendant. Plaintiff thereupon paid this amount into court for the use of the defendant, and a decree was entered in his favor accordingly. From this judgment the defendant has appealed, bringing the cause here upon the judgment roll alone.

Section 499 of the Civil Code is as follows: "Two lines of street railway operated under different managements may be permitted to use the same street, each paying an equal portion for the construction of the tracks and appurtenances used by said railways jointly; but in no case must two lines of street railway operated under different managements use the same street or tracks for a distance of more than five blocks consecutively." The sole question involved in this appeal is the construction to be given to this section. Its language is not free from ambiguity, but we are of the opinion that the superior court correctly construed it in its application to the present case. The section is in its terms prospective for each of the two lines of street railway, and, literally construed, applies to a case where permission is given to them to use a street in which no track has yet been constructed. In such a case the construction of the track and appurtenances would be a matter of contract between the two lines, under which the expense of the construction would be borne in accordance with the provisions of the section. A proper interpretation of the section, however, extends its provisions to a case in which a franchise is granted to operate a street railway over a portion of a street on which another railway has already been constructed and is in operation. The section itself does not use the term "cost" or "value" in defining the rights and obligations of the two, but states that each shall pay an

equal portion "for the construction," without specifying of what the "portion" consists. This ellipsis may be reasonably supplied by holding that the legislature intended that, in the absence of some unusual or controlling circumstance, each should contribute one-half of what would be the reasonable expense "for the construction," if at the time the right to use the same is sought both lines were for the first time preparing to make a joint use of the street, and to construct tracks and appurtenances thereon. It would be manifestly unjust to require payment of one-half of the money which may have been paid for the construction of tracks and appurtenances which have become greatly dilapidated, or which may have been constructed at a time when materials were much more expensive. The owner of the road that had been thus constructed would receive the full compensation intended by the statute if he should be paid one-half of the value of the track and appurtenances at the time the other is permitted to make use of them. The court allowed to the defendant herein one-half of what would have been the cost of the material at that time, and, in the absence of any other evidence thereon, this was sufficient evidence that that was its reasonable value. The judgment is affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

(129 Cal. 132)

DAYTON v. McALLISTER et al. (Sac. 614.)¹
(Supreme Court of California. July 18, 1900.)
FORECLOSURE—DEFENDANT—EVIDENCE FAIL-
ING TO SHOW INTEREST—IMMATERIALITY—
ERROR—PARTY WITHOUT INTEREST—RIGHT
TO REVIEW.

1. Where, in foreclosure, it appeared from a defendant's evidence that his claim of interest in the premises was based on a judgment in attachment against the mortgagor, which had been instituted after the mortgagor had conveyed the land to a co-defendant, such evidence was properly excluded as immaterial.

2. Where a defendant in foreclosure has no right in the premises and no personal liability, and no interest in the amount of plaintiff's recovery, he cannot complain, on appeal, of error in the admission of evidence bearing on the amount of recovery.

Department 1. Appeal from superior court, Stanislaus county.

Suit in foreclosure by D. F. Dayton against H. L. McAllister and Ida A. Zabel. From a decree in favor of plaintiff, defendant McAllister appeals. Affirmed.

C. W. Eastin, for appellant. F. A. Caldwell, for respondent Dayton. P. J. Hazen, for respondent Zabel.

HARRISON, J. The appellant was made one of the defendants under the allegation that he claimed some interest in the premises, but that his claim is subordinate and subject to the lien of the mortgage. The mortgage was executed to the plaintiff's as-

signor March 30, 1893, and on March 7, 1894, the mortgagor conveyed the mortgaged premises to the appellant's co-defendant, by good and sufficient deed, which was recorded in the office of the county recorder on that day. In his answer herein the appellant sets forth his claim upon the mortgaged land by virtue of the lien of a judgment against the mortgagor which was entered and docketed February 19, 1895. The court found that the appellant had no lien upon the mortgaged premises, and rendered its decree of foreclosure without making provision for the payment of any portion of the proceeds of the sale to the appellant, and directing that any surplus moneys arising from the sale should be brought into court to abide the further order of the court. The appellant moved for a new trial, which was denied, and from the judgment and the order denying a new trial he has appealed.

At the trial the appellant offered in evidence the judgment roll and other papers in the action in which the judgment was rendered, from which it appeared that the action was commenced May 2, 1894, and that the levy of an attachment upon the land described in the mortgage was made therein June 23, 1894. Upon the objection of the plaintiff that this evidence was immaterial, inasmuch as it appeared that the mortgagor had conveyed the land prior to the levy of the attachment, the court excluded the evidence. The appellant also excepted to the admission of certain evidence on the part of the plaintiff tending to show that certain moneys which had been received by the plaintiff's assignor were not received as a payment upon the mortgage debt. These rulings are assigned as error upon this appeal. In the statement of the case on motion for a new trial the appellant does not question the correctness of the finding that the mortgagor had conveyed the land to the other defendant prior to the date at which the writ of attachment in the appellant's suit was levied thereon, and consequently the finding that the appellant has no lien upon this land by reason of the judgment which was afterwards rendered and docketed in his action against the mortgagor follows as a legal conclusion. The evidence which he offered in support of his claim to an interest in the premises would not have counter-vailed or affected this finding of the court, and its exclusion, therefore, was harmless. As the appellant, therefore, was not interested in the amount for which the plaintiff might recover judgment upon the mortgage debt, the rulings of the court in admitting evidence thereon did not affect his rights, and need not be examined upon this appeal. No objection to these rulings was made by the party interested therein. The judgment and order are affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

¹ Rehearing denied August 16, 1900.

(129 Cal. 148)

TOLAND v. EARL et al. (S. F. 2078.)¹
(Supreme Court of California. July 10, 1900.)
EXECUTORS AND ADMINISTRATORS — DISTRIBUTION—PROBATE COURT—JURISDICTION—EQUITY—BILL TO INSTRUCT.

1. Where, in the administration of an estate, there is no embarrassment as to the proper mode of administering the same, the fact that the parties differ simply as to the distribution which shall be made of the residue of the estate after the administration has been completed does not authorize a suit in equity by the administrator to have the probate court instructed as to what distribution should be made.

2. Where a will creates no trust estates, and the questions relating to the distribution thereof are purely legal, a court of equity has no jurisdiction of a suit by the administrator for a decree instructing the probate court as to such distribution, since the jurisdiction of such questions by the probate court is exclusive.

Department 2. Appeal from superior court, city and county of San Francisco.

Bill by Hugo Huger Toland, administrator with the will annexed of the estate of Mary B. Toland, deceased, against Mary J. Earl and others, for the purpose of having the probate court instructed as to what distribution shall be made of the estate. From a decree in favor of plaintiff, defendants appeal. Reversed.

Beatty, Shortridge & Brittain, Wilson & Wilson, E. F. Treadwell, John B. Mhoon, and E. C. Harrison, for appellants. W. B. Treadwell, for respondent.

TEMPLE, J. This action was brought by the administrator with the will annexed of the estate of Mary B. Toland, deceased, for the purpose of having the probate court instructed as to what distribution shall be made of the estate under the will. There is a general averment in the complaint that differences exist between plaintiff and the defendants, and among the defendants themselves, by reason of which plaintiff is unable to properly administer said estate, and some of the doubts relate to controversies not within the jurisdiction of the court sitting as a court of probate; but nowhere in the complaint is it shown that the administrator has any doubt as to anything he is required to do, and when the doubts stated are fully considered it is manifest that there is no embarrassment whatever as to the proper mode of performing his trust in the administration of the estate. The parties simply differ as to what distribution shall be made of the residue of the estate after the administration has been completed.

Plaintiff sues in his representative and also in his individual capacity. In his representative capacity he has no interest in the questions he seeks to raise. It is alleged that E. B. Mastick and George H. Mastick contend that certain rents are by the terms of the will given to them. This certain other defendants deny, and claim that such rents under the will belong to a fund for the payment of legacies. These are matters to be determined

in the decree of distribution, and the doubts do not embarrass to any extent the administration. Ample funds are provided for the payment of the legacies, whatever conclusion may be reached upon that subject. There are no doubts as to whether it is necessary to provide, by sale or otherwise, a larger fund to pay legacies if these rents are given to E. B. and George H. Mastick. Plaintiff contends as an individual that he is entitled under the will to an undivided one-half of the proceeds of a sale ordered in the will, while certain defendants contend that plaintiff is entitled only to one-half of what will remain in such fund after the debts, the expenses of administration, and legacies have been paid out of it. To determine these questions is a function of the decree of distribution, and it is not at all important that they should be sooner determined.

The jurisdiction of a court of equity cannot be brought into action on the ground that a trustee is seeking instruction as to the proper mode of executing his trust (conceding that under our system such could ever be a ground of jurisdiction, which I do not), for the will creates no trust estate and the questions are purely legal. Pomeroy says that the present doctrine, where courts entertain suits to construe wills, is that the jurisdiction is simply an incident of the general jurisdiction of courts of equity over trusts, and "that a court of equity will never entertain a suit brought solely for the purpose of interpreting the provisions of a will, without any further relief, and will never exercise a power to interpret a will which only deals with and disposes of purely legal estates and interests, and which makes no attempt to create any trust relations with respect to the property donated." 3 Pom. Eq. Jur. § 1156. This proceeding would not be tolerated even in those jurisdictions where it is still held that courts of equity may, under some circumstances, interfere to interpret trusts created by wills during administration. But I think such a suit cannot be maintained under our system in any case; nor do I think the question is as to whether the jurisdiction of courts of equity in this state is as extensive as was formerly the jurisdiction of the courts of equity in England. There is no controversy here as to jurisdiction between courts of law and courts of equity. Both jurisdictions are vested in the same courts, and such matters are only material in determining the character of the remedy to which the party may be entitled in a particular case.

The legislature has provided a special proceeding for the administration of the estates of deceased persons, whether testate or intestate. For the conduct of this special proceeding a minute code has been provided, through which every purpose for which resort was formerly had to courts of equity is attained. In England only personalty was involved in the administration, but the relation of the personal representative to the creditors, legatees, and distributees was such, and

¹ Rehearing denied August 9, 1900.

the relief afforded in ecclesiastical courts so inadequate, that this was the most important branch of chancery jurisdiction. 1 Pom. Eq. Jur. § 77. In the probate proceeding provision is made for the presentation and allowance of the claims of creditors, and, when the assets of the estate have been fully ascertained, upon notice the claims of creditors are ordered paid, if the assets are insufficient to pay all, in a certain order. Certainly this provision must be exclusive of the jurisdiction of a court of equity to marshal the assets and to direct the payment of claims. If a legacy falls due, or a partial distribution of an intestate estate should be made, the probate court can order the personal representative to make the payment or distribution. This will also be done upon notice, and, the proceeding being in rem, when such notice is given the whole world is brought in. Surely this must be exclusive of a suit in equity, in which the parties are necessarily limited. The same is true as to the settlement of the accounts of the administrator or executor. Elaborate provision is made to force the executor or administrator to account, and in this accounting the creditors and distributees are interested. In an insolvent estate it is a necessary preliminary to the marshaling of the assets for payment of creditors, and it is always a necessary preliminary to a final distribution. This settlement, made after the prescribed notice, is conclusive upon all interested parties.

But the most conclusive reason, to my mind, why this jurisdiction must be held to be exclusive, is that, under our probate system, all deraignment of title to the property of deceased persons is through the decree of distribution entered as the final act in the administration of an estate, whether testate or intestate. No one will contend that this decree can be made by any other court or in any other proceeding. It constitutes, not only the law of the personality, but also of the real estate. In other jurisdictions this decree is also held to be conclusive; but generally it concerns only personal property, and the power to make it does not involve the power to construe trusts in land created by the will. Here the probate court not only may, but should, and often must, construe the trusts created by the will. After the decree is made, the will practically drops out of existence. The law of the estate is the decree, and not the will, and, as I have said, all deraignments of title are through it. *Goad v. Montgomery*, 119 Cal. 552, 51 Pac. 681. The proceeding differs much from the systems of administration where the personal property goes to the personal representative and the land to the heir. Here the relation of the probate court analogous to the relation of a court to its receiver; and here, too, the entire probate proceeding, from the grant of administration or the probate of a will, is calculated to give notice to the heirs of a decedent, and special notice is required to be given of the time when distribution will be made, where all

interested parties can be heard. The distribution is declared to be conclusive upon the whole world. It is no small consideration, in my opinion, that this probate proceeding is in the same court in which a suit would be brought to construe the will. The special proceeding may as well be in the nature of a proceeding in equity as at law, and it is before the same chancellor to whom it would be necessary to appeal in a personal action to instruct the administrator or executor and the court as to the proper construction of the will. If it were found necessary or convenient to embody such construction in an order, so that appeal could be taken to the supreme court, this could easily be provided for in the proceeding. Why should Judge Coffey, sitting in probate, be instructed by Judge Coffey, sitting in a case in equity brought for that purpose? If it is necessary or proper to appeal to a court of chancery, the probate court is such a court, and the proceeding is in fact for that purpose. It is the same court when sitting in matters of probate, and may exercise all equity powers necessary for a complete administration. In *re Burton*, 98 Cal. 459, 29 Pac. 36.

The cases relied upon to sustain this action, with the exception of *Williams v. Williams*, 73 Cal. 99, 14 Pac. 394, all arose under the former constitution. In the mentioned case, *Rosenberg v. Frank*, 58 Cal. 387, was followed without noticing that it arose under a different judicial system. The probate proceeding then was not in the court presided over by the same chancellor before whom the action to obtain a construction of the trusts would be brought. The supreme court had held that the probate court was an inferior court. While I do not wish to conceal my opinion that a wrong view was taken in those cases, the intention that the jurisdiction of the court sitting in probate should be exclusive was not so obvious under that judicial system, and it was quite natural that lawyers trained under a different procedure should for a time fail to appreciate the change, and the early cases show this. *Wilson v. Roach*, 4 Cal. 362, was an action against a guardian to compel him to account. The court said that district courts were vested with the jurisdiction by the constitution, and the legislature could not deprive them of the jurisdiction. The reasoning has no application now. The legislature has not attempted to deprive any court of its jurisdiction. It has only provided a mode in which that jurisdiction shall be exercised. *Clarke v. Perry*, 5 Cal. 59, was an action against an administrator to compel an accounting. He had accounted to the probate court, but it was contended that he had not fully accounted. The court held that one who was not an actual party to the accounting had in the probate court was not bound by it, and could proceed to enforce a full accounting in the district court. This was upon the ground that the probate court was of inferior and limited jurisdiction. *Deck v. Gerke*, 12 Cal. 433, was

a case to compel an accounting and a distribution. Judge Baldwin commenced his opinion with the statement that, apart from previous decisions, it would be doubtful if the probate court had not exclusive jurisdiction; but he says the probate courts are courts of special and limited jurisdiction, and under the decisions courts of chancery have assumed jurisdiction. The principle asserted is more convenient in practice, and it is too late to question the jurisdiction. *Payne v. Payne*, 18 Cal. 292, was a controversy submitted without action, as the statutes permitted, and no question of the right in that mode to interfere with probate proceedings was raised or discussed. In *Rosenberg v. Frank*, 58 Cal. 387, the point was the first time fully considered. That was also a consent case, and the remarks made upon the subject were evidently in reply to objections raised by a member of the court and set forth in a dissenting opinion. One argument urged in the dissenting opinion was that courts of chancery formerly took jurisdiction of cases of administration because the probate jurisdiction then existing was a "lame jurisdiction," and that under our system it was not so. The reply is, in effect, that all existing equity jurisdiction was by the constitution vested in the district courts, and the fact that other courts were vested with some equity jurisdiction did not limit the jurisdiction of the district court, in the absence of prohibitory language in the constitution, or unless it appeared affirmatively that the jurisdiction conferred upon the other court was intended to be exclusive. It was also held that, while the legislature could give to the probate court such probate jurisdiction as it saw fit, it could not take away from the district courts "any of the equity jurisdiction conferred on them by the constitution"; and it was also said that "the probate court held its jurisdiction subject to the exercise of this jurisdiction by the district court."

Rosenberg v. Frank arose under the former constitution, and much of this reasoning has no force whatever as applied to our present judicial system. There is no possible question now as to what courts have probate jurisdiction, nor whether courts of equity do or do not have jurisdiction over matters of administration. The superior court has full chancery jurisdiction, and also probate jurisdiction, and a special proceeding in rem has been prescribed to it, in which it is required to administer estates, whether testate or intestate; and I repeat there is no occasion in this case to determine whether, while sitting in probate, it is acting as a court of equity or not. It is clearly within its admitted jurisdiction, and further we need not go. We need not inquire under what branch of jurisdiction the particular proceeding comes. Much less reasonable would it be to say that, because formerly courts of chancery took cognizance of matters of administration on the ground that the jurisdiction of the ecclesiastical courts was a "lame jurisdiction,"

one judge of this court, calling himself a "chancellor," sitting in a case in equity, can interfere to control another judge in the same court sitting in probate. The proceeding is entirely statutory, and it is true that in some sense the court in this special proceeding is exercising a special and limited jurisdiction. The mode and procedure limit its jurisdiction. It is not there authorized to decide controversies not strictly within the probate proceedings. Except in the case of creditors, it has no jurisdiction to determine claims adverse to the estate itself. Such was *Griggs v. Clark*, 23 Cal. 427. The remark made by Judge Crocker, and quoted as authority here, might as well have been made in an action of ejectment. It was not denied that such an action could be brought in a court of equity, nor was it claimed that the probate court had any jurisdiction over the matter. Executors and administrators have frequent occasion to sue, and are often sued, in other courts. But I do not see what that has to do with the matter under discussion here. To determine such controversies is not within the scope of the proceeding in probate; nor, except as to creditors, does the court in that proceeding acquire jurisdiction over controversies or persons not claiming under the decedent. And it may be said that creditors do so. They are given by statute a right as to the estate and to share in some sense in its distribution.

This matter was really determined in *Goad v. Montgomery*, supra. It was there said: "It would be an anomaly in jurisprudence that a court which is vested with full jurisdiction in matters of probate should be controlled in the exercise of that jurisdiction by the action of a co-ordinate court which has neither controlling nor revisory jurisdiction in such matters. The court was not required to follow that judgment, but could distribute the estate in accordance with its own views." That being so, a judgment in this case one way or the other could not affect the proceeding in the probate court, and would afford no protection to the administrator, if he were required to base any action upon it. It would, in fact, be a void judgment. The judgment is reversed and the cause remanded, and the superior court is directed to dismiss the action.

We concur: MCFARLAND, J.; HENSHAW, J.

129 Cal. 164

BELTAIRE et al. v. ROSENBERG et al.
(S. F. 1,434.)

(Supreme Court of California. July 18, 1900.)
ACCOUNT STATED—ATTACHMENT—RIGHT OF ACTION.

Defendant contracted with plaintiff in New York for the purchase of goods, payable in 60 days at New York. At the end of the 60 days, plaintiff sent defendant a statement of account, and again two months later. Defendant replied, complaining of the salability of some of the goods sent, and asked more time

on the bill. Plaintiff thereupon commenced attachment proceedings as upon an account stated. Held not to constitute an account stated, as a new and independent contract.

Department 1. Appeal from superior court, city and county of San Francisco.

Attachment proceedings by H. A. Beltaire and others against George Rosenberg & Son. From an order dissolving the attachment, plaintiffs appeal. Affirmed.

Fox & Gray, for appellants. A. Ruef, for respondents.

VAN DYKE, J. This is an appeal from an order dissolving an attachment. From the affidavits and exhibits used on the motion to dissolve the attachment, embodied in the bill of exceptions, it appears that the defendants reside in and do business in the city and county of San Francisco; that the plaintiffs reside in the city of New York, and are engaged in the business of manufacturing hats in said city; that on or about the 1st day of August, 1897, Charles Rosenberg, one of the defendants, while in said city of New York, entered into a contract with the plaintiffs for the manufacture of a large number of hats, and to ship the same, when manufactured, to the defendants, in the city and county of San Francisco; that, by the terms of the purchase so made in the city of New York, it was agreed between the plaintiffs and said Rosenberg that the defendants should have 60 days' time to pay for said hats, and that such payments were to be made in New York. In accordance with this agreement of purchase, the plaintiffs manufactured and shipped to the defendants said hats so purchased, and sent a statement or bill of the same, a copy of which is as follows:

"Statement.

"New York, September 30, 1897.

"M. Rosenberg & Son, San Francisco, Cal., to Beltaire, Lurch & Co., Dr., Manufacturers of Fine Stiff and Soft Hats, 22 and 24 West 3rd Street, Factory, Danbury, Conn.

60 days dating.

Aug. 13	\$222 00
" 30	192 00
Sept. 8	186 00
" 16	2 75
" 24	72 00
	<hr/>
	\$674 75
" 17. By mdse	1 00
	<hr/>
	\$673 75

"Dear Sir: Please favor us with check for above by return of mail. If not remitted for by inst., we shall take the liberty of drawing for same, as is our custom.

"Respectfully, yours,
"Beltaire, Lurch & Co."

Under date of New York, November 1, 1897, another copy of the same statement was sent by mail in a letter to defendants, in which letter they say, "We inclose herewith a statement of your account, for which we would be pleased to receive your check, as the sum is now due," to which defendants replied by letter from San Francisco, in which they say:

"In regard to the hats you sent us, we have had fair success, but would have done much better if you would have sent us larger shapes, and no hats lined. It is very hard to dispose of small shaves, also lined hats, on this coast. The bottle-green hats we could not dispose of, but have sold all the other colors. Can you use the same? As soon as we get time, we will write you a list, exactly, what style and dimensions sell best on this coast. In regard to money matters, we would ask you to have patience with us until we get our returns from fall sales, which will be shortly. Yours, G. Rosenberg & Sons."

The action was commenced December 9, 1897, for the sum of \$673.75, the amount contained in the statement sent out to the defendants; and the affidavit on which the attachment was issued states that the action is founded upon contract, to wit, an account stated, which was made in this state. It is not disputed on the part of the appellants that the transaction between the parties was as stated; that is, the contract of purchase of the goods was made in New York by one of the defendant firm with the plaintiffs, to be paid for on 60 days' time in the city of New York upon the delivery of the goods here. But it is contended that a new contract sprang up, in the nature of an account stated, upon the receipt here by the defendants of the bill of the goods mailed by plaintiffs in New York, inasmuch as said defendants did not repudiate or refuse to pay said bill. To constitute an account stated, "it must appear that at the time of the accounting certain claims existed, for and concerning which an account was stated; that a balance was then struck and agreed upon; and that defendant expressly admitted that a certain sum was then due from him as a debt. Hence it follows that an account cannot be stated with reference to a debt payable on a contingency." 2 Chlt. Cont. (11th Am. Ed.) p. 962. Here it is shown from the correspondence between the parties that the defendants, upon receiving the bill of goods, wrote to the plaintiffs that they were unable to dispose of certain kinds of hats sent out, and said, "Can you use the same?" It appears, also, that other hats were to be ordered. In speaking of an account stated, this court, in *Coffee v. Williams*, 103 Cal. 556, 37 Pac. 506, says: "But the account, in order to constitute a contract, should appear to be something more than a mere memorandum. It should show upon its face that it is intended to be a final settlement up to date. And this should be expressed with clearness and certainty." The facts here did not bring this case within the rule in reference to an account stated, so as to constitute a new and independent contract. According to the contention of appellants, in case of any contract made and payable outside of this state it would only be necessary for the creditor to send to his debtor in this state a note or memorandum of the amount due, and thereupon, in case the claim was not disputed.

commence proceedings in attachment as upon a new contract made in this state. This would be a simple and easy mode of annulling or evading the law authorizing the summary process of attachment. We cannot agree with this contention of appellants. It would not be in accordance with the letter or spirit of the law, which permits an attachment only "where the contract is made or is payable in this state." "Proceedings by attachment are statutory and special, and the provisions of the statute must be strictly followed, or no rights will be acquired thereunder." *Gow v. Marshall*, 90 Cal. 567, 27 Pac. 422; *Rudolph v. Saunders*, 111 Cal. 233, 43 Pac. 619. The order is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

6 Cal. Unrep. 475

CORTELYOU et al. v. JONES et al.
(L. A. 677.)

(Supreme Court of California. July 18, 1900.)

MORTGAGE—ASSIGNMENT IN TRUST—FORECLOSURE—PARTIES—ATTORNEY'S FEE—ASSIGNEE'S RIGHT OF ACTION—SUFFICIENCY—ASSIGNMENT—ADMISSION OF TITLE—PROVISION AS TO TAXES.

1. Though an assignment of notes secured by a mortgage declares certain express trusts, the assignees may sue to foreclose the mortgage without joining the beneficiaries.

2. Where a mortgage provides that the mortgagee may include in its foreclosure a reasonable attorney's fee, and a copy of the mortgage is attached to and made a part of the complaint in foreclosure which alleges that plaintiffs have employed an attorney and become liable to him for a reasonable fee, "which fee is secured by said mortgage," there is a sufficient allegation as to attorney's fees to support a judgment therefor in plaintiffs' favor.

3. An assignment of "those certain mortgages and credits more particularly described as follows," followed by a description of the mortgage in suit, which sets forth the notes sued on, and declares that it is made to secure them, after which the assignment includes "all other moneys now due to me from any source whatever," is a sufficient assignment of the debts secured to support an action by the assignees, though the assignment is not of the notes themselves.

4. Where to a bill to foreclose a mortgage is attached a copy of the mortgage, which contains a recital that it "draws 8 per cent. net, as security for the payment of a promissory note, of which the following is a true copy," whereupon follow copies of the notes set out in the complaint, and this is not denied by the answer, the title of plaintiffs, who are assignees of the mortgage only, to the notes, is so far admitted as to sustain a judgment in their favor thereon.

5. The provision in the mortgage that the mortgagor shall pay taxes "on said premises, other than taxes on this mortgage or the money hereby secured," does not oblige the mortgagor to pay taxes on the mortgage itself.

Department 2. Appeal from superior court, Los Angeles county.

Action by C. A. Cortelyou and E. E. Johnson against O. H. Jones and Mary C. Jones. From a judgment in favor of plaintiffs, defendants appeal. Affirmed.

* Modified in banc. See 64 Pac. 119, 123 Cal. 131.

J. H. Knunagin and O. H. Jones, for appellants. E. E. Johnson and C. D. Welbur, for respondents.

McFARLAND, J. Action on two notes,—one for \$720, and the other for \$630,—and a mortgage to secure the same, all made and executed October 24, 1892, by defendants to Mercy Stoddard, and averred to have been assigned by the latter to plaintiffs. It is averred in the complaint that the first note has been paid, but that the whole of the principal and some of the interest on the second note are due and unpaid. Judgment was rendered for plaintiffs for a certain amount, and \$75 attorney's fees, and a decree of foreclosure to satisfy the same. Defendants appeal from the judgment and order denying a new trial. We will notice such points made for a reversal as call for any consideration.

Appellants contend that respondents cannot maintain the action in their individual capacity, because the written assignment under which they claim declares certain trusts. This contention cannot be maintained. A trustee of an express trust may sue without joining with him the beneficiaries. Code Civ. Proc. § 369.

The amount found due by the court is justified by the evidence.

The mortgage provides that upon default of payment the mortgagee or his assigns "may foreclose this mortgage, and may include in such foreclosure a reasonable counsel fee"; and this is an express provision that the mortgage is to be security for the counsel fees. Appellants contend that there is no averment about counsel fees in the complaint. A copy of the mortgage is attached to and made part of the complaint, and, whether or not that could be considered in the light of an averment, there is an allegation in the amendment to the complaint that respondents had employed an attorney and become liable to him for a reasonable fee, "which said fee is secured by said mortgage"; and this is sufficient on the subject, within any rule of pleading not unreasonably strict.

It is contended that the judgment cannot stand because the assignment introduced in evidence is not of the notes, but merely of their incident,—the mortgage. The assignment is not expressly of the notes, and is not, therefore, in the best legal form; but by the instrument the assignor assigns, etc., "those certain mortgages and credits more particularly described as follows, to wit." Following this there is a reference to a certain mortgage made by one Wetenhall, and then to the mortgage sued on in this action, which mortgage sets forth the notes described in the complaint, and declares that it is made to secure the same. After that is the following: "Also, all other moneys now due to me from any source whatever. Said mortgages and debts and credits to be collected, and the proceeds to be held in trust," etc. This was clearly an assignment of the debts secured by the mortgage, and the fact that

the debts were evidenced by the note set forth in the complaint and in the mortgage does not render the assignment ineffectual,—at least, as between the parties to this action. The notes were produced at the trial to be delivered up and canceled, and neither the rights of third parties, nor the rights of appellants in relation to third parties, are involved. Under these circumstances, it would be trifling with justice to reverse the judgment on account of the inartificial form of the assignment. Moreover, in the copy of the mortgage which is set out as part of the complaint appears the following: "This mortgage draws eight per cent., net, as security for the payment of a promissory note of which the following is a true copy, to wit [copies of the notes set out in the complaint are attached to the mortgage];" and there is no denial of this in the answer.

There is nothing in the contention that the mortgage obliges the mortgagor to pay taxes on the mortgage. The provision on the subject is as to "taxes on said premises, other than taxes on this mortgage, or the money hereby secured." The judgment and order appealed from are affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(129 Cal. 204)

MEYER v. BISHOP et al. (S. F. 1,275.)¹
(Supreme Court of California. July 18, 1900.)
ASSOCIATIONS — MONEYS PAID DIRECTORS —
KNOWLEDGE OF DISPOSITION — AUTHORITY TO RECEIVE — RECOVERY.

A member of an association cannot recover, against those who acted as its directors, for moneys voluntarily paid in by him with full knowledge of the disposition required thereof by its by-laws, and paid out by them in conformity thereto, because of lack of authority to receive and disburse the same, due to failure to incorporate, though such directors discontinued the business without sufficient cause.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Bertha Meyer against A. W. Bishop and others for moneys had and received. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

T. C. Spelling and Reddy, Campbell & Metson, for appellant. Davis & Hill, for respondents.

TEMPLE, J. This case seems to be on all fours with Perkins v. Fish, 121 Cal. 317, 53 Pac. 901. Plaintiff held a certificate of membership in the Mutual Endowment Association, which assumed to be and was doing business in the style of a corporation. The association went through the form of incorporation, and the defendants, who were its directors, still contend that it was a corporation de jure and de facto. Articles of incorporation were executed in due form, and were filed in the clerk's office of the county, and in the office of the secretary of

state. A board of directors was elected, and elaborate by-laws adopted. They provided, for its members only, endowment, insurance, and disability benefits, and also for assessments, with elaborate and minute provision for the disposition and management of the funds of the association. This action is not based upon any charge that the moneys have been wasted or misappropriated, but solely upon the proposition that there was a complete failure to incorporate, and the association was not even a corporation de facto, and therefore there was no authority on the part of defendant, claiming to act as trustees or directors of a corporation, to receive the money. But the payments were voluntary, and made with full knowledge as to the disposition authorized and required by the by-laws. To quote from Perkins v. Fish: "It [the money] was paid in and out under articles of association and rules and regulations framed by plaintiff and other members, or assented to by them in advance of any payment by them, and they must be held to be bound by their own acts." The members, therefore, who have continued for years to pay their chosen agents money, to be expended in a specified way, cannot, after the failure of the scheme, sue their agents, in an action for money had and received, to recover back the sums so paid. They are in pari delicto, and must share the loss. As to persons who were not members, different questions would be presented. Conceding all that plaintiff contends for, the purposes of the association were not improper, but the mode adopted for their attainment was unauthorized. They were all in it together, and it is difficult to see why, after failure, one set of members should recover from another set payments which they have made in the futile attempt. Counsel for appellant, in his oral argument, attempted to differentiate this case from the case of Perkins v. Fish, but we are unable to see any distinction affecting the vital point. It is suggested that the defendants discontinued the business without sufficient cause. The proposition sounds very strange, coming from the plaintiff, but this action is not for damages for the improper discharge of the duties of their trust on the part of defendants. If it can be said that defendants are sued as trustees, it is an involuntary trust, which is being forced upon them.

There are 82 counts in the complaint, stating as many different causes of action accruing to plaintiff and 81 others who had assigned their claims to plaintiff. They are all alike. Each assignor was a member of the association, and the demand of each is for money paid out upon a contract which it is alleged was void because the association was not a corporation de jure or de facto, and the business which the association attempted was unauthorized. The judgment is affirmed.

We concur: McFARLAND, J.; HENSHAW, J.

¹ Rehearing denied August 18, 1900.

120 Cal. 173

In re SHEID'S ESTATE. (L. A. 790.)

(Supreme Court of California. July 18, 1900.)

EXECUTORS AND ADMINISTRATORS—PETITION—SUPPLEMENTAL ACCOUNT—NOTICE OF HEARING—PETITION TO DETERMINE HEIRSHIP.

1. A petition for distribution was dismissed as having been filed before settlement of the final account, and on the hearing of the second petition the court directed the administrator to report and file a statement of all receipts and disbursements by him since the rendition of the last supplemental account, under Code Civ. Proc. § 1665, providing that a statement of any receipts and disbursements of the administrator since the rendition of his final account must be reported at the time of making final distribution. *Held*, that such statement was not the final account, settlement of which must precede the application for distribution, and hence a petition presented before settlement thereof was not premature.

2. Under Code Civ. Proc. § 1665, providing that a statement of any receipts and disbursements of the executor or administrator since the rendition of his final account must be reported and filed at the time of making distribution, and a settlement thereof made in the order or decree, notice of such settlement need not be given.

3. The fact that the clerk of the court filed a petition for distribution under a different number from the other papers in the estate is immaterial, there being but one estate.

4. A petition to determine heirship, which is pending and undisposed of, does not deprive the court of jurisdiction to hear and determine a petition for distribution of the estate, since Code Civ. Proc. § 1664, expressly provides that nothing therein shall be construed to exclude the right, on final distribution of any estate, to contest the question of heirship, where the same shall not have been determined under the provisions of the section.

Department 1. Appeal from superior court, San Luis Obispo county.

Application by Mary L. Wall for distribution of the estate of W. T. Sheid, deceased. From an order distributing the estate to petitioner, and from an order denying a new trial, certain other heirs of deceased appeal. Affirmed.

Chas. A. Palmer and F. A. Dorn, for appellants. Sanborn & McCall and W. H. Spencer, for respondent.

VAN DYKE, J. This is an appeal by the contestants, claiming to be heirs of said deceased, from an order and decree of distribution distributing the whole of the residue of said estate to respondent, Mary T. Wall, and also from an order denying the motion of said contestants for a new trial in said matter. W. T. Sheid died intestate March 9, 1896, in San Luis Obispo county, leaving an estate therein consisting of real and personal property. One Lacefield was appointed administrator of said estate March 25, 1896, and on May 2, 1896, notice to creditors was given. April 3, 1897, said administrator filed his final account, which was thereafter, on April 15, 1897, settled and allowed. On April 5, 1897, respondent, Mary T. Wall, claiming to be the only child and sole heir at law of deceased, filed an application for distribution of said estate. Appellants contested her heirship and

right to distribution, and on September 22, 1897, a decree was made and entered distributing said estate to said petitioner, Mary T. Wall. An appeal was taken from such decree of distribution, and this court held that as the petition for distribution was filed before the settlement of the final account, and after the filing of said account, the judgment should be reversed and the petition dismissed, and it was so ordered. In re Sheid's Estate, 122 Cal. 528, 55 Pac. 328. While the case was pending on appeal in this court, and in April, 1898, said administrator Lacefield made and filed in the court below a supplemental account, which was thereafter and upon proper notice settled and allowed, and he thereupon resigned as such administrator; and the public administrator of said county, M. Lewin, upon proper application, was appointed administrator of said estate on March 11, 1898, in place of the former administrator, and received from said former administrator the property and effects of said estate, and re-celpted to him therefor. On the going down of the remittitur the former petition of said Mary T. Wall for distribution was dismissed in pursuance of the order of this court, and thereafter, on January 19th, another petition was filed on the part of said Mary T. Wall for distribution of the residue of said estate to her, as the sole heir of said deceased. The findings recite that the said petition and the oppositions and contests of the contestants, and the issue raised by the pleadings came on regularly to be heard, and were tried by the court March 17, 1899, and on March 21, 1899, were argued, and thereupon the court made an order directing the administrator of said estate to report and file on or before March 31, 1899, a statement of all receipts and disbursements by him since the rendition of the last supplemental account of the administrator of said estate; and thereafter, upon April 1, 1899, the statement was reported and filed by said administrator pursuant to the order of said court, and was thereupon settled and allowed, and the decree of distribution to respondent, Mary T. Wall, made and entered.

The first point made by the appellants is that the court had no jurisdiction to entertain the petition, or to determine who are the legal heirs of the deceased, or to enter an order of distribution, for the reason that the petition was presented before the final account was filed or settled and allowed. What the appellants mean by the "final account," in this connection, is the statement furnished under the direction of the court at the hearing of the petition for distribution. And, further, it is contended that the court had no jurisdiction to settle and allow said account without notice having been given as required by section 1633 of the Code of Civil Procedure. Section 1665 of the same Code, relating to the distribution of the estate, says that "a statement of any receipts and disbursements of the executor or administrator, since the rendition of his final account, must be reported and filed at the time of making such distribu-

tion; and a settlement thereof, together with an estimate of the expenses of closing the estate, must be made by the court and included in the order or decree, or the court or judge may order notice of the settlement of such supplementary account, and refer the same as in other cases of settlement of the accounts." This statement of receipts and disbursements is clearly not the account referred to in section 1633, as claimed by appellants, nor the final account the settlement of which must precede the application for distribution. In this case the estate was in a condition for distribution at the settlement of the account, April 15, 1897, and it simply remained in the hands of the administrator awaiting the result of the appeal from the former decree of distribution. If all accounts or statements are required to be settled in advance of an application for distribution, it would in most cases result in preventing any distribution. Upon filing the petition for distribution, contests to heirship may, and frequently do, arise, and months, and perhaps a year or more, may elapse before such contests are finally settled. In the meantime receipts and expenditures go on, a statement of which should be furnished to the court before distribution is made and the executor or administrator discharged. The Code allows these statements, submitted after the decree of distribution is applied for, to be settled at the time the decree is made, without notice, or the court may order notice to be given, and refer the same for settlement. *Firebaugh v. Burbank*, 121 Cal. 190, 53 Pac. 560.

Upon filing the petition of the public administrator to be appointed in place of Lacey, resigned, the clerk indorsed said petition in said estate as No. 835, whereas all the former proceedings in said estate had been under the number 743. The last petition for distribution on the part of the respondent was filed in said estate under the number 743, whereas the statement of account submitted under direction of the court by the administrator and the decree of distribution were filed and made under No. 835; and the contestants therefore make the point that the petition is in one proceeding, and the settlement of account and decree of distribution in another. There is nothing in this contention. There is but one estate, and the mere fact that the clerk indorsed different papers with different numbers can make no difference. They all belong to the settlement of one and the same estate.

The contestants, upon the expiration of the year from the issuance of letters of administration in said estate, filed a petition, in pursuance of section 1664 of the Code of Civil Procedure, to determine heirship in their favor, which proceeding was pending, but not at issue, at the time of the order and decree of distribution appealed from. The pendency of this proceeding was set up by way of a plea in abatement, and it is contended on the part of the appellants that the court had no jurisdiction to hear and determine the

petition for distribution while such proceedings were pending and undetermined. This contention is not tenable. The section in question itself states that nothing therein "shall be construed to exclude the right upon final distribution of any estate to contest the question of heirship, title or interest in the estate so distributed, where the same shall not have been determined under the provisions of this section." See, also, *In re Oxarart*, 78 Cal. 109, 20 Pac. 367; *In re Sheld's Estate*, supra.

Appellants make objections to some of the rulings of the court at the hearing of the petition for distribution, but, having failed to discuss them in their brief, they will not be considered by the court. The decree of distribution and order denying a new trial are affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

In re COMSTOCK.

(Supreme Court of Oklahoma. June 30, 1900.)
BASTARDY—JURISDICTION—PROBATE COURTS
—IMPRISONMENT—HABEAS CORPUS.

1. Chapter 41, St. 1893, confers on probate courts jurisdiction in bastardy proceedings, and said power has been ratified by congress.

2. A bastardy proceeding is special in character, and is in the nature of a civil proceeding. There is no authority given to impose imprisonment as part of the original judgment in such cases, in order to compel the judgment debtor to secure the payment of the judgment by executing a bond.

3. A judgment debtor in a bastardy proceeding, who is imprisoned pursuant to the original judgment that he stand committed to the county jail until he gives bond for the payment of the judgment, will be discharged on habeas corpus. (Syllabus by the Court.)

Application by J. O. Comstock for a writ of habeas corpus. Petitioner discharged.

C. J. Wrightsman, for petitioner.

BURFORD, C. J. The petitioner was charged with bastardy in the probate court of Pawnee county. On the trial of the cause he was adjudged guilty, and judgment entered ordering him to pay to the prosecutrix the sum of \$840 for the maintenance of the bastard child; this amount to be paid at the rate of \$5 per month until said amount was fully paid. The judgment further ordered the defendant to enter into a bond to the territory of Oklahoma, with good and sufficient sureties to be approved by the court, to secure the payment of said sums for the first four years, and that he give bond, without sureties, for payment of the remainder of said sums. The decree and judgment then conclude as follows: "It is the further order of the court that the defendant, J. O. Comstock, be remanded to the custody of the sheriff of Pawnee county, Oklahoma Territory, to be by him committed to the common jail of Pawnee county until the bonds above mentioned are made and approved, and the

costs of the prosecution paid. And you, the said sheriff of Pawnee county, are hereby commanded to safely keep said J. O. Comstock until the bonds above mentioned are duly made and approved by the judge of the probate court, and until he pay the costs of the prosecution, or until he shall be discharged therefrom by due course of law. In testimony whereof, I have hereunto set my hand and official seal this 9th day of February, 1900. Wm. L. Eagleton, Probate Judge of Pawnee County, Oklahoma Territory. [Seal.] Pursuant to this judgment the defendant was committed to the county jail of Pawnee county, and, having failed to execute the bonds as directed, there remains. He now seeks to be discharged by habeas corpus.

There are a number of grounds set forth in the petition, questioning the jurisdiction of the court, the validity of the judgment, and the ability of the defendant to give bond; but as these matters all raise questions of fact, which may be determined in the trial court on proper application, or on appeal, or probably were determined on the trial, or may have been waived, we do not deem it necessary to examine them at this time, and therefore refrain from expressing any opinion as to whether or not they may be considered in this character of a case. There is one proposition that determines the case, and upon that question we think there is no room for serious contention. A bastardy proceeding, under our statute, is a special proceeding, in the nature of a civil action, and original jurisdiction is conferred on the probate court in such cases. Under the provisions of the organic act these courts did not have jurisdiction in proceedings in bastardy, but such jurisdiction was conferred by the legislative assembly in 1890 (chapter 41, St. 1893); and congress by a later enactment ratified this act of our legislature, in so far as it relates to the jurisdiction of probate courts. This chapter embraces all the laws we have on the subject of proceedings in bastardy, except as the same may be supplemented by the laws relating to procedure generally. Nowhere in this chapter is any authority given to imprison for failure to secure the judgment. If such power exists in the court, it could only be in contempt proceedings for failure to comply with the orders of the court, in which case the judgment debtor would be entitled to a day in court and a hearing before he could be committed to prison. In this case it is not shown or claimed that the defendant below was in contempt of court. The order of the court was that he be committed to the county jail and there confined until he should execute the bonds to secure performance of the judgment as directed. The order of imprisonment is a part of the original judgment. Most of the states whose statutes we have been enabled to examine contain provisions authorizing the courts having jurisdiction of bastardy proceedings to enforce their judgments by imprisonment of the judgment debtor. Our statute con-

tains no such provision and confers no such power. If the legislature has not seen fit to give this authority, the courts have no right to assume it. The writ of habeas corpus is awarded, and the prisoner ordered released from custody under the commitment by which he is now held. All the justices concurring.

In re BAILEY et al.

(Supreme Court of Oklahoma. June 30, 1900.)

HABEAS CORPUS—JURISDICTION.

The supreme court has no original jurisdiction over prisoners sentenced from Oklahoma and confined in the Kansas state penitentiary, and a writ of habeas corpus will not issue to the warden of the penitentiary at Lansing, Kan., to inquire into the validity of a sentence of persons while confined in said prison.

(Syllabus by the Court.)

Petition of Charles N. Bailey and Harry Plummer McCool for a writ of habeas corpus. Dismissed.

C. R. Buckner, for petitioners. H. S. Cunningham, Atty. Gen., for the Territory.

BURFORD, C. J. This is an application for a writ of habeas corpus. The petitioners allege that they are deprived of their liberty by the warden of the Kansas state penitentiary at Lansing, Kan., on a void judgment rendered by the district court of Canadian county, Okl. The petition is verified and filed by the attorney for the petitioners, and the attorney general of the territory has filed a waiver of notice, and agreed to submit the case on the papers. The attorney for petitioners has filed a waiver of the issuance of the writ and of the presence of the petitioners. The warden of the penitentiary has not been served with any notice, has not voluntarily appeared, and has neither come into the jurisdiction of this court, nor has he brought or agreed to bring the petitioners before the court either at or after a hearing.

The first question for determination is as to the jurisdiction of this court to hear and determine the cause. The petitioners are in the state of Kansas. They are confined in the state penitentiary of the state of Kansas. They are held by an officer of the state of Kansas who is in that state. It is alleged by counsel for petitioners that they are held on a commitment from the district court of Canadian county. This court judicially knows that persons sentenced to confinement in a penitentiary by the courts of this territory are sentenced to imprisonment at Lansing, Kan. The act of congress of June 16, 1880 (21 Stat. 259), provides: "That the legislative assemblies of the several territories of the United States may make such provision for the care and custody of such persons as may be convicted of crime under the laws of such territory as they shall deem proper, and for that purpose may authorize and contract for the care and custody of such

convicts in any other territory or state, and provide that such person or persons may be sentenced to confinement accordingly in such other territory or state, and all existing legislative enactments of any territories for that purpose are hereby legalized." Pursuant to the authority conferred by this statute, the legislative assembly of the territory of Oklahoma in 1890 (St. 1893, pp. 739-741) passed an act empowering the governor of the territory to contract with some other state or territory for the care and custody of such persons as may be convicted of crimes punishable in the penitentiary, by the courts of the territory. The act further provides that after entering into such contract all persons convicted of crimes punishable by imprisonment in the penitentiary shall be sentenced by the district courts to the penitentiary named in the contract, with like force and effect as though such penitentiary was located in the territory. Officers having such prisoners in charge are authorized to convey them from the territory to any other state or territory where provisions have been made for their incarceration. Under the provisions of this statute the governor of Oklahoma contracted with the proper authorities of the state of Kansas for the care and custody of Oklahoma prisoners in the Kansas state penitentiary at Lansing, Kan. No congressional or legislative enactment has been adopted giving the courts of Oklahoma jurisdiction over the Kansas penitentiary, its officers or inmates; nor has any attempt been made to extend the jurisdiction of our courts beyond our territorial limits. Where a person is arrested for a crime committed in any county in this territory, and tried in the district court, and convicted of a crime punishable by imprisonment in a penitentiary, he is sentenced to serve his term of imprisonment in the Kansas state penitentiary; and, unless the execution of the judgment is stayed by bond and appeal, such person is at once conveyed to such prison, and there delivered to the warden, to be confined subject to the commitment and the prison regulations. If the case be appealed, and the judgment of conviction be reversed, the warrant for the detention of the prisoner is set aside and canceled, and he is ordered delivered to the proper officer of the territory, to be returned to the territory for trial. The warden is bound to obey this order, for the reason that the commitment by which he holds such prisoner has been held for naught, and he no longer has any authority to hold the prisoner. But this court has no power to compel the warden of the Kansas penitentiary to bring a prisoner back into the territory, or to discharge a prisoner held by him on a commitment from a district court. This court exercises and can exercise no original jurisdiction over persons outside its territorial boundaries. While it may retain jurisdiction of the person of a prisoner where the prisoner appeals from a judgment of conviction, such jurisdiction is appellate, and not original. The petition for

a writ of habeas corpus in this case calls for the exercise of the original jurisdiction of this court over persons not within its jurisdiction, and not voluntarily submitting to it. "No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued, and an attempt to enforce it beyond these boundaries is nothing less than lawless violence." *Ableman v. Booth*, 21 How. 506, 16 L. Ed. 169. "The writ of habeas corpus cannot run outside the boundaries of the jurisdiction of the court which issues it." *Church. Hab. Corp.* § 108. "No sovereignty can extend its process beyond its own territorial limits, to subject either the property or the person of any one to its judicial decisions, decrees, or judgments. Every exercise of authority of this kind would be beyond the power granted, or, rather, beyond the power of the state to grant. All judicial power flows from the state, and the grant of legislative power ceases at the line of the state. Judicial power must cease, also, at that point." *Brown, Jurisd. Courts*, § 2.

We think it very clear that this court is without jurisdiction to award the writ in this case. The petitioners are not within the jurisdiction of this court, and we have no process by which they can be brought in. The warden of the Kansas penitentiary is not within our jurisdiction, and we have no authority to command him to come in. Hence the petition must be dismissed for want of jurisdiction, at costs of petitioners. All the justices concurring.

FOUST v. TERRITORY.

(Supreme Court of Oklahoma. June 30, 1900.)

CRIMINAL LAW—APPEAL—DISMISSAL.

Under the provisions of rule 6 (43 Pac. viii.), on a failure of either party to furnish copy of briefs as provided for in said rule it is within the discretion of the court whether said cause be continued, dismissed, or the judgment reversed or affirmed.

(Syllabus by the Court.)

Error from district court, Garfield county; before Justice John L. McAtee.

John Y. Foust was convicted of crime, and brings error. Dismissed.

The error assigned is that the district court made a final order in said cause overruling a motion of defendant to retax the costs incurred in the probate court, from whence said cause had been appealed. See 58 Pac. 728.

Lee M. Gray and Antrobus & Stevens, for plaintiff in error. O. D. Hubbell, Co. Atty., and J. C. Strang, Atty. Gen., for the Territory.

IRWIN, J. We think this appeal should be dismissed for noncompliance with rule 7 of the rules of practice of the supreme court of this territory. 43 Pac. viii. Rule 7 reads as follows: "In all criminal appeals in which

the territory or the United States is a party, and in all civil causes in which the territory or the United States is a party, or in which any of the property of the territory or the United States is involved, counsel shall serve their briefs upon the attorney general, or the United States district attorney—such service to be made as in civil cases, provided in rule 6, concerning the service of briefs on other counsel." Rule 6 (43 Pac. viii.) is as follows: "In each civil cause counsel for plaintiff in error shall furnish a copy of his brief to counsel for defendant in error at least thirty days before the first day of court, and the counsel for defendant in error shall furnish a copy of his brief to counsel for plaintiff in error at least ten days before the first day of said term. Proof of service of the briefs must be filed with the clerk of the court seven days prior to the first day of said term. In case of a failure to comply with the requirements of this rule, the court may continue or dismiss the cause, or affirm or reverse the judgment." In this case the records of this court fail to show that any briefs were ever prepared by the plaintiff in error, or served upon the county attorney or the attorney general, or any one else representing the defendant in error, or that any proof of service of briefs was ever filed in this court. Now, we are aware that this court has been very reluctant to dismiss a criminal case on account of the failure to furnish and file briefs, and heretofore has favored that portion of the rule which gives the court the right to hear and determine the cause on its merits, notwithstanding the failure to furnish and file briefs. But in this present case, as it involves only the retaxing of costs, we think justice requires that the plaintiff in error should be held to a strict compliance with the rule for furnishing and serving briefs and filing proof thereof. This requirement of the rule having been entirely disregarded by the plaintiff in error, this appeal should be dismissed, which is accordingly done. All of the justices concurring, except Justice McATEE, who, having presided in the court below, took no part in this decision.

VESELEY et al. v. ENGELKEMIER.
(Supreme Court of Oklahoma. June 30, 1900.)
APPEAL—EVIDENCE—SUFFICIENCY—WITNESS—
REDIRECT EXAMINATION—INSTRUCTIONS.

1. If, after considering all of the evidence introduced upon a trial, an appellate court can say that it reasonably supports the verdict, the judgment will not be disturbed on the ground that the evidence is insufficient.

2. Where a witness takes the stand and testifies as to matters about which he is competent to testify, and the other party on cross-examination inquires of him, over the objections of the party producing him, as to matters about which he is incompetent to testify, such party will not be heard to say that the court committed error in permitting such witness on redirect examination to explain the transactions elicited on cross-examination, even though as to such matters the witness was incompetent.

3. A court is not bound to give an instruction, even though it states a correct rule of law applicable to the issue on trial, in the language requested, but may choose its own language, provided it correctly states the principle of law requested, in language which is plain and unambiguous, and such as persons of ordinary understanding can comprehend.

(Syllabus by the Court.)

Appeal from district court, Kay county; before Justice Bayard T. Hainer.

Action by Elizabeth Engelkemier against John Veseley and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Cline & Hill, for appellants. Dale & Bierer, for appellee.

BURWELL, J. The appellants urge error in admitting incompetent evidence, in permitting an incompetent witness to testify, and in refusing to give requested instructions.

The appellee commenced suit in the district court of Kay county for a division of 1,600 bushels of wheat, and to recover possession of one-half of the same, claiming that she was in possession of 80 acres of a certain quarter section of land in Kay county; that it was agreed between the appellant John Veseley and appellee that Veseley should plant this land to wheat, the appellee to furnish the seed, and that they should divide equally the wheat grown on the land; that the appellee had furnished the seed wheat and complied with her part of the contract in every respect, but that the defendant Veseley, after harvesting and thrashing the wheat, refused to divide the same and deliver to the plaintiff her share. The defendants filed a general denial. The plaintiff's testimony supported the allegations of the petition, and she was corroborated by her husband, who, in part of the transactions, acted as her agent. The defendant John Veseley testified upon the trial, denying this contract, but admitted that the husband of the plaintiff furnished the seed wheat, claiming that during the year this wheat was grown, and for some three or four years prior thereto, he was and had been a homestead entryman on the land referred to; that during the year preceding the husband of the plaintiff had been his tenant, and had raised some 2,400 bushels of wheat on the tract, 800 bushels of which belonging to the defendant John Veseley, as the landlord's share, but that the husband of plaintiff had never delivered any of his share of the wheat to him until the fall of the year that the wheat in controversy was sown, when he received the seed wheat to sow the wheat in controversy; and that this seed wheat was in return for that amount of the 800 bushels. The husband of the plaintiff took the witness stand in behalf of his wife, and his testimony was confined strictly to the transactions wherein he acted as agent for her, until, on cross-examination, the attorney for the defendants asked him if he had told one Mr. Scott that he loaned Veseley the money with which Vese-

ley bought the claim (referring to the tract on which the wheat was grown). Counsel for the plaintiff objected to going into this transaction, for the reason that it was incompetent, irrelevant, and immaterial. The court overruled this objection, as well as similar objections to other questions of the same character. Then, on redirect examination, the attorney for plaintiff asked the witness this question: "Q. With reference to this loan,—whether it was a loan or not,—tell the jury just what that transaction was. A. He told me to look up a place, and he would file on it, if I paid for the premises, and I was to have the use of the land. If I paid for the land, I was to have the use of the land until he proved up. Whenever he was proved up, he was to turn the land over to me. Then he wanted \$200, and I had to pay for the proving up. I told him, 'All right.'" The witness also said that he had paid \$750 for the land, and also expended some \$300 for improvements, and that the 2,400 bushels of wheat grown during the previous year was his, under this contract. The appellants contend that the admission of this testimony was error. The witness, in our judgment, was incompetent to give this testimony, as he was the husband of the plaintiff, and at the time these matters transpired he was not acting as agent for his wife; but in this case its admission is not reversible error. The appellants had no right in the first instance to inquire of the witness as to these transactions, over the objections of the plaintiff; but when they did so, voluntarily, the plaintiff was entitled to have the witness explain the entire transaction, and the appellants will not be heard to say that the witness was incompetent to testify regarding the same. A party to an action cannot examine a witness on a matter about which he is incompetent to testify, and then, when he has gotten just such part of the transaction as is favorable to him, prevent the other party from eliciting the remainder of the transaction, which may be against him. Courts will not assist either party to an action in securing an unfair advantage, but, on the contrary, will see that fairness is accorded to each. The defendant and his witnesses testified fully as to the purchase of the claim, the jury heard his interpretation of the entire matter, and he alone was responsible for the submission of that question.

We have read the entire record in this case, and are satisfied, after an examination of all of the evidence, with the verdict of the jury. It is reasonably supported by the evidence, and should not be disturbed unless errors of law were committed to the prejudice of the appellant; and the only other error urged is the refusal of the court to give two instructions submitted by appellants. There is no merit in this contention. The charge of the court was very full, and more than fair to the appellants; and the court, in effect, covered the points involved in the instructions requested. The court was not bound to

charge the jury in the language requested. It had a right to choose its own language, and when it correctly stated the principles of law requested, in language which was plain and unambiguous, and such as persons of ordinary understanding could comprehend, it was sufficient. There is no good reason shown why this case should be reversed. It is therefore affirmed, at the costs of plaintiffs in error. All of the justices concurring, except HAINER, J., who presided at the trial below, not sitting.

MULKINS v. UNITED STATES.

(Supreme Court of Oklahoma. June 30, 1900.)
CRIMINAL LAW—INFORMATION—VERIFICATION—WHEN INSUFFICIENT.

A verification on information and belief to a complaint in a criminal case is not sufficient to authorize a court to put the defendant upon trial for the offense charged therein. Such complaint should be sworn to positively, or the facts upon which the warrant should issue ought to be presented to the court by affidavit or by competent evidence.

(Syllabus by the Court.)

Error from district court, Canadian county; before Justice John L. McAttee.

William Mulkins was convicted of cutting timber on an Indian reservation, and brings error. Reversed.

Marsh & Wallace, for plaintiff in error. Horace Speed, U. S. Atty., and John W. Scotchorn and B. S. McGuire, Asst. U. S. Attys.

BURWELL, J. The appellant, William Mulkins, was charged by complaint in the district court of Canadian county with the crime of cutting and removing timber from the Caddo Indian reservation. The complaint was verified by Hon. B. S. McGuire, assistant United States attorney, on information and belief only. When the case was called for trial, the defendant, by his counsel, objected to the introduction of any evidence, because of the insufficiency of the complaint. After trial, conviction, and sentence, the defendant filed his motion for a new trial; and after it was overruled by the court he interposed a motion in arrest of judgment, which was also denied. Exceptions were saved to each of these rulings, and an appeal taken by transcript to this court.

The appellant presents just one question to this court, viz. the sufficiency of the verification of the complaint. A verification, on information and belief, to a complaint in a criminal case, is not sufficient to authorize a court to put the defendant upon trial for the offense charged therein. Such complaint should be sworn to positively, or the facts upon which the warrant should issue ought to be presented to the court by a positive affidavit or by competent evidence. *Miller v. U. S.*, 8 Okl. 315, 57 Pac. 836. The complaint was not sufficient. For the reasons herein stated the case is reversed and remanded at the costs of the appellee, and the

defendant will be held to await the action of the district court of Canadian county; and said court is hereby directed to grant leave to the United States to properly verify the complaint heretofore filed, or to file a new complaint for such offense. All of the justices concurring, except McATEE, J., who presided at the trial below, not sitting.

DUNN v. YAKISH et al.

(Supreme Court of Oklahoma. June 30, 1900.)

EQUITY—SALE OF REALTY—TITLE—LOSS BY FIRE—ACTION FOR PRICE—LACHES—INSURABLE INTEREST.

1. Equity treats things agreed to be done as actually performed, and when real estate is sold under a valid contract, the purchase money to be paid in part, and the deed executed at a future day, the equitable title passes at once to the vendee, and equity treats the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor.

2. Where buildings are destroyed by fire, without the fault of either party, between the date of a contract of sale of the real estate and the time the conveyance is made, the loss must be borne by the vendee, who holds the equitable title, as the vendor only holds the naked legal title for the use of the vendee.

3. Where a valid contract for sale of real estate has been entered into, the deed to be executed at a future day, it is no defense, in an action to recover balance of purchase money, that the estate has been diminished in value by the destruction of the buildings thereon by fire, unless it is shown that the vendor was in some way at fault in causing such fire.

4. Where the language of a contract is that the vendor "has this day sold and agreed to convey" to the vendee his "building and lot," it clearly imports a binding contract of sale then executed and consummated. By such terms the title in equity passes from the date of the contract. The contract is not for a sale, but only for a conveyance at a future day. The whole foundation of this doctrine of equity is that the equitable title and interest pass by the contract of sale, and from the time of its execution, and it contemplates delivery of possession as well as payment of purchase money and a conveyance at a future period.

5. Even though time is made the essence of the contract, equity will not permit a party to take advantage of his own laches to defeat the enforcement of the contract; and, where the party seeking to enforce the contract had in time complied with all its terms, equity will compel specific performance in his favor, though the other party has made default in time.

6. Vendor's agreement for sale of building and lot, possession to be delivered and conveyance made at a future day, does not amount to condition that the contract shall be void if there is any change in the state or value of the property on the day for its delivery.

7. From the date of a valid contract of sale of real estate, and deed to be executed at a future period, the purchaser has an insurable interest in the property, and may protect his interest against loss by fire. He is entitled to all benefits which may accrue to the property, and must bear any losses which may occur.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; before Justice B. F. Burwell.

Action by Ed L. Dunn against Annie A. Yakish and W. H. Yakish. Judgment for

defendants, and plaintiff brings error. Affirmed.

P. O. Cassidy, Keaton & Kearful, for plaintiff in error. J. H. Woods, for defendants in error.

BURFORD, C. J. On December 27, 1897, the parties to this action entered into a written agreement as follows: "This indenture, entered into between Annie A. Yakish, of Pottawatomie county, Okla., party of the first part, and Ed L. Dunn, party of the second part, witnesseth, that the party of the first part has this day sold and agreed to convey to the party of the second part by general warranty deed, except against the acts of said party of the second part, the following described property, to wit, building and lot nine (9) in block twenty-four (24), city of Shawnee, in Pottawatomie county, Oklahoma territory, for and in consideration of the sum of \$1,000.00, upon the following terms of payment: \$100.00 cash in hand paid, the receipt of which is hereby acknowledged, and the balance of said consideration to be paid by the party of the second part in installments as follows: \$650.00 on or before the 1st day of February, 1898; \$100.00 on or before the 24th day of May, 1898; \$100.00 on or before the 24th day of May, 1899; \$50 on or before the 24th day of May, 1900. The three last payments, to the amount of \$250.00, is due to Loren D. Whelpley, who holds a mortgage against said property for the sum of \$250.00, payable as the three last payments indicate, at the rate of 6% per annum, of which party of second part assumes. Party of second part is to have possession of premises on Jan. 1st, 1898, except to conditions hereinafter provided. Said deferred payments are evidenced by promissory notes for the amounts above named, and are to draw interest from date at the rate of twelve (12) per cent. per annum until fully paid; and it is hereby especially agreed that, any failure on the part of the party of the second part to comply with all the conditions of this contract, the party of the second part hereby agrees to surrender possession of the premises to the parties of the first part, together with all improvements placed thereon by the party of the second part. Upon the terms of this agreement being fully complied with by the party of the second part, the party of the first part hereby agrees to execute and deliver to the party of the second part on February 1st, 1898, a general warranty deed (except taxes 1898), as herein provided, to said property, subject to all taxes, liens, and incumbrances that shall become liens against said property after the date of this agreement, and the party of the second part hereby agrees to assume and pay such taxes, liens, and incumbrances; and it is further stipulated that no assignment of the premises shall be valid unless the aforesaid payments have been fully made by the party of the second part. All goods stored in said

building owned by J. A. Hays is not to be moved prior to Feb. 1st, 1898, should party 1st part institute proceedings for collection of rent due party of 1st part from J. A. Hays. It is further agreed that time is the essence of this contract, and, unless said installments shall be paid as herein provided, this contract shall be void; otherwise, to be and remain in full force and effect. Signed and executed in duplicate this 27th day of December, 1897." On February 25, 1898, Dunn commenced a suit in equity against Mrs. Yakish to enforce specific performance of the contract, and in his petition alleged that the building located on the lot described in the contract was worth the sum of \$550, and the lot alone worth \$450; that on the 10th day of January, 1898, and while the tenants of the vendor were in possession of said building, it was totally destroyed by fire; that on the 1st day of February, 1898, the vendee tendered to the vendor \$100, which, with the \$100 cash paid at time of executing the contract, and the \$250 mortgage assumed by the vendee, aggregated \$450, and at the time of the tender demanded a deed from the vendor; that the vendor refused to deliver a deed on said conditions, but did tender to the vendee a deed on condition that he would pay the \$650 due at that time as provided in the contract. And he prayed the court to decree a specific performance of the contract, by compelling the vendor to accept the \$100 tendered, and execute to him a deed for said property. The vendor answered, admitting the execution of the contract, and that the building had been accidentally destroyed by fire, and alleged that she executed a good and sufficient warranty deed on the 1st of February; and she tendered said deed in court, and demanded judgment for \$650 against the vendee. The cause was tried to the court, and judgment given in favor of the vendor against Dunn, the vendee, for \$650, the balance of purchase money agreed upon, less the amount assumed in the mortgage. From this judgment Dunn brings the case here for review.

The sole question in controversy is as to which of the parties, the vendor or vendee, shall suffer the loss of the building destroyed by fire. The contract is an absolute contract of sale of the real estate, with an agreement to convey at a future date on payment of the installments of purchase money. The building was burned after the date of the agreement, and before the time for the conveyance to be executed. It is a maxim in equity that "equity looks upon things agreed to be done as actually performed." Consequently, when a contract is made for the sale of real estate, equity considers the vendor as a trustee for the purchaser of the estate sold, and the purchaser as a trustee of the purchase money for the vendor. 1 Sugd. Vend. c. 5, § 1. In contracts of this kind between individuals, the vendee is, in equity, the owner of the estate from the time of the contract of sale, and must sustain the loss if the estate be

destroyed between the agreement and the conveyance, and will be entitled to any benefit which may accrue to it in the interim. This rule has become elementary, and is supported by all the text writers, and practically all the courts. The general rule is not questioned by counsel for the plaintiff in error, but it is contended that there are some exceptions to the rule, and that this case comes within some of the exceptions. It is contended that time is made the essence of the contract, and that, where time is of the essence of the contract, equity will not interpose to change a contract. This contention is supported by authority, but what application has it to this case? The contract recites that the party of the first part has "this day sold and agreed to convey." The sale is in present. The agreement to convey is in futuro. By the sale the equitable title at once passes to the vendee. The vendor retains the naked legal title, which he agrees to convey at a future day. So far as time is of the essence of the contract, it relates only to the transfer of the legal title, and not the equitable title, which passes, by operation of equitable principles, as soon as the contract is executed. We can see no difference in principle between this case and the many cases cited in the textbooks as supporting the general doctrine. This case is not unlike the case of *Brewer v. Herbert*, 30 Md. 301, 96 Am. Dec. 582, in which Justice Miller, speaking for the court, has very clearly and appropriately stated the law thus: "From these and other authorities of equal weight, announcing the maxim that equity regards as done that which was agreed to be done, is deduced, as the established doctrine in equity, that, from the time the owner of an estate enters into a binding agreement for its sale, he holds the same in trust for the purchaser, and the latter becomes a trustee of the purchase money for the vendor, and, being thus in equity the owner, the vendee must bear any loss which may happen, and is entitled to any benefit which may accrue, to the estate in the interim between the agreement and the conveyance. 1 Sugd. Vend. 228, 391; 2 Pow. Cont. 69; Dart, Vend. 114-118; 2 Story, Eq. Jur. § 1212. The contract here is not for a sale at a future day. It does not use in this respect prospective or contingent terms. Its language is, the vendor 'has this day sold to' the vendee his house and lot, which clearly imports a binding contract then executed and consummated. By such terms the title in equity passes from the date of the contract, and, if there were nothing else in it, there would be no room for argument; for it would be impossible to withdraw the case from the operation of the rule above stated. But it has been earnestly and strenuously urged by the appellant's counsel that as the contract contains an agreement by the vendor to deliver possession of the house and lot to the vendee on the 1st of April, 1898, the destruction of the house by fire before that period rendered performance by the vendor of this

part of the contract impossible, and he cannot, therefore, either in law or equity, ask the vendee to perform his part of it; and this circumstance, it is insisted, distinguishes the case from those cited, and prevents it from falling within the principle established by them. Let us test the soundness of this argument. The vendee knew before and at the time of the contract there was a tenant in possession, whose term would not expire until the 1st of April; and the first installment of purchase money is made payable on, and interest on the deferred payments runs from, that day. The subject-matter of sale is realty,—a lot of ground with a house on it, described as a house and lot. The agreement as to delivery is not like the usual covenant by a tenant in a lease to deliver in as good condition and repair as when the contract was made. There is also no difficulty about delivery, except that the premises were not, as to the buildings upon them, in the same condition as at the date of the contract. The question then resolves itself into this: Does the fact of the insertion into a contract like the present, for the sale of real estate, of an agreement to deliver possession at a future day, make any difference in the application of the rule? It is true, it does not appear in the cases cited there were in the contracts any stipulations as to delivery of possession at a future day, nor is this circumstance alluded to; but they explicitly say it is the passing of the title in equity which throws the risk of loss upon the vendee, and entitles him to accruing benefits. To this, as we have seen, a conveyance is not necessary, nor is payment of the purchase money or any part of it; for in *Hampson v. Edelen*, 2 Har. & J. 66, 3 Am. Dec. 530, this court has decided that 'a contract for land, bona fide made for a valuable consideration, vests the equitable interest in the vendee from the time of the execution of the contract, although the money is not paid at that time.' Neither can possession nor delivery of possession be necessary; for, if the contract had been silent on this subject, the vendor would have had the right to retain possession until the 1st of April, when the first installment of the purchase money was payable, and, if the vendor had obtained possession before, he would have been restrained in equity from exercising any acts of ownership prejudicial to the inheritance, and yet the equitable title would all the time have been in him, subject to his disposition by deed or will, and liable for his debts. If, then, in the absence of a stipulation to deliver at a future day, there is an implied right in the vendor to retain possession until that period, and this would make no difference as to the liability of the vendee for an intermediate loss, how can the insertion of such a stipulation have, in equity, any different effect? The whole foundation of this doctrine of equity is that the equitable title and interest pass by the contract of sale, and from the time of its execution, and it contemplates delivery

of possession as well as payment of purchase money and a conveyance at a future period." The foregoing case so completely meets every contention of the plaintiff in error in this case, that we have quoted to unusual length. If the equitable title passed to Dunn when the contract of sale was executed, then the loss occasioned by the destruction of the buildings by fire without fault of the vendor is the loss of the vendee, and he cannot refuse to comply with the contract on that ground. If, after the contract is entered into, and before the conveyance is executed, the buildings are destroyed by fire, the loss will fall on the purchaser. 1 Sugd. Vend. c. 7, § 2; *McKechnie v. Sterling*, 48 Barb. 330; 1 Pom. Eq. Jur. § 368; 2 Warv. Vend. 850; *Reed v. Lukens*, 44 Pa. St. 200; *Lombard v. Congregation*, 64 Ill. 482; *Snyder v. Murdock*, 51 Mo. 175.

The next contention of the plaintiff in error is that, as he failed to pay the purchase money on the day it fell due, by the terms of the contract he was released, or, in other words, a failure on the part of either the vendor or vendee to perform any requirement of the contract caused such contract to become noneffective and void. If the vendor had failed, in any substantial part, to comply with the terms of the agreement on her part, the vendee then might have elected to either treat the contract as void, or proceed to enforce it. But it is a well-established rule in equity that one will not be permitted to take advantage of his own laches or defaults to defeat the enforcement of a contract. Provisions for forfeiture in contracts are made for the benefit of the adverse party, and not for the benefit of the one who fails to perform his part. *Wilcoxson v. Stitt* (Cal.) 4 Pac. 629; *Mason v. Caldwell*, 5 Gilman, 196; *Canfield v. Westcott*, 5 Cow. 270. The case of *Thompson v. Gould*, 20 Pick. 134, is cited by counsel for plaintiff in error as supporting the contention that the vendor cannot recover the purchase price if buildings burn before conveyance is made. The case does not support this doctrine. The parties entered into a parol contract to sell real estate to be conveyed at a future date. The purchase money was paid, but the buildings burned before the deed was executed. The purchaser sued to recover back the purchase money. The court held that he was entitled to recover, for the reason that the oral contract was void and passed no title, either equitable or legal. And this is not in conflict with the general rule that equity treats that as performed which it is agreed shall be done. The contract which equity will treat as performed must be a valid, enforceable contract. *Hunter v. Bales*, 24 Ind. 299. The case of *Wells v. Calnan*, 107 Mass. 514, announces a doctrine, contrary to the general rule, and is not supported by the authorities. We find nothing in the cases cited for plaintiff in error that calls for any modification of the general rule as announced herein, or which requires an application of any of the

exceptions claimed. The contract was a specific, certain, and positive one, for sale of real estate; the purchase money in part to be paid and the conveyance to be made at a future day. The equitable title passed at the time. The vendee had an insurable and transferable interest from the date of the contract. He was entitled to all benefits from increase in value, additional improvements, or valuable discoveries that might be made on the lot; was liable for any losses not the result of the default of the vendor or her tenants. He could have protected himself from loss by fire by insuring the building, had he been so disposed. If the law works a hardship in this instance, it is because of the fact that the vendee did not take the usual and ordinary precaution for his own protection. We find no error in the record. The judgment of the district court is affirmed at costs of plaintiff in error. All concur, except BURWELL, J., who tried the case below, not sitting.

HIPPEN v. FORD et al. (S. F. 1968.)

(Supreme Court of California. July 23, 1900.)

INTOXICATING LIQUORS—LICENSE—ISSUANCE—
MANDAMUS—CITY ORDINANCE—COMPLIANCE—PROOF—APPLICATION FOR LICENSE—
PUBLICATION—BOND—APPROVAL.

1. Where petitioner applied for mandamus to compel the board of trustees of a city to issue him a license to sell liquor, the burden of proof was on him to show that he had complied with all laws, rules, and ordinances of the city in making his application.

2. Where a city ordinance required that each applicant for a license to sell liquor should publish a notice of his intention to apply therefor in a newspaper published in the city for three weeks preceding the meeting of the board at which the application should be made, and that the application should be accompanied by a bond signed by two residents and freeholders of the city, and should be approved by the chairman of the board of trustees, a petition for mandamus to compel the board of trustees to issue a license, which did not show that the petitioner had made such publication, or that his sureties were qualified, or that his bond had been approved, did not state facts sufficient to constitute a cause of action.

Commissioners' decision. Department 1. Appeal from superior court, San Mateo county.

Petition by H. J. Hippen for mandamus to compel defendants, as the board of trustees of the city of San Mateo, to issue petitioner a license to sell liquors. From a judgment granting the writ, defendants appeal. Reversed.

Charles N. Kirkbride and Geo. C. Ross, for appellants. Chas. G. Nagle, for respondent.

COOPER, C. This proceeding was brought for the purpose of obtaining a writ of mandate to compel the defendants, in their official capacity as the board of trustees of the city of San Mateo, to issue a license to petitioner for the sale of liquors at retail within said municipal corporation. After trial, judg-

61 P.—59

ment was entered in favor of petitioner that the writ issue as prayed for. This appeal is from the judgment upon the judgment roll and a bill of exceptions. It appears from the record that the court below excluded all evidence except evidence of what was done by petitioner in presenting his application to the defendants, and as to the action of the defendants in their official capacity in relation thereto. It must therefore appear that the petitioner complied with the law, and took all the necessary steps required in order to show that it was the duty of defendants to issue the license. The burden of proving all the facts in issue necessary to make it the duty of defendants, as a board, to issue the license was upon petitioner. The petitioner alleges that in making the application he duly complied with all the laws, rules, ordinances, and regulations of said municipality, and performed all and every requirement necessary under and by virtue of said laws, ordinances, rules, and regulations. The court found, in the language of the pleading, that the petitioner, in making his application, duly complied with all the laws, ordinances, rules, and regulations of said city, and performed all the acts required of him to be performed under such laws, rules, and ordinances. Conceding that this finding is sufficient, and that it is a finding of facts, and not of conclusions of law, it is not supported by the evidence. The ordinance of the city introduced by petitioner, and upon which he relies, requires that each applicant for a license shall cause to be published in a newspaper published in the city of San Mateo, for not less than three successive issues of said newspaper immediately preceding any regular meeting of said board at which the application will be made, a notice that the applicant will apply at such regular meeting for a permit to obtain a license. The ordinance further prescribes the form of the notice, and that proof of the due publication thereof must be made by the affidavit of the publisher. There is nothing in the record to show that such notice or any notice was published in any paper, or that any proof was made, by affidavit or otherwise, of any publication in any manner of such notice. The ordinance further provides, as a condition upon which the license shall be issued, that the applicant shall accompany his application with a good and sufficient bond in the penal sum of \$1,000, containing certain prescribed conditions, with two sureties, each of whom shall be a resident and freeholder of said city of San Mateo, and neither of whom shall be an applicant for nor a holder of any permit or license under the ordinance; and that such bond shall be subject to the approval or rejection of the chairman of the board of trustees, and shall not be approved unless such chairman shall deem each of the sureties thereon sufficient for the whole penal sum of said bond. The bond introduced in evidence does not appear to have been approved by the chairman of the board, or by any one else. Neither is there any evi-

dence in the record tending to show that the sureties in the bond possessed the qualifications required by the ordinance, or that any request was made of the chairman to approve the bond. It is alleged in the complaint and found by the court that petitioner tendered to defendants the sum of \$30, the amount due for a license under the ordinance. There is no evidence in any manner tending to prove such tender. There is no allegation in the petition, nor finding by the court, that the petitioner demanded of defendants that a license be issued to him. It was necessary to prove that a demand was made of defendants to issue the license, or, in case no demand was made, it was necessary to allege and prove facts showing that such demand would have been of no avail. The judgment should be reversed, and the cause remanded, with directions to the court below to allow petitioner to amend his petition if so advised.

We concur: CHIPMAN, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed and the cause remanded, with directions to the court below to allow petitioner to amend his petition.

(129 Cal. 806)

PEOPLE v. ARNETT. (Cr. 644.)

(Supreme Court of California. July 21, 1900.)

CRIMINAL LAW—FORMER JEOPARDY.

Where defendant was tried on an information charging assault with intent to commit murder, and was convicted of an assault with a deadly weapon, and the jury was discharged without his consent, and on appeal the verdict was set aside as a nullity, defendant was entitled, on a second trial, to his discharge on the ground that he was placed in jeopardy on the first trial.

In bank. Appeal from superior court, Lassen county.

J. W. Arnett was convicted of assault with intent to murder, and he appeals. Reversed.

E. V. Spencer, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. The defendant was tried upon an information charging assault with intent to commit murder. He was convicted of the crime of assault with a deadly weapon. Upon appeal to this court it was held that the verdict was a nullity, as the offense of which the defendant was convicted was not an offense included within the information upon which he was tried. *People v. Arnett*, 126 Cal. 680, 59 Pac. 204. Upon the second trial the defendant was convicted of the offense charged in the information, but the court instructed the jury to find against him upon his plea of once in jeopardy and a former acquittal. He now claims this was error upon the part of the trial court, and that the proceedings of the first trial resulted in placing him in jeopardy, which should have demanded

his discharge at the second trial. It was held upon the previous appeal that the verdict rendered at the first trial was a nullity. Indeed, the case after verdict stood exactly the same as though the verdict had been one declaring the defendant guilty of the crime of robbery. The case in principle is exactly similar to that of *People v. Curtis*, 76 Cal. 57, 17 Pac. 941. The defendant has been in jeopardy by reason of the first trial and the void verdict rendered therein, and is now entitled to his discharge, unless at the first trial he consented to the discharge of the jury without a verdict, and thus waived the jeopardy which had attached to him. It is said in the *Curtis Case*: "The verdict constituted no legal reason for the discharge of the jury, and, in our judgment, if they were discharged without consent of the defendant (except in the cases specially provided for), it operated as an acquittal of the defendant."

* * * Under our statute in a case like this the consent must appear on the minutes of the court." In this case the jury were not discharged upon any of the statutory grounds, and we find no consent in the minutes upon the part of the defendant that the jury might be discharged. In the *Curtis Case* the minutes of the trial court were not before this court, but in this case the minutes are before the court, and under such circumstances nothing is to be presumed, for the minutes speak for themselves. This is the vital difference between the two cases. The defendant not having consented to the discharge of the jury at the previous trial, and the verdict rendered being a nullity, jeopardy attached to him, and he was entitled to plead it upon his second trial. Upon the facts and the law the plea was a good one, and should have been sustained. The judgment is reversed, and the cause is remanded, with directions to the trial court to discharge the defendant.

We concur: VAN DYKE, J.; HARRISON, J.; McFARLAND, J.; TEMPLE, J.

(129 Cal. 818)

MURRAY v. ETCHEPARE et al. (L. A. 605.)

(Supreme Court of California. July 24, 1900.)

MORTGAGES—FORECLOSURE—PARAMOUNT TITLE.

In a proceeding to foreclose a mortgage, where defendant claimed title to the property paramount to that of both mortgagor and mortgagee, she cannot set up such title in a cross complaint, and litigate it in the foreclosure proceedings.

Department 2. Appeal from superior court, Los Angeles county.

Action by Elizabeth Murray against Laurent Etchepare, Maria E. O. de Leonis, and others to foreclose a mortgage. From a judgment in favor of plaintiff, defendant Leonis appeals. Affirmed.

Dunnigan & Dunnigan for appellant. Horace Bell, for respondent.

McFARLAND, J. Action to foreclose a mortgage executed February 12, 1895, by defendant Etchepare to plaintiff. Leonis was made a party defendant upon the averment that she claimed some interest in the mortgaged premises "subsequent to and subject to the lien of the plaintiff's mortgage." Etchepare suffered default. Leonis answered averring that she was the owner of the premises on and prior to July 31, 1894, and on that day conveyed the same to defendant Etchepare; that the conveyance to the latter was procured by fraud, false representations, etc.; and that these facts were known to plaintiff when she took the mortgage. She also presented a cross complaint, in which she set up these facts, and prayed that plaintiff be restrained from foreclosing the mortgage, etc., but the court refused to allow the same to be filed. Judgment was then rendered on the pleadings, foreclosing the mortgage for the amount found to be due. Leonis appeals from the judgment.

These rulings of the court below were correct, and we see no reason for reversing the judgment. The title asserted by appellant to the mortgaged premises was paramount and hostile to that of both the mortgagor and mortgagee, and it has been definitely established here that such a title cannot be litigated in an action to foreclose a mortgage. *City and County of San Francisco v. Lawton*, 18 Cal. 474; *Croghan v. Minor*, 53 Cal. 15; *Marlow v. Barlew*, 53 Cal. 456; *Ord v. Bartlett*, 83 Cal. 428, 23 Pac. 705; *Cody v. Bean*, 93 Cal. 578, 29 Pac. 223; *Sichler v. Look*, 93 Cal. 608, 609, 29 Pac. 220. The rule is not affected by the cases of *Houghton v. Allen*, 75 Cal. 102, 16 Pac. 532; *Hewlett v. Pilcher*, 85 Cal. 542, 24 Pac. 781; and *Randall v. Duff*, 79 Cal. 115, 19 Pac. 532, 21 Pac. 610, 3 L. R. A. 754, 756. In the *Houghton* Case it appears from the briefs that the parties did not raise the question here involved, evidently because they wanted other important matters touching their property rights definitely determined in that action, and the court did not see fit itself to raise a question which the parties had ignored. But the court, in its opinion, restated the rule by saying: "The rights only of those who hold or claim under the mortgagor can be determined in an action to foreclose a mortgage. A title claimed adversely to the mortgagor cannot be thus litigated,"—citing authorities above referred to. In the *Hewlett* Case the question decided was one of evidence, and there is no reference in the case to the point here involved. Moreover, the fact that the defendant there had succeeded to the title of the mortgagor by a judgment rendered subsequently to the mortgage was probably the reason why the point involved in the case at bar was not made in that case. *Randall v. Duff* was a different case from the one at bar. That action was brought by a purchaser under a foreclosure sale to quiet title against the owner of the mortgaged premises, whose attorney in fact had, without authority,

conveyed the land in the owner's name to the mortgagor. It was not an action to foreclose a mortgage, and the question involved was the right of the defendant to redeem. Before the action to foreclose, under which plaintiff claimed, had been commenced, the defendant had commenced an action to set aside the deed of his attorney, of which action plaintiff had notice; and it was this fact, together with other circumstances, that, as the court said, "entitled William Duff [the defendant] to be made a party to the foreclosure suit, and that his right to redeem could not otherwise be barred." The theory was that William Duff was, under the facts, substantially in the position of a subsequent grantee, or that he was, himself, really the mortgagor; otherwise, he need not have relied on his "right to redeem," which was the question in the case. If he had been in the position of one holding the paramount title adversely to both mortgagee and mortgagor, that title would have been unaffected by the foreclosure.

The judgment in the case at bar would have been in better form if it had expressly saved all the rights of appellant which are paramount and adverse to those of the mortgagor and mortgagee, as was ordered in *Ord v. Bartlett*, supra, and *Cody v. Bean*, supra; but as it has been so clearly declared by this court that a decree of foreclosure, no matter what its terms may be, has no effect on a paramount title, we do not deem it necessary to order the judgment modified in that respect in the case at bar. In *Sichler v. Look*, supra, the court, speaking of a defendant who was alleged in the foreclosure suit to claim some interest in the mortgaged premises, says: "A sale of the mortgaged premises under the judgment entered against him by default will be limited in its effect to the rights acquired therein by him subsequent to the mortgage, irrespective of the character of the averment,"—citing cases. It is proper to make such a person defendant in a foreclosure suit, and "the character of his interest is immaterial to the plaintiff, and need not be set forth in the complaint." *Sichler v. Look*, supra, and cases there cited. Such a defendant, if he have an interest subject to the mortgage, can appear, if he so desires, and have such interest protected or enforced by the judgment. If his title be a paramount one, it will not be affected by a foreclosure, whether he appear or not; but, if he undertakes to set up such paramount title, it will not be litigated in the action. In such case the plaintiff could successfully demur to the answer, which was done in *Ord v. Bartlett*, supra, or could dismiss the action as to the adverse claimant, but in no event would the decree of foreclosure affect the paramount and adverse title. There is no reason why the principle does not apply to an equitable paramount title as well as to a legal one. In *Croghan v. Minor*, supra, the court said, "It is manifest that those claiming either legal or equitable estates adversely to that of the

mortgagor are not proper parties to such a proceeding." There is no ground for making this case an exception to the rule. If the law permitted it, any other kind of an adverse and paramount claim could be litigated in a foreclosure suit, as well as the one sought to be litigated in the case at bar; and, if the law be violated in one case, exceptions would soon so darken the definitely established rule as to throw the whole matter into doubt and confusion. "Such titles must be settled in a different action." *Ord v. Bartlett*, supra. It appears incidentally that appellant has already commenced such an action, and in that action her rights can be fully protected and enforced. The judgment is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(129 Cal. 306)

MELDE v. REYNOLDS. (S. F. 1,224, 1,256.)¹
(Supreme Court of California. July 23, 1900.)

JUDGMENT BY DEFAULT—SETTING ASIDE—EXCUSABLE NEGLECT—EVIDENCE—SUFFICIENCY.

1. Code Civ. Proc. § 473, provides that the court may, in its discretion, relieve a party from a judgment taken against him through his mistake, inadvertence, or excusable neglect. In 1880 plaintiff sued defendant. Nothing further was done until 1890, when an order was obtained setting the case for trial on April 23, 1897, in department 4 of the superior court. Owing to difficulties with his attorney, defendant employed new attorneys in 1897. The latter sent their chief clerk to ascertain the status of the case, and he reported that it was pending in department 4, but the date for trial had not been set. The attorneys then consulted the clerk, and also the judge of department 4, and were informed that the case would not be reached for hearing for at least three months. Thereupon defendant left the state, and on April 23d the case was tried in department 5, and judgment taken by default against defendant. *Held*, that the evidence shows excusable neglect on defendant's part.

2. An affidavit by defendant's attorney in support of a motion to vacate a judgment taken by default was sufficient, without defendant's signature, where defendant was absent from the state under the attorney's advice that his case would not be reached for trial for several months.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by Henry Melde against John Reynolds. From an order overruling defendant's motion to vacate a judgment entered against him by default, defendant appeals. Reversed.

Smith & Murasky and William J. Herrin, for appellant. Dorn & Dorn and Carson & Savage, for respondent.

HARRISON, J. Judgment herein was rendered in favor of the plaintiff and against the defendant April 23, 1897, and was entered of record April 26th. May 25th the defendant gave notice of a motion to vacate and set aside the judgment upon the ground that it was rendered through mistake, inadvertence, and excusable neglect on his part, accompany-

ing the same with certain affidavits in its support. At the hearing of the motion, counter affidavits and other documentary evidence were presented on behalf of the plaintiff, and the motion was denied. From this order the defendant has appealed.

It appears from the bill of exceptions that the complaint was filed in May, 1880, and that in July of that year the defendant filed an answer denying all the allegations of the complaint. No action was taken by either party tending to bring the case on for trial, and in 1890 it was dropped from the calendar by stipulation. In November, 1896, the attorney for the defendant gave notice of a motion to dismiss the action. This was met with a counter motion on behalf of the plaintiff to set the cause for trial. Both motions were heard at the same time, and the court denied the motion to dismiss, and set the action down for trial for April 23, 1897; that day being agreed upon by the attorneys for both parties. A few days prior to that date Mr. Shadbourne, the attorney for the defendant, informed him of these facts, and on the following day the defendant visited him at his office; and, upon expressing dissatisfaction at his course, Mr. Shadbourne suggested that he get another attorney, which he said he would do, and Mr. Shadbourne thereupon gave him the papers in the cause. The defendant thereupon employed Messrs. Smith & Murasky as his attorneys, and on the next day Mr. Murasky instructed his managing clerk to ascertain what proceedings had been taken in the case, and was informed by him, after such examination had been made, that the action was pending in department 4 of the superior court, and that a motion to set the cause for trial had been granted, but that the date for said trial was not contained in the records of the case. Mr. Murasky then inquired of the clerk, and also of the judge of that department, upon what day the trial of the cause had been set, and was informed by each of these officers that, as the cause did not appear upon the calendar for any date, it would not be reached for trial for at least three months. He thereupon informed the defendant that there was no likelihood of a trial being had for several months, and on the 21st of April the defendant left San Francisco for Japan. When the action was originally brought it was assigned to department 4, but had subsequently been transferred to department 5, but Mr. Murasky had no knowledge of such transfer until after the judgment had been rendered. On the 23d of April no appearance was made in behalf of the defendant, and the cause was tried, and judgment rendered in favor of the plaintiff.

When these facts were made to appear to the court, a proper exercise of its discretion required it to set aside the judgment. See *Dougherty v. Bank*, 68 Cal. 275, 9 Pac. 112; *Grady v. Donahoe*, 108 Cal. 211, 41 Pac. 41. Section 473, Code Civ. Proc., provides, "The court may in its discretion, after notice to the adverse party, upon such terms as may be

¹ Rehearing denied August 23, 1900.

just, relieve a party or his legal representative from a judgment, order or other proceeding, taken against him through his mistake, inadvertence, surprise or excusable neglect." This is a remedial provision, and, under the terms of section 4 of the same Code, which require it to be liberally construed with a view to effect its objects and promote justice, is best observed by disposing of causes upon their substantial merits, rather than with strict regard to technical rules of procedure. The discretion of the court ought always to be exercised in conformity with the spirit of the law, and in such a manner as will subserve rather than impede or defeat the ends of justice; regarding mere technicalities as obstacles to be avoided, rather than as principles to which effect is to be given in derogation of substantial right. *Roland v. Kreyenhagen*, 18 Cal. 455; *Bailey v. Taaffe*, 29 Cal. 424; *Watson v. Railroad Co.*, 41 Cal. 17. That the failure of the defendant to be represented at the trial, and the rendition of judgment against him in his absence, were the result of a mistake, must be conceded, and it may be conceded that this mistake was owing to neglect; but if the neglect was, under the circumstances, excusable, he was entitled, under the provisions of this section, to be relieved therefrom. His absence was not owing to any neglect on his part, inasmuch as he had been advised by Mr. Murasky that the cause could not be tried for several months. It is true that the day upon which it was called for trial had been agreed to by his attorney, Mr. Shadbourne; and although he was technically bound by the acts of his attorney, and chargeable with knowledge of the fact that that day had been fixed for the trial, it is not claimed that Mr. Murasky knew of what Mr. Shadbourne had agreed to; and, if this ignorance was excusable, the provisions of the above section are applicable. The purpose of this section is to enable courts to relieve a party from the consequences of enforcing the strict and technical rules of procedure, by applying such equitable rules in any individual case as will do justice between the litigants. Neither is it sufficient to say that by a diligent examination Mr. Murasky could have learned that the cause had been set for trial on the 23d of April. What the court was called upon to ascertain, when this application for relief was made, was whether his failure to learn that fact was, under the circumstances, excusable, or was the result of carelessness or inattention. When it appeared that he had made an honest effort to ascertain the condition of the cause, and had availed himself of such means as would be ordinarily employed, but was misled thereby, he could justly claim that his mistake was not the result of negligence. To hold that, notwithstanding all his efforts, a party is bound by the result of any mistake which is made in the prosecution or defense of his cause, would deprive him of the very remedy which section 473 is intended to provide. Mr. Murasky had intrusted the examination of the

records to his managing clerk, whose capacity is not impugned; and the court could not fail to recognize the fact that the details of a law office in extensive practice are greatly under the supervision of a managing clerk, and that the attorney is dependent upon him for information as to the condition of the causes in his office. When Mr. Murasky was informed by his clerk that the cause was pending in department 4, and that a motion to set the cause for trial had been granted, but that the records did not show the date for which the trial was set, he sought to ascertain this date from the clerk of that department, and also from the judge thereof; and, when informed by both of these officers that the cause would not be reached for trial for at least three months, he could not be charged with neglect in accepting their statements as correct and acting accordingly. The fact that the columns of the *Daily Law Journal* showed that the cause was set for trial in department 5 for April 23d is not sufficient to establish neglect on his part. The copy of the complaint which the defendant handed him indicated that when the action was commenced it was assigned to department 4, and his clerk had informed him that it was still pending in that department. Under these circumstances, his failure to observe this publication in the *Journal* is not attributable to any neglect. We are of the opinion that the facts presented in behalf of the defendant established an ample excuse for his failure to be represented at the trial, and that the court should have granted his application.

It is not claimed that the plaintiff was chargeable, in any respect, with the defendant's failure to be represented at the trial. On the contrary, it appears that the plaintiff's attorneys made all reasonable effort to secure his presence before proceeding therein. The plaintiff, however, cannot claim the right to enforce a judgment which was rendered in his favor, by reason of a neglect on the part of the defendant which in the eye of the law is excusable. He has the right to be compensated for the damage which he has sustained at the hands of the defendant; but if the defendant has, without any fault on his part, been prevented from presenting his defense, it is but simple justice that he should have an opportunity therefor. If it had been made to appear that the plaintiff would thereby be subjected to additional expense, or that any loss or damage would result from granting the defendant's motion, the court could indemnify him by making the order "upon such terms as may be just." No showing was made on his behalf, however, that he would be injured by setting the judgment aside, in any respect other than by the delay and inconvenience of a second trial, and for all this he could be compensated by the terms which the court would impose as the condition of making the order. The trial of the cause had been delayed for nearly eight years since it had been at issue,

and it cannot be assumed that the plaintiff would be greatly prejudiced by a few weeks' additional delay.

It is urged by the respondent that the order should be affirmed upon the ground that a proper affidavit of merits was not presented to the court; the affidavit presented being made by Mr. Murasky, and not by defendant. It does not appear that this objection was made in the court below, nor did the court deny the application upon this ground; and we are of the opinion that, under the circumstances shown, the court would not have been authorized to do so. Upon the advice of his attorney that the cause would not be tried for several months, given under circumstances sufficient to exonerate him from all charge of neglect, the defendant had left the state on the 21st of April for Japan, and at the time the application was made was absent from the state, and thus prevented from presenting an affidavit made by himself. An affidavit of merits made by the defendant in person is not a jurisdictional element for granting relief under this section, and in a case like the present may be dispensed with, if the court is otherwise satisfied that the application is meritorious and is made in good faith, and not merely for delay. The verified answer of the defendant contradicting all the averments of the complaint was on file, and could be considered by the court for the purpose of determining this fact. See *Fulweiler v. Mining Co.*, 83 Cal. 126, 25 Pac. 65; *Merchants' Ad-Sign Co. v. Los Angeles Bill-Posting Co.* (Cal.) 61 Pac. 277. The court had before it, also, the affidavit of Mr. Murasky, and, in addition thereto, could take into consideration the evidence that had been presented on behalf of the plaintiff at the time the judgment was rendered. Under these circumstances, it was authorized to hold that a further affidavit from the defendant was not necessary. If it had deemed a further affidavit requisite, or if the plaintiff had made objection to the application on this ground, it should have continued the hearing a sufficient time to enable it to be procured.

2. After the court had denied the defendant's motion to set aside the judgment, he moved for a new trial upon the ground of accident and surprise which ordinary prudence could not have guarded against, and filed certain affidavits in support of his motion. Counter affidavits were filed on behalf of the plaintiff, and the court denied the motion. From this order, and also from the judgment, the defendant has also appealed, and the record of this appeal is presented in the case S. F. No. 1,256. Inasmuch as we hold that the court should have granted the defendant's motion to set aside the judgment, the order to be made in pursuance of our judgment reversing its action will render the motion for a new trial, and the action of the court thereon, of no moment, and the necessity of considering the appeal therefrom is therefore obviated.

The order appealed from in S. F. No. 1,224,

is reversed, and the superior court is directed to enter an order as of June 25, 1897, setting aside and vacating the judgment theretofore entered, and restoring the cause to its calendar for trial. Case No. 1,256 is also remanded for further proceedings.

We concur: VAN DYKE, J.; GAROUTTE, J.

6 Cal. Unrep. 477

WILLIAMS v. GROSS. (Sac. 621.)

(Supreme Court of California. July 19, 1900.)

QUIETING TITLE—ADVERSE POSSESSION—PAYMENT OF TAXES—EVIDENCE—SUFFICIENCY—FINDINGS—APPEAL AND ERROR.

1. Where, in a suit to quiet title, plaintiff and his grantor claimed title by adverse possession, and there was an irreconcilable conflict in the evidence as to whether plaintiff's grantor had furnished the money with which the property was bought, the findings of the lower court on such question will not be disturbed on appeal.

2. Code Civ. Proc. § 325, provides that in no case shall title by adverse possession be considered established unless the party claiming such title shall have paid all taxes assessed against the land. Plaintiff and his grantor claimed title to a portion of a mining claim by adverse possession, and alleged payment of taxes by them for a period of 13 years. Plaintiff's grantor testified that he furnished the money to his niece, and she paid the taxes. The niece and other witnesses denied that she received money from plaintiff's grantor, and stated that she paid the taxes with money belonging to her brother. The tax receipts offered in evidence confirmed the latter witnesses. Held sufficient to sustain a finding that the taxes had not been paid by plaintiff or his grantor during the years claimed, and hence that they had not acquired title by adverse possession.

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county.

Suit by Owen T. Williams against J. R. Gross to quiet title. From a judgment in favor of defendant, and from an order denying a motion for a new trial, plaintiff appeals. Affirmed.

F. W. Street and Crittenden Hampton, for appellant. F. P. Otis, for respondent.

GRAY, C. In a suit to quiet title the defendant had judgment, and the plaintiff appeals to this court from said judgment, and from an order denying him a new trial.

Two separate causes of action are stated in the complaint. The second cause of action as stated, is to quiet plaintiff's title to all that portion of the north extension of the Marryatt quartz mining claim which lies north and east of what was formerly the old county road leading from the present county road at Swerer's store, in Tuttletown, over the hill, to the present county road, at a point near the old Patterson mill site. Said property is situated in Tuolumne county. Plaintiff and his grantor claim title to that portion of the north extension of the Marryatt quartz mining claim above described, by adverse possession of 13 years immediate-

ly preceding the commencement of the action, and allege that they have paid the taxes thereon all during that period. The complaint further alleges in the second count that, for more than 8 years prior to the commencement of the action, plaintiff and his grantor have been owners, and that plaintiff now is the owner, of said premises. It is upon this second cause of action that plaintiff relied particularly at the trial of the case, and upon which he now relies upon this appeal, and to which all his points and assignments of error in the appeal from the decision of the lower court are directed. Therefore it will not be necessary to further notice plaintiff's first cause of action. The defendant, in his answer, after denying the allegations of the second count of the complaint as to adverse possession, payment of taxes, and ownership by plaintiff, claims ownership to the property in controversy in himself by virtue of having located and filed a mining claim in 1884, and having since that time possessed and worked said claim according to law, which said mining claim embraces within its limits the property here in controversy. Defendant also pleaded a judgment in a former action as a bar to plaintiff's right to recover in this action.

The findings negative the more material allegations of the complaint, and coincide with the principal allegations of the answer. These findings are attacked by appellant, and upon such attack, alone, hangs the decision herein. It is said, first, that the evidence is insufficient to justify that portion of finding 14 wherein it is found that one F. E. Gross on the 20th day of November, 1879, acquired all the right, title, and interest (consisting of a mere possessory right) which the estate of Thomas Leach had in the premises in controversy. Appellant introduced evidence at the trial tending to show that his predecessor in title, F. J. Gross, had furnished the money to buy, and had bought, the interest of the Leach estate in the said premises, but had the deed thereof made to F. E. Gross, with the distinct understanding that the title was to be held in trust for the said F. J. Gross. This evidence was flatly contradicted on behalf of respondent both by testimony as to where the purchase money came from, as well as by evidence of numerous declarations and admissions on the part of F. J. Gross, made prior to his conveying the property to plaintiff, to the effect that F. E. Gross bought the property with his own money, and that it was the property of said F. E. Gross. We cannot say, from the record before us, that the finding does not find support in the evidence. Where there is a substantial conflict in the evidence, this court does not interfere, as to questions of fact, with the decision of the tribunal before which the witnesses have appeared. The finding that neither F. J. Gross nor his grantee, the plaintiff, paid the taxes on said property before the year 1895, is also attacked as not supported by the evidence. Here, again, the

evidence was in irreconcilable conflict. F. J. Gross testified that he furnished the money to his niece, Mary Gross, and with it she paid the taxes. Mary, on the contrary, testified, in addition to other evidence to the same effect, that she received no money from F. J. Gross, but paid the taxes with the money of her brother, F. E. Gross, and produced the tax receipts in confirmation of her statement that the taxes were paid for and on behalf of her said brother. The payment of the taxes by F. E. Gross could not be considered as payment for or on behalf of F. J. Gross, on any theory of a trust relation between them, because, as we have already seen, the findings negative any such trust relation. The finding as to the nonpayment of the taxes, therefore, seems to be supported by the evidence. It is needless to consider whether the other findings challenged are supported by the evidence or not, or whether they are as full and complete as they should be, for the reason that the plaintiff, as we understand his brief, relies solely on title by adverse possession, and, not having paid the taxes, he could not recover on his alleged title by prescription or adverse possession, whatever the findings might be as to the other facts upon which he relies, in part, to uphold his said title. Code Civ. Proc. § 325. The payment of the taxes assessed against the land by the party claiming such title is an essential element of title by prescription. It is also immaterial whether the defense of res adjudicata interposed by defendant is good or bad. The plaintiff could not recover, were the finding in his favor on said defense. Nor is it material to determine whether the court erred in receiving in evidence the judgment roll offered in support thereof. The judgment and order should be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

6 Cal. Unrep. 481

MILLER & LUX v. BATZ, County Treasurer.
(L. A. 800.)

(Supreme Court of California. June 15, 1900.)

SWAMP LANDS—RECLAMATION FUNDS—ASSIGNMENT—SALE OF LAND.

Since Pol. Code, § 3477, requiring the county treasurer to pay amounts due on reclamation of swamp land to the original purchaser or his assigns, contemplates payment only to the owner or assignee of the indebtedness, mandamus will not lie to compel such a payment to one who is not shown to be the assignee of the claim on the fund of an original purchaser who became entitled thereto, though he claims as a successor in interest of such original purchaser, by virtue of a purchase of the land.

Commissioners' decision. Department 2. Appeal from superior court, Kern county.

Mandamus by Miller & Lux against J. B. Batz, treasurer of Kern county. From a

judgment refusing the writ, plaintiff appeals. Affirmed.

J. B. Garber, for appellant. J. W. Athern, for respondent.

CHIPMAN, C. Mandamus. Plaintiff seeks to obtain a peremptory writ compelling defendant to pay to plaintiff, out of the swamp-land fund of Kern county, the sum of \$2,341.71, or as much thereof as that fund contained. The writ was refused, and plaintiff appeals from the judgment. The cause was submitted on an agreed statement of facts. The court made findings of fact, but both parties agree, and it is the law, that the findings should not be considered, and that this court should consider the agreed statement. Gregory v. Gregory, 102 Cal. 50, 36 Pac. 364; McMenomy v. White, 115 Cal. 339, 47 Pac. 109. It is not necessary to state the facts in detail, as there is no dispute about them. Plaintiff claims as the successor in interest of certain persons who purchased certain swamp land from the state. Reclamation was made according to law, and the then owners of the land, or their assigns, became entitled, on demand, to be paid out of the swamp-land fund of the county the sums claimed in the petition. This right accrued as to \$1,931.38 on March 11, 1891, and as to \$414.37 on April 14, 1893. In its petition, plaintiff sets forth "that the said land was purchased from the state of California by predecessors in interest of said corporation, * * * and that there has been paid into the treasury of Kern county by said purchasers, as part of the purchase price of said land, together with interest thereon, the sum of \$1,931.38; that thereafter a patent for all the swamp and overflowed lands hereinabove described was issued by the state of California to Henry Miller, as successor in interest of the said original purchasers of said lands; that said Henry Miller was the immediate predecessor in interest of said corporation, Miller & Lux, and was a successor in interest of said original purchasers." The facts as agreed upon are the same as alleged in the petition. There is no allegation in the complaint, and no fact stated in the agreed statement, that plaintiff is the assignee of the claim upon the fund, or that Henry Miller was such assignee. In appellant's brief the claim is made that plaintiff's predecessor became entitled to the money in question at the dates above mentioned, but no claim is made on behalf of plaintiff as assignee, other than as successor in interest of the land. Both parties seem to have assumed that a conveyance of the title to the land, or an assignment of the certificate of purchase entitling the assignee to a patent, carried with it an assignment of the claim for the money held by the county treasurer in the swamp-land fund, which had been paid in by the original purchasers. In a recent case this court held that the word "assigns," as used in section 3477, Pol. Code, refers to one to whom the indebtedness is as-

signed, and does not refer to a purchaser of the land, and that a conveyance of the title to the land does not carry with it or operate as an assignment of the fund to which the original purchaser is entitled. Carpenter v. Union, 61 Pac. 92. Before the writ can issue, it must appear that the petitioner is entitled to the fund in question, but in the present case the only evidence of plaintiff's right to the fund is as successor in interest of the land. We are unable to distinguish this case from the Carpenter Case, supra, on the authority of which the judgment should be affirmed, and we so advise.

We concur: HAYNES, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

129 Cal. 177

STEWART v. HOLLINGSWORTH. (L. A. 708.)

(Supreme Court of California. July 18, 1900.)

APPEAL AND ERROR—REVIEW—FINDING OF FACT—MOTION TO MAKE FINDING.

1. On appeal on a judgment roll alone, a finding as to the value of the property in question is conclusive.

2. In the absence of any bill of exceptions, or other showing that evidence was given upon the issues presented by a cross complaint in an action for the rescission of a contract, the omission of the court to make findings on such issues is not a ground for reversal of the judgment.

Department 1. Appeal from superior court, Los Angeles county.

Action by one Stewart against one Hollingsworth for rescission of a contract and other relief. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Dillon & Dunning, for appellant. Hendrick & Knott, for respondent.

HARRISON, J. It is alleged in the complaint herein that the defendant represented to the plaintiff that a certain street-sweeping machine was in every respect first-class and well adapted for sweeping streets, and had been thoroughly tested as such and found satisfactory; that by reason of such representations the plaintiff was induced to enter into a contract with the defendant, whereby the defendant promised to sell the machine to him, and the plaintiff, as the consideration therefor, agreed to and did deliver to the defendant another street-sweeping machine of the value of \$225, together with his written obligation to pay the defendant \$400, and that he had paid the sum of \$77.50 thereon; that the said representations of the defendant were false and fraudulent, and were known by him to be such, and were made for the purpose of inducing the plaintiff to enter into said contract, and with the intention of defrauding and cheating the plaintiff; that as soon as the plaintiff ascertained that said representations were false he notified the de-

fendant of his rescission of the contract, and offered to return to him all that he had received thereunder, and demanded the return of the machine delivered by him to the defendant, together with the aforesaid written obligation; that the defendant had taken possession of the machine received by the plaintiff, but had not returned the written obligation or the machine received by him from the plaintiff. Plaintiff thereupon asked judgment for the rescission of the contract, and that the written obligation be canceled and delivered to him, and that he be entitled to the possession of the machine delivered by him to defendant, and also for the sum of \$77.50. In his answer the defendant denied the greater part of the allegations of the complaint, and in addition thereto made a cross complaint against the plaintiff to the effect that he had made a conditional sale of the machine to the plaintiff, by the terms of which the plaintiff was to pay \$400 therefor in installments, and that until full payment thereof the title to the machine should remain in the defendant, and in the meantime the machine should be held by the plaintiff in trust as security for the payment of said installments, and that in case of default in such payment the plaintiff would, on request, return the machine to the defendant; that the plaintiff did not pay said installments of money, or either of them; and that the defendant had taken possession of the machine and sold it for the account of the plaintiff for the sum of \$100. He thereupon asked judgment against the plaintiff for the sum of \$300. The cause was tried by the court, and findings made that all the allegations in the complaint were true, except that the value of the machine delivered by the plaintiff to the defendant was \$175 instead of \$225, and that there was no agreement between the parties by which the machine received by the plaintiff from the defendant should be held by the plaintiff in trust or as security to the defendant for the payment of any sum of money whatever. Judgment was thereupon rendered in favor of the plaintiff and against the defendant for the sum of \$175, and for the cancellation and delivery to the plaintiff of the written obligation given by him to the defendant, and that the defendant take nothing by his cross complaint. The defendant has appealed from this judgment upon the judgment roll alone, without any bill of exceptions.

Upon the facts alleged in the complaint, the right of the plaintiff to a recovery is clear. The defendant does not deny that he received the machine from the plaintiff, nor does he deny that, after he had received back from the plaintiff the machine delivered by him, he refused, upon the plaintiff's demand, to return the machine received from the plaintiff, or the written obligation. In the absence of the evidence thereon, the finding of the court that the machine was of the value of \$175 is conclusive, and the judgment against the defendant for this amount was properly ren-

dered. The defendant had answered the complaint, and it was competent to receive evidence for that purpose, and was within the case made by the complaint, and within the issue, to give judgment for the value of the machine rather than for its possession. Code Civ. Proc. § 580. The failure of the court to give judgment for the \$77.50 paid to the defendant by the plaintiff might have been objected to by the plaintiff, but the defendant has no reason to complain of this omission.

In the absence of any bill of exceptions, or other showing that evidence was given upon the issues presented by the cross complaint, the omission of the court to make findings upon such issues is not a ground for the reversal of the judgment. *Himmelman v. Henry*, 84 Cal. 104, 23 Pac. 1098; *Winslow v. Gohransen*, 88 Cal. 450, 26 Pac. 504; *Klokke v. Escallier*, 124 Cal. 297, 56 Pac. 1113. It may be added that the facts alleged in the cross complaint are not inconsistent with those alleged in the plaintiff's complaint, except as to the averment that the machine was to be held by the plaintiff in trust as security to the defendant for the payment of its price, and the court found that this allegation was not true. The defendant alleges that, by the terms of his sale to the plaintiff, the title to the machine was to remain in him until fully paid for. Consequently when he took possession of it he had no further claim upon the plaintiff for its price, if, as found by the court, the plaintiff's agreement to pay for it had been obtained by fraud and false representations. The judgment is affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

129 Cal. 301
MAIN ST. & A. P. R. CO. v. LOS ANGELES
TRACTION CO. (L. A. 646.)

(Supreme Court of California. July 21, 1900.)

STREET RAILWAYS—CONSTRUCTION—CONTRACTS—CONSIDERATION—ESTOPPEL—DISCHARGE—NOTICE.

1. Plaintiff owned and operated a street railway on M. street, and defendant obtained a franchise for a street railway on T. street, which did not cross M. street directly, but entered it from the east, and followed it for a short distance, and branched off to the west. Defendant agreed, in writing, that, if plaintiff would grant the right to use its track on M. street from the entering to the departure of T. street, defendant would reconstruct that part of plaintiff's line and equip it for use as an electric line. Four months later they executed a supplemental agreement, which provided that, in the event plaintiff elected to spread its tracks to a greater distance than 8½ feet from center to center, defendant would pay all costs incident to such change. *Held*, that the supplemental agreement was void for want of consideration, since it was not an alteration of the original contract, but an addition to it of a new and onerous burden on defendant.

2. Where, after plaintiff and defendant had executed a written agreement, they entered into a second one, which was designated as supplemental to and explanatory of the first, the fact that it was so designated did not estop defendant from showing that the supplemental

agreement was not a part of the original, and that it was without consideration.

3. Where, after plaintiff and defendant had executed a written agreement, they entered into a second, which was designated as supplemental to and explanatory of the first, the fact that defendant notified plaintiff that he would not be bound by the supplemental agreement did not discharge him from his obligation under it, since the party in fault cannot discharge a contract by repudiating it.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by the Main Street & Agricultural Park Railroad Company against the Los Angeles Traction Company. From a judgment in favor of plaintiff, defendant appeals. Reversed.

E. H. Lamme and E. E. Milliken, for appellant. Bicknell, Gibson & Trask, for respondent.

SMITH, C. The action was brought to recover money alleged to be due by written contract. The judgment was for the plaintiff. The points relied on for reversal are insufficiency of the complaint and of the findings, and error in sustaining demurrers to two affirmative defenses set up in the answer. In the view we take of the case, it will be unnecessary to consider any but the last of these grounds. At the dates hereinafter mentioned the plaintiff was the owner of a street railroad in the city of Los Angeles along Main street, and the defendant was the owner of a franchise for a railroad along Third street, and was about to enter upon the construction of the same; and on the 1st day of March, 1895, they entered into a written contract with reference to the crossing of plaintiff's road by that of defendant. Third street, it will be understood, does not cross Main directly, but, after entering it from the east, follows it northward to a point where it leaves it for the west. By this contract plaintiff granted to the defendant the right to construct, maintain, and operate, jointly with it, the portion of its railway between the points of most convenient connection of the two railroads at the entrance of Third street into, and its departure from, Main street, together with the "right to make such connections and crossings" as might be necessary; and the defendant agreed to construct, over the portion of Main street described, "a good and sufficient railroad track for an electric road in place and stead of the tracks [then] located on Main street, and also to erect all necessary electric apparatus along said Main street between the points named," and to make the necessary connections. Afterwards, July 13, 1895, another contract was executed by the parties, entitled an "Agreement Supplemental and Explanatory" of the former, wherein the defendant agreed, "in the event of [the plaintiff] electing to spread its tracks to a greater distance than * * * eight and one-half feet from center to center of tracks, to pay all costs and expenses in-

cident to the making of the necessary change in the said crossing to conform to the change made in the distance between the said tracks." The execution of these contracts is alleged in the complaint, and copies are attached. The complaint then proceeds to allege that after the execution of the latter contract plaintiff determined to reconstruct its railroad along Main street, including the part of the street described in the agreement, and in doing so widened or spread its tracks from 8½ feet from center to center of tracks to 11 feet, and that the costs and expenses incident to making the necessary changes in said crossing, and which were thereon necessarily expended, was the sum of \$1,260.02, and prays judgment for that sum. The affirmative defenses set up in the answer, to which demurrers were sustained, are (1) that there was no consideration for the supplemental agreement; and (2) that, before the work referred to in the complaint was commenced, defendant repudiated the supplemental contract, and notified plaintiff to that effect.

1. In the former defense the facts alleged are, in effect, that the defendant, being the owner of a franchise from the city for the construction and operation of its road, made with the plaintiff the contract of March 1, 1895, and in accordance therewith was on or about July 13, 1895, proceeding to construct its railway along the portion of Main street described in the contract, when plaintiff demanded of it the execution of the supplemental agreement of that date, which the defendant accordingly executed; that there was no consideration for said agreement; and that before the commencement of the work alleged in the complaint, which was done in the year 1897, plaintiff was notified that defendant objected to the proposed change, and would not pay therefor. It is claimed by defendant that the demurrer to this defense was improperly sustained, which is the point to be considered. There can be no doubt of the principle contended for by the appellant, that an agreement adding to the terms of an existing agreement between the same parties, and by which new and onerous terms are imposed upon one of the parties without any compensating advantage, requires a consideration to support it, though this, of course, may consist either in a new consideration, or in some favorable modification of the original contract. *McCarty v. Association*, 61 Iowa, 287, 16 N. W. 114; *Ayres v. Railroad Co.*, 52 Iowa, 478, 8 N. W. 522; *Festerman v. Parker*, 10 Ired. 474; *Swearingen v. Insurance Co. (S. C.)* 29 S. E. 722; *Smith v. Ware*, 13 Johns. 257; *Vanderbilt v. Schreyer*, 91 N. Y. 392; *Reynolds v. Nugent*, 25 Ind. 328. An executory contract may, indeed, be altered or modified by the parties. *Civ. Code*, § 1698. "But * * * the variation of a contract is as much a matter of contract as the original agreement." *Festerman v. Parker*, *supra*. And a contract for such variation, equally with other con-

tracts, requires a consideration. Anson, Cont. 88 (68). There is an exception to this rule provided in Civ. Code, § 1697, for the case of parol contracts, but this has no application to written contracts. In this case, properly speaking, the supplemental agreement is not a modification or alteration of the original contract, which remains unaltered and unimpaired, but, rather, an addition to it of a new and onerous obligation, for which there is no compensation, either in the release of previous obligations or in a new consideration. It would seem, therefore, directly within the principle announced. It is claimed, however, by the respondent's counsel, that the supplemental agreement is declared by its terms to be merely "explanatory" of the first, from which it is inferred that it was in fact a part of the original agreement, though not included in the writing; and, undoubtedly, could this be conclusively inferred from the language used, the original consideration would be sufficient to support it. But the use of the word "explanatory" cannot be regarded as conclusive on this point; nor was the defendant precluded by this recital from showing that the agreement was not part of the original contract, and consequently that there was in fact no consideration. Civ. Code, §§ 1614, 1615; 1 Greenl. Ev. (16th Ed.) §§ 284, 304. Whether there was or was not a consideration for the new agreement was the precise issue raised by the plea, and the demurrer should therefore have been overruled.

2. With regard to the second affirmative defense the demurrer was rightly sustained. It is not in the power of one of the parties to a contract to discharge it by repudiating it. Upon such repudiation the other party may regard it as discharged, but not the party in fault. Anson, Cont. 363 (276) et seq. The cases cited, though some of them unguardedly expressed, relate only to the measure of damages. *Heaver v. Lanahan* (Md.) 22 Atl. 263, and cases cited. We advise, therefore, that the judgment be reversed, and cause remanded for further proceedings in accordance with this opinion.

We concur: GRAY, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, and cause remanded for further proceedings in accordance with this opinion.

(129 Cal. 293)

SHIVELY v. EUREKA T. G. M. CO. et al.
(Sac. 571.)¹

(Supreme Court of California. July 20, 1900.)
CORPORATIONS—INTERVENTION BY STOCKHOLDER—ASSESSMENT ON STOCK—HOW COLLECTED—ADMISSIONS BY DEFENDANT—APPEAL—REVERSAL—NEW TRIAL.

1. Where a complaint in intervention alleged that the action was brought against defendant corporation for the use of the president and two directors, who were a majority of the

board, and the answer of defendant admitted the plaintiff's cause of action, a stockholder may intervene to defend without alleging a request to the corporation officers so to do.

2. Civ. Code, §§ 331-339, prescribe the procedure to be followed by a corporation in levying an assessment on its stock. The procedure includes the publication of a notice stating the amount of the assessment, when stock will be delinquent for nonpayment thereof, and that any delinquent stock will be sold. Section 349 provides that on the day specified for declaring stock delinquent, or at any time thereafter, the directors may waive further proceedings to collect the assessments by sale of stock, and may elect to sue therefor. *Held*, that allegations and findings that certain persons owned stated amounts of stock, that an assessment of a given amount was levied on such stock and not paid, and that said owners were indebted to the corporation in the amount of said assessment, were not sufficient to show a personal liability of such owners for the amount of the assessment, since none of the facts required by statute to constitute a personal liability for the assessment were alleged or found.

3. Where a complaint in intervention alleged that plaintiff's assignors were indebted to the defendant corporation for an assessment levied on the stock, and the only evidence to sustain the same was the admissions in defendant's answer, which were verified by one of the assignors, a finding that such assignors were so indebted, and a conclusion of law that plaintiff take nothing by his suit, cannot be sustained, since the admissions of the answer were not evidence against the plaintiff.

4. Plaintiff sued a corporation on claims assigned to him, and the defendant answered, admitting the cause of action. A stockholder intervened, alleging that plaintiff's assignors were officers of defendant, and that there was a conspiracy to defraud the defendant of its property. Intervener also set up a counterclaim that plaintiff's assignors were indebted to defendant for an assessment levied on their stock. The trial court found for the intervenor on the counterclaim, but made no finding as to the fraud. *Held*, in reversing the judgment for the intervenor, that judgment would not be ordered for plaintiff, but that a new trial must be had.

Commissioners' decision. Department 1. Appeal from superior court, Shasta county.

Action by Charles Shively against the Eureka T. G. M. Company, defendant, and B. C. Northrup, Intervener. From a judgment in favor of the intervenor, and from an order denying a new trial, plaintiff appeals. Reversed.

Isaacs & Tillotson, for appellant. Dozier & Herzinge, for defendant. Reddy, Campbell & Metson, for respondent.

SMITH, C. Appeal from a judgment against the plaintiff, and from an order denying a new trial. The suit was brought to recover various sums of money, set up in as many counts of the complaint, and aggregating \$28,528.44. One of these counts was for a small amount alleged to be due on a promissory note made by the defendant corporation to the plaintiff; the others, for various claims against the company, assigned to plaintiff by Ludlum, one of its directors. Of the assigned claims, some were for claims originally held by Ludlum; others for claims assigned to him,—one by one Reid, for a small amount; another by Jones, a director of

¹ Rehearing denied August 18, 1900.

the company; and the others by Swezey, also a director. These claims were all expressly admitted in the answer of the defendant corporation, but disputed by the intervener, by whom it is in effect alleged that the suit was brought for the use and benefit of Ludlum, Swezey, and Jones, and that the claims sued upon were concocted by them in pursuance of a conspiracy to defraud the company of its mine and mining property. And it was further alleged by the intervener, by way of counterclaim in favor of the defendant, that Ludlum and Swezey, prior to the assignments of their respective claims against the company, became indebted to the company each in the sum of \$20,987, on account of assessments levied on stock held by them. The intervener's interest in the controversy, as appears from the allegations of the complaint, was simply that of a stockholder. The court found for the plaintiff on each of the causes of action set up in the complaint, except the fourth, on which the finding was against the plaintiff, and the sixth, where the claim was reduced from \$5,850 to \$2,264; the aggregate amount thus found for the plaintiff being \$15,969.10. But the court also found, upon the issues raised by the counterclaim, that Ludlum and Swezey, prior to their respective assignments, were indebted to the company, on account of assessments on stock held by them, each in the sum of \$20,000, and, as conclusion of law, that the intervener was entitled to judgment that plaintiff take nothing by his action, and for costs.

It is claimed on behalf of appellant that it appears affirmatively from the findings that there was no indebtedness from Ludlum and Swezey to the company on account of the counterclaim alleged and found, and hence that he is entitled to judgment on the findings for the amount found to be due to his assignors, or, failing this, that he is at least entitled to a new trial on account of the insufficiency of the evidence to justify the findings as to counterclaim, and of those findings to sustain the judgment, and also because the intervener was not entitled to intervene.

On the last point the case presented by the complaint in intervention, disregarding the allegations as to fraudulent conspiracy, is that of a suit brought against the corporation defendant for the use of the president and two directors, constituting a majority of the board, and in which the plaintiff's causes of action were all admitted in the answer. In such a case there can be no doubt of the right of a stockholder to intervene, nor was it necessary to allege a request to the corporation officers to defend. *Whitehead v. Sweet*, 126 Cal. 73, 58 Pac. 376, and authorities cited.

With regard to the finding as to counterclaim, there was no evidence of the assessment found. This is in effect admitted by the respondent's counsel, who relying exclusively on the admissions of the defendant's answer, which was verified by Ludlum. But this can-

not be regarded as evidence against the plaintiff. It is also clear that neither the allegations of the complaint in intervention, nor of the findings, are sufficient to show a personal indebtedness of Ludlum and Swezey on account of the alleged assessment. All that is alleged or found on this point is, in effect, that at all the times mentioned in the complaint Ludlum and Swezey were each the owner of over 80,000 shares of the stock of the company, and that on the 5th day of April an assessment of 25 cents per share was levied on the stock of the corporation, payable on or before May 8, 1895; that neither paid his assessment, amounting to over \$20,000; and that at and prior to the assignment to the plaintiff each "was indebted to the corporation defendant in the sum of \$20,000 upon and on account of the assessment so levied as aforesaid, and no part of which has been paid." There is no allegation or finding of any of the facts necessary, under the provisions of the Civil Code, to create a personal liability on the stockholders. Civ. Code, §§ 331-339, 349; *Investment Co. v. Merrill*, 108 Cal. 490, 41 Pac. 487; *Fruit Co. v. Coon*, 107 Cal. 447, 40 Pac. 542. The findings, however, would not justify a judgment for the plaintiff. A fraudulent conspiracy is alleged in the complaint in intervention, and, in the absence of findings disposing of these issues, we would not be justified in rendering judgment for the plaintiff. We therefore advise that the judgment and order denying a new trial be reversed.

We concur: HAYNES, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are reversed.

129 Cal. 197

COONAN v. LOEWENTHAL (two cases. S. F. 1,343, 2,213).

(Supreme Court of California. July 18, 1900.)

ATTORNEY—AUTHORITY—PLEADING—AMENDMENT—APPEAL—VERDICT—SUFFICIENCY OF EVIDENCE—REVIEW—PREJUDICIAL ERROR—TRIAL—ADMISSION OF EVIDENCE—HYPOTHETICAL QUESTION—BASIS.

1. Where a party appears by attorney, the latter, while acting as such, has control of the case; and his acts in the presence of the court concerning the trial are the same as those of the party himself.

2. Where, on trial, plaintiff's counsel asked leave to amend complaint, and, there being no objection, the court allowed amendment, it is too late for the party, who made no objection thereto, to raise any question as to regularity.

3. Code Civ. Proc. § 283, providing that an attorney can bind his client only by stipulation in writing filed, does not apply to consent to a motion to amend complaint made during the trial.

4. Where an appeal was not taken within 60 days after entry of judgment, as required by Code Civ. Proc. § 939, the sufficiency of the evidence to support the verdict cannot be reviewed.

5. Refusal to permit cross-examination of plaintiff on matters not material, nor on which he had testified in chief, was not error.

6. Under Code Civ. Proc. § 475, providing that no judgment shall be reversed for error unless it affects substantial rights of the party appealing, where the record failed to show how appellant was prejudiced by a witness reading a certain contract to the jury, a judgment against him will not be reversed.

7. A hypothetical question, based on averments in the complaint not denied by the answer, and on evidence in the case, was properly admitted.

Department 1. Appeal from superior court, Humboldt county.

Action by J. F. Coonan against J. Loewenthal. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

J. W. Turner and Chamberlin & Wheeler, for appellant. J. F. Coonan and Buck & Cutler, for respondent.

VAN DYKE, J. On the trial of the main case (S. F. No. 1,343) plaintiff's counsel asked leave of the court to amend his complaint in certain particulars, and, there being no objection, the court allowed the amendment to be made. The amendment consisted in changing 1 to 4 in the second count, so that the claim for services would be \$4,750, instead of \$1,750; and the prayer of the complaint was also amended to correspond with such change. The amendment was made on the original complaint on file, by writing over the former words and figures the substituted words and figures. The trial of said action resulted in a verdict for the plaintiff in the sum of \$5,000. A motion for a new trial was made on a bill of exceptions, which motion was denied. Thereupon the defendant appealed from the judgment and order denying a new trial. The transcript on said appeal was filed in this court March 2, 1898, and thereafter in due course the opening brief on the part of the appellant and the brief of the respondent were filed, and the reply brief of appellant was filed May 31, 1898. Up to this time the defendant and appellant had been represented by Chamberlin & Wheeler as his attorneys. In October, 1898, additional points and authorities were filed on the part of the appellant, who was then represented by J. W. Turner in place of his former attorneys. Thereafter, while the case was still pending here, in December, 1899, the defendant and appellant, through his substituted attorney, Mr. Turner, moved the court below to correct the record by striking out the words and figures inserted by way of amendment in the original complaint, and restore the former words and figures, on the ground that the said amendment was not properly authorized. The court below denied the motion to amend and correct the record, and from that order the defendant took an appeal, being case No. 2,213. On the hearing of the motion to amend the record it appeared, both from the rough minutes, and as entered into the book of permanent minutes, that by consent plaintiff was granted leave to amend his complaint herein by inserting the word "four" in lieu of "one" on

page 3 of said complaint after the word "of"; also by inserting the figure "4" in lieu of "1" after the word "dollars." Mr. Buck, one of plaintiff's attorneys, also testified that he called Mr. Chamberlin's attention to the fact that he desired to make the amendment, and when they came into court, and before the trial commenced, he asked leave of the court to make such amendment, and that he then made the amendments and showed them to Mr. Chamberlin, and he consented to them, and that the motion was granted with his consent.

A mere statement of the case would seem to dispose of this appeal. However, appellant's counsel presses the matter with such earnestness as to require, perhaps, some notice of his contention. It is a common occurrence for the trial court to allow pleadings to be amended, both before and during the trial of a cause, on the consent of the opposite party, or without such consent on a proper showing, where it can be done without material prejudice to the other side. Such practice may, and generally does, facilitate the disposition of business. In this case to have continued the trial to allow the complaint as amended to be engrossed and copied, served on the adverse party, with time allowed to file an amended answer thereto, would have served no useful purpose. The amendment could as well be made then and there on the original complaint, and the answer on file stand as the answer to the complaint as amended, and the trial proceed, as was done. This being so, it is too late for the party who consented to the amendment, or made no objection thereto, to raise any question as to its regularity. A party may appear in person or by attorney; but, when he appears by attorney, the latter, while acting as such, has control and management of the case, and his sayings and doings in the presence of the court concerning the trial of the cause are the same as though said and done by the party himself. *Board v. Younger*, 29 Cal. 149; *Mott v. Foster*, 45 Cal. 72; *Wylle v. Gold Co.*, 120 Cal. 486, 52 Pac. 809; *Canal Co v. Montgomery*, 124 Cal. 135, 50 Pac. 797.

Conceding, as claimed by appellant's attorney, that the provisions of the Code as to the mode in which an attorney may bind his client by stipulation (Code Civ. Proc. § 283) are like the statute of frauds, still that does not aid him. Where by the statute of frauds certain contracts are declared void unless in writing, it has always been held that performance, or even part performance, of the agreement takes the case out of the operation of the statute; otherwise, as said, instead of the statute being one to prevent frauds, it would afford the means for perpetrating frauds. After the trial and judgment, and pending an appeal from such judgment and order denying a new trial, the court below very properly refused to grant the motion in question, which in effect would have been to rescind its former action to the prej-

notice of plaintiff, without fault on his part being shown. See *Smith v. Whittier*, 95 Cal. 279, 30 Pac. 529.

In case No. 1,343 the appeal is taken from the judgment and order denying a new trial, and both cases were argued and submitted together. The appeal having been taken more than 60 days after the entry of judgment, the question whether the evidence is sufficient to support the verdict cannot be reviewed on such appeal from the judgment. Code Civ. Proc. § 939. The appeal from the order denying a new trial presents very few questions. The motion was based on two grounds only, to wit, errors of law occurring at the trial, and that the evidence did not sustain the verdict. On the hearing of the motion, however, only the questions of errors of law occurring at the trial were urged or considered by the court below. Among the assigned errors are:

1. That the defendant was not allowed to cross-examine the plaintiff while on the stand. Defendant's counsel called the attention of the plaintiff on cross-examination to an exhibit in reference to his charge for services in Loewenthal against Robinson, and was interrupted by the judge, who asked whether he proposed to interrogate the witness in regard to that; whereupon defendant's attorney stated what he proposed to ask the plaintiff, which offer the court denied, "upon the ground that the plaintiff in this case has offered no evidence whatever upon the first count of that complaint. There is, therefore, nothing before the court in relation to that count or those items; but, however, when you reach your defense, if those items are involved in what you term to be an open, mutual, and current account, it would then become competent." It does not appear that the question sought to be asked the witness on cross-examination related to matters on which he had testified in chief, or that the matter sought was at all material, and therefore the defendant's right of cross-examination was not, as he claims, prejudiced.

2. Appellant further contends that the court erred in permitting plaintiff, while on the stand as a witness, to produce and read, over the objection of defendant, his former client, a certain contract or agreement with Hyman & Well, trustees for creditors; but the agreement is not set out in the record, nor is there anything to show what its contents were, or that it was in any way material. If it were conceded, therefore, which it is not, that errors occurred in the respects above noticed, the court would not be justified in disturbing the judgment on that ground, inasmuch as it does not appear that they were prejudicial errors, or that the appellant has sustained any injury therefrom. Code Civ. Proc. § 475.

3. The action was for professional services as an attorney, and on the trial the plaintiff, to prove the value of his services, called as expert witnesses a number of members of

the bar, and put to them certain hypothetical questions as a basis from which to estimate the value of such services. These questions assumed certain facts, and the questions were similar as put to each of the witnesses. The following is given in appellant's brief as a sample of the questions propounded to said witnesses: "Suppose that defendant was carrying a stock of goods of over \$100,000, and was financially embarrassed, having liabilities of about \$60,000, and but little ready money, and had employed plaintiff as his legal adviser, with constant daily communications between them, by the way of advice, drawing papers, etc., for about 13 months, and by such labors saved defendant \$30,000 to \$50,000. Suppose that at the end of those 13 months defendant should have reached a position where his indebtedness had been reduced \$48,000, and his stock amounted to \$70,000, and he was comparatively easy, and worth \$50,000 as the result of plaintiff's labors." Appellant's contention is quite correct that hypothetical questions should be based upon the testimony of witnesses or other competent testimony tending to prove a fact; that every hypothesis contained in the question should have some evidence to sustain it. The record, however, shows that the conditions required as the basis of the questions existed in this case. It is averred in the complaint that the defendant on September 1, 1894, was engaged in carrying a stock of over \$100,000, with stores at Eureka, Arcata, and Ferndale, in Humboldt county, which is not denied by the answer. It is also averred in the complaint, and not denied in the answer, that on said date the defendant had liabilities of \$60,000 and but little ready money. It is also averred, and not denied, but admitted, in the answer, that from September 1, 1894, to September 29, 1895, the plaintiff was employed as the legal adviser of the defendant. It is further averred in the complaint that as such attorney plaintiff acted for 13 months, holding daily consultations, giving advice, and drawing up legal documents, and that he went to San Francisco for, and constantly guided, the defendant. It is denied by the defendant that his services were daily or constantly rendered, or to the degree and amount stated in the complaint. But evidence was introduced before the hypothetical questions were propounded tending to support the allegations of the complaint in this respect. It is averred in the complaint that the services of the plaintiff for the defendant resulted in saving to the defendant nearly \$50,000. The answer does not deny the saving of the \$50,000, but denies that it was effected by the plaintiff's services. The answer admits that the defendant was financially embarrassed, and it was in evidence that he considered himself a ruined man in October, 1894. The testimony in at the time tended to show that the plaintiff was the sole guide and adviser of the defendant in the different moves made to save him; that from the condition of in-

solvency, within the period of 18 months, he had become solvent, and had some \$70,000 of assets and only \$10,000 of debts; and the plaintiff had testified that it was through his exertions and efforts that this favorable change had been brought about. Whether this was so or not was a question for the jury to determine; but the evidence in, with the admissions in the pleadings, was sufficient as a basis for the hypothetical questions.

These are the only material errors assigned and relied upon by appellant's counsel on appeal. The order refusing to correct the record (case No. 2,213) is affirmed. The judgment and order denying a new trial in the main case (No. 1,343) are also affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

129 Cal. 184

HIGGINS v. SAN DIEGO SAV. BANK.
(L. A. 777.)

(Supreme Court of California. July 18, 1900.)
HUSBAND AND WIFE—AGREEMENTS OF SEPARATION—MORTGAGES—FORECLOSURE—COMPLAINT—REDUNDANT MATTER—UNNECESSARY FINDINGS—SUCCESSIVE ACTIONS.

1. While it is proper to strike from a complaint redundant and irrelevant matter, a refusal to do so does not constitute error, where it appears that no substantial right has been affected thereby.

2. Though undenied allegations in a complaint require no findings, it was not error to make such findings, where it appears that neither party was prejudiced thereby.

3. Under a contract of separation between plaintiff and her husband, plaintiff was entitled to an annuity out of certain property subsequently purchased by defendant at foreclosure of a mortgage given by the husband to defendant. Plaintiff sued to enforce her lien against the property. Code Civ. Proc. § 728, provides that, where the debt for which a lien or incumbrance is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease, and afterwards, as often as more becomes due, the court may, on motion, order more to be sold. Held that, since in the former action the court did not determine that any sums would be due in the future, plaintiff is not obliged to proceed by motion in her original action, but may bring a new action for the installments as they become due.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county.

Action by Emily J. Higgins against the San Diego Savings Bank, to enforce plaintiff's lien upon certain real estate. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

N. H. Conklin, for appellant. A. H. Sweet, for respondent.

CHIPMAN, C. Action to enforce the lien upon real estate created by a contract entered into by plaintiff and her husband to live separate and apart. Plaintiff had judgment, from which defendant appeals. The record is here on bill of exceptions.

On April 9, 1891, plaintiff and her husband,

H. M. Higgins, entered into an agreement to live separate and apart, and H. agreed therein to pay plaintiff a certain annuity during her life, payment to be in definite installments. By the terms of the agreement the sums agreed to be paid were made a lien on the real estate of H. On April 24, 1895, H. mortgaged his real estate to defendant. On December 1, 1896, he being in default on his contract with plaintiff, she commenced an action to foreclose her lien. Defendant in this action appeared and answered, and by cross complaint in that action sought the foreclosure of its mortgage. A decree was entered foreclosing defendant's mortgage, and also foreclosing plaintiff's contract for the amount then due thereon. Defendant caused the property to be sold under the decree in its favor, subject to the lien of plaintiff, became the purchaser, and obtained a deed, prior to the commencement of this present action. The decree in the foreclosure action referred to above was affirmed here on appeal. Higgins v. Higgins, 121 Cal. 487, 53 Pac. 1081. After the sale to defendant, plaintiff, under the decree, sold a portion of the land described in defendant's mortgage. On October 6, 1898, plaintiff commenced this action, alleging that there had become due under the terms of the separation contract the sum of \$1,123.50; making the bank, as the purchaser subject to her lien, the sole defendant. In the complaint the entire proceedings in the first action are set forth.

1. Appellant made a motion to strike out all this matter as redundant and unnecessary and irrelevant. We find the same difficulty here which has often been pointed out by the court, to wit, failure to identify in the transcript the portions of the pleading referred to in the motion. What was plain enough to the trial judge when the motion was made is obscure and uncertain here, because a reference to the manuscript pleadings, by page and line, does not identify the printed transcript. Conceding, however, that the matter in the complaint and in the supplemental complaint attempted to be referred to was unnecessary, it does not follow that the refusal to strike it out is sufficient ground or reversal of the judgment. The cause was tried upon its merits, and it appears that no substantial right was affected by the ruling of the court. In such case the judgment will not be reversed. Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. In the cases cited by appellant the rule was correctly stated to be that immaterial matter appearing in a complaint should be stricken out as irrelevant. But the cases cited do not suggest that the refusal of the court to follow this very proper rule is necessarily prejudicial error.

2. Appellant complains that certain findings were unnecessary, because they follow certain allegations of the complaint which are not denied; and it is claimed that these findings were inserted for the same reason that the complaint and supplemental com-

plaint contained unnecessary matter, to wit, "to make it so burdensome upon appellant to appeal that it would be deprived of that resort for the correction of errors." It is true that undenied allegations in the complaint require no findings, as has been often held, but it is not error to make such findings. We cannot assume that the findings complained of were purposely made burdensome, from the fact that they were immaterial or unnecessary.

3. It is claimed that the action was unnecessary and contrary to the provisions of section 728, Code Civ. Proc., citing *Bank of Napa v. Godfrey*, 77 Cal. 612, 20 Pac. 142. The contention is that there had already been one action on the contract, and plaintiff should have proceeded by motion in that action for an order to sell to satisfy the amounts falling due since the first action was brought. Section 728 provides that where "the debt for which the mortgage, lien or incumbrance is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold." It was held in *McDougal v. Downey*, 45 Cal. 165, where a mortgage was given to secure the payment of money on a contract not unlike the one here, and the mortgage was foreclosed as to one of the installments that became due, that a second suit could be maintained notwithstanding the former action. The reason given was that the demand for which the second action was brought had not arisen when the first action was commenced; that its amount had never been judicially ascertained, and no relief could be had under the provisions of section 248 of the practice act, which was the same as section 728 of the Code of Civil Procedure. In the *Bank of Napa Case*, relied on by appellant, there was a foreclosure for that part of the principal and interest of the note, which at the time had become due. The court, in its decree, adjudged that there were certain installments of interest to become due at periods stated, and also that the principal would be due at a stated period; and the decree made provision "that hereafter, as more shall become due according to the terms of said note and mortgage, and remain unpaid, the plaintiff may apply to the court for a decree that more of the mortgaged premises be sold to satisfy the same." There was an adjudication of the amounts yet to fall due, and provision made in the decree for the plaintiff to apply to the court for further sale of the property. It was held here that the decree was proper, and that the proper practice is, in such a case, when further installments of the debt fall due, to file a motion in the case, reciting the proceedings therein, alleging that other installments have become due, and asking for a sale of the property. In the case of *Higgins v. Higgins*, supra, the court at that trial did not determine that any sums would be due in the future under the con-

tract, and no provision was made in the decree for any future sales of property to meet installments yet to become due. We do not think, in such a case, the mortgagee is compelled to resort to a motion, under section 728, supra; nor, indeed, would it be proper for him to do so. *McDougal v. Downey*, supra. But where, in the decree, provision is made for future sales to enforce payments which the court has, in its decree, determined will be due in the future, the simpler and less expensive mode of procedure is as provided by section 728, supra, and as approved in *Bank of Napa v. Godfrey*. The course pursued in the present action we think the proper practice. It is advised that the judgment be affirmed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(129 Cal. 24)

PACIFIC PRESS PUB. CO. v. LOOFBOUROW et al. (S. F. 1,423.)¹

(Supreme Court of California. June 15, 1900.)

CONTRACTS—BREACH—MODIFICATION—CONSENT—GUARANTY—DISCHARGE OF GUARANTOR.

1. In June, 1896, defendant became guarantor for L. on a contract with plaintiff. Difficulties having arisen between them, the contract was modified in important respects on November 12th; defendant writing and signing on the modified contract the following: "I consent to the foregoing." Held, that this amounted to a consent to all of the modifications therein contained, and hence defendant was not discharged.

2. Where a contract on which defendant was liable as guarantor was modified with his written consent, it was not necessary that the modified instrument should contain formal words of guaranty, in order to continue defendant's liability as guarantor.

3. Where plaintiff contracted to print certain books, and there was nothing to show that time was of the essence of the contract, his refusal to deliver them for two days after they were finished did not constitute a breach of contract.

Department 2. Appeal from superior court, Alameda county.

Action by the Pacific Press Publishing Company, a corporation, against G. T. Loofbourow, W. J. Spencer, and others. From a judgment in favor of plaintiff, defendant W. J. Spencer appeals. Affirmed.

Davis & Hill, for appellant. Max Marcuse and A. B. McKee, for respondent.

McFARLAND, J. This is an action brought by plaintiff against defendant Loofbourow for printing and binding a certain book, and against defendant Spencer as guarantor that Loofbourow would perform his part of the contract between him and plaintiff touching the printing, etc., of said book. Judgment went for plaintiff against both defendants for \$604.50, the amount due plaintiff on the contract. Loofbourow has not appealed, and it

¹ Rehearing denied July 14, 1900.

is admitted that the judgment against him is right. Spencer appeals from the judgment, bringing up the judgment roll, which includes a bill of exceptions. No exception was taken to any ruling of the court as to the admissibility of evidence, nor to any ruling at all during the progress of the trial. The court made voluminous findings; and to these appellant takes many exceptions, under the heads of "specifications of particulars" in which the evidence is insufficient to justify the findings of fact, "errors of law," and that "the decision is against law." The real position of appellant, however, is that the court erroneously concluded as a matter of law from the facts in the case that appellant was liable as a guarantor. There is really no material conflict of evidence, and it clearly supports the facts found.

On July 16, 1896, the respondent Loofbourow entered into a written contract for the printing and binding of 5,000 copies of the book, with specifications of the different kinds of work to be done, and the prices therefor; the estimates for the total cost amounting to \$1,248.75. To this contract, and as a part of it, appellant attached his written guaranty that Loofbourow would pay for the book according to the contract. On September 15, 1896, respondent and Loofbourow entered into a written modification of the contract of June 16th; the particular changes being a reduction of the number of copies from five to three thousand, and of the estimated cost from \$1,248.75 to \$1,035.75. To this appellant also attached his written consent and express guaranty. A large number of persons had subscribed for the book, and in each of these contracts there was the following provision: "The first moneys received on collections of same to be turned over to us [respondent], until the entire bill for printing and binding is liquidated." The whole of the money for the work was payable "in thirty days from the delivery of the first books." It is admitted that the work on the book was properly done. On October 5, 1896, about 185 copies were delivered to appellant, who held an order for the same from Loofbourow, and had also an assignment from the latter of the subscription list as security for the guaranty. Appellant and Loofbourow delivered these books, or a large part of them, to subscribers, and collected some money due thereon, but neglected and refused to pay any money collected to respondent, as provided in the contract. On November 10, 1896, respondent wrote a letter to appellant, calling attention to the fact that he had neglected to pay over the money collected on the subscriptions, as provided in the contract, and saying that respondent would be under the necessity of withholding the further delivery of books if that part of the contract was not complied with. On the next day, November 11th, appellant told respondent that he would not be guarantor any longer, because respondent had broken the contract, to which respondent

objected. On the next day, November 12th, the parties came together, and another written modification of the contract was made and signed by respondent and Loofbourow. The main features of this modification were that delivery of books by Loofbourow to subscribers was to continue, and that collections of the subscribers should be made by respondent, and credited to the account of Loofbourow; collections to be pressed by respondent with diligence. It was also provided that certain cuts and electrotypes used by respondent in doing the work, and belonging to Loofbourow, would be delivered to the latter. Upon this written contract, and after the signatures of the other two parties, and as a part of the transaction, appellant wrote and signed the following: "I consent to the foregoing." The delivery of the books immediately proceeded. The respondent diligently collected all the subscriptions that could be collected. The amount thus collected was \$360.50, which left due respondent \$664.50, and for the latter amount judgment was rendered. The cuts and electrotypes were delivered to Loofbourow. All the books were delivered to Loofbourow by November 20, 1896, except some copies which under the contract were to be folded, but not bound; and these latter were tendered to Loofbourow December 16, 1896, and the latter refused to receive them. There is no dispute about the amount due on the contract, and we think that upon the facts the judgment is right.

In a part of his brief, counsel for appellant argues the case as though the action was founded on the instrument of November 12th alone, and that, as said instrument does not contain any formal words of guaranty, therefore appellant cannot be held as guarantor. But the action is based on the original guaranty, and the instrument of November 12th is only a modification of the original contract made with the consent of the appellant. Of course, when the original parties to a guarantied contract change it in a material manner without the consent of the guarantor, the latter is released; but this principle has no application to a case like the one at bar, where the change has been made with the express consent of the guarantor. See *Baylies*, Sur. p. 290. It is contended that appellant only consented to allow the respondent to collect the subscriptions, and to waive his rights as the assignee of Loofbourow; but his consent was to the whole of the instrument, which is on its face, as well as according to the evidence introduced without objection, a modification of the original contract, and would be incomplete and meaningless if not considered as referring to such contract. The court correctly found that appellant, as guarantor, consented to the modification. Neither do we think that the liability of appellant as guarantor is at all affected by what occurred between him and respondent during the two days from the 10th to the 12th of November. Waiving the point that appellant himself first violated the contract

by refusing to pay to respondent the money collected on the subscriptions, still the mere failure of respondent to deliver books during those two days was not a violation of the contract, for nothing can be found in the contract which makes such failure a violation of it; and the court correctly found that it is not true that "down to and upon the 12th day of November, 1896," respondent had not performed his part of the contract. If respondent had actually never delivered any more books, and appellant had taken no other action in the premises, then, perhaps, a different question would have been presented; but the temporary difficulty between the parties during the two days was immediately settled by the instrument of November 12th, to which appellant became a party by consenting thereto in writing,—his consent being a part of the transaction. As he consented to it, it is not necessary to consider whether the modification was material or in any way disadvantageous to appellant, although it was evidently a benefit to him, as it imposed on respondent the task of collecting the subscriptions. Upon the facts, we see nothing which, as matter of law, relieves appellant's liability as guarantor. The judgment is affirmed.

We concur: TEMPLE, J.; HENSHAW, J.

(129 Cal. 12)

ROBINSON v. THORNTON. (S. F. 1,452.)¹
(Supreme Court of California. June 15, 1900.)

EJECTMENT—EVIDENCE—JUDGMENT ROLL—MUNIMENT OF TITLE—RES JUDICATA—ADMISSIBILITY.

Where, in ejectment, title was claimed under an execution sale on a judgment against one to whom a patent had issued, and who was shown to have been in possession until shortly before commencement of the action, it was error to exclude from the evidence the judgment roll showing such judgment, the execution, levy, sale, and sheriff's deed.

Department 2. Appeal from superior court, San Mateo county.

Ejectment by C. P. Robinson against R. S. Thornton. From a judgment in favor of the defendant, and an order denying a motion for a new trial, plaintiff appeals. Reversed.

T. M. Osmont, for appellant. B. B. Newman and E. F. Fitzpatrick, for respondent.

PER CURIAM. Ejectment. The defendant had the verdict of the jury, and judgment thereon. Plaintiff appeals from the judgment, and from an order denying his motion for a new trial. Appellant claimed title to the premises under an execution sale made upon a judgment rendered in the case of McCombe against Green and wife. It was admitted that a United States patent had issued to said Green for the land in contest in August, 1871. Appellant also proved the possession of said Green of the land from 1864 to a short time preceding the commencement of the action. Thereupon he offered in evi-

dence the judgment roll in the said case of McCombe against Green and wife, which showed a money judgment against Green in favor of McCombe; also, execution thereon, levy, sale, and sheriff's deed to appellant of the premises in contest. This evidence was objected to by respondent on the ground that it was immaterial, irrelevant, and incompetent, and *res adjudicata*; and the objection was sustained "on the ground of *res adjudicata*." This ruling of the court, as it appears from a portion of the opinion of the court delivered at the time, which is in the record, was founded upon the notion that this court, in *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120, and in *Robinson v. Thornton*, 114 Cal. 275, 46 Pac. 79, had decided that the judgment roll in *McCombe v. Green* was inadmissible, and that this decision had become the law of the case. But no such decision was made in either of those appeals. In the appeal in 102 Cal., and 34 Pac., it appeared, from evidence which had been introduced in the case by the defendant, that prior to the levy of the execution in *McCombe* against Green the interest of the Greens in the land had been extinguished by a certain mortgage foreclosure. It also appeared by the evidence which had been introduced that Green had in 1872 executed a conveyance of the land to the defendant Thornton, who then went into possession thereof, and had since remained in adverse possession; and the main question in the case was whether or not Thornton was estopped from pleading the statute of limitations,—the court holding that he was not so estopped. But there was no adjudication—as, indeed, there could not properly have been—that the judgment roll, etc., was not admissible evidence on the part of the plaintiff. As a matter of fact, that judgment roll had been introduced, and there was no intimation whatever that it had been improperly received in evidence. The decision of this court on that appeal reversed the judgment of the lower court in favor of the plaintiff, but the reversal was based upon evidence introduced by the defendant subsequent to the introduction of the judgment roll in *McCombe* against Green. On this present appeal there was no evidence whatever introduced at the trial by the appellant, and none of the questions raised upon the appeal determined in 102 Cal., and 34 Pac., were before the court at all. After appellant's main muniments of title were ruled out by the court, it was useless for him to proceed further; and, of course, he had to submit to a judgment against him. It was clearly error to sustain the objection to the judgment, execution, sheriff's deed, etc., offered by the appellant. Whether or not respondent could have overcome that evidence by a showing of other facts was not a question before the court. As to the appeal in 114 Cal., and 46 Pac., there a judgment in favor of the defendant was reversed because the court below had done substantially what was done in the case at bar. On that appeal the court took

¹ Rehearing denied July 14, 1900.

the case away from the jury, and instructed them to bring in a verdict in favor of the defendant, because "the law of the case," as declared on the appeal in 102 Cal., and 34 Pac., had settled the case definitely in favor of the defendant; and the court, in its opinion in 114 Cal., and 46 Pac., shows that this was not so. In the case at bar, appellant proved title in Green, and offered proper documentary evidence which showed the deraignment of title to him from Green, and the competency of such evidence is beyond question. For the ruling excluding such evidence, the judgment must be reversed. The judgment and order appealed from are reversed.

129 Cal. 8

ROBINSON v. SOUTHERN CALIFORNIA RY. CO. (L. A. 882.)

(Supreme Court of California. June 13, 1900.)

RAILROADS—EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—ENTRY—CONSTRUCTION OF ROAD—TRESPASS—STATUTE OF LIMITATIONS.

1. Under Civ. Code, § 466, and Code Civ. Proc. § 1242, permitting railroad companies to enter on private land and make examinations, surveys, etc., to determine the most advantageous route for a proposed road, a railroad company is not authorized to enter and construct its road without commencing condemnation proceedings.

2. Where defendant company entered on plaintiff's land in 1889, and constructed a railroad thereon, without commencing condemnation proceedings, it was liable as a trespasser; and hence plaintiff's action therefor, brought 10 years later, was barred, under Code Civ. Proc. § 338, subd. 2, providing that actions of trespass must be brought within 3 years.

Commissioners' decision. Department 1. Appeal from superior court, Riverside county.

Action by Laura Robinson against the Southern California Railway Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

W. F. Bray, for appellant. C. N. Sterry and Henry Stevens, for respondent.

CHIPMAN, C. Action to recover damages for taking possession of a strip of land 100 feet wide, and constructing thereon a railroad track. Defendant demurred to the complaint for want of sufficient facts, and also averring that the action is barred by sections 818 and 819, and subdivision 2 of section 838, and subdivision 1 of section 339, Code Civ. Proc. The demurrer was sustained, and plaintiff declining to amend, defendant had judgment, from which plaintiff appeals.

The complaint sets forth that plaintiff is now, and has been for more than 13 years last past, the owner of the N. E. $\frac{1}{4}$ of section 24, township 5 S., range 3 W., S. B. M.; that defendant is a California corporation, formed November 7, 1889, by the consolidation of certain three other railroad corporations (naming them), incorporated under the laws of this state, and that the railroads constructed by these three corporations, respec-

tively, have been operated as parts of one system, and under the same general management; that in May, 1887, the California Central Railway Company, one of said three companies, "as agent of the state of California, in the exercise of the right of eminent domain, entered upon the above-described lands of plaintiff, and seized and took possession of a strip of said land one hundred feet in width, running diagonally across said above-described northeast quarter of section twenty-four" (particularly describing this strip); that defendant, as successor of said last-named company, "in the exercise of its right of eminent domain, constructed a steam railroad upon and over said strip of land, and completed the same on or about June, 1888; and that since November 7, 1889, the defendant has operated the said railroad." It is then alleged that neither of said companies ever acquired title to said strip of land "by purchase or by voluntary grant or donation; that neither said defendant nor said California Central Railway Company ever tendered or paid any compensation for said strip of land so taken and used," and has commenced no proceedings for condemnation, and has never "paid to plaintiff or her predecessors in interest for the taking of said land or the damage thereto." The complaint then sets forth the value of the land, to wit, \$8,000, "and that the said land has been injured by the wrongful act of said defendant in taking possession of said strip, * * * by the operation of a steam railroad thereover," etc., "to plaintiff's damage in the sum of five thousand dollars." Appellant contends that a railroad company, under the law of this state, cannot acquire title to land for right of way by prescription or adverse possession, and can do so only by purchase or by voluntary grant or donation or by condemnation proceedings, and that any other mode of acquiring title is ultra vires, and that the statute of limitations referred to has no application to this case.

It does not appear clearly from the allegations of the complaint that defendant entered upon the land and built its track thereon without permission. It is averred that defendant entered upon the land in the exercise of the right of eminent domain; but it is also averred that no proceedings for condemnation were ever commenced, without which there could be no entry under the right of eminent domain, except for the limited purposes prescribed by statute, as will hereafter appear. Assuming that the pleading may be construed as averring that the entry was unlawful, the question to be determined is whether the action is barred. Plaintiff says in her brief that it is not an action to try the title or to eject defendant. The complaint alleges and the demurrer admits that defendant has no title. It is therefore unnecessary to consider the cases cited by appellant upon the point as to whether defendant has title by prescription or otherwise. Appellant seems to contend that under

our statute a railroad corporation may lawfully enter upon land and build its track without waiting for condemnation proceedings; that, as there is no time fixed or ascertainable when the entry would become unlawful, there is likewise no time fixed when the statute of limitations can be set in motion.

By the terms of section 465, Civ. Code, it is provided that a railroad corporation may enter upon land to make surveys to determine the most advantageous route for its road. Subdivision 1. It may receive, hold, take and convey by deed or otherwise, voluntary grants and donations made to it in aid of the construction of its railroad. Subdivision 2. It has power "to purchase, or by voluntary grants or donations to receive, enter, take possession of, hold and use, all such real estate and other property as may be absolutely necessary for the construction," etc., of such railroad. Subdivision 3. Section 1242, Code Civ. Proc., provides that "the state, or its agents in charge of such public use [and a corporation having the right of eminent domain is a state agent in its exercise. Civ. Code, § 1001], may enter upon the land and make examinations, surveys and maps thereof, and such entry shall constitute no cause of action in favor of the owners of the land," etc. It is a mistaken construction of the statute to suppose that a railroad corporation can enter upon land and construct its road, under sanction of law, before commencing condemnation proceedings. When it does so it becomes a trespasser, as would a natural person under like circumstances, and the ordinary common-law remedies are open to the owner. *Hull v. Railroad Co.*, 21 Neb. 371, 32 N. W. 162; *Ewing v. City of St. Louis*, 5 Wall. 413, 18 L. Ed. 657. It has been held that the owner may enjoin the entry (*Railroad Co. v. Menk*, 4 Neb. 21; *Cameron v. Supervisors*, 47 Miss. 264; *City of Paris v. Mason*, 37 Tex. 447; *Pierpoint v. Town of Harrisville*, 9 W. Va. 215); also, that he may bring ejectment (*Railroad Co. v. Smith*, 78 Ill. 96; *Smith v. Railroad Co.*, 67 Ill. 191; *Bothe v. Railroad Co.*, 37 Ohio St. 147); and in *Potter v. Ames*, 43 Cal. 75, plaintiff recovered for damages, *quare clausum fregit*, where the county proceeded illegally in taking possession of land for a highway. In *Smithers v. Fitch*, 82 Cal. 153, 22 Pac. 935, plaintiff had the remedy of injunction to prevent an entry upon his land, and the commission of a trespass by removing gates erected across a highway placed there by plaintiff; the highway having been illegally established. It seems to us that the complaint shows a trespass by defendant in 1889, for which plaintiff had his appropriate remedy. The complaint alleges an unlawful taking of possession in May, 1887. The damages alleged accrued at least as soon as the road was built and operated, which was in 1889. The complaint was filed August 11, 1890, and we think the action was barred by subdivision 2, § 338, Code Civ. Proc., which

bars "an action for trespass upon real property" after three years. If it should be said that the complaint alleges a lawful occupation,—i. e. under an implied permission, and not under any statutory right as for condemnation, and not by grant or donation,—it would fall under the two-year provision relating to contracts not in writing, and the action would be barred, by subdivision 1, § 339, Id. We are of the opinion that the demurrer was rightly sustained, and therefore advise that the judgment be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

MORAN v. McINERNEY et al. (S. F. 1,374.)
(Supreme Court of California. July 21, 1900.)

In bank. Appeal from superior court, city and county of San Francisco.

On petition for rehearing. Denied.

For former opinion, see 61 Pac. 575.

PER CURIAM. In this case an error in the printed opinion has been made the basis of a large part of the petition for a rehearing. The court did not say "Cahill filed a cross complaint," as printed, but "Cahill filed no cross complaint." The rehearing is denied, but the opinion is modified by striking out the following paragraph: "If the pleadings had been in proper form to allow a judgment in favor of Cahill against McInerney, there is no foundation whatever for the claim of a lien on the part of Cahill. It is not even essential that he shall reconvey the property. It was conveyed to him in trust, and the purposes of the trust failed, and his title, if he had any, ceased."

129 Cal. 108
DOWDELL et al. v. CARPY et al. (S. F. 1,273.)

(Supreme Court of California. July 18, 1900.)

MALICIOUS PROSECUTION—COMPLAINT—
SUFFICIENCY.

Where the complaint in an action for malicious prosecution showed that in the former action plaintiff (now defendant) had recovered judgment, which had been reversed in the supreme court, and the cause remanded for new trial, it was bad on demurrer, as it failed to show that the litigation was without probable cause or that it had terminated.

Department 1. Appeal from superior court, city and county of San Francisco.

Action by James Dowdell and Arthur B. C. Dowdell, partners as James Dowdell & Son, against Charles Carpy and others, for malicious prosecution. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Rodgers & Paterson, for appellants. Daniel Titus, Chickering, Thomas & Gregory, and H. M. Barstow, for respondents.

VAN DYKE, J. The demurrer to the complaint was sustained, and the appeal is taken from the judgment entered thereon. The sufficiency of the complaint is the only question presented on appeal. It is contended on the part of the appellant that the action is for the recovery of damages for a conspiracy between defendants to injure plaintiffs. The case cited and relied upon to support this theory is *Dreux v. Domec*, 18 Cal. 83. That was an action, however, for malicious prosecution. Several defendants were embraced in the action, the complaint averring "that the defendants, contriving and maliciously intending to injure the plaintiff, etc., procured him to be indicted." A demurrer was interposed, among other grounds, because no averment was made of any joint agency on the part of the plaintiffs in instituting the prosecution, which demurrer was overruled. It is said in the opinion on the appeal: "It is well settled that this action for malicious prosecution will lie against several defendants. It is argued, however, that a conspiracy must be averred. It is true that an action lies for a conspiracy unjustly to prosecute a defendant, but we apprehend that this action is somewhat different, in form at least, from an action on the case for a malicious prosecution. The gist of this action is the malicious prosecution. That of the other is the conspiracy,—the combining of two or more to do an unlawful and injurious act. In the first case, we apprehend, the cause of action is complete before an acquittal. In the other, the acquittal or termination of the prosecution is necessary to enable the plaintiff to maintain the suit. But, however this may be, we think that it would be holding the rule to unnecessary strictness to hold that the defendants are not sufficiently and clearly charged with a joint act when but one general offense is charged, and this averred to be committed by all with the same unlawful motive, and that they all contrived to effect it." The language of the opinion is not very clear. There seems to be an ambiguity as to which action reference is made,—whether to malicious prosecution or conspiracy. It is stated that the cause of action is complete before acquittal. If in reference to an action for malicious prosecution, it is against all the authorities; and a mere conspiracy, without carrying out the purposes of the conspiracy or perpetrating some wrong, is not the ground for a civil action. In *Saville v. Roberts*, 1 Ld. Raym. 378, Chief Justice Holt said: "An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution, but if the party be damaged the action will lie, from whence it follows that the damage is the ground of action." And in *Herron v. Hughes*, 25 Cal. 560, this court says: "A simple conspiracy, however atrocious, unless it results in actual damage to the party, never was the subject of a civil action; and, though such conspiracy be charged, the averment is immaterial and need not be proved. When two or more are sued for a wrong done, it

may be necessary to prove a previous combination in order to secure a joint recovery, but it is never necessary to allege it, and, if alleged, it is not to be considered as of the gist of the action. That lies in the wrongful and damaging act done." In *Taylor v. Bidwell*, 65 Cal. 489, 4 Pac. 491, it is said: "The gravamen of the action is the alleged malicious prosecution. The averments of the complaint with respect to the conspiracy of the defendants are not of the gist of the action. That lies in the wrongful and damaging act done." In that case the complaint averred, in substance, that the defendants confederated together for the purpose of falsely charging the plaintiff and maliciously prosecuting him for the crime of arson. In the present case the complaint charges the defendants with conspiring and combining together to prosecute a civil action for the purpose of obtaining a judgment of foreclosure and selling property of the plaintiff thereunder, wrongfully procuring the appointment of a receiver therein, and for dissuading parties from bidding at said foreclosure sale, thereby injuring their business and sacrificing their property, to their damage, etc. *Parker v. Huntington*, 2 Gray, 124, was an action to recover damages against the defendants for conspiring together to maliciously prosecute the plaintiff upon a charge of perjury. The question arose as to whether the case was an action for conspiracy or for malicious prosecution. The court used the following language: "By the ancient forms of pleading, all actions for malicious prosecution where two or more were made defendants were laid with a charge of conspiracy. This practice is supposed to have had its origin in the phraseology of St. 21 Edw. I., which gave the form of writs in such cases by using the words, 'Do placito conspiracionis et transgressionis.' But the charge of conspiracy was never deemed essential to an action, and in modern times this form of allegation has fallen into disuse. By the rules of common law, an action of conspiracy, or, to use an equivalent expression, a writ of conspiracy, was never allowed but in two cases,—one, for conspiracy to procure a man to be indicted for treason; the other, for conspiracy to prosecute a man for felony, by which life was put in danger. This form of action, however, has become obsolete in those cases where it was allowed at common law, having been superseded by an action on the case in the nature of a conspiracy which furnishes an adequate and more liberal remedy for malicious prosecutions of every nature and description. * * * The gist of the action is not the conspiracy, but the damage done to the plaintiff by the acts of the defendants; and that is equally great, whether it be the result of a conspiracy or the act of a single individual. The insertion in the declaration of the averment that the acts were done in pursuance of a conspiracy does not change the nature of the action." In this case, likewise, the gravamen of the action is the alleged malicious prosecution, and, to support such

action, it must appear that the prosecution complained of was not only malicious, but without probable cause, and that such prosecution has terminated. In this case the complaint shows that the prosecution complained of resulted in a judgment in the superior court in favor of the plaintiff therein; that an appeal was taken, and such judgment was reversed. By reference to the case in this court (*Carpy v. Dowdell*, 115 Cal. 677, 47 Pac. 695) it appears that a new trial was ordered. And it is not alleged, nor does it appear from the complaint, that the litigation complained of had terminated before this action was brought, and the fact that the first judgment was reversed does not raise a presumption of want of probable cause. The recovery of a judgment in a court of competent jurisdiction would rather show probable cause for bringing the action, although such judgment may subsequently be reversed on appeal. It does not appear from the complaint in this cause that there was a want of probable cause, or that the litigation or proceedings complained of were terminated; and the complaint, therefore, is fatally defective. *Hibbing v. Hyde*, 50 Cal. 206; *Anderson v. Coleman*, 53 Cal. 188; *Holliday v. Holliday*, 123 Cal. 26, 55 Pac. 703; *Dennehey v. Woodsum*, 100 Mass. 195; *Closson v. Staples*, 42 Vt. 209; *Carpenter v. Nutter* (Cal.) 59 Pac. 301. The demurrer was properly sustained, and the judgment is affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(6 Cal. Unrep. 483)

MULLALY v. TOWNSEND et al. (L. A. 623.)¹

(Supreme Court of California. July 20, 1900.)
ATTACHMENT — REDELIVERY BOND — MORTGAGE OF RELEASED PROPERTY—DEMAND
—LEVY OF EXECUTION.

K. executed to plaintiff a redelivery bond, signed by defendants, to secure the release of an attachment; and, after the release, K. executed a mortgage on the property. Plaintiff, after obtaining judgment against K., issued an execution; but the sheriff released the levy and returned the execution unsatisfied, because the property was claimed by the mortgagor, whereupon plaintiff sued defendants on the redelivery bond. *Held*, that the levy of the execution by the sheriff constituted a sufficient demand by plaintiff for the return of the property to support an action against the sureties on the bond.

Department 1. Appeal from superior court, Los Angeles county.

Action by Joseph Mullaly against F. N. Townsend and others. From a judgment in favor of plaintiff, and from an order denying a new trial, defendants appeal. Affirmed.

Jones & Wiles, for appellants. King & Hannon and Henning & Bowen, for respondents.

VAN DYKE, J. The plaintiff commenced this action against the defendants as sureties upon a bond to release an attachment. The

action in which the attachment was taken was brought by the plaintiff against one Kelly, and certain personal property, consisting of the furniture in a hotel, was attached. On a former trial the court granted defendants' motion for a nonsuit, the defendants admitting that the plaintiff could prove the allegations of his complaint. On appeal by the plaintiff from that judgment, this court reversed the same and remanded the cause. 119 Cal. 47, 50 Pac. 1066. In the opinion of the court in that case it is said: "The terms of the bond required Kelly to redeliver the attached property to the sheriff upon demand. As to this demand there seems to be no question. It was not only alleged that, in fraud of the plaintiff's rights, he had mortgaged the property to Hunter, but it is also alleged that an execution upon the judgment was placed in the hands of the sheriff, with instructions to levy upon said property, and that Kelly and Hunter refused to deliver it to the sheriff, otherwise than upon the payment of the five hundred dollars to Hunter. This was a refusal to deliver the property. The plaintiff was not bound to accept part of the property, or to accept it all burdened with a lien placed upon it after the execution of the bond, and the release of the attached property thereunder." On the second trial of the case the court found that subsequent to the giving of the said undertaking described in the complaint, dated November 21, 1895, and the release of said attached property, and prior to the levy of execution under said judgment, the said Thomas J. Kelly willfully, and in fraud of the rights of the plaintiff to said property and satisfaction of said judgment recovered in said action, gave a certain indenture of mortgage upon said property to secure the sum of \$500, alleged and claimed by said Kelly to be due from him to one Cal. F. Hunter. The court also found that the plaintiff caused an execution to be taken out on the judgment recovered against Thomas J. Kelly, and placed the same in the hands of the sheriff of Los Angeles county, with instructions to levy upon the furniture and articles attached, which were released upon giving the bond in question; that the sheriff levied said writ upon said property, but that thereafter he was informed that the same was subject to a mortgage to Hunter, as already found; and that on account of such mortgage, and not otherwise, he released the levy, and returned the execution wholly unsatisfied, the said Kelly having no other property out of which to make the amount of the said judgment, or any part thereof. The court also found that before the commencement of this action the plaintiff demanded of the defendants, and each of them, that they pay the plaintiff the said judgment, and fulfill the obligations as expressed in the undertaking executed by them.

The main and really the only point necessary to be considered, made by the appellants on this appeal, is that there was no demand

¹ Rehearing denied August 12, 1900.

for the return of the property made by the plaintiff prior to the commencement of the action; the condition of the bond signed by the defendants on the release of the attachment being that the defendant Kelly would, on demand, in the event that plaintiff recovered judgment against him, redeliver the attached property, or in default thereof the defendants would, on demand, pay the value thereof. On the former trial this court held that the allegations of the complaint were sufficient to constitute a demand on the defendant Kelly, and the findings of the court on the last trial, as already set out, are in line with the allegations of the complaint. In speaking of the nature of a return bond given to release an attachment, this court, in *Metrovich v. Jovovich*, 58 Cal. 341, says: "The condition is that the attached property shall be returned, and the terms of the undertaking are not complied with by an offer or by a return of a portion of the property. It is not pretended in this case that there was any return, or any offer to return, the whole of the property attached. The evidence conclusively shows that the defendant in the attachment proceeding had put it out of his power to make such return. Therefore return is impossible." In this case, as shown and found, after the release of the property the defendant Kelly mortgaged it to one Hunter, and, when the sheriff levied on the property by virtue of the execution issued on said judgment, it was claimed by Hunter. As held by this court on the former trial, "The plaintiff was not bound to take the property burdened with a lien placed upon it after the release of the attachment." There was not only a demand on the defendant for the property, but a refusal on his part to turn it over in the condition in which it was at the time of being released from the attachment. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

129 Cal. 208

CURTIS v. SCHELL et al. (S. F. 2,027.)
(Supreme Court of California. July 18, 1900.)
EXECUTORS AND ADMINISTRATORS—ALLOWANCE FOR SUPPORT—PROBATE DECREE—FRAUD—EQUITY.

1. By the terms of the will the estate was not to be divided until the youngest son, then 2 years old, should become 21. In the meantime the income of the real estate was to be paid to the widow, for the support of herself and children. The income not being sufficient, the widow, who was executrix, borrowed money, which was used to support the family, and secured the loans by mortgages on her interest in the real estate of such estate. After the majority of the youngest son an allowance for family support was made for all the years of administration, and the real estate ordered sold to pay it. The interest of the widow in the estate, after payment of such allowance, was insufficient to pay the mortgages. *Held*, that the proceeds of the real estate should be applied to the payment of the mortgages before the payment of the family allowance; the money loaned being used in lieu of a family allowance,

and not loaned to an heir, merely, but to the sole executrix of the estate.

2. The judgment of the probate court granting the allowance, without knowledge of the mortgages for the money used for that purpose during administration, was not conclusive, but equity would relieve against the fraud, without specifically finding fraud or setting aside the order of the probate court, by taking charge of the proceeds of the sale, and directing their application among those entitled.

In bank. Appeal from superior court, city and county of San Francisco.

Suit by May B. Curtis against Georgiana L. Schell, executrix of the will of Theodore L. Schell, deceased, and others, to set aside an order granting a family allowance in the settlement of the estate of Theodore L. Schell, deceased, and to set aside an order authorizing the sale of the real property of the estate for the purpose of paying such allowance. From a judgment in favor of plaintiff, and from an order denying a motion to set aside such judgment, defendants appeal. Affirmed.

Fisher Ames, for appellants. Gordon & Young, for respondent.

VAN DYKE, J. This is a proceeding in equity to set aside an order granting a family allowance in the matter of the estate of Theodore L. Schell, deceased, and an order authorizing the sale of the real property of said estate for the purpose of paying said family allowance, and for general relief. From the facts found, the court, as a conclusion of law, held that the mortgages given to secure the indebtedness held by the plaintiff were a lien upon the interest of the defendant Georgiana L. Schell in and to the real estate of the estate of said Theodore L. Schell, and that said interest of defendant Georgiana L. Schell, as an heir at law, legatee, and devisee of said Theodore L. Schell, in the proceeds of the sale of said real estate, should be applied to the payment and satisfaction of said borrowed money so secured by said mortgages, before the payment of said family allowance, and a decree was entered accordingly. This appeal is taken from the judgment and decree so entered, and from an order made and entered, denying the motion of the defendants to set aside and vacate said judgment, and is based upon questions of law alone.

It is contended on the part of the appellants that the conclusions of law are not justified by the facts found; that there is no finding of fraud in procuring the order for a family allowance, or the order of sale to pay the same; that, failing to find fraud or to set aside the orders of the probate court, the jurisdiction of a court of equity was at an end, and the court, therefore, could not control or direct the application of the proceeds of the sale.

A history of the case may be necessary to a proper understanding of the questions involved: Theodore L. Schell died at the city and county of San Francisco December, 1877, leaving a will by which the defendant Georgiana L. Schell and one William Hale were

appointed executors. In June, 1886, Hale resigned as executor, and since that date the defendant Georgiana L. Schell has continued to administer the estate solely as the executrix of the said last will. By the terms of the will one-third of the estate was devised to said defendant Georgiana L. Schell, the widow of the said decedent, and the remaining two-thirds to his six children, the youngest of whom, a son, was, at the time of his death, 2 years old. It was provided in the will that the estate should remain intact and undistributed until the youngest son should attain the age of 21, and in the meantime the income of the real estate should be paid to said widow for the support and maintenance of herself and children. The youngest son became of age December, 1896. The income from the estate, after the expenses of managing the same, not being sufficient to support the family, the widow from time to time borrowed money for such purpose, mingling the said moneys so borrowed with the moneys received by her as income from the said estate, and using the same for the family support. To secure the money so borrowed, she executed mortgages to the parties loaning the same of all her right, title, interest, and estate as an heir at law, devisee, and legatee in and to the real estate of said estate. The first of the mortgages so executed was to the Bank of Sonoma County, in April, 1883, and was given to secure the sum of \$5,600 with interest. The second was executed November, 1887, to Lewis F. Curtis, to secure the payment of the sum of \$3,000, with interest. These two mortgages covered lands belonging to said estate in Sonoma county. In November, 1887, she executed two other mortgages to said Lewis F. Curtis,—one to secure the sum of \$2,800, and the other the sum of \$1,200, with interest on each at the rate of 8 per cent. per annum, on certain real estate belonging to said estate, in the city and county of San Francisco. The mortgage held by the Bank of Sonoma County was foreclosed, and the interest covered by the same sold thereunder, which interest has become vested in the plaintiff. The other mortgages, by proper assignment and transfer, have also become vested in the plaintiff. Two of the children having died, their interest under the will became vested in their mother, the defendant Georgiana L. Schell. On December 14, 1896, on the petition of the said Georgiana L. Schell, the probate court of the city and county of San Francisco, in which the estate was being administered, granted an order for family allowance in the sum of \$150 a month, running back to the 1st of January, 1890; aggregating, as stated in the findings, the sum of about \$30,000. Thereafter, on the 23d of April, 1897, said probate court made and entered an order to sell the real estate of said decedent to pay said family allowance and expenses of administration; and it is found that said order was based upon the claim made by said executrix that there was

then due the sum of \$36,000 for expenses of administration and for said family allowance, and there was no personal property remaining in the hands of the said executrix wherewith to pay the same. The value of the whole of the property of the said estate in December of that year was appraised at \$44,396. As above shown, the decedent directed by his will that all the income of the estate should belong to the widow, for the purpose, among other things, of providing family support; but said income, it appears, did not afford sufficient means for the support of the family, and hence the widow, instead of obtaining an order of court for the sale of the property of the estate to provide for family support, borrowed money from time to time, and used such money, as found by the court, for the purpose of supporting the family. This state of things continued about 19 years, and until after the youngest of the children had attained majority. The mortgages to secure the money borrowed, as already appears, were executed by Georgiana L. Schell on her interest as devisee, legatee, and heir at law of Theodore L. Schell, deceased.

The rule of law is, as claimed by the appellants, that one to whom the title or interest of an heir at law is transferred pending administration takes only so much of the distributive share belonging to said heir as remains after the purposes and objects of administration have been satisfied. It is therefore claimed that the mortgagee who loaned money in this case did so, presumably, knowing the law. Although a party is presumed to know the law, he is not presumed to anticipate any unusual or extraordinary proceeding taken under the form or guise of law. Family allowance in the administration of an estate is generally for a temporary purpose, and the settlement of an estate and the distribution of the same to the parties entitled thereto generally take place within a reasonable period. Certainly no one would be bound to take notice that an application for a family allowance would be made, as in this case, after all the children had ceased to be a charge upon the widow, and after the estate was ready for distribution under the terms of the will, and in view of the fact that the money loaned was for the purpose of supporting the family, and presumably in view of avoiding the necessity of selling the estate to provide a family allowance. The application for family allowance was therefore not in the ordinary course of procedure. Upon the hearing of the petition for family allowance, although it was stated that the petitioner had borrowed money from divers persons for the support and maintenance of herself and family, it was not stated that these sums had not been paid; and it is found: "The court was not informed, and at the time of making said order for said family allowance had no notice or knowledge, that the said defendant Georgiana L. Schell had made and executed the mortgages mentioned."

This was the suppression of a very material fact, which ought to have been brought to the knowledge of the court. The amount of debts, exclusive of these mortgages, and including the family allowance, as shown by the finding, was some \$38,000; and the value of the whole property, as also found, was \$44,396. Deducting the expenses, including the family allowance, from the whole value of the property, would leave only a little over \$8,000. The widow held a five-ninths interest in this, which would be less than \$5,000. The amount secured by mortgages which were a subsisting lien upon the interest of the petitioner, with accumulated interest, aggregated from \$20,000 to \$25,000. Therefore, if the scheme inaugurated on behalf of the petitioner should be carried out by a sale of the entire property for the payment of the said family allowance and the expenses of administration, there would be less than \$5,000 remaining of the interest belonging to her with which to discharge the indebtedness due the plaintiff, leaving nearly \$20,000 unpaid. The case here is different from that of simply buying the interest of an heir, in which, of course, the purchaser takes what is left upon distribution, after the settlement of the estate, including the charges and expenses of administration. Here, as already appears, the money was advanced for the purpose of supporting the family. It was in lieu of a family allowance, and it was loaned not to an heir, merely, but to the sole executrix of the estate, who is a trustee to protect the interests of creditors. *Bergin v. Haight*, 99 Cal. 52, 33 Pac. 760.

To give the appellant, under the name of "family allowance," the proceeds of a sale of the same property on which she had borrowed money to support the family, would be to pervert the law designed for a beneficent purpose into an instrument for the perpetration of a gross fraud. It is not to be supposed that a court possessed of all the facts and circumstances of the case would permit itself to be used for such purpose. "In general, it may be stated that in all cases where, by accident or mistake or fraud, or otherwise, a party has an unfair advantage in proceedings in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage, a court of equity will interfere and restrain him from using the advantage which he has thus improperly gained." *Story, Eq. Jur.* § 885. In *Insurance Co. v. Hodgson*, 7 Cranch, 332, 3 L. Ed. 362, Chief Justice Marshall laid down the rule in such cases as follows: "Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may be safely said that any fact which clearly appears to be against conscience to execute a judgment, and of which the injured party could not have availed himself at law, or of which he might

Cal. Rep. 60-62 P.—29

have availed himself at law, but was prevented by fraud or accident, unmixed with any fraud or negligence in himself or his agents, will justify an application to a court of chancery." In this case the respondent was entirely helpless, as against the proceedings in the probate court initiated and carried on by the appellants. The proceeding to set aside family allowance is *ex parte*. In fact, an order for such purpose can be entered by the court of its own motion. The complaint charges and the court finds the suppression of a material fact, which matter thus suppressed and withheld was a fraud, not only against the respondent, but also a fraud committed upon the court. The fraud, however, was extrinsic and collateral to the question examined on the application for the family allowance. The case, therefore, does not fall within the restrictions against setting aside judgments of courts obtained through intrinsic fraud, such as *U. S. v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, and other cases in that line relied upon by appellants. The respondent had no adequate relief, either by appealing from the order entered in the probate court, or upon motion to set it aside. The probate court does not possess the requisite machinery to try a question of fraud. That is the peculiar province of a court of equity. In *re Hudson's Estate*, 63 Cal. 454; *Dean v. Superior Court*, 63 Cal. 473; *Wickersham v. Comerford*, 96 Cal. 433, 440, 31 Pac. 358; *Bergin v. Haight*, *supra*. *Wickersham v. Comerford*, *supra*, was an action to set aside an order of the probate court designating and setting apart a homestead to the defendant, the widow of Richard Comerford. Said Comerford some time prior to his death had entered into an agreement of separation with his wife, Sarah, under which agreement the property of said parties was divided, and she relinquished all right as wife, in law or equity, for support and maintenance. Upon the execution of this agreement the parties immediately separated, and never again lived together. The wife, with her minor son, removed to Alameda county, upon the property which was conveyed to her under the deed of separation; and the husband remained at their former place of residence, in Sonoma county. After his death the wife took out letters of administration upon his estate, and thereafter made an application to have certain property in Sonoma county, which had been purchased by the husband with the proceeds of his separate estate, set apart to her as a homestead, which application was granted by the probate court of said county. On the application for setting apart the homestead, nothing was stated in reference to the deed of separation, or the division of the property thereunder. The complaint in the case charged a willful suppression of material facts, and the suggestion of a falsehood by the defendant, with the intent to deceive and mislead the court, to the prejudice of the creditors of the estate, and averred that such suppression and suggestion had the intended

effect, to the injury of the plaintiff, who was one of such creditors. This court held that that constituted fraud, and answers the contention on the part of the defendant there, that the only remedy was an appeal from the order setting apart the homestead, as follows: "No doubt, that order was appealable, but, conceding that plaintiff's relation to the case [that of a mere creditor of the estate, whose claim had not been allowed] was such as would have entitled him to appeal from that order, yet he could have obtained no adequate relief by such appeal, since neither the fraud upon which this action is grounded, nor the fact that plaintiff was a creditor, could have been brought into the record on appeal from that order. Nor did plaintiff have an adequate remedy by motion to vacate the order, even conceding that he was entitled to make such motion, and had made it within the proper time. To say nothing of the disadvantage of trying an issue of fraud on such a motion, he could not have appealed from an order denying the motion, because the order sought to be vacated, viz. the order setting apart the homestead, was itself an appealable order. [Citing a number of cases.] It will hardly be contended that a remedy for the wrongs complained of, thus restricted, is not defective and inadequate, as compared with an original equitable action, adapted to a thorough investigation of the issues, and in which all errors committed by the trial court may be corrected on appeal." *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619, 28 L. Ed. 547, was an original suit in the circuit court of the United States for the district of Louisiana, brought for the purpose of setting aside fraudulent and void sales made by a testamentary executor under the orders of the probate court in said state. In that case it was contended that the plaintiff was concluded by the proceedings in the probate court, which was alleged to have exclusive jurisdiction of the subject-matter, and that its decision was conclusive against the world,—especially against the plaintiff, who was a party to the proceeding. The supreme court of the United States, in its opinion, conceding that the administration of the estate there in question properly belonged to the probate court, and that, in a general sense, the decisions of that court were conclusive and binding, especially upon parties, said: "But this is not universally true. The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court of chancery is always open to hear complaints against it, whether committed in pais or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceedings in another court; but it will scrutinize the conduct of the parties, and, if

it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it,"—citing a large number of cases. *Arrowsmith v. Gleason*, 129 U. S. 86, 9 Sup. Ct. 237, 32 L. Ed. 630, presented the question as to the jurisdiction of a probate court to make a sale of the lands there in controversy, and confirm sales reported by the guardian in said proceeding in probate. It was claimed there, as here, that the party complaining was bound by the judgment and orders in the probate court. The supreme court of the United States, however, says in its opinion: "But it is insisted that the circuit court of the United States, sitting in Ohio, is without jurisdiction to make such a decree as is specifically prayed for, namely, a decree setting aside and vacating the orders of the probate court of Defiance county. If by this is meant only that the circuit court cannot by its orders act directly upon the probate court, or that the circuit court cannot compel or require the probate court to set aside or vacate its own orders, the position of the defendants could not be disputed. But it does not follow that the right of Harmening, in his lifetime, or of his heirs since his death, to hold these lands, as against the plaintiff, cannot be questioned in a court of general equitable jurisdiction on the ground of fraud. If the case made by the bill is clearly established by proof, it may be assumed that some state court of superior jurisdiction and equity powers, and having before it all the parties interested, might afford the plaintiff relief of a substantial character. But, whether that be so or not, it is difficult to perceive why the circuit court is not bound to give relief according to the recognized rules of equity as administered in the courts of the United States." To the same effect is *Bowen v. Evans*, 2 H. L. Cas. 257: "If a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery they may have been effected, and notwithstanding any contrivance by which it may have been attempted to protect them. It is immaterial, therefore, whether such machinery and contrivances consisted of a decree of equity, and a purchase under it, or of a judgment at law, or of other transactions between the actors in the fraud."

It appears, therefore, from the foregoing cases,—and many others to the same effect might be cited,—that it was not necessary to first revise or set aside the orders made by the probate court. The desired purpose can be accomplished by allowing the sale ordered by that court to proceed, but to direct and control the disposition of the proceeds of such sale according to the right of the case, and this was done by the court below in its decree.

The orders herein for the family allowance, and also for the sale of the real estate, were made by the superior court in the exercise of its probate jurisdiction. No appeal was

taken from either of these orders, nor was any motion to modify or set them aside made in the proceeding before the probate department until after the time limited for an appeal therefrom, and the orders had thus become final; and no relief from them could be had in the probate department, even if under any circumstances that department could have given relief. When it appeared that the order for family allowance had been made to reimburse the widow for moneys which she had already expended in the support of her family, and that she had obtained these moneys from the assignors of the plaintiff herein by mortgaging her interest in the estate as security for their repayment, and, without disclosing this fact, had, as executrix, obtained an order for the sale of the entire estate, under which the purchaser would take the title discharged of such mortgages, there was presented the precise case in which a court of equity should interfere to control the enforcement of the judgment of another court by directing the application of the proceeds of that sale. In its judgment herein the superior court does not purport to set aside or modify either of these orders, but controls Mrs. Schell in the disposition of the moneys which may be received by her upon the family allowance. Neither does the court assume to determine the amount of the charges and expenses of administration which are to be paid out of the proceeds of the sale. These matters, as well as the return of sale that may be made under the order of sale, and the hearing upon the application for its confirmation, are within the jurisdiction of the probate department, and will be determined by it. The superior court by its judgment herein in no respect interferes with the jurisdiction of the probate department in reference thereto. It takes control of the disposition of the proceeds of the sale after the confirmation and payment of those charges and expenses, and at that point intercepts the appropriation by Mrs. Schell to herself of the proceeds of the sale of her interest in the real estate which she had mortgaged to the assignors of the plaintiff, by compelling the executrix to apply these proceeds, as far as may be necessary or applicable, in satisfaction of the liens which Mrs. Schell, as widow and heir of the deceased, had created upon that interest for the express purpose of obtaining the money for the reimbursement of which the order of sale was made. The judgment merely compels the executrix to make the payment of the family allowance to the assignee of the widow in accordance with contracts theretofore made by her. The equitable relief thus sought could not be granted in the probate department of the court, for the reason that such relief is not within its probate jurisdiction. Sitting as a court of probate, the superior court exercises a special and limited jurisdiction under statutory procedure, and, although guided by principles of equity in the exercise of that jurisdiction, does not exercise

its general jurisdiction in equity, but is limited to matters in probate, and, in the administration of the estates of decedents, to the objects of such administration. These objects are the temporary preservation and protection of the estate of the deceased, the satisfaction or payment of such debts and claims as are charges or liens upon it, and the distribution of the residue to those who are entitled thereto. Incidentally the expenses incurred in the administration, and a temporary provision for the support of the family, including a homestead, where proper, are to be taken for the estate. This provision, however, is in reality a distribution of a portion of the estate to those who by virtue of the statute are entitled thereto. Under its probate jurisdiction the court cannot bring before it strangers to the estate for the purpose of adjusting their claims to property held by the executrix or administrator, or for determining their rights to the proceeds of a sale derived under those for whose benefits the sale was ordered. For this want of jurisdiction in the proceeding for the administration of the estate, the equity jurisdiction of the court was properly invoked and exercised herein. The judgment, and the order denying the motion to vacate and set aside the said judgment, are affirmed.

We concur: TEMPLE, J.; HARRISON, J.; McFARLAND, J.; HENSHAW, J.

BEATTY, C. J. I concur in the judgment and generally in the opinion of justice VAN DYKE. I am not, however, prepared to say that the probate court, as such, is without jurisdiction, in making an order of family allowance for the purpose of reimbursing moneys advanced for family support, to extend the benefit of its order to a third party who at the request of the executor or administrator has made such advances. I think, on the contrary, that, if in this instance the facts had been disclosed to the probate court at the time the order of sale was made, it would have been perfectly competent for that court to have directed payment to the plaintiff here of all sums advanced by her for the support of the family. This view does not, in my opinion, invalidate the conclusion that she can sustain the present action to enforce her equitable claim upon the fund which will result from the sale of the property. She had no actual notice of the proceeding in the probate court, and her failure to make her claim there was not her fault, but the fault of the defendant.

(129 Cal. 279)

CAMERON et al. v. ARCATA & M. R. R. CO.
(S. F. 1,318.)¹

(Supreme Court of California. July 20, 1900.)
BILL OF EXCEPTIONS—TIME FOR SERVICE—
EXTENSIONS—RESTRICTION—JURISDICTION
TO SETTLE—CONSIDERATION ON APPEAL.

Code Civ. Proc. § 650, gives a party against whom judgment is rendered 10 days, and such

Rehearing denied August 15, 1900.

further time as the court may allow, for preparation and service of a proposed bill of exceptions. Section 1054 authorizes an extension of time to prepare and serve a proposed bill of exceptions, and restricts such extension to 30 days, unless made with the consent of the adverse party. *Held*, that the provision of section 650 for further time is governed by the restriction of section 1054, and a second extension of 30 days, made without consent of the adverse party, was unauthorized, and where no application was made for relief from default the court was without jurisdiction to settle a bill of exceptions prepared and served after expiration of the first extension, and hence the same could not be considered on appeal.

Department 1. Appeal from superior court, Humboldt county.

Action by Lottie Cameron and another against the Arcata & Mad River Railroad Company. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Affirmed.

Buck & Cutler, Chamberlin & Wheeler, and Geo. D. Murray, for appellant. Sevier & Selvage, for respondents.

HARRISON, J. The plaintiffs are the surviving widow and infant child of Alexander D. Cameron, deceased, and recovered judgment herein against the defendant in the sum of \$10,000 damages for the death of the deceased, resulting from the negligence of the defendant. From this judgment and an order denying a new trial the defendant has appealed, bringing the case here upon the judgment roll and a bill of exceptions. The respondents insist that the appellant is not entitled to have the bill of exceptions considered, for the reason that it was not prepared or served upon them within the time provided by the statute, and that the judge had no jurisdiction to settle the same. The verdict of the jury was rendered September 3, 1897, and judgment thereon was entered upon the next day. September 10th the defendant served upon the plaintiffs, and filed with the clerk, its notice of intention to move for a new trial. The defendant did not serve upon the plaintiffs its proposed bill of exceptions until October 29th, and the plaintiffs then objected thereto upon the ground that the same was served too late. November 8th the plaintiffs, reserving all objection to the proposed bill of exceptions that it was served too late, proposed amendments thereto, and, when the same was presented to the judge for settlement, again objected to its settlement upon the same ground. It was shown at that time, and appears from the bill of exceptions itself, that on September 4th the court extended the defendant's time 30 days within which to prepare and serve its proposed bill of exceptions, and that on October 4th the court extended the time for preparing and serving said bill for 30 days further. Each of these extensions was made upon the ex parte application of the defendant, and without the consent of the plaintiffs, and it also appears that the plaintiffs did not at any time stipulate or consent to any extension of time for the preparation and serving of any bill of exceptions.

The judge overruled and disallowed the objection of the plaintiffs, and settled and signed the bill, and the same was then filed.

Section 1054, Code Civ. Proc., provides: "When an act to be done as provided in this Code relates to * * * the preparation of statements or of bills of exception, or of amendments thereto, the time allowed by this Code may be extended upon good cause shown by the judge of the superior court in and for the county in which the action is pending, or by the judge who presided at the trial of said action; but such extension shall not exceed thirty days without the consent of the adverse party." Under section 650, Code Civ. Proc., the defendant was entitled to 10 days after September 4th, the day upon which the judgment was entered, within which to prepare and serve its draft of a bill of exceptions. The order of September 4th "extending" the time for 30 days should be considered as giving to the defendant that time in addition to the 10 days allowed by this section, and would therefore expire October 14th. The notice of its intention to move for a new trial was given September 10th, and, as it was stated in this notice that the motion would be made "upon a bill of exceptions to be settled and filed herein," under section 659 (2), Code Civ. Proc., the defendant would have 10 days from that date within which to prepare and serve such bill. The time thus authorized expired September 20th, and, although under section 1054 the judge would then have been authorized to extend the time for preparing and serving a proposed bill for 30 days, such extension was not granted or sought; the defendant doubtless acting upon the theory that the extension granted by the order of September 4th had not yet expired. Unless, therefore, the defendant should prepare and serve a draft of the bill on or before October 14th, the judge was not authorized to settle it. The order of October 4th extending the time for 30 days thereafter was not available to the defendant in any view that can be taken of the proceeding. The court had exhausted its power to extend the time for preparing the bill to be used on an appeal from the judgment, and the time within which it might make an order extending the time for preparing and serving the proposed bill under the notice of intention to move for a new trial expired September 20th. Even if we could hold that the order of October 4th could be construed as extending the time for 30 days after September 20th, it would not be available to the defendant, as the draft of his bill was not prepared or served until October 29th.

The suggestion of the appellant that section 1054 is to be construed as declaring that the court cannot grant an extension of more than 30 days at any one time, but that it may make several extensions of 30 days each, and thus extend the time for more than 30 days, is not only contrary to previous decisions of this court (*Bryan v. Maume*, 28 Cal. 238; *Bunuel v. Stockton*, 83 Cal. 319, 23 Pac. 301),

but is also in direct violation of the language of the section, which declares in express terms that "such extension" (that is, whatever extension may be made by the court) shall not exceed 30 days without the consent of the adverse party. "The judge of the court exhausted his power when he extended the time thirty days, and the last extension of time by him was unauthorized." *Bunuel v. Stockton*, supra. The provision in section 650, Code Civ. Proc., that the draft of the bill may be prepared and served within 10 days after the entry of judgment, "or such further time as the court in which the action is pending, or a judge thereof, may allow," does not authorize the court to grant an indefinite extension of time for the preparation and serving of the draft, but is to be read in connection with the restriction in section 1054 upon the amount of time which may be allowed by the court.

Nor can we accede to the proposition of the appellant that, as the judge has settled the statement, it must be considered here that there were sufficient reasons presented to him to excuse the defendant's failure to serve the draft within the time allowed therefor, and that such determination is conclusive in this court. It is a sufficient answer to this contention to say that it does not appear that any attempt was made on the part of the defendant before the superior court to excuse his delay, or that any such determination was made by the judge. The record itself fails to show any facts from which the appellant could claim relief from his default, or that he made any application to the court to obtain such relief. In *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332, and in *Banta v. Siller*, 121 Cal. 414, 53 Pac. 935, cited by the appellant, application was formally made to the superior court, under section 473, to be relieved from the default in presenting the bill; but in the present case no such application was made, the defendant apparently relying upon the extension of October 4th, which, as we have seen, was unauthorized. It must be held, therefore, that the judge was without jurisdiction to settle the bill of exceptions when it was presented to him, and it follows that it cannot be considered upon this appeal. *Connor v. Road Co.*, 101 Cal. 429, 35 Pac. 990; *Henry v. Merguire*, 106 Cal. 142, 39 Pac. 599. The judgment and order denying a new trial are affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

6 Cal. Unrep. 486

ADAMS et al. v. CITY OF MODESTO. (Sac. 659.)¹

(Supreme Court of California. July 20, 1900.)

MUNICIPAL CORPORATIONS—CLAIM FOR DAMAGES—DEMAND—NECESSITY—WAIVER—PLEADING.

1. Under Act March 13, 1883, c. 49, subc. 7, § 864, providing that all demands against a city or town shall be presented to and audited by

¹ Modified in banc. See 63 Pac. 1063, 121 Cal. 501.

the board of trustees in accordance with such regulations as they may prescribe by ordinance, where plaintiff sued defendant city for damages for maintaining a nuisance, his failure to make a demand on the city prior to the suit was fatal to his cause of action, since the term "demands," as used in the statute, includes claims for damages for torts as well as on contract.

2. Where plaintiff sued defendant city for damages for maintaining a nuisance, without making a demand prior to the suit, and defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, it did not waive its right to raise the objection of plaintiff's failure to make a demand, required by Act March 13, 1883, c. 49, subc. 7, § 864, on appeal.

3. Under Act March 13, 1883, c. 49, subc. 7, § 864, providing that all demands against a city shall be presented to and audited by the board of trustees in accordance with such regulations as they may by ordinance prescribe, where plaintiff sued defendant city for damages, without making a demand prior to the suit, and the petition contained no averment that the city had not passed any ordinance prescribing in what manner such demands should be presented, plaintiff cannot excuse his noncompliance with the statute on the ground of the city's failure to pass such ordinance.

Commissioners' decision. Department 1. Appeal from superior court, Stanislaus county.

Action by David Adams and others against the city of Modesto. From a judgment in favor of plaintiffs, and from an order denying a new trial, defendant appeals. Reversed.

P. J. Hazen, for appellant. Needham & Dennett, for respondents.

CHIPMAN, C. Action to abate a nuisance and for damages. Plaintiffs had judgment, from which, and from the order denying its motion for a new trial, defendant appeals.

Defendant demurred to the complaint for insufficiency of facts, and in the specifications in support of the motion for new trial it was specified "that there is no evidence that any claim was ever presented to the defendant city for the damage claimed by plaintiffs." The city of Modesto is a municipal corporation of the sixth class, and comes within the provisions of the act of March 13, 1883 (St. 1883, p. 93) subc. 7, at page 266 et seq. Section 864 provides as follows: "All demands against such city or town shall be presented to and audited by the board of trustees, in accordance with such regulations as they may by ordinance prescribe; and upon the allowance of any such demand the president of the board shall draw a warrant," etc. Section 878 provides, among other things, that "the clerk shall also keep a book, marked 'Demands and Warrants,' in which he shall note every demand against the city or town, and file the same. He shall state therein, under the note of the demands, the final disposition made of the same. * * * This book shall contain an index, in which reference shall be made to each demand. * * * He and his deputy shall take all necessary affidavits to demands against the city or town, and certify

the same without charge." The act does not provide that no action shall be brought unless the claim is presented as required by section 864, nor is there a limitation as to the right to sue. Section 850 expressly provides that the corporation "may sue and be sued in all courts," etc. Respondent contends: (1) That it does not appear in the pleadings that the claim was not presented. (2) Failure to present a claim must be taken advantage of by demurrer or answer, or it will be regarded as waived; citing 15 Am. & Eng. Enc. Law, p. 1194, note; *Sheel v. City of Appleton*, 49 Wis. 125, 5 N. W. 27. (3) Statutes requiring the presentation of claims are not usually held to include torts. (4) The act of 1883 requires the presentation of demands in accordance with such regulations as the trustees may by ordinance prescribe, and there is no evidence that the trustees have made any regulations on the subject, or that plaintiffs' claim does not comply with the prescribed form.

Bancroft v. City of San Diego, 120 Cal. 432, 52 Pac. 712, was similar to the present case. The action was for damages caused by grading a street so as to leave plaintiffs' lot in a hollow several feet below the street. The claim for damages was not presented to the common council before suit. The city charter did not provide that no action should be brought unless the claim should be first presented. There was no limitation as to the right to sue, and it was claimed that the demand was for damages from a tort. The charter there read: "All claims for damages against the city must be presented to the common council and filed with the clerk within six months after the occurrence from which the damages arose." It was held that a failure to present a claim is fatal to recovery in an action upon it. The term "demands," as used in the act of 1883, is certainly broad enough to include "all claims for damages," which latter are the terms used in the San Diego charter. We are unable to distinguish the present case from the *Bancroft* Case. The term "demands," therefore, includes damages for torts. Has defendant waived its right to raise the question? The point arises on general demurrer. *Thompson v. City of Milwaukee*, 69 Wis. 492, 34 N. W. 402; *Flieth v. City of Wausau*, 93 Wis. 446, 67 N. W. 731. Defendant demurred for insufficiency of facts, and the objection was, therefore, not waived. Whether a failure to demur or to raise the question by answer would be deemed a waiver need not be decided. The act provides that demands must be presented to the trustees "in accordance with such regulations as they may by ordinance prescribe." The act requires the demand to be presented to the trustees to be audited, it is true; but the act authorizes them, also, to allow the demand. As the legislative body of the city they have more extensive powers in matters of demands against the city than ordinarily pertain to the duties of auditing committees of boards of

trustees. If, as was held in the *Bancroft* Case, and as we now hold, it was necessary to present the claim to the trustees before suit, and that the fact should appear in the complaint, it would seem to follow that, if plaintiffs wanted to excuse their noncompliance with this requirement, they should have alleged in their complaint that the trustees had made no regulations prescribing in what manner demands should be presented. This view of the point raised by defendant makes it unnecessary to further consider the case. The judgment and order should be reversed.

We concur: COOPER, C.; GRAY, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

120 Cal. 233

BERONIO et al. v. VENTURA COUNTY
LUMBER CO. (L. A. 638.)

(Supreme Court of California. July 19, 1900.)

QUIETING TITLE—BILL—SUFFICIENCY—FORECLOSURE OF MORTGAGE—DECREE—RES JUDICATA.

1. That a bill in a suit to quiet title asked the annulment of a sheriff's deed executed on a sale of the property under mortgage foreclosure did not render it demurrable as improperly uniting two causes of action, since the annulment of the deed was only a remedy incidental to the enforcement of plaintiff's right to the property, and did not in itself constitute a cause of action.

2. Where B. conveyed property in trust for plaintiff, and the conveyance was duly recorded, plaintiff's title was superior to that of a subsequent mortgagee from B.

3. Where plaintiffs claimed title to property superior to that of both mortgagor and mortgagee, and it did not appear that their title had been adjudicated in a foreclosure proceeding, the fact that they were made parties defendant in that proceeding did not estop them from asserting their title in a subsequent suit to quiet title.

4. An allegation in a mortgage foreclosure proceeding that defendants (plaintiffs in this suit) claim an interest in the property subsequent and subordinate to the mortgage did not present the issue of their claim of a prior and superior title to that of both mortgagor and mortgagee, and hence a finding that their title was subsequent, etc., did not amount to such an adjudication as to estop them from asserting such title in the present suit to quiet title.

Department 1. Appeal from superior court, Ventura county.

Suit to quiet title by Gaetano Beronio, Jr., and others, against the Ventura County Lumber Company. From a judgment in favor of defendant, plaintiffs appeal. Reversed.

Henning & Bowen, for appellants. Blackstock & Ewing, for respondent.

HARRISON, J. Suit to quiet title. The complaint sets forth that in the year 1884 Gaetano Beronio, Sr., was the owner of the land involved in the action, and built thereon a two-story brick building for the purpose of conducting therein a general merchandise store and hotel. He was at that time un-

married, and with his servants conducted said business and hotel until December 29, 1886, when he married, and thereafter, with his wife, continued to conduct said business, occupying a portion of the building with his family for that purpose. There were several other buildings upon the lot, separated from the hotel building, all of which were used in connection with the hotel business, but not as the dwelling of Beronio or of his family. February 3, 1887, he executed and acknowledged a declaration of homestead upon said lot, sufficient in form, and filed the same with the county recorder. January 10, 1891, he executed a deed of conveyance of said lot to Charles Ingalls, which was recorded in the office of the county recorder on the same day. This conveyance was intended for the benefit of the plaintiffs herein, and on June 4, 1892, Ingalls conveyed the lot to them by deed, which was recorded on the same day. April 13, 1892, Beronio, Sr., and his wife executed a mortgage of the lot to Roger McMenamin; and on December 13, 1896, Catherine Walsh, to whom this mortgage had been assigned, commenced an action for its foreclosure, in which these plaintiffs were named as defendants. In the complaint therein it was alleged that these plaintiffs claimed an interest in said mortgaged premises, and that their claim was subsequent and subordinate to said mortgage, and the court found and decreed in that action in accordance with this allegation. Under the judgment rendered therein the property was sold by the sheriff October 16, 1897, to Catherine Walsh, for the amount of the judgment and costs; and immediately thereafter she assigned the sheriff's certificate to the defendant herein, to whom on April 17, 1898, the sheriff executed a deed of conveyance. Upon these facts the plaintiffs ask that the sheriff's deed be adjudged void, and that their title to the premises be quieted against any claim of the defendant. The defendant demurred to the complaint upon the ground that it failed to state a cause of action, and also upon the ground that two causes of action had been improperly united therein, viz. an action to quiet the plaintiffs' title, and an action to have the sheriff's deed declared void. The demurrer was sustained by the court, and from the judgment entered in favor of the defendant the plaintiffs have appealed.

1. The complaint presents only a single cause of action, viz. the enforcement of the plaintiffs' right to the premises in question against the unlawful claim of the defendant thereto. As a portion of the remedy for the enforcement of that right, it seeks the annulment of the sheriff's deed, but a plaintiff may frequently be entitled to several species of remedy for the enforcement of a single right. Pom. Rem. § 459; *Hutchinson v. Answorth*, 73 Cal. 452, 15 Pac. 82; *McLennan v. McDonnell*, 73 Cal. 273, 20 Pac. 566.

2. Upon the authority of *Laughlin v. Wright*, 63 Cal. 113, affirmed in *McDowell v. His Creditors*, 103 Cal. 264, 35 Pac. 1031, the

declaration filed by Beronio did not have the effect to impress the property with any of the characteristics of a homestead. The conveyance by Beronio, without his wife uniting therein, had the effect, therefore, to transfer to Ingalls the title to the property, and, being of record at the date of the execution of the mortgage, was notice to the mortgagee that Beronio had already parted with his title thereto. Under the conveyance by Ingalls to the plaintiffs, they therefore took the property freed from the incumbrance of the mortgage, or of any title derived thereunder.

3. It is contended, however, on behalf of the defendant, that inasmuch as the plaintiffs herein were made parties defendant in the foreclosure suit, and the court decreed in that action that their rights and interests in the mortgaged premises were subsequent and subordinate to the mortgage, they are estopped from asserting any claim thereto adverse to the title derived by virtue of the sale under said judgment of foreclosure. In order that a judgment in one action may constitute an estoppel against the parties thereto in a subsequent action, it must be made to appear, either upon the face of the record or by extrinsic evidence, that the identical questions involved in the issues to be tried were determined in the former action. 1 Greenl. Ev. § 528; *Kerr v. Hays*, 35 N. Y. 331; *Cromwell v. Sac Co.*, 94 U. S. 351, 24 L. Ed. 195; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214; *Lillis v. Ditch Co.*, 95 Cal. 553, 30 Pac. 1108. "Every estoppel must be certain to every intent, and not to be taken by argument or inference." Co. Litt. 352b. "If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence." *Russell v. Place*, supra. By section 1908, subd. 2, Code Civ. Proc., the effect of a judgment is conclusive "in respect to the matter directly adjudged"; and by section 1911, "That only is deemed to have been adjudged in a former action which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto." The object of a suit for the foreclosure of a mortgage is to subject to a judicial sale, and vest in the purchaser thereunder, the same title or estate in the mortgaged property which the mortgagor had at the time of the execution of the mortgage, and the only proper or necessary parties defendant to such suit are the mortgagor, and those who claim an interest in the property derived subsequent to the date of the mortgage. Titles adverse to that of the mortgagor, or superior to that covered by the mortgage, are not proper subjects for determination in the suit. *Jones, Mortg.* § 1589; *Wilt. Forec.* §§ 191, 192; *McComb v. Spangler*, 71 Cal. 418, 12 Pac. 347. Whenever it is made to appear that the interest of a defendant is adverse or superior to that covered by the mortgage, the proper

action of the court is to dismiss him from the suit. *Ord v. Bartlett*, 83 Cal. 428, 23 Pac. 705; *Cody v. Bean*, 93 Cal. 578, 29 Pac. 223; *Hoppe v. Hoppe*, 104 Cal. 94, 37 Pac. 894. If, however, the plaintiff makes the holder of an adverse title a party defendant to the foreclosure suit, setting forth facts from which he claims that such title is subordinate to his mortgage, and issues upon these facts are presented for adjudication without objection on the part of the defendant, the judgment of the court thereon will not be void. The court may decline to pass upon the question, as not germane to the suit for foreclosure, or it may determine that such claim of the defendant is unfounded, or that his interest in the premises is subordinate to the mortgage, or it may render a decree of foreclosure, subject to the prior rights of such defendant. The subject-matter of such controversy will be within the jurisdiction of the court, and, if the parties thereto submit the controversy to its determination, the judgment thus rendered will be as conclusive upon them as if rendered in an action specially brought for that purpose, and will not be subject to collateral attack. *Helck v. Reinheimer*, 105 N. Y. 470, 12 N. E. 37; *Goebel v. Iffia*, 111 N. Y. 170, 18 N. E. 649; *Cromwell v. MacLean*, 123 N. Y. 474, 25 N. E. 932. Under the usual allegation in a complaint for foreclosure, that a defendant other than the mortgagor claims some interest in the premises, and that such interest is subsequent and subordinate to that created by the mortgage, any prior interest held by such defendant is not affected by the judgment therein. Such averment is not material to the plaintiffs' cause of action, nor is it an issuable fact; and whether the court rendered judgment upon the default of the defendant, or upon an issue created by a denial of this averment, without setting forth the character of his interest, any prior interest held by him is not affected by such judgment. *Lewis v. Smith*, 9 N. Y. 502; *Frost v. Koon*, 30 N. Y. 428; *Smith v. Roberts*, 91 N. Y. 470; *Payn v. Grant*, 23 Hun, 134; *Elder v. Spinks*, 53 Cal. 293; *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220. It does not appear that in the foreclosure suit there was any adjudication upon the title of the plaintiffs which is set forth in the complaint herein, or that their claim that their interest in the mortgaged premises is superior to that derived under the mortgage was submitted to that court for determination, or was determined by it. The allegation in the complaint therein that they claimed an interest in the mortgaged premises, and that this claim was subsequent and subordinate to said mortgage, did not present this issue for determination. The averment that their claim was "subordinate" to the mortgage was but a legal conclusion, and the allegation of fact upon which that conclusion depended—that the claim was subsequent to the mortgage—negated any claim that it was prior thereto. The answer of these plaintiffs was but a denial of these allegations, and their admis-

sion that they had an interest in said premises as purchasers was not only consistent with the allegations of the complaint and with the object of the foreclosure suit, but failed to present any issue upon a claim of title superior to that covered by the mortgage, or upon the validity of such title. No facts were alleged, either in the complaint or in their answer, by which an issue upon their title or claim was presented to the court or made a subject for its determination; and the oral statement of their attorneys to the court, and its finding and decree thereon that their claim and interest were "subsequent" and subordinate to said mortgage, is of no higher force than if made upon their default. The demurrer should therefore have been overruled. The judgment is reversed, and the superior court is directed to enter an order overruling the demurrer of the defendant, and giving to it a reasonable time within which to answer the complaint.

We concur: VAN DYKE, J.; GAROUTTE, J.

129 Cal. 277

LAST CHANCE WATER-DITCH CO. v.
EMIGRANT DITCH CO. (Sac. 636.)

(Supreme Court of California. July 20, 1900.)
DITCH COMPANIES—DIVERTING WATER—ACTION—PLACE OF TRIAL.

Where plaintiff owned a water ditch situate partly in the county of F. and partly in the county of K., its right to have water flow through it was coextensive with its right to the ditch; and hence an action to enjoin defendant from diverting the water was properly brought in K. county, though defendant resided in F. county, and the diversion also occurred in that county.

Department 1. Appeal from superior court, Kings county.

Action by the Last Chance Water-Ditch Company, a corporation, against the Emigrant Ditch Company, to enjoin defendant from diverting water from plaintiff's ditch. From an order denying a motion to change the place of trial, defendant appeals. Affirmed.

L. L. Cory and Stanton L. Carter, for appellant. Bradley & Farnsworth and Short & Irwin, for respondent.

HARRISON, J. Appeal from an order denying a motion to change the place of trial. Plaintiff is the proprietor of a water ditch situate partly in Fresno county and partly in Kings county, through and by means of which it takes and supplies to its stockholders water which it has appropriated from Kings river for the irrigation of their lands situated along the line of the ditch. In 1894 the defendant constructed a canal known as the "Fowler Switch Canal," about 32 miles above the head of the plaintiff's ditch, through which it diverted a certain quantity of water from Kings river, and afterwards constructed a dam in the channel of the river just below the head of

said canal, by means of which it has since April, 1898, diverted all the water flowing in the channel of the river at the head of the canal, and prevented the water from entering the plaintiff's ditch, and thereby deprived it of the water of the river to which it is entitled, and threatens to continue such diversion of the water. The plaintiff brought this action in the county of Kings to enjoin the defendant from thus interfering with the natural flow of the water. The defendant has its office and principal place of business in the county of Fresno, and the point at which the defendant constructed the dam and diverted the water from Kings river is also within the county of Fresno, and the water diverted by defendant was used for irrigating lands within the county of Fresno. Upon an affidavit setting forth these facts, the defendant moved the court to have the action transferred for trial to the county of Fresno. The motion was denied, and the defendant has appealed.

The case falls directly within the principles declared in *Lower Kings River Water-Ditch Co. v. Kings River & Fresno Canal Co.*, 60 Cal. 408, in which it was held that the plaintiff's right to have water flow in the ditch is coextensive with its right to the ditch, and that, although the act of diverting the water committed in Fresno county, it was an injury to that portion of its ditch which was in Tulare county, and that the action was properly brought in the latter county. In *Drinkhouse v. Waterworks*, 80 Cal. 308, 22 Pac. 252, it was held that a suit for an injunction to restrain the defendant from building a dam which when completed would permanently flood the plaintiff's land was a suit for an injury to real property, and under section 392, Code Civ. Proc., the county in which was situated the property that would be injured was the proper place for its trial, even though the action did not seek for damages. The right of the plaintiff to maintain the action without averring that it had already sustained any damage, or the amount thereof, is clear. *Moore v. Waterworks*, 68 Cal. 146, 8 Pac. 816. The order is affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

129 Cal. 258

PEOPLE v. PUTTMAN. (Cr. 590.)

(Supreme Court of California. July 19, 1900.)

HOMICIDE—TRIAL—CONTINUANCE—MOTION—AFFIDAVIT—POSTPONEMENT OF TRIAL—WITNESSES—CONDUCT OF PROSECUTING ATTORNEY—INSTRUCTIONS—APPEAL.

1. An affidavit for a continuance of a criminal case on the ground of absence of witnesses and lack of counsel, which failed to give the names of the witnesses, except one, who was stated to be a convict sentenced to be executed within 10 days, and, as to counsel, alleged only that defendant's mother was endeavoring to negotiate for the services of another attorney, 61 P.—61

but failed to show any diligence, was insufficient, and the motion was properly overruled.

2. Where it does not appear that defendant in a criminal case was prejudiced by the action of the court in overruling his motion for a postponement, such action will not be reversed on appeal.

3. Where, in a criminal case, the defendant made application to have certain convicts in the state prison brought to the place of trial to testify in his behalf, and the court granted the application as to part, and ordered the depositions of the others taken, defendant has no cause of complaint, since an order for the production of such witnesses does not issue as a matter of right.

4. It is permissible to ask a convict witness in a criminal case the nature of the felony of which he was convicted.

5. Where in a criminal case the court charged that certain statements of the prosecuting attorney which were outside the issues involved should be disregarded, and it did not appear that the improper remarks were such as to militate against a fair trial, error cannot be predicated thereon.

6. An instruction in a criminal case which, in substance, tells the jury that they are not to disregard the testimony of convict witnesses merely because they are convicts, but that they are to consider and weigh their testimony according to the rules of evidence, is not open to objection.

7. Where, in a prosecution for murder, there was no dispute as to the fact of the homicide, an instruction assuming the fact as true was not objectionable.

In bank. Appeal from superior court, Sacramento county.

George Puttman was convicted of murder, and he appeals. Affirmed.

F. S. Sprague, S. S. Holl, and E. C. Harrison, for appellant. Atty. Gen. Ford, for the State.

VAN DYKE, J. Defendant was informed against by the district attorney of Sacramento county for the crime of murder, and was tried and convicted of murder in the first degree. He thereupon moved for a new trial, which was denied, and he was sentenced to death by hanging. From the judgment and order overruling his motion for a new trial, the defendant prosecutes this appeal.

The evidence discloses that the defendant was a convict in the state prison at Folsom; that on May 15, 1899, within the prison walls, defendant walked past a fellow convict named Showers, who was sitting on a doorstep, wheeled around, grasped Showers by the chin with his left hand, pulled his head around, and stabbed him six times with a knife, from the effects of which Showers died in a few minutes thereafter.

The first point made on the part of the appellant is that the court erred in overruling the defendant's motion for a continuance of the trial. The motion is based on affidavits of one of defendant's counsel. Pretty much everything stated in the affidavit was upon information and belief. The grounds for a continuance were: First, absence of witnesses; and second, lack of sufficient counsel. The names of the witnesses, except as to one Abe Majors, are not given; and it is stated that said Majors was a convict, and

to be executed within 10 days from the date of the affidavit, and his testimony was sought to be procured for the purpose of refuting an anticipated theory of the prosecution. There was no showing of diligence in the affidavit, nor that the continuance was not sought for mere delay. With reference to obtaining additional counsel, the affidavit sets forth that defendant's mother was endeavoring to negotiate for the services of an attorney other than the two appointed by the court to defend the appellant. The affidavit was clearly insufficient on both of the grounds, and it was not an abuse of discretion on the part of the trial court to deny the motion. Besides, it appears that the defendant was zealously and ably defended by the counsel who represented him, and was allowed an opportunity to, and did, procure the attendance of witnesses. The cause was set down for trial on June 5, 1899, and prior thereto the court permitted the defendant to withdraw his plea of not guilty, in order to file an objection to the sufficiency of the information. The court having overruled the objection to the sufficiency of the information, and the defendant having again entered his plea of not guilty, he moved the court to continue the cause to some other date than the 5th of June, which motion was denied, and this is assigned as error. It is not shown, nor does it appear, that the defendant was prejudiced in any way by the ruling of the court in refusing to postpone the trial, and it is apparent that he was not so prejudiced.

The defendant made application to have 13 convicts, some of them under sentence of death, and confined in the state prison at Folsom, brought to Sacramento to testify in his behalf. Upon the showing made, the court granted the application as to 6 of the parties mentioned in the affidavit, and ordered that the depositions of the other 7 be taken at the prison. This question was fully considered in *Willard v. Superior Court*, 82 Cal. 456, 22 Pac. 1120. It was there held that the order for the production of such witnesses does not issue as a matter of right. It issues only when it appears to the satisfaction of the trial court that the witness is necessary. The statute has lodged in that court the right to determine whether the witness is necessary. In the concurring opinion of Chief Justice Beatty he says: "I feel very sure, however, that it does not mean, and that it never was intended, that on the mere demand of a defendant in a criminal action, any convict, or any number of convicts, must be transported from the state prison to the place of trial, as an essential prerequisite to proceeding with the trial. It is not possible that the court or judge to whom application is made has no discretion to examine the sufficiency of the grounds upon which it is based, and to deny it if in his opinion it ought to be denied." In *People v. Willard*, 92 Cal. 486, 28 Pac. 587, in reference to this same matter, it is said: "We feel that this is a privilege extended to persons accused of

crime which is capable of gross abuse unless strictly guarded, and we do not wish to be understood as holding that the order should be made except upon a very strict showing, and upon previous notice to the state of the application; but when such notice has been given, and a case of apparent necessity is made out, or, in other words, when the materiality of the evidence and its importance are clearly and satisfactorily shown, and the good faith of the defendant making the application also appears, the court should, in the exercise of its discretion, make the order for the attendance of the prisoner as a witness." In the case under consideration it is quite apparent that the action of the court was not at all prejudicial, inasmuch as the defendant was allowed to take the depositions of the witnesses named who were not ordered produced at the trial, thereby giving him the benefit of the testimony of all of those named in his application.

Under the rule laid down in this court in *People v. Chin Hane*, 106 Cal. 607, 41 Pac. 697, it is permissible to ask a witness the nature of the felony of which he has been convicted. Although an objection to such a question asked by the defense of the witness James was sustained, yet the witness answered the question, and the answer was not stricken out. Therefore the defendant was not injured by the ruling. The same may be said in reference to the question asked of the witness Rodgers.

Error is assigned in reference to the remarks made by the district attorney in his argument to the jury. Possibly some of the matters touched upon by the district attorney may be said to be outside of the issues, but the court instructed the jury specially not to regard any of the statements that were objected to by the defendant. Counsel's conduct must reach a course of proceeding militating against justice and the fair and orderly conduct which should characterize a judicial proceeding in criminal cases, before error can be predicated on it. *People v. Ward*, 105 Cal. 340, 38 Pac. 945; *Same v. Wong Chuey*, 117 Cal. 630, 49 Pac. 833.

Error is assigned as to an instruction given in reference to convict testimony, and it is contended by appellant's counsel that the instruction in effect told the jury that they were to disregard the fact that certain witnesses had been convicted of a felony, in weighing their testimony. The instruction will not bear the interpretation put upon it by appellant. It was, in substance, that the jury were not to arbitrarily reject the testimony of the convict witnesses simply because they were convicts, but that their testimony should be considered and weighed in accordance with the rules of evidence.

Error is assigned in the giving of certain charges by the court at the request of the prosecution, on the ground that such charges are in respect to matters of fact, and are therefore prohibited by the constitution (section 17, art. 6). An instruction which as-

sumes a fact as proved will not warrant a reversal, if the fact is admitted, or there is no shadow of conflict of evidence with respect to it. The matter of fact referred to by the trial court here was the commission of the homicide, about which there seems to have been no dispute or question at the time the instructions were given. *People v. Messersmith*, 61 Cal. 249; *Same v. Phillips*, 70 Cal. 61, 11 Pac. 493; *Same v. Lee Sare Bo*, 72 Cal. 623, 14 Pac. 310.

The court did not err in refusing at the defendant's request to give certain instructions with reference to a preponderance of evidence. Other instructions bearing upon that question, free from the objections of defendant's instructions, were given.

An examination of the record shows that the instructions as a whole, as well as the entire course of the trial, were as fair and favorable to the defendant as the case would justify. Judgment and order affirmed.

We concur: MCFARLAND, J.; HARRISON, J.; GAROUTTE, J.

(129 Cal. 194)

WHITEHURST v. STUART. (S. F. 1,348.)¹
(Supreme Court of California. July 18, 1900.)

CORPORATIONS — ACTIONS AGAINST STOCKHOLDER — JUDGMENT BY DEFAULT — COMPLAINT — SUFFICIENCY.

A complaint to enforce a stockholder's liability set forth the existence of the corporation and its capital stock, and alleged that the corporation, for value received, executed the note set forth in the complaint, which was due and unpaid, and that, during the time said debts and liabilities of the corporation were contracted, defendant was a stockholder (giving the number of shares of stock held by him). *Held*, that the allegations of the complaint were sufficient to support a judgment by default, as against the objection that it did not allege when the indebtedness for which the notes were given was incurred, which was waived by failure to demur.

Department 1. Appeal from superior court, Santa Clara county.

Action by one Whitehurst against one Stuart. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

C. D. Wright, for appellant. E. E. Cottrill, for respondent.

HARRISON, J. The plaintiff seeks by this action to recover from the defendant, as a stockholder in the Standard Gold & Silver Mining Company, a corporation, a certain sum of money, as and for his proportion of the indebtedness of the corporation. Judgment by default for the amount claimed was entered against the defendant, and he has appealed therefrom upon the ground that the complaint fails to state a cause of action against him.

The complaint sets forth the existence of the corporation and the amount of its capital stock, and also sets forth certain promissory notes transferred to the plaintiff, which

are alleged to have been executed by the corporation and to be past maturity and unpaid. It alleges that on certain days (naming them) "said corporation, for value received, by its officers and agents duly authorized and empowered thereto," made the promissory notes thus set forth. It also alleges "that at and during the times said debts and liabilities were contracted and incurred, the defendant was a stockholder in said corporation" (giving the number of shares of stock held by him), and asks for judgment for \$490, which is alleged to be the "proportion of said indebtedness for which the defendant is liable to the plaintiff." The objections to the complaint urged by the appellant are that it does not appear therefrom that the original indebtedness of the corporation was created at the times when the notes were executed, and that the notes may have been given for an indebtedness created prior to the time when the defendant became a stockholder in the corporation. It may be conceded that the complaint is open to the objection of uncertainty, in failing to allege with definiteness the times when the corporation incurred the indebtedness for which the notes were given, and, if a special demurrer had been interposed upon that ground, it should have been sustained; but this objection was waived by failing to so present it. The allegation that, "at the times said debts and liabilities were contracted and incurred, defendant was a stockholder in said corporation," is an inferential averment that the debts and liabilities of the corporation represented by the promissory notes were contracted and incurred while the defendant was a stockholder therein to the amount alleged. This is a defective statement of a material fact, and for that reason was subject to special demurrer, but it cannot be held that there is an entire absence of an allegation of such fact. If this objection had been made, it might have been cured by an amendment to the complaint. *Hill v. Haskin*, 51 Cal. 175; *Oushing v. Pires*, 124 Cal. 663, 57 Pac. 572. The corporation incurred a liability at the times when the notes were given, and its indebtedness may have been incurred at those times. *Knowles v. Sandercock*, 107 Cal. 629, 40 Pac. 1047; *Plow Works v. Montgomery*, 115 Cal. 380, 47 Pac. 108. Under a general denial to a complaint in this form, evidence in support of this fact, if received without objection, as well as a finding thereon, would be sufficiently within the issues to support a judgment in favor of the plaintiff. The same result follows a judgment rendered upon a default of the defendant by reason of his failure to appear and answer the complaint. The subsequent averment of "the proportion of said indebtedness for which the defendant is liable to the plaintiff" indicates that the pleader was seeking to establish the liability of the defendant for his proportion of the indebtedness of the corporation repre-

¹ Rehearing denied August 17, 1900.

sented by the notes, and not a recovery upon the promissory notes. The judgment is affirmed.

We concur: VAN DYKE, J.; GAROUTTE, J.

132 Cal. 666

In re MARTI'S ESTATE. (S. F. 1,872.)
(Supreme Court of California. July 19, 1900.)

WILLS—DEVISE—PRECATORY WORDS—INSTRUCTIONS.

Where testator devised all his property, both real and personal, to his wife, with power to sell, lease, and manage the business without order of the court, and in a subsequent and independent paragraph stated that it was his desire that his wife, on her death, should devise to his relatives one-half of the property which she received under his will, the wife was entitled to the entire estate, free from any limitations or trust in favor of testator's relatives.

Department 1. Appeal from superior court, Sonoma county.

Proceedings for the distribution of the estate of Melchoir Marti, deceased, and for the construction of his will. From a decree distributing the estate, Elizabeth J. Marti appeals. Reversed.

Lippitt & Lippitt, for appellant. Stanley, McKinstry, Bradley & McKinstry, for respondents.

HARRISON, J. This appeal is from the decree of distribution in the above estate, and involves the construction of the will of the decedent. The will, after a bequest of certain personal property, contains the following provisions: "Secondly, I give and bequeath to my wife, Elizabeth Jenny Marti, all the other property, real and personal, and wherever situated, of which I may die possessed [giving a description thereof]. I appoint my wife as executrix of this my last will and testament, to serve without bonds, with full power of disposition, and to manage the business, to sell, to lease, and manage the property without order of the court or interference whatever. Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives." The decedent left a surviving widow, the appellant herein, and three nieces, children of a deceased sister, who are the respondents. The property involved was the community property of the deceased and the appellant, and she has elected to take under the will. The superior court, after providing for the legacy of personal property, distributed the residue of the property to the widow, as follows: "The undivided one-half thereof in fee absolute; and the remaining one-half for and during the term of her natural life, with the remainder in fee of all said property, real and personal, to his (Melchoir Marti's) relatives living at the time of the death of the said Elizabeth J. Marti." The appellant contends that under the terms of the will she is entitled to the entire residue of the estate,

as absolute owner, while the respondents claim that the testator has provided that one-half of his estate shall belong at her death to those who would then be his heirs at law, and that the appellant is entitled to only a life estate in that half of the property. The testator does not himself make direct disposition of any portion of his estate to his relatives, but, after giving the whole thereof to his wife, in the latter part of his will expresses his desire with reference to her testamentary disposition of the property which he had already bequeathed to her. Section 1321, Civ. Code, has, therefore, no application, inasmuch as this latter part of the will is not irreconcilable with the other parts. The contention of the respondents is that a proper construction of the will makes the appellant a trustee of one-half of the residue of the estate for those who upon her death would be the heirs at law of the testator. The will does not contain any direct words of trust, but it is claimed that the precatory words used by the testator in expressing his desire that she should devise it to them create an implied trust which can be enforced against her.

The cardinal rule for the construction of all wills is to ascertain the intention of the testator, and this intention is to be ascertained from the words of his will, taking into view, when necessary or appropriate, the circumstances under which it was made. Civ. Code, § 1318. Precatory words may or may not create a trust, according as they are used, and whether in any particular will they have been used for this purpose will depend upon the construction to be given to that will. The question for determination is whether the devisee or legatee is the beneficiary, or merely a trustee for others of the gift bestowed upon him,—whether the wish or desire or recommendation that is expressed by the testator is meant to govern the conduct of the party to whom it is addressed, or whether it is merely an indication of that which he thinks would be a reasonable exercise of the discretion of that party, leaving it, however, to the party to exercise his own discretion. *Williams v. Williams*, 1 Sim. (N. S.) 358. In order to make him a trustee, it must appear that the testator intended to impose an imperative obligation upon him, and for that purpose has used words which exclude the exercise of discretion or option in reference to the act in question. *Briggs v. Penny*, 3 Macn. & G. 546. Mr. Bispham says (Eq. § 71): "The English rule now is that precatory words are not to be regarded as imperative unless it is plain from the context that the testator so intended them." "When property is given absolutely and without restriction, a trust is not to be lightly imposed, upon mere words of recommendation and confidence." *Hess v. Singler*, 114 Mass. 56. What precatory words annexed to a bequest or devise will create a trust in reference to the property bequeathed or devised has been the sub-

ject of frequent discussion in the construction of wills, and it is impossible to harmonize the several decisions upon the subject. Upon this proposition, more perhaps than upon any other, may it be said that the decision in any one case cannot be taken as a precedent for another, but is available only to illustrate the application of the general rules for the construction of wills. Mr. Pomeroy says (Eq. Jur. § 1016), "Each case must turn upon its own circumstances, and not a little upon the sentiments and prepossessions of individual judges." In the earlier cases in England, and also in this country, where those cases were followed, very slight terms were held sufficient to create such a trust; but in the later cases in England, as well as in this country, with the exception, perhaps, of New Jersey, a different rule has been followed. Mr. Redfield says (2 Redf. Am. Cas. Wills, *413) that the doctrine of the early cases is constantly disregarded, and that the inclination of the later cases is to follow the natural import of the words used. In *Re Diggles*, and *Gregory v. Edmondson*, 39 Ch. Div. 253, it was said by Cotton, L. J.: "No doubt, in the old cases slight expressions were laid hold of to create a trust, but the recent authorities have gone the other way. I adhere to what I said in *Re Adams*, and *The Kensington Vestry*, 27 Ch. Div. 394: 'Having regard to the later decisions, we must not extend the old cases in any way, or rely upon the mere use of any particular words, but, considering all the words which are used, we have to see what is their true effect, and what was the intention of the testator, as expressed in his will.'" See, also, *Bank v. Raynor*, 7 App. Cas. 321; *Foose v. Whitmore*, 82 N. Y. 405; *Hess v. Singler*, supra; *Story*, Eq. Jur. § 1069. If the testator accompanies his bequest with a desire on his part that it shall be applied in a certain way, or for the benefit of another than the legatee, either by coupling the same as a directing clause in the sentence by which the bequest is made, or by specific reference thereto, there is a clear manifestation that it was his intention that such disposition should be made of the property given to the legatee. In such a case a duty or obligation towards the other is imposed upon the legatee as a consideration for the gift. His acceptance of the property is upon the condition that he will comply with the direction or request of the testator, and he will be held as a trustee for that purpose. *Knox v. Knox*, 59 Wis. 172, 18 N. W. 155; *Warner v. Bates*, 98 Mass. 274; *Eddy v. Hartshorne*, 34 N. J. Eq. 419; *Campbell v. Beaumont*, 91 N. Y. 464; *Colton v. Colton*, 127 U. S. 300, 8 Sup. Ct. 1104, 32 L. Ed. 138. But we have not been cited to any case in which it has been determined that a legacy or devise which the testator in one portion of his will has given in absolute terms is held in trust by reason of words of request or desire contained in a subsequent and independent clause of the will. In *Colton v. Colton*, cited by the respond-

ents, and in some other cases, the words by virtue of which it was held that the trust was created were not, it is true, a portion of the sentence creating the gift, but, as they followed immediately thereafter, they accompanied the gift as fully as though joined with it by a connecting word. The court in its opinion places stress upon the fact that the bequest to the wife was "immediately followed" by these words, and that they were "in direct connection" with the gift. It is also to be observed that in that case the intention of the testator was derived from a comparison of other clauses in the will, and also in view of the circumstances under which the will was made,—the situation of the testator, the property involved in the gift to his wife, the circumstances of those for whom the bequest was made, and the relation between them and the testator,—while in the present case there are no surrounding circumstances to be considered, and the intention of the testator is to be drawn from the language used in the will.

The precatory words in the present will are, "Upon the death of my wife, I desire that one-half of the property bequeathed to her shall be devised by her to my relatives." These words stand in the will in a paragraph separate from that by which the property is given to the wife, and there is nothing in the context or in any other part of the will which throws any light upon the intention with which the words were used. The words themselves fall far short of a command or a direction, and are, rather, in the nature of an expression of the testator's feelings, and a suggestion or recommendation to be considered by her in making a testamentary disposition of her estate, or as a reason to influence her therein. While the desire of a testator for the disposition of his estate will be construed as a command when addressed to his executor, it will not when addressed to his legatee be construed as a limitation upon the estate or interest which he has given to him in absolute terms. "The words of a will are to be taken in their ordinary and grammatical sense, unless a clear intention to use them in another sense can be collected, and that other can be ascertained." Civ. Code, § 1324. "Prima facie a mere request, or an expression of hope or confidence or expectation, does not import a command." Bisp. Eq. § 71. According to the ordinary use of the English language, the word "desire" does not import a trust or charge. In *re Diggles*, supra. See, also, to the same effect, *In re Pennock's Estate*, 20 Pa. St. 268; *Hopkins v. Glunt*, 111 Pa. St. 287, 2 Atl. 183; *In re Bellas' Estate*, 176 Pa. St. 122, 34 Atl. 1003; *Batchelor v. Macon*, 69 N. C. 545; *Bills v. Bills*, 80 Iowa, 269, 45 N. W. 748; *Hess v. Singler*, 114 Mass. 56; *Shaw v. Lawless*, 5 Clark & F. 120; *In re Hutchinson*, 8 Ch. Div. 540; *In re Adams and The Kensington Vestry*, 27 Ch. Div. 394, 410. This question has been very fully considered in a recent case in England (*Williams v. Wil-*

Hams [1897] 2 Ch. 12), in which it was held that, where the testator gave his residuary estate to his wife "in the fullest trust and confidence that she will carry out my wishes" in certain particulars, the wife took the estate absolutely and free from any condition or trust; Lindley, L. J., saying, "Unless it appears from the whole will that an obligation was intended to be imposed, no obligation will be held to exist." See, also, *Hill v. Hill* [1897] 1 Q. B. 483; *In re Hamilton* [1895] 2 Ch. Div. 370, 12 Rep. 355. The testator had by a previous clause in his will given and bequeathed to his wife "all the other property, real and personal, and wherever situated, of which I may die possessed." This gift is explicit, and without any words of limitation or qualification. Considered by themselves, they create in her an absolute estate in the property given by him. The authorities all agree that, when an absolute estate has been conveyed in one clause of a will, it will not be cut down or limited by subsequent words, except such as indicate as clear an intention therefor as was shown by the words creating the estate. Words which merely raise a doubt or suggest an inference will not affect the estate thus conveyed, and any doubt which may be suggested by reason of such subsequent words must be resolved in favor of the estate first conveyed. This rule of construction controls the rule that an interest given in one clause of a will may be qualified or limited by a subsequent clause. *Thornhill v. Hall*, 2 Clark & F. 36; *Hess v. Singler*, 114 Mass. 56; *Clarke v. Leupp*, 88 N. Y. 228; *Freeman v. Colt*, 96 N. Y. 63; *Clay v. Wood*, 153 N. Y. 134, 47 N. E. 274; *Fullenwider v. Watson*, 113 Ind. 18, 14 N. E. 571; The rule has been formulated in this state in section 1322, Civ. Code, which declares that a clear and distinct devise or bequest cannot be affected by any other words not equally clear and distinct, or by inference or argument from other parts of the will.

Upon the foregoing considerations, it must be held that the appellant is entitled to the entire residue of the estate of her husband, free from any limitation or trust. The judgment is reversed, and the superior court is directed to enter a decree distributing the entire residue of the estate to the appellant.

We concur: VAN DYKE, J.; GAROUTTE, J.

(9 Kan.App. 877)

SMITH et al. v. PARRY MFG. CO.

(Court of Appeals of Kansas, Southern Department, C. D. Aug. 3, 1900.)

DEMURRER TO EVIDENCE—DEPOSITIONS.

1. The record examined. *Held*, that the action of the trial court in overruling the demurrer to the plaintiff's evidence finds support in the proven facts.

2. Depositions of two of the defendants, taken in another action, to which they were parties, and the plaintiff not a party, were introduced and read as admissions of such defendants, notwithstanding they were called as wit-

nesses at the trial. *Held* not error. *Moore v. Brown*, 23 Kan. 270.

(Syllabus by the Court.)

Error from district court, Cowley county; J. A. Burnette, Judge.

Action by the Parry Manufacturing Company against Walt Tels Smith, trustee, and others. Judgment for plaintiff. Defendants bring error. *Affirmed*.

Pollock & Lafferty, for plaintiffs in error. J. E. Torrance, for defendant in error.

MILTON, J. The defendant in error obtained a judgment against the plaintiffs in error, setting aside a mortgage executed by G. J. Ferguson, conveying to Walt T. Smith, as trustee for the Pekin Plow Company and T. & H. Smith & Co., two Illinois corporations, a fractional 80-acre tract of land in Cowley county, to secure the payment of two promissory notes, aggregating \$1,111.41, made by Ferguson, and delivered by him to Smith as trustee,—the payee therein. Ferguson was indebted to the plaintiff herein at and prior to the time the said mortgage and notes were given, and thereafter judgment was obtained by the plaintiff against Ferguson upon that indebtedness. In the present action the plaintiff sought to set aside the said mortgage on the ground that the same was given and received for the purpose of hindering, delaying, and defrauding the creditors of the said Ferguson; the petition alleging that he was not in any wise indebted to the corporations represented by Smith as trustee. The defendants demurred to the evidence introduced by the plaintiff, and, the demurrer being overruled, they declined to introduce any evidence. The court thereupon, over the objection of the defendants, made findings of fact and conclusions of law, and entered judgment in favor of the plaintiff in accordance with the prayer of the petition.

A careful examination of the record leads to the conclusion that the action of the trial court in overruling the demurrer to the evidence and in entering judgment for the plaintiff finds sufficient support in the facts proven. We think the conduct of the defendants, who procured and received the mortgage, which secured an indebtedness greater, by more than 40 per cent., than that actually due them from the mortgagor, needed other and further explanation than that appearing in the record.

On the trial the plaintiff, over the objection of the defendants, was permitted to identify and introduce in evidence the depositions of the defendants Ferguson and Walt T. Smith, which were taken in an action wherein O. A. Pratt was plaintiff and the defendants in the present action were parties defendant, notwithstanding the fact that Ferguson and Smith were present in court, and were called as witnesses by the plaintiff. The depositions were part of the files of the court, and were properly identified as such by the clerk. They were also identified by the deponents

themselves. The depositions were offered and read as the written admissions of the defendants Ferguson and Smith. It was not error to permit them to be read in evidence. *Moore v. Brown*, 23 Kan. 270.

As to the introduction of the files in the Pratt case, we hold that the error, if any, was immaterial, since such files did not tend to prove any issue in the present case, and seemingly contained nothing detrimental to the interests of the defendant. The judgment of the district court is affirmed.

(9 Kan.App. 871)

MADISON TP., GREENWOOD COUNTY, v. SCOTT.

(Court of Appeals of Kansas, Southern Department, C. D. July 31, 1900.)

HIGHWAYS — ESTABLISHMENT — EVIDENCE — DEFECTS—KNOWLEDGE.

1. Evidence that a road has been used and traveled by the public, and kept in repair by the road overseer of the district in which it is located, is sufficient, *prima facie*, to establish the existence of such road as a public highway.

2. Actual knowledge on the part of a township trustee of a patent defect in a public highway located in his township is sufficient to satisfy the requirement of section 48, c. 42, Gen. St. 1897, relating to notice.

3. In an action against a township to recover damages for the death of plaintiff's husband, alleged to have been caused by the defective and dangerous condition of a public highway in said township, it is competent for plaintiff to show that, while the highway was in the same condition, accidents similar to that which caused the death of her husband occurred at the same place.

(Syllabus by the Court.)

Error from district court, Greenwood county; C. W. Shinn, Judge.

Action by Augustine Scott against the township of Madison, Greenwood county. Judgment for plaintiff. Defendant brings error. Affirmed.

Madden Bros., for plaintiff in error. J. B. Clogston and Lew E. Clogston, for defendant in error.

SCHOONOVER, J. Augustine Scott brought this action against the township of Madison, Greenwood county, Kan., to recover damages for the death of her husband, Jacob S. Scott. In her petition, Mrs. Scott alleges: "That on or about the 1st day of July, 1893, said Jacob S. Scott, while traveling upon the public highway (the same being the public road running east and west in said township of Madison, and the same being open and usually and ordinarily traveled by the public as a public highway), * * * while returning from the city of Madison to his home with a horse and cart, traveling in the usual and ordinary manner, the wheel of said cart did strike an obstruction in said public highway, causing a great jerk and jar, by which said Jacob S. Scott was thrown from said cart to the ground, and received great bodily harm and injury, par-

ticularly to his head, neck, and spine, and did bruise and lacerate his head, face, and back, causing a very painful and dangerous injury, from which said injury said Jacob S. Scott did linger a few hours, and from said injury and the effects thereof did die. Plaintiff further represents that the said township of Madison did, at the time of the opening of said road, leave standing in said roadway, at the place where said above injury occurred, a line of stumps and stubs, ranging from six to ten inches high. Said line of stumps were left and remained standing from the time said road was opened up, and until after the injury to said Jacob S. Scott, and his death thereafter. * * * That the trustee and other officers of said township had full knowledge of the conditions of said road, and had had said knowledge ever since said road had been opened up to public travel, and had full knowledge of the dangerous condition up to and at the time of the death of said Jacob S. Scott as aforesaid." Defendant answered by a general denial, and also alleged contributory negligence on the part of Mr. Scott; but the second ground of defense was, by permission of the court, dismissed before going to trial. The case was tried to a jury, which returned a verdict for Mrs. Scott, together with special findings of fact. Judgment was entered upon the verdict, and the township brings the case here.

The first error complained of by plaintiff in error is the overruling by the trial court of defendant's demurrer to plaintiff's evidence. It is contended that the evidence did not show that the road upon which Mr. Scott was injured was a public highway. Several of plaintiff's witnesses testified that the road had been traveled by the public for 18 or 19 years, or even longer, and that the road overseer of the road district in which the road was located had done public work upon it whenever needed. This was sufficient *prima facie*, to establish the existence of a public highway, and the court did not err in permitting plaintiff's evidence to go to the jury. 15 Am. & Eng. Enc. Law (2d Ed.) 353; *Logan Co. v. People* (Ill. Sup.) 6 N. E. 475; *Brown v. Jefferson Co.*, 16 Iowa, 339; *State v. Auchard* (Mont.) 55 Pac. 361. Plaintiff in error urges that the evidence did not show that the road was in Madison township, or that it was connected with any public highway. Many witnesses testified that they used the road in going to and from the town of Madison, and that it was the only road which they could so use. This evidence would be sufficient to support an inference that the road connected at one end, at least, with some public highway. It is true that plaintiff failed to show that the road in question was in Madison township, but proof of such fact was supplied by defendant. Dan Blakeley, one of defendant's witnesses, testified that he lived in Madison township, and that his place was on the north side of

the road, about 100 yards from the line of stumps which plaintiff alleges caused the accident to Mr. Scott. F. A. Abshire, another one of defendant's witnesses, testified that he lived in Madison township, one-half mile directly south of the piece of road near Mr. Blakeley's house. This evidence located the road in Madison township, and supplied the deficiency in plaintiff's case. The error in overruling the demurrer to plaintiff's evidence was therefore immaterial, so far as this question is concerned. *Railway Co. v. Cross*, 58 Kan. 424, 49 Pac. 599.

It is next contended that it was not shown that the trustee of Madison township had such notice of the defective condition of the highway as is required by 1 Gen. St. 1897, p. 490, § 48. J. W. Maxfield, who was trustee of Madison township at the time the accident occurred, testified as follows: "Q. You may tell the jury whether or not at that time, and before that injury, you had knowledge that there was a line of hedge-fence stumps across the road there. A. I had knowledge that there had been a hedge cut out there. Q. And that the stumps were standing across the road? A. Well, there wasn't much stumps. Q. Whatever stumps there were? A. The ground had worn away a little. Q. I didn't ask you that. I asked you if you knew of the fact that the stumps from that hedge fence were standing in the road. A. Yes; the stubs where the hedge had been cut off. Q. How long had you known that fact before the injury? A. Ever since they were cut off. Q. Ever since they were cut off. And about how long had you known that fact? A. They were cut off in '91 or '92." The accident to Mr. Scott occurred in 1893, and it appears that the trustee must have known that the road was in a defective condition for several months, at least. The testimony of several witnesses was to the effect that the stumps were six or eight inches high. Others testified that they were from three to six inches high, and from eight inches to one foot apart. We think that the record clearly shows that the township trustee had actual notice of the defective condition of the highway. Plaintiff in error cites the case of *McFarland v. Emporia Tp.*, 59 Kan. 568, 53 Pac. 864, in support of its contention that the township trustee did not have such notice of the defective condition of the highway as is required by the statute. We have examined the case, and find it not applicable to the facts in this case. In that case the defect was not a patent defect. There was nothing to show that the trustee had actual knowledge that a certain fence erected along a river's bank was not a sufficient barrier to have prevented a team of horses from being driven over the bank. The fence, apparently, was a sufficient barrier, and the attention of the trustee was not directly challenged to its insufficiency. We

do not think that it would be seriously contended that a county could escape liability for an injury caused by a defective county bridge,—as, for instance, if a number of boards were missing from the floor of such bridge,—and it were shown that for several months the chairman of the board of county commissioners had actual knowledge that such defect existed. The row of stumps extending across the road constituted a patent defect, almost as surely as would boards missing from the floor of a bridge. The statutes of this state are to be construed liberally, with a view to promote their object; and certainly we would not be placing a liberal construction upon the statute under which this action was brought, if we were to hold that it required anything to be done which was absolutely useless and unnecessary. The evidence clearly shows that the trustee had actual knowledge of a patent defect, and this we hold to be sufficient to satisfy the requirement of the statute.

It is also contended that the court erred in permitting evidence of other accidents occurring at the same place to go to the jury. In the case of *City of Topeka v. Sherwood*, 39 Kan. 600, 18 Pac. 933, it was held that, "in an action against a city to recover damages for injuries received from a fall on a defective sidewalk, it is competent for plaintiff to show that while the walk was in the same condition similar accidents occurred at the same place." The testimony shows that for several years the stumps had been standing in the road, and that the soil continued to wear away from them, so that naturally they became more and more of an obstruction as time went by. We think that the evidence was clearly admissible. See, also, the cases cited in case of *City of Topeka v. Sherwood*, supra.

Plaintiff in error further contends that the court erred in refusing to admit evidence to show that, at the time the accident occurred, Mr. Scott was driving a wild and unmanageable horse. This evidence appears to have been offered for the purpose of proving that the proximate cause of the accident was the vicious disposition of the horse. The special findings of the jury show that the error, if any, was immaterial. In answer to the question, "Did the horse get beyond Scott's control before he reached the place where he was injured?" the jury responded, "No." This answer was supported by the evidence of two witnesses who testified that, at the time the wheels of the cart in which Mr. Scott was riding struck the stumps, the horse was going in a jog trot,—about eight miles an hour.

Plaintiff in error also complains of a certain instruction of the court, but the special findings clearly show that the error, if any, was not prejudicial. No error appearing in the record, the judgment of the district court will be affirmed.

(10 Kan.App. 48)

SWIFT & CO. v. HOBLAWETZ.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

LIMITATIONS—DISMISSAL OF FIRST ACTION—REMOVAL OF CAUSE.

1. We adhere to our construction of section 23 of the Code (Gen. St. 1889), that its provisions apply to an action which has failed otherwise than upon its merits, although the time limited by the statute in the first instance had not expired at the time of such failure.

2. The removal of a case from the state to the federal court does not so invest the federal court with jurisdiction of the subject-matter as to preclude the plaintiff from again suing upon the same cause of action in the state court.

(Syllabus by the Court.)

Error from court of common pleas, Wyandotte county; W. G. Holt, Judge.

Action by Mary F. Hoblawetz against Swift & Co. Judgment for plaintiff. Defendant brings error. Affirmed.

Amos H. Kagy and Hutchings & Keplinger, for plaintiff in error. T. P. Anderson and Getty & Hutchings, for defendant in error.

MAHAN, P. J. Defendant in error began this suit to recover damages on account of the death of her husband, which she says was occasioned by the negligent conduct of plaintiff in error while her husband was in their employment about their packing house. Joseph Hoblawetz, her husband, lost his life in the fire of August 6, 1896, which caused the injury to Henry Creasy, whose case was before this court upon petition in error of Swift & Co. The plaintiff herein charges in her petition nine different acts of negligence. The first is that Swift & Co. failed to have steam pipes constructed, accessible to each of the smoking rooms, so that steam could be turned upon the fire to extinguish it. The second is in failing to have an efficient method of extinguishing fire in its smoke rooms. The third is in failing to advise its employes of the danger of throwing large quantities of water directly upon the fire when one occurred in the smoke rooms. The fourth is in failing to instruct its employes to prevent other persons from throwing water upon such fires. The fifth is in not having employes who were properly informed of the method of extinguishing such fires. The sixth is in not having safe and proper means of egress for its employes from the room in which Hoblawetz was killed. The seventh is in instructing defendant's smoker to rush the smoking in room 15, wherein the fire occurred. The eighth is in rushing the smoking therein in such a negligent manner as to cause the meat to take fire. The ninth is in ordering defendant's employes to turn the water on the fire. The answer is a general denial, a plea of another action pending, contributory negligence, the assumption by Hoblawetz of the risk as being incident to the service in which he was employed, and that his death was due

to the negligent act of a fellow servant. There was a trial to a jury, and a verdict and judgment for the plaintiff.

The first assignment of error is that the court overruled an objection to the introduction of evidence for the reason that it was disclosed by the petition that the cause of action therein stated was barred by the two-years statute of limitations. The plaintiff began her action in December, 1896, which was dismissed without prejudice in December, 1897. Another action was begun in December, 1897, removed by Swift & Co. to the federal court, which was dismissed November 28, 1898. This action was begun August 26, 1898. Counsel say, in support of this contention: "The death occurred August 6, 1896. This action was commenced August 26, 1898. The petition sought to avoid this fact by alleging the commencement of a prior action on or about December 10, 1896, and its subsequent dismissal within one year from its commencement. The answer admitted the commencement and dismissal of the prior action, but alleged the commencement of a second action, which was pending at the commencement of this action, and was still pending at the time the answer was filed. The reply admitted these statements of the answer." It is contended, upon this, that the case does not come within the provisions of section 23 of the Code (Gen. St. 1889), because the time limited by the statute had not expired at the time the first action was dismissed. In *Knox v. Henry* (Kan. App.) 55 Pac. 668, we held against this contention, and adhere thereto.

The second assignment of error is that the court overruled their demurrer to the evidence of the plaintiff. This assignment is based upon the same proposition of law that number 1 is, and must fall with it.

The third assignment is that the court refused certain instructions. By their request numbered 11, they asked the court to say to the jury that there was no evidence in support of the act of negligence numbered 7, and that, therefore, the defendant could not be held liable on that ground. The court said to the jury in its general charge: "The first question for you to determine in these cases is, was the defendant guilty of any of the acts of negligence charged against it by the plaintiff? The burden of proof is upon the plaintiff to prove by a preponderance of evidence that the defendant was guilty of one or more of the acts of negligence charged against it, and if the evidence upon such matters is evenly balanced, or if it preponderates in favor of the defendant, then your verdict should be for the defendant." The request was simply the same matter in a different form.

The twelfth and thirteenth requests might have been given without objection on the part of the plaintiff, and yet their refusal is not sufficient ground for a reversal of the judgment. The proposition expressed in No. 12—that, if the fire arose from accident purely, the jury could not find that it was occa-

sioned by the negligence of the smoker, Joss—is self-evident, and is necessarily embodied in the substance of the general charge of the court. By request 13 the court is asked to say to the jury that there is no evidence tending to show that the smoking could not be rushed without danger, and that, therefore, the jury could not attribute the fire to the fact that Jackson, the foreman, told Joss to rush the smoking, and could not consider it an act of negligence for which the defendant would be responsible. It cannot be required of the court by its charge to apply the general rule of law given in its charge to each particular feature of the case to which it might be applicable. Such application is a matter of argument.

Request 14 is clearly embodied in the general charge.

Request No. 10, in its conclusion, is too broad. It says to the jury that if they believe Joss was an experienced smoker, and that the smoking could be rushed with safety, and if the evidence fails to show that he performed his duties in the proper manner, the defendant would be responsible by reason of the fact that the fire occurred. The occurrence of the fire was the occasion of all the acts of negligence charged that were done after the fire was discovered. Counsel probably intended to say that, if the evidence failed to show that he did not perform his duty in a proper manner, then the jury could not find the defendant guilty of the seventh and eighth grounds of negligence specified in the petition and in the general charge of the court.

Counsel for plaintiff in error requested the court to say to the jury that there was no evidence in support of the fourth charge of negligence. In this, counsel are mistaken. The refusal of the court to say to the jury that the death of Hoblawetz was not the natural, ordinary, and proximate result of the direction given to rush the smoking, and that such direction, if given, could not be considered in determining the defendant's liability, was not prejudicial error. It was not and is not contended that there was any proof to sustain this charge of negligence. It is not possible that the jury could have based its verdict thereon, under the instructions given them. No injury could have resulted from the refusal.

Further complaint is made that the court refused to charge the jury that Henry Creasy, at the time of the injury which caused the death of Hoblawetz, was a fellow servant of Hoblawetz, and that the plaintiff cannot recover for an injury which resulted from his negligence. This is not directed to any issue presented, nor any evidence offered, in the case. It could only tend to distract the minds of the jury from the real questions to be decided. The acts of negligence charged to plaintiff were those for which it was responsible by reason of the conduct of Stewart and Forsinger, who stood in the relation of master to the deceased, and not in acts or conduct of fellow servants.

The fifth specification of error is that the court was divested of all jurisdiction of the cause of action by removal of the original suit to the federal court. In the argument in support of this contention we are referred to *Kern v. Huldekoper*, 103 U. S. 485, 26 L. Ed. 354; *Railroad Co. v. Fulton* (Ohio) 53 N. E. 265; *Cox v. Railroad Co.*, 68 Ga. 418. The first case cited does not support the contention. It construes the act of March 3, 1875, providing for the removal of causes to the federal court, and the effect of such removal on the jurisdiction of the state court from which it was removed. It holds that a compliance with the act of congress by a party entitled to remove a cause, in a case that is removable under the act, removes the cause and the subject-matter, notwithstanding the refusal of the state court to allow such removal, and that thereafter the state court has no jurisdiction in that case to proceed further therein. The state court having been wholly divested of jurisdiction in the case by the removal, it does not follow that when the federal court's jurisdiction is divested by the termination of the cause, as a dismissal without prejudice, the plaintiff cannot choose the forum in which he will bring another action or case, founded upon the same cause of action. It would be just as reasonable to say that the beginning of an action in the courts of one state, and the subsequent dismissal thereof, would oust the jurisdiction of the courts of all other states where the defendant might be found and properly sued, but for the first suit. We decline to hold that after the removal of a cause from a state to a federal court with jurisdiction of the cause of action, it never can be divested thereof. We hold, on the contrary, that a dismissal without prejudice, or other final disposition of the case not upon the merits, not only divests the federal court of jurisdiction of that case, but of the subject-matter of the suit, and that the plaintiff is at liberty to renew his cause in the state court, or in any court having jurisdiction of the subject-matter and of the parties.

The sixth specification of error is that the court denied the defendant's motion for a new trial. Under this assignment it is contended that there is no evidence of negligence on the part of the defendant to sustain the verdict of the jury. Under this contention an argument is made as to what Creasy saw at the time he obeyed the instruction of Stewart, and held the nozzle of the hose, while Stewart turned the water on; of Creasy's knowledge of the conditions in the floor above him, where the deceased was; of Creasy's knowledge of the result of throwing water upon the fire, and the result of Creasy's going to investigate the conditions, or of his going for other means for extinguishing the fire. All this is outside of the real issues that were tried in the case. Suffice it to say that, in our view, the evidence of negligence is ample. The trial was conducted fairly. The plaintiff in error has no reason to complain of any con-

duct of the court towards it therein. The judgment is just and a meritorious one, and is affirmed.

MULVANE et al. v. SEDGLEY et al.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

APPEAL—RECORD—PARTIES ENTITLED TO ALLEGE ERROR—PLEADING—TRIAL—DEMURRER TO EVIDENCE—BILLS AND NOTES—PRINCIPAL—SURETIES—ELECTION.

1. Since plaintiff had a statutory right to elect whom she would sue and against whom she would take judgment, it was not error to permit her to amend the prayer of her petition by striking out a claim for judgment against one of the defendants.

2. Where, in an action on a note, defendant set up the statute of limitations, and the evidence showed that defendants were absent from the state a sufficient time to prevent the bar of the statute, it was proper to overrule defendant's demurrer to plaintiff's evidence.

3. Assignments of error based on the reception and rejection of evidence and the giving and refusing of instructions will not be considered on appeal, where the evidence and the instructions are not preserved in the record.

4. Where, in an action on a note, there was a dispute as to whether the period of limitations has elapsed, as to whether one of the defendants had been accepted by the plaintiffs as a principal, and as to whether there had been an extension of time of payment, it was proper to submit the case to the jury.

5. Defendants executed to plaintiff their note secured by mortgage. W., having later purchased and assumed to pay the mortgage debt, was made a defendant in an action on the note. Defendants contended that plaintiff had elected to treat W. as principal and them as sureties, and that, since the liability of W. was barred by the statute of limitations, their liability was also barred. Held, that since the question of plaintiff's election was fairly submitted to the jury under instructions assuming the correctness of defendants' view of the law, and found against defendants, they could not be heard to complain that no judgment should have been rendered for plaintiff.

6. The fact that plaintiff in an action on a note asked judgment against W., who had assumed payment of the note, did not amount to an election to treat him as principal and the makers as sureties.

Error from district court, Shawnee county; Z. T. Hazen, Judge.

Action by Nellie P. Sedgley against P. I. Mulvane and others. From a judgment in favor of plaintiff, certain defendants bring error. Affirmed.

Quinton & Quinton, for plaintiffs in error. Frank H. Foster, for defendants in error.

PER CURIAM. This action was begun in the district court upon two notes and a mortgage against the plaintiffs in error by Nellie P. Sedgley, one of the defendants in error. Subsequently A. L. Williams was made a party defendant by leave of the court, and it was alleged that subsequent to the making of the mortgage he purchased and assumed to pay the mortgage debt, as a part of the purchase price. Judgment was prayed against the makers, plaintiffs in error, and the defendant A. L. Williams, for a

personal judgment and a foreclosure. Plaintiffs in error answered by general denial and plea of the five-years statute of limitations; that the plaintiff had, by an arrangement with A. L. Williams, subsequent to his acquiring the estate, recognized and treated with him as principal, with a full knowledge of all the facts, and had extended the time of payment of the mortgage debt, whereby they were discharged; and a further plea that, the plaintiff having recognized and agreed to take A. L. Williams as the principal debtor, and permitted the claim to become barred as to him, he by reason thereof being the principal debtor, the debt was likewise barred as to them, as sureties. Williams denied the assumption of the debt, and alleged the bar of the five-years statute. Subsequently the petition was amended so that no claim for personal judgment was made against Williams, and he, with permission of the court, withdrew his answer. The answer alleged the agency of John R. Mulvane, for the plaintiff, to do the acts which they claim constituted the acceptance of Williams as principal. The reply, denying this allegation, was verified. There was a trial by the court and a jury, and a verdict and judgment for the plaintiff.

The plaintiffs in error assign 23 reasons for a reversal of the judgment. The 1st is founded upon the court permitting the plaintiff to amend the prayer of the petition by striking out the claim for judgment against Williams. Under our statutory law, the plaintiff had a right to elect who she would sue, and against whom she would take a judgment.

It is next contended that the court erred in overruling the demurrer to the plaintiff's evidence. Under the allegations of the petition, the only proof required to sustain the plaintiff's action was that the defendants (now the plaintiffs in error) were absent from the state a sufficient length of time to prevent the bar of the statute. The proof was ample in this respect, and the demurrer was properly overruled.

The 3d and 4th reasons are the same in substance as the 2d, and reference is made therein to each of the several counts of the petition. Both counts were sustained by the evidence.

The 5th and 6th grounds assigned are that the court overruled the motion of the plaintiffs in error for judgment upon the plaintiff's evidence, which is the same in substance as the 2d, 3d, and 4th.

The 7th and 8th assignments of error are based upon the rejection and admission of evidence. These assignments do not conform to the rule of this court, and we will not examine them.

The 9th contention is that the court erred in submitting the case to a jury, there being no disputed questions of fact. This contention is without merit, as appears by the record. The question of the bar of the statute

was in dispute. The question of the plaintiff having accepted Williams as surety was in dispute. The question of the extension of the time to Williams as principal was in issue.

The 10th and 11th contentions are that the court erred in overruling their motion for judgment upon all the evidence under the two separate counts of the petition. These are based upon the same assumption made in the 9th. There were issues to be submitted to the jury for their determination.

The 12th, 13th, 14th, 15th, 16th, 17th, 18th, and 19th contentions are based upon the giving and refusing of instructions. The rule of this court in relation thereto is ignored, and the assignments do not, therefore, merit our consideration.

The 20th contention is that the court denied the defendants' motion for a new trial. No reason is pointed out by the brief or in the argument, other than the matters heretofore alluded to, why a new trial should have been awarded. We find nothing in the record to sustain the contention.

The 21st and 22d contentions are that the court erred in rendering judgment for the plaintiff and against the defendant upon the two respective counts in the petition, and in rendering judgment for the plaintiff at all. In the argument, both by brief and orally, it is contended that the action as to both notes was barred. There was some evidence introduced as to A. L. Williams' absence from the state after the action became due. The plaintiff asking no judgment against him, it became immaterial whether an action upon the notes was barred as to him, unless the jury found, under one of the instructions of the court, that as to the plaintiff he had become principal, and the plaintiffs in error sureties. This question was fairly submitted to the jury by the court, in an instruction wherein the court assumed all of the contention of counsel to be correct, but the jury found against them. Under the second paragraph of the argument in the brief it is contended, and was likewise upon oral argument, that inasmuch as Williams became principal, and the plaintiffs in error sureties, and it appearing by undisputed evidence that the action was barred upon both the notes as to Williams, the law is that it was barred as to the plaintiffs in error, the makers, who had become by the action of the plaintiffs sureties for Williams. As we have said before, the court so instructed the jury. The fact of the plaintiff having agreed to take Williams as principal, and to look to the plaintiffs in error as sureties only, was not admitted. It depended very largely, if not altogether, upon the question of the authority of John R. Mulvane as agent of the plaintiff. The great weight of the testimony on this question was against the plaintiffs in error; that is, against the authority of Mulvane to perform the acts sworn to by the defendants and their witnesses, and denied by the plain-

tiff and John R. Mulvane. The plaintiffs in error had the full benefit of the rule of law as they now contend for it, whether right or wrong, and the jury evidently obeyed the instruction of the court, but found against these contentions as to the fact itself.

It is further contended that from the mere fact that, in the petition as originally drawn, plaintiff asked a judgment against Williams, she thereby agreed or elected to accept Williams as principal, and the makers of the note as surety. We cannot say that it had this result.

An examination of the record with much care leads us to the conclusion that the trial was without prejudice, and without incident or action of the court or the plaintiff that was prejudicial to the rights of the defendants; that the result arrived at was the true result; that the verdict and judgment are the only verdict and judgment that could have been rendered and given in the case lawfully and justly. The judgment is affirmed.

(10 Kan. App. 61)

WESTERN UNION TEL. CO. v. MORRIS.
(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

PLEADING—CONTRIBUTORY NEGLIGENCE—INJURY TO WIFE—DAMAGES.

1. It is not error for the trial court to exclude evidence of contributory negligence, where such defense is not pleaded. Contributory negligence is an affirmative defense, and must be pleaded to be available.

2. A husband may, in an action for damages resulting from injuries sustained by his wife by reason of the negligence and carelessness of another, in some cases, recover for the loss of his own time in attendance and nursing his wife. The value of the husband's time, however, while so engaged, is determinable with reference to its value as a nurse; but he cannot recover, in addition, for the loss of his time, as such, its value in his ordinary occupation, nor for the reasonable value of his time which he may have lost from his business.

(Syllabus by the Court.)

Error from district court, Jackson county; Charles F. Johnson, Judge.

Action by Frank Morris against the Western Union Telegraph Company. Judgment for plaintiff. Defendant brings error. Reversed.

George H. Fearons and Rossington, Smith & Histed, for plaintiff in error. S. B. Isenhardt, for defendant in error.

McELROY, J. This action was brought by Frank Morris against the Western Union Telegraph Company, in the district court of Jackson county, for the recovery of damages alleged to have been sustained through the negligence and carelessness of the defendant. Frank Morris, together with his wife, Daisy E. Morris, resides a short distance from Hoyt, in Jackson county. Mrs. Morris on the 4th day of December, 1895, became sick. She desired the attendance of their family physician, Dr. Dawson, of

North Topeka. On the evening of that date, at 7:30 o'clock p. m., plaintiff caused a message to be prepared, and delivered to the agent of the telegraph company at its office in Hoyt, and paid the charges for its transmission, which read as follows: "Hoyt, Kansas, December 4, 1895. Dr. Dawson, North Topeka, Kansas: Come on the morning train and not fail; answer. I will meet you. Frank Morris." The message was delivered to Dr. Dawson in due time on the same evening, but when delivered it read: "Hoyt, Kansas, December 4, 1895. Dr. Dawson, North Topeka, Kansas: Come on the morning train and not answer. Fronk." Hoyt is a station on the Rock Island Railroad about 20 miles north of Topeka. There were two trains daily, leaving Topeka for Hoyt at 6:30 a. m. and at 3:30 p. m. If the telegram had been properly transmitted and delivered, Dr. Dawson could have taken the early morning train, and, if he had, would have arrived at the home of the defendant in error at about 8 o'clock a. m. of December 5th. There was a man by the same name of "Fronk" living near Hoyt, with whom Dr. Dawson was acquainted; and, presuming that the message was from this individual, he did not answer the call. Had he known the message was from Frank Morris or his wife, he would have gone to Hoyt, as requested. If he had taken the morning train he could have reached his patient about 8 o'clock a. m. of December 5th, but by reason of the error in the transmission of the telegram he did not leave Topeka until he received a second message, and he did not reach the bedside of his patient until 5 o'clock of that date. He found his patient suffering with inflammation of the peritoneum, called "acute peritonitis." The doctor remained with the patient on that date a few hours, and again visited her on December 7th. She had no further medical treatment, except that Dr. Dawson sent medicines to her from time to time, until the 24th of December, when she was placed in charge of Dr. Plummer, of North Topeka. On December 29th she underwent a surgical operation, which consisted in removing her ovaries and Falloplan tubes. The operation was performed by Dr. McClintock, assisted by Dr. Plummer. It was the plaintiff's contention that the operation was the direct and proximate result of the negligence and carelessness of the telegraph company in not transmitting his message, so that medical attendance could have been earlier secured for his wife; that, if the message had been properly transmitted, the doctor would have reached the patient in time to have removed the causes which ultimately resulted in the operation. The telegraph company practically admits its negligence in the transmission of the telegram, but denies that the surgical operation, or any portion of the prolonged sickness of Mrs. Morris, resulted therefrom. This action was for the loss of services and other pecuniary dam-

ages claimed to have been sustained by reason of the prolonged sickness and operation. A trial was had before the court and jury, which resulted in a verdict and judgment for plaintiff in the sum of \$1,276. The defendant filed its motion for a new trial, which was overruled, and, as plaintiff in error, presents the record to this court for review, and alleges error in the proceedings of the trial court,—that the trial court erred in the admission of testimony, in the exclusion of evidence, in its instructions to the jury, and in overruling the motion for a new trial.

The first contention is based upon the admission of the following testimony of Dr. Dawson: "Q. I will ask you, if you had seen Mrs. Morris at the time that her disease became acute, if, in your opinion, you could have cured her, and prevented the operation that afterwards took place. Ans. Yes, sir; if I had seen her at that time there would have been no trouble. Q. Now, I will ask you, if you had seen her at or very near after this inflammation became severe and acute, what would you or could you have done for her? Ans. I could have stopped the pain immediately, and relieved the inflammation. Q. Now, if you had been there to see this patient in time (that is, in the early inception of peritonitis, when it commenced), could you or would you have prevented these different stages which she went through with? State whether that, in your opinion as a physician, you would have worked a cure in her case. Ans. That would have saved her. She would not have had any pus formation. Q. So that would have saved this operation, in your judgment? Ans. Of course. The pus formation was the cause of the operation. Preventing that local hyperæmia, congestion, stasis, secretion, and inflammation, there would have been no formation of pus, and, of course, no operation." The witness had been the family physician of the Morris family for about four years. He visited her on December 5 and 7, 1895, made examinations, noted her symptoms, watched the development of her ailment, prescribed for her until the 24th day of that month, and knew the result of the affliction. When he arrived on the evening of December 5th the patient was suffering from acute peritonitis. Her ailment was not of long standing. It had existed but a few hours. In *Railway Co. v. Frazier*, 27 Kan. 465, the court says: "It is insisted that the testimony of the physicians, so far as it is expert testimony, must be based upon their personal examination, and upon the facts as proved before the jury, or else upon a hypothetical statement. Doubtless, this proposition is correct. It is true that within what is meant by the phrase 'personal examination' is properly included information derived from statements by the patient of present feelings and pain. In 1 Greenl. Ev. par. 102, it is stated that 'the representations by a sick person of the

nature, symptoms, and effect of the malady under which he is laboring at the time are received as original evidence.'” The court in this opinion recognizes three distinct methods of introducing expert testimony of a physician: It must be based either upon his personal examination, or upon the facts as proven before the trial court, or upon a hypothetical question. In the case at bar the former formed the basis upon which Dr. Dawson gave his testimony, and, we think, correctly. See, also, 8 Enc. Pl. & Prac. 764, 765.

There are two specifications of error under the second assignment. In the argument of plaintiff in error, he says: “Dr. Dawson arrived late on the 5th of December; contented himself with a few hours’ visit; saw the patient on the 7th. That for upwards of seventeen days the patient was allowed to remain without medical attendance, further than the sending of medicines by Dr. Dawson upon receiving reports of her condition from her husband. This is exceedingly hazardous.” The defendant sought to show by the testimony of Dr. Roby and Dr. McClintock that the neglect of medical attention from December 7th to the 24th contributed much more to produce the condition of Mrs. Morris in the latter part of December than did the delay in the arrival of Dr. Dawson, and that this neglect was the direct and proximate cause of the operation. This testimony was offered for the purpose of establishing contributory negligence, which was not pleaded. Contributory negligence is an affirmative defense and must be pleaded. The testimony was properly rejected.

The only contention under the third assignment of error which we deem worthy of serious consideration is that the court erred in instructing the jury upon the measure of damages. The court instructed the jury: “If you find for the plaintiff, you may allow him for the expenses of said surgical operation, and also for any other or further expenses for medicine and medical attendance which he had been caused in and about the treatment of his said wife. You may also allow him the reasonable value of the services of his said wife, which he has lost, from the time when said injury was caused until the present time; and, if you find that the injuries to the plaintiff’s said wife are permanent, then you may allow the plaintiff such other and further sum for the loss of her services which you are reasonably certain from the evidence he will sustain in the future. You may also allow the plaintiff for the loss of his own time while caring for his said wife, in such a sum as the evidence shows you said plaintiff’s time was reasonably worth. The plaintiff must establish by a preponderance of the evidence that he has suffered loss of his wife’s services by reason of the injury received by the wife as alleged, and, in determining what such services were for which the plaintiff can recover, you may take into consideration the household duties

performed by the wife in caring for the children and keeping the house, and the various household tasks incumbent upon the wife to perform, and ascertain what the services so lost are, in their extent and value; how far the evidence shows she has been incapacitated by the injury from performing them; what the plaintiff has been reasonably compelled to pay out to have such duties performed by others. You may take into consideration any time reasonably devoted by the plaintiff himself in assisting in the performance of such duties, and the reasonable value of the same, if any such were performed by him. You may also consider the time he lost from his business, if any, and may allow him the reasonable value thereof. You may take into consideration the character of the wife’s injuries, whether temporary or permanent, and if you find such injury to be permanent, or of such a nature that the disability resulting therefrom is reasonably certain to continue, then you may allow the plaintiff for such further reasonable expenditure or sum as you find will be necessary in and about such ordinary and usual services performed by her as aforesaid (that is to say, such other, further reasonable expenses may be considered by you in arriving at your verdict herein as aforesaid); and, after considering all the facts and circumstances in the case, you may give, if you find for the plaintiff, such a sum as, in your sound judgment, will be a fair and just compensation for the loss of the services of his wife in the past, and such services as you find he will be reasonably certain to lose in the future, as the result of said injury, which, of course, may be added to such sum or sums as the evidence may show that he has reasonably expended or incurred in doctor’s bills and medicine, and in the treatment of said injury, as hereinbefore explained, if you find that the same was caused by the negligence of the defendant as aforesaid.” It will be observed that the court instructed the jury as to the measure of recovery as follows: “You may also allow the plaintiff for the loss of his own time while caring for his said wife in such a sum as the evidence shows you said plaintiff’s time was reasonably worth.” And further: “You may also consider the time he [plaintiff] lost from his business, if any, and may allow him the reasonable value thereof.” These instructions cover an element of damages not recoverable in the action. The court had already instructed the jury that plaintiff might recover for any time reasonably devoted by himself in assisting in the performance of such duties as devolved upon the wife to perform, and the reasonable value of the same. The husband may, in an action for damages resulting from injuries sustained by his wife by reason of the negligence and carelessness of another, in some cases, recover for the loss of his own time in attendance and nursing of his wife. The value of the husband’s time, however, while so engaged, is determinable with reference to its

value as a nurse; but he cannot recover, in addition, for the loss of his time, as such, its value in his ordinary occupation, nor for the reasonable value of his time which he may have lost from his business. The instructions in this respect were erroneous. They authorized a recovery for the loss of time from plaintiff's business, which, as such, was not properly an element of damages. *Hazard Powder Co. v. Volger*, 7 C. C. A. 130, 58 Fed. 153; *Town of Salida v. McKinna* (Colo. Sup.) 27 Pac. 810; 8 Am. & Eng. Enc. Law, 649.

The court erred in overruling the motion for a new trial. The judgment is reversed, and the cause remanded for a new trial. All the judges concurring.

MILLER v. PICKERING.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

APPEAL—PARTIES.

Where judgment is recovered against three defendants, and one brings error without making the other defendants parties, the proceeding will be dismissed.

Error from district court, Johnson county; John T. Burris, Judge.

Action by I. O. Pickering against John D. Miller and others. Judgment for plaintiff, and defendant Miller brings error. Dismissed.

Ogg & Scott, for plaintiff in error. I. O. Pickering, pro se.

PER CURIAM. In the trial court the defendant in error, as plaintiff, recovered a judgment against the plaintiff in error and three others, decreeing said plaintiff in error to be the owner of certain real property in the city of Olathe, and barring all the defendants from any interest therein, and for costs. None of the defendants in the district court, except the plaintiff in error, have been brought to this court; and, under the well-settled rules of practice, the proceedings in error must be dismissed for lack of the necessary parties herein. This case is therefore dismissed.

(10 Kan. App. 74)

STATE v. GRINSTEAD.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

CRIMINAL LAW—BURDEN OF PROOF.

An instruction, in a criminal case, throwing upon the defendant the burden of proving the matters of defense to the satisfaction of the jury, is erroneous, and is not cured by a general instruction giving the law as to the burden of proof and a reasonable doubt.

(Syllabus by the Court.)

Error from district court, Doniphan county; William I. Stuart, Judge.

Pool Grinstead was convicted of criminal libel, and appeals. Reversed.

Harvey & Harvey, for appellant. A. A. Goddard, Atty. Gen., and S. M. Brewster, Co.

Atty. (Ryan & Reeder and Baker & Bell, of counsel), for the State.

WELLS, J. This was a prosecution for criminal libel, brought in the district court of Doniphan county. The defendant was found guilty, and appeals to this court. There are four grounds of error alleged, and we will consider them in order.

1. The court erred in overruling this appellant's motion to quash the information for the reason that it does not state a public offense. The information charges, in substance, that on August 5, 1899, Pool Grinstead was the editor and publisher, in Doniphan county, Kan., of a weekly newspaper, and, with the intent to expose one Albert Perry to hatred and contempt, and to deprive him of public confidence, did then and there unlawfully, willfully, and maliciously compose and publish, and cause and procure to be composed and published, in said paper, of and concerning said Albert Perry, the following false, malicious, defamatory, and libelous words: "With Leland's brother-in-law (meaning thereby the said Albert Perry) as the chairman of the Democratic committee (meaning thereby the Democratic Central Committee of Doniphan county, Kansas), even that party was run (meaning the Democratic party in Doniphan county, during the campaign in which said Albert Perry was chairman of said Democratic Central Committee) pretty much as Leland directed (meaning thereby Cyrus Leland, who was a leading Republican in said county, and meaning thereby that the said Albert Perry, who, during the time referred to, was chairman of the Democratic Central Committee of the Democratic party of Doniphan county, Kansas, as such chairman, betrayed the trust and confidence reposed in him by the said Democratic party and its central committee, and that the said Albert Perry, as such chairman, suffered and permitted the said Cyrus Leland to control, in the interest of the Republican party, the acts of said Albert Perry as such chairman, to the great scandal, injury, and disgrace of the said Albert Perry)." The majority of the court hold that the information does not state an offense, within the authority of *State v. Elliott* (just decided) 61 Pac. 981, and that the court erred in overruling the motion to quash. It is contended by the appellant that the law always gives to words their usual and ordinary meaning, and presumes that men are innocent of crime or criminal intentions, whether directing the affairs of their own party or of some other. This is not true. The law does not always give to words their usual and ordinary meaning, and for the leader of one political party to be controlled, as to his political action, by the leader of the opposite political party, is neither honest nor creditable.

The next question is that the information does not charge a publication. We think it does. It says: "He then and there did compose and publish, and then caused to be com-

posed and published," not his paper, as argued by the appellant, but the matter complained of.

The remaining objection to the information is that it was not properly verified. It states that "the facts therein set forth are true." And it is said that facts are always true, and therefore said words are meaningless. This is true, if the word "facts," is taken in its common and primary meaning; but a secondary meaning of the word is permissible to represent the thing asserted. The term "facts" was held to be equivalent to "matters," when used in a jurat in *Whelpley v. Van Epps*, 9 Paige, 332. I think the motion to quash was properly overruled.

2. The court erred in overruling this appellant's motion and petition for a change of venue. The facts upon which the defendant relied for a change of venue are substantially the same as in case No. 821, *State v. Grinstead* (just decided) *infra*. The majority of the court hold that the trial court erred in overruling such motion, but the writer hereof thinks otherwise. The application for a change of venue was supported by the oral testimony of the defendant alone, with exhibits of articles published by him against the judge; and, while his evidence discloses an abundance of provocation on his part to excite the prejudice and enmity of an average person under ordinary circumstances, the only evidence that it had that effect upon the judge was that on one occasion the judge failed to respond when spoken to by the defendant, and whether this was intentional or not is left somewhat to conjecture. In the face of the fact that the judge expressly denies that he had any ill will or prejudice against said defendant on any account whatever, I do not think there was sufficient evidence to justify us in saying that he was mistaken, and in reversing the case for that reason.

3. The court misdirected the jury in material matters of law. The court properly instructed the jury upon the law of the burden of proof and of a reasonable doubt, but in the eighth instruction he told them: "If you believe from the evidence in this case that the defendant was not present, and did not know of the insertion in the *Wathena Star* of the alleged libelous article complained of in the information, and in no manner counseled, aided, or abetted in the publication of such article, then you should find the defendant not guilty;" and in the thirteenth: "It is incumbent upon him [the defendant] to satisfy you that it was not published with his knowledge or authority, and, unless he has satisfied you, you should return a verdict of guilty in this case." The nineteenth instruction reads: "A publisher of a newspaper is responsible for the matter of his paper, as though the same was inserted by himself or published by his express direction, unless it is shown by the evidence that he did not publish or aid or assist in such publication, and did not know of the same." These

instructions would, by themselves, naturally convey to the minds of the jury the idea that, as to the defenses claimed by the defendant, the burden of proof was upon him to establish them, and, if he failed to do so to their satisfaction, they must find a verdict of guilty; and this impression would not be removed by being told, in general terms, that the burden of proof in a criminal case never shifted from the state to the defendant. The instructions referred to are erroneous. Our attention is also called to the fourteenth instruction, in which the jury are told that the article complained of is libelous, and thus it is claimed the court decides the case for the jury. We do not think the words complained of, unaccompanied by explanation or innuendo, are necessarily libelous: "With Leland's brother-in-law as chairman of the Democratic committee, even that party was run pretty much as Leland directed." These words, by themselves, could convey no definite impression to the mind of a person entirely ignorant of the surrounding conditions and circumstances. For the errors hereinbefore noticed, the motion for a new trial should have been allowed. The judgment of the trial court is reversed, and a new trial directed.

(10 Kan.App. 78)

STATE v. GRINSTEAD.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

LIBEL AND SLANDER—CRIMINAL LIABILITY—INFORMATION—INDUCEMENT—INNUEENDO—CRIMINAL LAW—CHANGE OF VENUE—INSTRUCTIONS—BURDEN OF PROOF—REASONABLE DOUBT.

1. Where, in all the counts of an information charging a criminal libel, matters explanatory of the publication, and necessary to be stated by way of inducement, are stated only by way of innuendo, and the offense is not complete from the publication itself, a motion to quash should have been sustained, since matters which should have been stated by way of inducement cannot be supplied by the innuendo.

2. Where defendant in a prosecution for criminal libel had charged a judge with bribery in a newspaper, in securing his election within a year previous to the trial, and defendant made affidavit for a change of venue from the judge because of his bias and ill feeling towards defendant on account of such publications, and alleges that the judge will not speak to him because of his ill feeling towards him, it was error to refuse the change of venue, though the judge made affidavit that he entertained no ill feeling towards defendant.

3. In a prosecution for criminal libel, it is only incumbent on the defendant to raise a reasonable doubt in the minds of the jury as to his participation in the alleged publication to secure his acquittal.

4. An instruction, in a prosecution for criminal libel, that a publication against a public officer, which imports a charge of unfitness to administer the duties of the office, is libelous, is erroneous, since official conduct is a proper matter for criticism within reasonable bounds.

Error from district court, Doniphan county; W. I. Stuart, Judge.

Pool Grinstead was convicted of criminal libel, and he appeals. Reversed.

This is an appeal from a judgment of conviction upon an information charging libel in four different counts, based upon four different publications in a newspaper called the "Wathena Star," of which the defendant was editor and publisher. The article charged in the first count to have been published by the defendant is as follows: "It would be hoped that no dirty scandals would attach to the present Republican administration, and that a record would be made whereby we could march proudly before the people in the campaign of 1900. But here comes the asylum scandal, along on top of the other dirty deals which it seems the managers of the administration have laid awake nights to conjure. That boodle was used in securing the location for Parsons there is no question. One of the main things urged in the matter of the new asylum was that the building should be nearer access to the western portion of the state. A number of senators who had declared their intentions of voting for Clay Center as the site changed their minds, and voted for Parsons, almost in the extreme east, where the other institutions were located. Our own dear Senator Fulton (meaning thereby the said John A. Fulton), who promised to support the Wathena high school, went square back on us, and voted for Parsons on the asylum question, which was an open violation of his pledge. Senator Zimmer, one of the demopops, and a hobnobber of Leland and his gang in the judgeship contest, and who is looked on by the members of his own party as venal enough to sell his soul for a very small piece of filthy lucre, was into the play. He was also pledged to Clay Center as the location; but, when it came to balloting, Zimmer, like traitor Fulton (meaning thereby the said John A. Fulton), went back on the whole thing, and voted for Parsons, and Zimmer tore up the ballots, in the face of every honest member of the committee. Several of the senators had no knowledge that they were offered money for their votes. There is no question as to what John Fulton did (meaning thereby the said John A. Fulton). This is the kind of cattle the Leland gang foist upon their party. Fulton (meaning thereby the said John A. Fulton), a man devoid of honor, character, or decency, representing this district in the senate, by the grace of Cy. Leland. A man who will sell out every constituent which he has while in public office 'is a sweet thing' to Leland, and this is one of the glories of serving the boss." The introductory part of the information is confined to an allegation that this publication was made by the defendant, willfully and maliciously, and the defendant thereby was contriving and intending to vilify and defame one John A. Fulton, and provoke him to wrath, and expose him to public hatred and contempt and ridicule, and deprive him of public confidence and social intercourse; in short, a recital of the words of the statute. Sufficient innuendo is introduced to apply the statement of the pub-

lication to the defendant personally, and to elucidate the meaning of the several statements more fully than appears by themselves, as asserted to be in fact; the pleader assuming, probably, that the words were libelous per se, that no allegation of extrinsic facts was necessary, and hence there is no colloquium. The introductory part of the information avers that the publication was of and concerning the complaining witness, which is probably sufficient colloquium where the words are actionable or libelous per se, and no allegation of extrinsic facts in support of the publication, or explanatory thereof, is necessary. Without any explanatory allegation, the second count charges the defendant with having willfully, unlawfully, and maliciously, contriving, etc., as in the first count, to have published of and concerning the said John A. Fulton the following: "Senator Fulton rode on a pass, and then charged up \$52.38 as mileage, while getting in his graft on the new asylum location, in which case he also very suddenly changed his mind in favor of Parsons instead of Clay Center, after Parsons began paying \$3,000 for votes. This is the kind of a senator that graces the seat in this district by the grace of the king of Doniphan." This is followed by an innuendo attempting to give to the words the meaning attributed thereto by the complaining witness. The third count of the information, in the same way, charges the defendant with having published, of and concerning John A. Fulton, the following: "John A. Fulton got \$3,000 for his vote to betray the people in the location of the new asylum." This is followed by an innuendo setting forth the meaning attributed to the words by the complaining witness. In the fourth count, with the same introductory matter, the defendant is charged with having published, of and concerning John A. Fulton, the following: "If the legislature had not met until this fall, Cy. Leland's little traitor boodle senator John Asylums Fulton's pocketbook would not have been as fat by \$3,000 for juggling with the misfortunes of the insane." This is followed by an innuendo attributing to the words the meaning charged to have been intended by the defendant in the publication. It will be observed that in neither of these counts is there an allegation of introductory matter charging that the words were published concerning the complaining witness in any official relation whatever. Now, does it appear, from the words themselves, respecting what official position or what transaction the words refer to, so that an intelligent person would know the meaning thereof, unless he had acquired knowledge otherwise than from the information itself? The defendant moved the court to quash the information upon the grounds that it did not state facts sufficient to constitute a public offense, which was overruled. The defendant then filed his motion and petition for a change of venue, on the ground that the judge of the district court was so biased and prejudiced against him

that he could not have a fair and impartial trial.

The petition alleges, as facts in support of the allegation of bias and prejudice, the following: "That one Cyrus Leland is the Republican boss of Kansas and of Doniphan county; that Leland procured the nomination and election of the judge of the district court, and has a great influence over him; that the defendant published a series of articles in his paper, the Wathena Star, reflecting severely on the conduct of said Leland and Judge Stuart in procuring and receiving said nomination and election; that the defendant, being a Republican in the beginning of the campaign of Judge Stuart, supported him up to about the 20th of September, 1898; that, in order to procure the support of the defendant and his paper, Judge Stuart promised to pay the defendant the sum of \$50, and did pay \$40 thereof, and also promised to secure the defendant a share of the county printing of Doniphan county; that, Judge Stuart failing to pay the balance of the \$50, and failing to procure the county printing for the defendant, he refused to further support him for judge, and afterwards supported Judge Stuart's opponent, one James Falloon; that Stuart and Falloon, after the election, had a contest before the state senate respecting said judgeship, said contest commencing about March 22, 1899; that the defendant appeared as a witness for Falloon, and testified to said bribery by Judge Stuart, and also the bribery by Judge Stuart of Ewing Herbert, editor of the Brown County World, and of Bert Howard, editor of the Horton Headlight, and of Ray Arries, editor of the Robinson Index; that Judge Stuart testified to the contrary in the contest proceedings, but that the senate found him guilty of corruptly bribing those editors; that, as a result of these matters, the defendant and Judge Stuart became and were, at the time of the hearing of the petition, enemies, and that Judge Stuart refused and refuses to speak to or recognize the defendant." This petition is verified by the defendant's oath to the truthfulness of all the matters set out therein. Upon the hearing of this petition the defendant was examined orally, and testified in detail to all of the matters contained in the petition, and produced and offered in evidence several of the publications in his paper alluded to therein, in which many charges of wrongdoing, dishonorable conduct, and the particular acts of bribery mentioned in the petition are openly charged both to Judge Stuart and to Cyrus Leland. These matters were contained in publications made before the election, and in publications made after the election, and after Judge Stuart entered upon the discharge of his duties. In opposition to the motion for a change of venue the state offered the affidavits of John H. Reese, John Norman, and J. W. McClellan. The substance of these affidavits is that they have been acquainted with Judge Stuart for two years and

three years; have been frequently in his company, and talked over the issues of the last campaign,—that is, the campaign of 1898,—and since the election have talked over matters connected with the campaign and with the judicial contest; that they never heard Judge Stuart speak in an unfriendly manner of the defendant, and they never heard any word or saw any act of Judge Stuart showing any prejudice or resentment against the defendant; and that from their acquaintance with Judge Stuart, and of their knowledge of his character and disposition, they believe he is able to determine whether he has any prejudice or not against the defendant; and, for the same reasons, they believe the defendant can have a fair trial before him. Judge Stuart also makes and files in the case, upon the hearing of the motion, the following statement: "The judge of this court never at any time stated to Grinstead that in return for his support for judge, that he, the judge of this court, would use his influence to get Grinstead a portion of the county printing, and that the said judge of this court never at any time said to Grinstead that he would give him \$50, or any other sum, if he, the said Grinstead, would support him for judge; that the judge of this court never asked said defendant at any time, or at any place, if he thought that he (Stuart) had better pay Arries \$25, and no reply was ever made by said defendant, as given in his testimony; that said judge never said to said defendant, at any time or place, that he would pay Arries any money whatever, and never arranged for a meeting with Mr. Arries at Wathena, at said defendant's office in Wathena, at any time; that the judge of this court never, at any time or place, had any conversation with said defendant or paid to him the sum of \$40, or any other sum, to secure his support for said judge, for the office of district judge; that the judge of this court never, at any time or place, had any conversation with said defendant, in which he told said defendant that he would have to give Ewing Herbert \$100, or any other sum, to get his paper to support him, and the judge of this court never, at any time or place, told said defendant that he had run a bluff on Bert Howard, and had him settled so that he would have to support him; that at no time since the hearing of the contest case has the judge of this court read, and never knew, a large portion of the articles which appeared in the Wathena Star, and which have been offered in evidence on the hearing of said motion; that others of the articles which were published in the Wathena Star, and which have been offered in evidence on the hearing of this motion, the judge of this court had read, but, as they were published in the heat of the campaign, the judge of this court did not attach any great importance to them, and had and has no ill will or prejudices against said defendant on account of them, and the judge of this court has no ill will or preju-

dice against defendant on any account whatever; that while there has been no personal communication between said defendant and the judge of this court since about October, 1899, that it has been because said defendant and the judge of this court have lived in different towns, they were not much together, and the judge of this court had no occasion or inclination to communicate in any manner with the said defendant, and took it for granted that said defendant had no occasion or inclination to communicate in any manner with the judge of this court. Wm. I. Stuart, District Judge." Thereupon he denied the petition for a change of venue. This hearing was had upon the petition for a change of venue on the 11th day of September, 1899. On the 5th of December, 1899, the case was called for trial in the absence of the defendant, his recognizance was forfeited, and it was ordered that a bench warrant issue for his arrest. On the 6th of December, 1899, the case was tried to a jury, and resulted in a verdict of guilty upon each of the four counts. A motion for a new trial was denied.

The court gave to the jury, among other instructions, the following: "(3) There is no dispute in the evidence in this case but that the defendant, Pool Grinstead, was, at the time the alleged libelous articles were published in the said Wathena Weekly Star, both editor and publisher of said paper. The law therefore presumes that such publications were by the authority of said defendant, and, as to the counts of the information to which the defendant makes the defense, that they were published without his knowledge and authority; and, unless he has so satisfied you, you should return a verdict of guilty in this case, unless you believe from the evidence that such articles were true, and that they were published for justifiable ends." "(12) Any imputation against any person who is in the enjoyment of an office, either public or private, of honor, profit, or trust, which imports a charge of unfitness to administer the duties of the office, is libelous." "(21) A publisher of a newspaper is responsible for the matter in his paper, as though the same was inserted by himself, or published by his express direction, unless it is shown by the evidence that he did not publish or aid or assist in such publication, and did not know of the same."

The following errors are assigned: (1) The court erred in overruling the motion to quash; (2) the court erred in denying the motion for a change of venue; (3) the court misdirected the jury in material matters of law, and failed and refused to instruct the jury in matters of law, as prayed for in writing by the defendant. The requests for instructions are not embodied in the assignment, or in any part of the brief. Upon looking into the record, we find that the court refused to instruct the jury that malice was an essential ingredient of the crime, and, fur-

ther, that proof of the truth of the publication, and that it was published for justifiable ends, was a legal defense under the constitution of the state.

Harvey & Harvey, for appellant. A. A. Godard, Atty. Gen., and S. M. Brewster, Co. Atty. (Baker & Bell and Ryan & Reeder, of counsel), for the State.

MAHAN, P. J. (after stating the facts). The motion to quash went to the entire information. If either count charged an offense, the motion was properly denied. The supreme court of Massachusetts, in *Carter v. Andrews*, 16 Pick. 6, says: "Whenever words have the slanderous meaning alleged, not by their own extrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in a traversable form, which averment is called the 'inducement.' There must then be a colloquium, averring that the slanderous words were spoken of or concerning this fact. Then the word 'meaning' or 'innuendo' is used to connect the matters thus introduced by averments and colloquia with the particular words laid, showing their identity, and drawing what is then the legal inference from the whole declaration,—that such was, under the circumstances thus set out, the meaning of the words used." It is well settled criminal law that an innuendo cannot take the place of such allegations of inducement. Mr. Bishop, in section 748 of his work on Criminal Procedure, in speaking of innuendo, says: "Its office is limited strictly to the explanation thus indicated; for it cannot add to or change or explain the previous statements, which must be sufficient as to the facts attendant on the libelous publication, without drawing anything from the innuendo. It is not, therefore, a matter upon which evidence can be introduced to sustain it at the trial." The same rule is announced in *State v. Atkins*, 42 Vt. 252; 13 Enc. Pl. & Prac. 88, 89. In all of the counts of this information, by way of innuendo only, are stated matters explanatory of the publication, which were necessary to be alleged by way of inducement. The offense does not appear complete from the publication itself; in other words, the facts attendant on the publication, which were necessary to explain it, and necessary to charge the offense sought to be charged by the information, are not well pleaded therein. This applies to all of the counts. For this reason, the motion to quash should have been sustained.

We are of the opinion that the court abused its discretion in denying the defendant's petition for a change of venue. The facts alleged are sufficient to sustain the charge of prejudice. They are not denied, except that the presiding judge, in his statement, denies that he bribed, or attempted to bribe, the defendant, to procure his support at the preceding election. He explains, or attempts to explain, why he has not spoken to the de-

fendant since the election. The fact, however, remains, that within a year before the trial the defendant did charge the judge with bribery. This charge was made by a publication in his newspaper during the progress of the canvass. It was again reiterated in the contest proceeding in March, 1899. These occurrences were too recent not to affect, in some degree, the feelings of the judge towards the defendant. He may have believed that he could act without bias or prejudice in the trial, but it would be an experiment dangerous to the rights of the defendant to permit him to make the effort.

It was error to give paragraph 13 of the instructions. It was not necessary that the defendant should prove to the satisfaction of the jury that he did not participate in the publication. It was only necessary for him to produce evidence sufficient to raise in the minds of the jury a reasonable doubt that he did so. The burden was upon the state as to this issue, and it did not change. *State v. Walt*, 44 Kan. 320, 24 Pac. 354; *State v. Osborn*, 54 Kan. 473, 38 Pac. 572; *State v. Child*, 40 Kan. 482, 20 Pac. 275.

It was error to give paragraph 17 of the instructions. The court said in that instruction that any imputation against a person holding an office, which imports a charge of unfitness to administer the duties of the office, is libelous. It seems to savor of the old adage that "the king can do no wrong." If an officer is the servant of the people, his official conduct is a proper matter for criticism within proper bounds, and a mere imputation of unfitness for the office is not libelous per se; and this is the substance of what the court said to the jury. It follows that the court erred in denying the defendant's motion for a new trial. The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

McELROY, J., concurs.

WELLS, J. I concur in the judgment reversing this case on the ground that the court misdirected the jury, but dissent to the rest of the opinion.

(10 Kan.App. 90)

STATE v. GRINSTEAD.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

LIBEL AND SLANDER—DEFENSE—BURDEN OF PROOF—REASONABLE DOUBT—INDICTMENT AND INFORMATION.

1. Where the language used in a criminal libel is actionable per se, the information need not allege that it tended to provoke to wrath the libeled person, or expose him to public hatred.

2. In a prosecution for criminal libel, it is only incumbent on defendant, to secure his acquittal, to introduce such evidence of the truth and the justifiableness of the publication as will raise in the minds of the jury a reasonable doubt of his guilt.

Wells, J., dissenting in part.

Appeal from district court, Doniphan county; William I. Stuart, Judge.

Pool Grinstead was indicted for criminal libel and convicted, and appeals. Reversed.

Harvey & Harvey, for appellant. A. A. Goddard, Atty. Gen., and S. M. Brewster, Co. Atty. (Ryan & Reeder and Baker & Bell, of counsel), for the State.

PER CURIAM. This is an appeal from a judgment of conviction upon an information charging the defendant with the publication of a criminal libel in a newspaper, the *Wathena Star*, of which he was editor and publisher. There are three assignments of error, which we will consider in order.

1. That the court erred in overruling defendant's motion to quash the information, for the reason that the same does not state facts sufficient to constitute a public offense: The language set out in the information as constituting the libel is actionable per se, and it is not necessary that the information state that it tended to provoke to wrath or expose to public hatred. *State v. Osborn*, 54 Kan. 471, 38 Pac. 572.

2. That the court erred in overruling the defendant's motion and petition for a change of venue: The petition for a change of venue, and the evidence offered in support of and against the same, are identical with that in case No. 821,—*State v. Grinstead* (just decided) 61 Pac. 976. Upon the authority of that case, we must hold that the court erred in overruling the application for a change of venue.

3. That the court misdirected the jury in material matters of law: The court instructed the jury: "(12) The article set out in the information as having been published and circulated by said defendant is libelous, and unless you believe from the evidence that such article was true, and that it was published for justifiable ends, you should find the defendant guilty." "(17) If the jury believe from the evidence in this case, beyond a reasonable doubt, that the defendant published in said paper, Doniphan county, Kansas, the alleged libel, and that the same was published of and concerning John A. Fulton, and that said publication tended to provoke said Fulton to wrath or expose him to public hatred, contempt, or ridicule, such publication is libelous, and the law presumes that the same was published maliciously, and you should find the defendant guilty, unless you believe from the evidence that such article was true, and it was published for justifiable ends." "(19) If you believe from the evidence in this case that the article complained of in the information was true, and that the defendant published the same for justifiable ends, then the defendant should be acquitted." In these instructions the court plainly tells the jury that: "If you believe from the evidence in this case that the article complained of in the information is true, and that defendant published the same for justifiable ends, then the defendant should be acquitted. * * *

And unless you believe from the evidence that such article was true, and that it was published for justifiable ends, you should find the defendant guilty. * * * And you should find the defendant guilty unless you believe from the evidence that such article was true, and it was published for justifiable ends." Now, this is not the law. It is only incumbent upon the defendant to offer such proof, in his defense, in regard to the truthfulness of the article alleged to be libelous, and the object of its publication, or such defense as he may reply, as is necessary to raise in the minds of the jury a reasonable doubt; and, if such reasonable doubt arises either from the evidence or from a lack of evidence, the defendant is entitled to an acquittal. The court erred in its instructions to the jury. The burden of proof was not upon the defendant to establish his defense to the satisfaction of the jury before he could demand an acquittal. The court therefore erred in overruling the defendant's motion for a new trial. The judgment is reversed, and the cause remanded.

MAHAN, P. J., concurring.

WELLS, J. I concur in the judgment reversing this case of an account of erroneous instructions, but dissent from the conclusion that the court committed reversible error in refusing a change of venue.

STATE v. ELLIOTT.

(Court of Appeals of Kansas, Northern Department. E. D. July 11. 1900.)

CRIMINAL LIBEL—INDICTMENT—DEFENSES—EVIDENCE.

1. In an action for libel, where the words have the alleged slanderous meaning, not by their own extrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in traversable form, and it is not sufficient to plead such fact by way of innuendo only.

2. It is incumbent upon the state, in an action for libel, to prove every material averment of the information. The burden never shifts to the defendant. It is not necessary in such case that the defendant prove his defenses to the satisfaction of the jury. It is only incumbent upon him to present such matters as are sufficient to raise a reasonable doubt. This entitles him to an acquittal.

Wells, J., dissenting.

(Syllabus by the Court.)

Appeal from district court, Doniphan county; William I. Stuart, Judge.

Frank W. Elliott was convicted of criminal libel, and appeals. Reversed.

G. C. Clems, for appellant. A. A. Goddard, Atty. Gen., and S. M. Brewster, Co. Atty., for the State.

McELROY, J. This was an action for criminal libel, brought in the district court of Doniphan county. The defendant was found guilty, and appeals to this court.

There are two grounds of error relied upon, which require a reversal of the judgment:

1. That the court erred in overruling appellant's motion to quash the information, for the reason that it does not state a public offense: The information charges: "That on or about the 12th day of August, 1899, one Frank W. Elliott was the editor and publisher, in said Doniphan county, of a weekly newspaper called, 'The Troy Times,' that on or about the said 12th day of August, in said newspaper, the said Frank W. Elliott, in said Doniphan county, and state of Kansas, with intent to expose one Albert Perry to hatred and contempt, and to deprive him, the said Albert Perry, of public confidence and social intercourse, did then and there unlawfully and willfully and maliciously publish and circulate, and cause and procure to be published and circulated, of and concerning one Albert Perry, the following false, malicious, and defamatory, and libelous words, as follows: 'With Leland's brother-in-law' (meaning thereby the said Albert Perry) 'as chairman of the Democratic committee' (meaning thereby the Democratic central committee of Doniphan county, Kansas), 'even that party was run' (meaning the Democratic party in Doniphan county during the campaign in which the said Albert Perry was chairman of the said Democratic central committee) 'pretty much as Leland directed,' meaning thereby Cyrus Leland, who was a leading Republican in said county, and meaning thereby that the said Albert Perry, who during the time referred to was chairman of the Democratic central committee of the Democratic party in Doniphan county, Kansas, as such chairman betrayed the trust and confidence reposed in him by the said Democratic party and its central committee, and that the said Albert Perry, as such chairman, suffered and permitted said Cyrus Leland to control, in the interest of the Republican party, the acts of said Albert Perry as such chairman, to the great scandal, injury, and disgrace of the said Albert Perry, and contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state of Kansas." It is elementary that the innuendo cannot serve as averment, but must rest upon averments elsewhere distinctly made in traversable form. The supreme court of Massachusetts, in *Carter v. Andrews*, 16 Pick. 6, says: "Whenever words have the slanderous meaning alleged, not by their own extrinsic force, but by reason of the existence of some extraneous fact, this fact must be averred in a traversable form, which averment is called the 'inducement.' There must then be a colloquium averring that the slanderous words were spoken of or concerning this fact. Then the word 'meaning' or 'innuendo' is used to connect the matters thus introduced by averments and colloquia with the particular words laid, showing their

identity, and drawing what is then the legal inference from the whole declaration,—that such was, under the circumstances thus set out, the meaning of the words used." The same rule is announced in *Bish. Cr. Ev.* § 748; *State v. Atkins*, 42 Vt. 252; 13 Enc. Pl. & Prac. 88, 89; *State v. Grinstead* (Kan. App.; just decided) 61 Pac. 980. In the above information, by way of innuendo only, are stated matters explanatory of the publication, which are necessary to be alleged by way of inducement. The offense does not appear complete from the publication itself. The language of the publication alone, without explanation, is not actionable per se. The facts necessary to the offense sought to be charged in the information are not well pleaded. The motion to quash should have been sustained.

2. That the court misdirected the jury in material matters of law: The court instructed the jury: "Eighth. Before a person can be guilty of a criminal libel, he must have a malicious intent to defame the persons alleged to be libeled; and malice, in a legal sense, denotes the intentional doing of a wrongful act without just cause or excuse, or the wicked intention to do an injury, but such malice may be proven by circumstances; and if you believe from the evidence in this case that the defendant was not present, and did not know of the insertion in the *Troy Times* of the alleged libelous article complained of in the information, and in no manner aided, counseled, or abetted in the publication of such article, then you should find the defendant not guilty." "Thirteen. There is no dispute in the evidence in this case but that the defendant was, at the time the libelous article was published in the said *Troy Times*, both editor and publisher of said paper. The law therefore presumes that such publication was by the authority of said defendant, and it is incumbent upon him to satisfy you that it was not published with his knowledge and authority; and, unless he has so satisfied you, you should return a verdict of guilty in this cause." "Nineteenth. A publisher of a newspaper is responsible for the matter in his paper, as though the same was inserted by himself or published by his express direction, unless it is shown by the evidence that he did not publish or aid or assist in such publication, and did not know of the same. Twentieth. If you believe from the evidence that the defendant did not know of the publication of the alleged libel, and did not directly direct its insertion in the *Troy Times*, yet if you believe from the evidence that he authorized his brother, John Elliott, to insert matter in said paper as he might think proper, he cannot excuse himself from the consequences of such publication by claiming that he did not specially direct such publication. Twenty-First. A defendant cannot relieve himself from punishment for the publication of a libel without at the earliest opportunity denying the

truth thereof in said paper, and denouncing its falsity, unless he wishes to justify by proof on the trial of the truth of the charge." These instructions are erroneous and were misleading. They were calculated to give the jury the impression that as to the defenses presented in a criminal case the burden of proof is upon the defendant. It is incumbent upon the state to prove every material averment of the information. The burden never shifts to the defendant. It is only incumbent upon the defendant to present such matter to the jury as to raise a reasonable doubt. This entitles him to an acquittal. The court erred in giving these instructions. It was not necessary that the defendant should prove to the satisfaction of the jury that he did not participate in the publication.

The court erred in overruling the motion for a new trial. The judgment is reversed, and the cause remanded.

MAHAN, P. J., concurs.

WELLS, J. I concur in the last section of the syllabus, and in the reversal of the judgment herein on account of erroneous instructions, but dissent from the balance of this opinion.

ANDERSON et al. v. METROPOLITAN ST. RY. CO.

(Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.)

ATTORNEY AND CLIENT—CONTRACT WITH COLLECTION COMPANY—NOTICE OF ATTORNEY'S LIEN—SETTLEMENT WITH CLIENT.

Where B. made an agreement with a collection company to prosecute her claim against defendant, and plaintiffs were the attorneys for such collection company, and there was a contract directly between B. and plaintiffs, subsequent to B.'s arrangement with the collection company, by which plaintiffs should act as her attorneys, and, in spite of notice by plaintiffs to defendant that they claimed an attorney's lien, defendant settled with B., a finding that plaintiffs were not attorneys for B., and not entitled to recover, is not justified.

Error from district court, Wyandotte county; Henry L. Alden, Judge.

Action by T. P. Anderson and B. S. Henderson, partners as Anderson & Henderson, against the Metropolitan Street-Railway Company. From a judgment for defendant after trial by the court without a jury, and from an order denying a new trial, plaintiffs bring error. Reversed.

T. P. Anderson, for plaintiffs in error. Miller, Buchan & Morris, for defendant in error.

PER CURIAM. This was an action by the plaintiffs in error against the defendant in error to recover fees for services rendered by them in behalf of one Mary J. Beagle against the defendant company. In the action of Mary J. Beagle against the Metropolitan Street-Railway Company, a recovery was sought for damages on account of the death

of the plaintiff's husband, alleged to have been caused by the negligence of the railway company. Plaintiffs in error herein were the attorneys of Mrs. Beagle, and, as such attorneys, served upon the defendant in error notice of their lien for fees. Notwithstanding this notice, the defendant in error settled with Mrs. Beagle, paying her \$293, for which they obtained a stipulation that her case should be dismissed. In the course of this settlement she was advised that she need not pay her counsel anything out of the money she received. The case was tried to the court without a jury. The court, at plaintiffs' request, made certain findings of fact, and therefrom made its conclusions of law, holding that the plaintiffs were not entitled to any lien. The plaintiffs moved the court for a new trial, which was denied, and seek herein to reverse that order and the judgment of the court.

There are nine assignments of error. The first is based upon the court's denying the plaintiffs a new trial. The second and third are to the effect that the conclusions of law are not supported by the findings of fact, and that the plaintiffs were entitled to judgment thereon. This assignment of error—or, rather, this one contention embraced within the two assignments—cannot be sustained, for the reason that the finding of the court is to the effect that plaintiffs were not the attorneys for Mary J. Beagle. The fourth assignment is that the court erred in its findings of fact Nos. 3 and 4, which, in effect, are that the plaintiffs were not the attorneys of Mary J. Beagle, although that is by inference rather than by express finding. The fifth assignment of error is the same as the second and third. The sixth and seventh assignments are that the court erred in not rendering judgment for the plaintiffs upon the evidence, and in rendering judgment for the defendant upon the evidence. The other assignments relate to the admission and exclusion of evidence, which it will be unnecessary for us to notice.

Finding of fact No. 3 is as follows: "(3) Some time prior to the 29th day of April, 1896, one Mary J. Beagle entered into a contract with the Claim Adjustment Company, a corporation organized for and engaged in the business of soliciting and obtaining contracts for the prosecution of suits in court, adjusting claims, making collections, and other business of like character, whereby the said Claim Adjustment Company undertook and agreed to prosecute, or cause to be prosecuted, for and on behalf of the said Mary J. Beagle against the said Metropolitan Street-Railway Company, an action for the recovery of damages for wrongfully and negligently causing the death of the husband of the said Mary J. Beagle, and by the terms of which contract the said Claim Adjustment Company, in case suit was brought upon said claim, was to receive one-half of whatever was recovered or received from the Metropolitan Street-Railway Company in said action or upon said

claim, by compromise or otherwise." Finding of fact No. 4 reads as follows: "(4) At the time of making said contract, said Anderson, Henderson, and Littick were, and thereafter continued to be, the regular attorneys of said Claim Adjustment Company, under a contract or agreement that they should receive, as compensation for their services rendered, one-half of whatever was received by said Claim Adjustment Company upon matters placed in their hands by said company."

The evidence does not establish the facts found by the court in the third finding, except that it is very doubtful from the evidence if the contract between Mary J. Beagle and the corporation named ever was consummated. But it is not material to the conclusion we have reached whether it was or not. The evidence clearly discloses that, after the negotiations or contract referred to, there was a contract made with the plaintiffs for Mrs. Beagle, by which plaintiffs were employed, for a fixed consideration, to bring and maintain the suit. This evidence is uncontradicted by anybody. The fourth finding is, in part, sustained by the evidence, and in part it is not. The evidence does not justify the finding that the plaintiffs were regularly employed upon a compensation of one-half of what the corporation received, and to be paid by the corporation. The evidence of Henderson and of the manager of the Claim Adjustment Company is clear, positive, and specific upon this proposition. The only evidence upon which the court could have possibly based that finding is what purports to be a cross-examination of Henderson, one of the plaintiffs. But there is nothing in it that cannot be perfectly harmonized with the truth of the statements of Anderson and Frehlich, the manager of the corporation. In this cross-examination, Henderson was led to make some general statement that at first might seem to be inconsistent with the testimony of Anderson. And, further than this, the court finds that after the suit was commenced, and before it was dismissed upon the application of the defendants in error, there was an agreement made directly with the plaintiffs and Mary J. Beagle, confirming the former contract as claimed by Mr. Anderson. This finding is based upon the testimony of Henderson, largely. By this arrangement, which the court finds was made September 20, 1896, all interference upon the part of the corporation, and all interest of the corporation in the suit, were eliminated. There was evidence, however, in the case, to the effect that, even after that, there was an agreement between the plaintiffs and the corporation that the plaintiffs should make some division of fees with it. Upon the evidence uncontradicted, the plaintiffs were entitled to recover, and the motion for a new trial should have been sustained. The judgment is reversed, and the case remanded, with directions to award a new trial.

(10 Kan.App. 327)

HARDMAN v. PORTSMOUTH SAV. BANK et al.

(Court of Appeals of Kansas, Northern Department, W. D. Nov. 18, 1899.)

HOMESTEAD—MORTGAGE—EXTENSION—WIFE'S CONSENT.

The husband, without the consent of the wife, cannot, by contract with the mortgagee, extend the duration of a mortgage lien upon their homestead beyond its original term.

(Syllabus by the Court.)

Error from district court, Graham county; C. W. Smith, Judge.

Suit by the Portsmouth Savings Bank against Martha J. Hardman and another to foreclose a mortgage on defendant's homestead. From a judgment in favor of plaintiff, defendant Martha J. Hardman brings error. Reversed.

H. J. Harwl and Ira E. Lloyd, for plaintiff in error. F. D. Turck and W. M. Roberts, for defendant in error.

MAHAN, P. J. There is but one question of law to be decided in this case. That arises upon the following agreed statement of facts: On February 1, 1887, Martha J. Hardman, plaintiff in error, and her husband, John M. Hardman, made to the Buchanan Mortgage Company their note and mortgage to secure the sum of \$1,000, payable in five years from that date. The mortgaged premises at the time were the homestead of the Hardmans, and have been ever since. On the 23d day of February, 1892, after the note and mortgage became due, and after they had been assigned to the Portsmouth Savings Bank, that company and John M. Hardman entered into a written contract extending the time for the payment of the debt five years from February 1, 1892. The legal title was in the husband. This action was begun August 25, 1898, to foreclose the mortgage and for judgment against both the defendants. The plaintiff in error claimed in her answer that the cause of action upon both the note and mortgage was barred, and, the premises being her homestead, the contract of extension being without her consent, the mortgage no longer operated as a lien upon the land against her homestead interest, and was void. It was admitted that the plaintiff's cause of action against her upon the note was barred, and upon this agreed statement of facts the court rendered a personal judgment against the husband and a judgment decreeing a foreclosure and sale of the land against both the husband and wife. The question is, could the husband, by his contract alone, enlarge the scope of the mortgage, and continue the lien thereunder? We are of the opinion that this question was decided by the supreme court in the negative in *Jenkins v. Simmons*, 37 Kan. 508, 15 Pac. 529. After referring to many of the cases upon this question, the opinion concludes: "The logic of all these cases is that no act of the husband alone can create, extend, postpone, or renew a lien upon

the homestead without the written consent of the wife in the exact manner prescribed." In the body of the opinion there is a lengthy quotation from the case of *Barber v. Babel*, 36 Cal. 11, which directly decides this question. It is as follows: "The giving of a new note and the extending of the time of payment were also the act of the husband alone, to which the wife was no party." Under the authorities cited, he could no more indirectly in this mode effect the same purpose by continuing the old loan beyond the time when the action would be barred as to the wife than in the direct mode of executing a new mortgage and discharging the old." This case is cited in support of the conclusion reached by the court, quoted above. See, also, *Smyth, Homest.* § 271; *Dunn v. Buckley*, 56 Wis. 190, 14 N. W. 67; *Campbell v. Babcock*, 27 Wis. 512; *Smith v. Scherck*, 60 Miss. 491. Counsel for defendant in error object to the consideration of the case, because all necessary parties were not served with the case-made, and are not before the court. It appears from the certificate of the judge settling the case that the parties all did appear, and waived amendments thereto. No party to be affected by a reversal of this judgment is absent from the court; in other words, all necessary parties are here within the year from the rendition of the judgment sought to be reviewed. Upon the merits counsel for defendant in error cite *Jenness v. Cutler*, 12 Kan. 500; *Hubbard v. Ogden*, 22 Kan. 363; *Vining v. Willis*, 40 Kan. 609, 20 Pac. 232. The principle involved in the case under consideration does not enter at all into the decision of either of the cases cited. There was no attempt upon the part of the husband in either of these cases to in any manner create, extend, renew, or enlarge the mortgage lien. In *Jenness v. Cutler*, supra, the wife contended that she was surety for the husband, and that the holder of the security had extended the time of payment without her knowledge or consent, and that she was, therefore, discharged, and, being discharged, that her homestead interest in the land was discharged. The court held that there was no valid contract of extension. Then, assuming that there was a contract, the court proceeded to argue the question whether the property of the principal would be discharged, and held that it would not; that the mere extension would not invalidate the mortgage. The question of the statute of limitations was not involved. It was not contended that, because the action was barred as to the wife, it was therefore entirely barred as to the homestead. In *Hubbard v. Ogden*, supra, there is no mention of the homestead interest. The question was whether there was a valid contract of extension. The supreme court held that there was, and that it discharged the wife, who signed as surety for the husband, and discharged her separate property, which she, as surety, pledged for her husband's debt. The case of *Vining v. Willis*, supra, decides that the wife

owning the homestead may devise one-half thereof to a person other than her husband; that such devise is not in contravention of the constitutional provision in relation to homesteads and the alienation thereof. It necessarily follows that the district court erred in decreeing a foreclosure of the mortgage, and it must be reversed to that extent. All concur.

(10 Kan.App. 428)

JORDON v. BEVANS.

(Court of Appeals of Kansas, Southern Department, E. D. July 25, 1900.)

CLAIMS AGAINST DECEDENT'S ESTATE—EVIDENCE.

The evidence complained of was properly admitted, and the evidence sustains the judgment rendered.

(Syllabus by the Court.)

Error from district court, Crawford county; Walter L. Simons, Judge.

Application of Clara Jordon for allowance of claim against W. D. Bevans, administrator of Timothy Jordon, deceased. From a judgment disallowing the claim, plaintiff brings error. Affirmed.

W. R. Biddle, for plaintiff in error. Arthur Fuller and T. W. Wells, for defendant in error.

DENNISON, P. J. This action is founded upon a claim filed in the probate court of Crawford county, Kan., by the plaintiff in error, as claimant, against the estate of Timothy Jordon, deceased. The claim was not allowed by the probate court, and was appealed by her to the district court. The case was tried by the district court without a jury, and judgment rendered against the plaintiff in error for costs. Proceedings in error were instituted in this court to reverse the judgment of the district court. The claimant, this plaintiff in error, alleges that Timothy Jordon, in his lifetime, agreed to pay her \$2 per week, and, after the death of the said Timothy Jordon and his wife, to pay her \$1,000 out of his estate, if she would come and live with them so long as either of them should live, and during such time take care of and straighten their household affairs, and perform the general duties of housekeeper for them, and render them, and each of them, such care and attention as should be required. During the trial in the district court the defendant in error introduced in evidence the records of the probate court to show that, after the death of Timothy Jordon and his wife, this plaintiff in error filed her claim in said court for the balance due her upon the agreement to pay \$2 per week, which said claim was allowed by the probate court. It is claimed that the court erred in permitting the introduction of this testimony, for the reason that, even if the said claim was filed and allowed, the present claim was not res adjudicata. We are of the opinion that the

evidence was properly admitted, as tending to show that the contract for \$1,000 had never been entered into. The evidence sustains the judgment. The judgment of the district court is affirmed.

(10 Kan.App. 439)

CITY OF OTTAWA v. BLACK.

(Court of Appeals of Kansas, Southern Department, E. D. July 25, 1900.)

DEFECTIVE SIDEWALKS—INJURY TO PEDESTRIAN—EVIDENCE.

1. Where, in an action against a city to recover for personal injuries, the petition alleged that the accident which caused the injuries occurred at the west side of North Oak street, along the east side of block 26, in front of lots 30 and 32 of said block, all in Bowles & Sheldon's addition to the city of Ottawa, Kan., and the claim presented to the city stated that the injuries were sustained on the west side of North Oak street, along the east side of block 26, in front of lots 30 and 32 of said block, *held*, that the statement in the claim was sufficient to identify it as the claim sued upon.

2. The verification of a claim against a city by the husband, as agent of claimant, is sufficient to satisfy the requirement of section 67, c. 37, Gen. St. 1897.

3. Evidence that plaintiff knew that a sidewalk was in very bad condition is not of itself sufficient to establish contributory negligence on the part of plaintiff.

4. Defendant offered to show that, nearly one year after the accident was alleged to have occurred, it had the sidewalk examined, and that at the time of such examination the sidewalk was in good condition. *Held*, that the court did not err in excluding such testimony.

(Syllabus by the Court.)

Error from district court, Franklin county; S. A. Riggs, Judge.

Action by Sarah Black against the city of Ottawa. Judgment for plaintiff. Defendant brings error. Affirmed.

F. A. Waddle and Walter Pleasant, City Atty., for plaintiff in error. W. S. Jenks and C. A. Smart, for defendant in error.

SCHOONOVER, J. Mrs. Black, the defendant in error, brought this action in the district court of Franklin county against the city of Ottawa to recover damages for personal injuries claimed to have been sustained by her while passing over a defective sidewalk in said city. Defendant, in its answer, denied every material allegation in plaintiff's petition, and alleged that the injuries claimed to have been sustained "were caused, if at all, by the fault and negligence of plaintiff herself." The case was tried to a jury, which returned a verdict in favor of plaintiff. Judgment was rendered upon the verdict, and the city brings the case here.

The trial court, over the objection of defendant, permitted the plaintiff to introduce in evidence the claim for damages presented by plaintiff to the city council. Plaintiff in error contends that such claim was not identified as the one in suit, and also that it was not properly verified.

The petition alleges that the accident oc-

curred at the west side of North Oak street, along the east side of block 26, in front of lots 30 and 32 of said block, all in Bowles & Sheldon's addition to the city of Ottawa, Kan. The claim presented to the city states that the injuries were sustained on the west side of North Oak street, along the east side of block 26, in front of lots 30 and 32 of said block. This, we think, sufficiently identifies the claim presented as the one sued upon.

The claim appears to have been verified by the husband of plaintiff, as her agent, and it is insisted by plaintiff in error that such verification was not sufficient. Section 67, c. 37, Gen. St. 1897, provides, "All claims against the city must be presented in writing, with a full account of the items, and verified by the oath of the claimant or his agent, that the same is correct, reasonable and just. * * * We do not understand that the provisions of the Code relating to the competency of witnesses in civil actions have any application to the facts under consideration, and we think that the verification was sufficient. But, even if plaintiff in error's contention were well grounded, that fact would not bar a recovery, but would only affect the question of costs. *Id.*; *City of Atchison v. King*, 9 Kan. 551.

Plaintiff in error next contends that the court erred in overruling its demurrer to plaintiff's evidence, and it is urged that plaintiff's own testimony shows that she did not use proper care. The testimony in question establishes the fact that plaintiff knew that the walk was in a very bad condition, and nothing more. This, alone, is not sufficient to show contributory negligence. *Maultby v. City of Leavenworth*, 28 Kan. 748; *City of Osage City v. Brown*, 27 Kan. 74; *City of Emporia v. Schmidling*, 33 Kan. 487, 6 Pac. 893; *Langan v. City of Atchison*, 35 Kan. 318, 11 Pac. 38. Of course, if a person recklessly and heedlessly walks upon a sidewalk which he knows to be in an unsafe condition, and is injured, he cannot recover. But Mrs. Black's testimony tends to show that she was using due care. The question of care and prudence was properly submitted to the jury, and their finding will not now be disturbed.

The court refused to permit one Beeler, a carpenter, to testify as to the condition of the walk, and plaintiff in error insists that this was error. It appears that Beeler had examined the walk the day before the trial, with a view of ascertaining its condition. This was nearly one year after the injuries were alleged to have been sustained, and testimony as to the condition of the walk at the time the examination was made was properly rejected.

Many other alleged errors are set out in plaintiff in error's brief, but a discussion of them all would extend this opinion to an undue length. It is sufficient to say that we have carefully considered them, and find that the error, if any, is not such as to require a reversal of the case. The judgment of the district court is affirmed.

(10 Kan.App. 442)

CITY OF OTTAWA v. McCREERY.

(Court of Appeals of Kansas, Southern Department, E. D. July 25, 1900.)

DEFECTIVE SIDEWALK—INJURY TO PEDESTRIAN—EVIDENCE.

1. The petition examined. *Held*, that the facts stated are sufficient to constitute a cause of action.

2. The conclusions of this court in the case of *City of Ottawa v. Black* (lately decided) 61 Pac. 985, relating to admissibility of evidence to show presentation of claim to city council, are adopted in this case.

3. Defendant offered testimony to show that W., who was employed by the city to repair sidewalks, was a competent workman. W. had testified that he had made certain repairs on the sidewalk upon which plaintiff claimed to have been injured. He did not testify as an expert, and his reputation as a workman had not been attacked. *Held*, that the court did not err in excluding such testimony.

4. The instructions complained of examined. *Held* that, construed in connection with the rest of the court's charge, they fairly state the law.

(Syllabus by the Court.)

Error from district court, Franklin county; S. A. Riggs, Judge.

Action by Capitola McCreery against the city of Ottawa. Judgment for plaintiff. Defendant brings error. Affirmed.

F. A. Waddle and Walter Pleasant, City Atty., for plaintiff in error. C. B. Mason and W. S. Jenks, for defendant in error.

SCHOONOVER, J. The defendant in error, while walking on the sidewalk on one of the streets of Ottawa, was tripped and caused to fall down, as she alleges, by reason of a defect in the sidewalk, and was thereby injured. To recover damages, she brought an action against the city, which was tried to a jury, and a verdict returned in her favor for \$500. To reverse the judgment rendered upon the verdict, the city brings the case to this court.

1. It is urged by plaintiff in error that the court erred in overruling its demurrer to plaintiff's petition. It is insisted that the petition was fatally defective, because (1) it contained no allegation that the sidewalk upon which plaintiff claimed to have been injured was in the city of Ottawa, or on a public street of said city; and (2) because it did not allege that the defect existed a sufficient length of time to allow of its discovery and repair by the city. The petition is in part as follows: "The above-named plaintiff complains of the said city of Ottawa, defendant, and alleges (1) that the defendant is a municipal corporation, being a city of the second class, under the laws of the state of Kansas, and situated in the county of Franklin, in said state; (2) that on or about the 17th day of September, 1896, and for a long time prior thereto, as defendant well knew, or by the exercise of ordinary diligence might and could have known, the sidewalk on the west side of Locust street, in front of lots numbered ten and twelve of block fifty-six in said city, was and had been

in a dangerous and defective condition, in this: that the stringers were rotten, incapable of holding nails driven, so that the boards in said sidewalk at divers places in said sidewalk were loose and unsafe, liable to cause persons traveling over and upon said walk to be tripped and fall down and be injured." It will be observed that the sidewalk is described as being located on the west side of Locust street, in front of lots numbered 10 and 12 of block 56 in said city. The only city referred to in the petition is the city of Ottawa, and the words "said city" clearly refer to the city of Ottawa, so that the accident is alleged to have occurred on the sidewalk on the west side of Locust street, in front of lots 10 and 12 of block 56 in the city of Ottawa. This certainly locates the alleged defect with a sufficient degree of precision; and, in this connection, we do not think that the plaintiff in error's contention is well grounded. Nor do we think the contention that the petition is defective because it did not allege that the accident occurred on a public street has any merit. Bouvier defines a street as "a public thoroughfare or highway in a city or village." In 24 Am. & Eng. Enc. Law, p. 2, a street is defined as "a public road or way in a city, town, or village." In view of these definitions, it would be unnecessary to allege that the street upon which the injury was alleged to have been sustained was a public street. The petition alleged "that on or about the 17th day of September, 1896, and for a long time prior thereto, as defendant well knew, or by the exercise of ordinary diligence might and could have known, the sidewalk * * * was and had been in a dangerous and defective condition. * * * We think that, under this allegation, evidence could be introduced to show that the defect had existed for such a length of time as to charge the defendant with notice. In the case of Posey Co. v. Stock (Ind. App.) 36 N. E. 928, cited by plaintiff in error in its brief, the court said: "Or had the complaint, in terms, charged notice or knowledge on the part of the appellant, without limiting it to the time 'before the bridge broke down,' such averment might be supported by proof that the bridge was so defective for such a length of time that the appellant became chargeable with knowledge or notice." We think that the petition stated a cause of action, and that the court properly overruled the demurrer.

2. It is urged that the court erred in admitting the evidence offered to show the presentation of the claim to the city council. In the case of City of Ottawa v. Black (recently decided by us) 61 Pac. 985, our views upon this question are stated, and it will not be necessary to here repeat them.

3. Plaintiff contends that the city had the right to prove that one Wilkerson, who was employed by the city to repair sidewalks, was a competent workman. We think that the court properly excluded such testimony,

as it was wholly immaterial. Wilkerson's reputation as a workman had not been attacked. He testified that he had nailed down some boards on the walk on which the injury was alleged to have been sustained, and that he had examined it and found some rotten stringers, etc. Wilkerson did not testify as an expert, and there was, indeed, no need of expert testimony. The question was, was the sidewalk defective, and, if so, for what length of time had it been in such condition? And, taking the facts testified to by Wilkerson and others, the jury could easily reach a conclusion as to the condition of the walk at the time the accident occurred.

4. Plaintiff in error also complains of certain instructions given by the court. The instructions in question have not been set out in the brief, as required by the rules of this court, but nevertheless we have examined them, and find that, construed in connection with the rest of the charge of the court, they fairly state the law.

Other errors are complained of, but they are not such as to require a reversal of the case. The judgment of the district court is affirmed.

STATE ex rel. GEMMELL v. CLANCY.
Judge.

(Supreme Court of Montana. July 30, 1900.)
INJUNCTION — DISOBEDIENCE — CONTEMPT —
ADJUDICATION—REFUSAL TO AL-
LOW DEFENSE.

Code Civ. Proc. § 2172, provides that, where a contempt is not committed in the court's presence, an affidavit of the facts shall be presented. Section 2173 authorizes the issuance of an order to show cause on such affidavit, and sections 2178 and 2179 provide that, when the person on whom the order to show cause was served appears, the court must investigate the charge and determine whether the person charged is guilty. *Held*, that it was improper to refuse to allow relator to move to dissolve a temporary injunction, or to be heard in opposition to the motion to continue it, on the ground that he was in contempt for violating the injunction by posting notices on the property on which he was forbidden to go, when no contempt proceedings had been instituted against him, and no opportunity was given him to defend himself in the matter.

Certiorari by George Gemmell to review the action of William Clancy, judge of Second district court, in holding relator guilty of contempt. Orders reversed.

F. E. Corbett, Geo. M. Borquinn, and Clayberg & Gunn, for relator. Wm. H. De Witt, for respondent.

WORD, J. Proceedings on certiorari to review the orders of the district court of Silverbow county made on the 3d and the 30th days of March, 1900. The facts are these: In a certain action pending in said district court, entitled "Lyman M. Harley and Butte & Boston Consolidated Mining Company, Plaintiffs, vs. Montana Ore-Purchasing Company, George Gemmell, et al.,

Defendants," respondent, as judge of said court, issued a temporary injunction against said defendants, which was duly served on the relator herein on the 6th day of January, 1900, enjoining and restraining him from entering upon the Washington placer-mining claim, particularly described in the complaint, of which plaintiffs alleged they were the owners and in possession. On January 26, 1900, relator filed his separate answer in said action, denying, among other things, the ownership and possession by plaintiffs of said Washington placer-mining claim, and setting up matters in the way of defense immaterial on this hearing. Relator subsequently filed an amended answer and a supplemental answer, and also made and served his motion to dissolve the temporary restraining order theretofore issued in said cause. This motion came on for hearing on the 3d day of March, 1900. Testimony was introduced in support of said motion. It appeared from the evidence of relator given on said hearing that on the 6th day of January, 1900, and shortly after he had been served with said temporary restraining order, relator had posted upon the premises embraced in said order three separate location notices, copies of which were offered in evidence. Thereupon counsel for plaintiffs objected to relator being heard upon his motion to dissolve, on the ground that relator was in contempt of court. Relator further testified that he had posted said location notices by advice of counsel. The court, the respondent herein, sustained said objection, and refused to hear relator on his said motion to dissolve, on the ground that relator was in contempt of court in entering upon said premises and posting said location notices thereon after said restraining order had been served upon him. Afterwards, to wit, on March 30, 1900, plaintiffs' order to show cause why an injunction pendente lite should not be granted came on to be heard. Witnesses were called and evidence was given in behalf of plaintiffs. At the close of plaintiffs' evidence, relator offered to introduce evidence in his own behalf. At once, and before the introduction of any evidence by relator, plaintiffs objected to any testimony whatsoever being offered on the part of the relator, for the reason that it had already been adjudged, on March 3, 1900, that relator was in contempt of court. The court sustained said objection, would not permit relator to introduce evidence, and refused to hear him in opposition to plaintiffs' application for an injunction pendente lite. Thereafter, on the 30th day of April, 1900, the court made an order granting plaintiffs' prayer for an injunction during the pendency of the action. On the application of relator, writs of certiorari issued out of this court to review the orders of the court above designated. Only one return has been made; but, as this return embraces all the matters pertaining to both orders, they will be considered together.

First, as to the order of March 3, 1900. The defendant Gemmeil, relator herein, as was his right, had filed and served his motion to vacate the temporary restraining order issued on the day the action was begun. In due course this motion to dissolve came on for hearing. While the relator was on the stand, counsel for plaintiffs objected to said relator being heard, on the ground that it appeared from his own testimony that said relator was in contempt. The court adopted the views of plaintiffs' counsel, and refused to hear relator. When relator's motion came on for hearing, and he took the stand in his own behalf, no judgment or other proceedings for contempt had been taken against him. No affidavit containing the facts constituting the contempt had been presented. No notice had been given him, nor had he been served with an order to show cause why he should not be punished for contempt. On the contrary, it does appear that, on the hearing of said motion on the 3d day of March, relator was held guilty of contempt without notice, without an opportunity to be heard, without an opportunity to defend, and in the absence of an affidavit of the facts constituting the contempt necessary to set the power of the court in motion. It appears from the evidence of relator that any contempt which relator may have committed was "constructive,"—that is, one not committed in the immediate view and presence of the court,—and therefore a contempt which did not permit a summary punishment. Section 2172 of the Code of Civil Procedure provides that, when a contempt not in the presence of the court is committed, an affidavit shall be presented of the facts constituting the contempt. Upon the affidavit an order to show cause may be made. Id. § 2173. When the person upon whom the order to show cause is served appears, the "court or judge must proceed to investigate the charge" (Id. § 2178), and must determine whether the person proceeded against "is guilty of the contempt charged" (Id. § 2179). These provisions of the Code, plainly disregarded, should have been followed; for, as was said in *Batchelder v. Moore*, 42 Cal. 412, "the power of a court to punish for an alleged contempt of its authority, though undoubted, is in its nature arbitrary, and its exercise is not to be upheld, except under the circumstances and in the manner prescribed by law. It is essential to the validity of proceedings in contempt, subjecting a party to fine and imprisonment, that they show a case in point of jurisdiction within the provisions of the law by which such proceedings are authorized, for mere presumptions and intendments are not to be indulged in their support. The statute of this state regulating contempts and their punishments provides that, when the alleged contempt is not committed in the presence of the court, an affidavit of the facts constituting the contempt shall be presented. Prac. Act, § 481. If there be no affidavit present-

ed, there is nothing to set the power of the court in motion, and if the affidavit as presented be one which, upon its face, fails to state the substantive facts which in point of law do or might constitute a contempt on the part of the accused, the same result must follow; for there is no distinction in such a case between the utter absence of an affidavit and the presentation of one which is defective in substance, in stating the facts constituting the alleged contempt." *Galland v. Galland*, 44 Cal. 475, 478; *Johnson v. Superior Court*, 63 Cal. 578, 579; *Ex parte Ah Men*, 77 Cal. 198, 200, 19 Pac. 380; *Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co.* (Mont.) 60 Pac. 807. The practice of beginning contempt proceedings by affidavit, as provided by section 2172 of the Code of Civil Procedure, is almost universal; and an examination of the authorities will generally disclose that in all contempt proceedings, save for such as are committed in the court's immediate presence, an affidavit is essential. 4 Am. & Eng. Enc. Pl. & Prac. 279; *Rap. Contempt*, p. 122. Nothing said by this court in the case of *Forrester v. Mining Co.*, 23 Mont. 122, 58 Pac. 40, whether by way of argument or otherwise, was intended, or is to be understood, as a holding that in a proceeding for a contempt the affidavit required by statute need not be presented.

The relator was entitled to notice of the alleged contempt in order that he might be afforded an opportunity to prepare his defense; and, even in cases where the alleged contempt consists in the violation by a party of an order made in a civil suit still pending, it is held—and, in our opinion, correctly held—that such party is entitled to a separate and distinct notice of the proceeding. *Worcester v. Truman*, 1 McLean, 483, Fed. Cas. No. 18,043; *State v. Matthews*, 37 N. H. 450; *Ex parte Kilgore*, 3 Tex. App. 247; *Ex parte Langdon*, 25 Vt. 680; *Ex parte Ireland*, 38 Tex. 344; *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914; *Code Civ. Proc.* § 2173. Proceedings in constructive contempt are criminal in their nature. *Ex parte Gould* (Cal.) 33 Pac. 1112, 21 L. R. A. 751. Relator should have been accorded the inalienable privilege of being heard in his defense; for no proposition can be more clearly established than that a man cannot incur the loss of liberty or property for an offense by a judicial proceeding until he has had a full opportunity of meeting the charge against him. In *Galpin v. Page*, 18 Wall. 350, 21 L. Ed. 959, the court said: "It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear and has been afforded an opportunity to be heard. Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and can never be upheld where justice is justly administered." "Where-

ever one is assailed in his person or his property, there he may defend; for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914. In *Hovey v. Elliott*, 167 U. S. 409, 17 Sup. Ct. 841, 42 L. Ed. 215, the court say: "The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends." In disregard of the statute, without notice, without a hearing, without an opportunity to defend, the respondent on March 3d held relator guilty of contempt, and, by way of punishment, refused to hear him on his motion to dissolve the temporary restraining order theretofore issued in said cause.

We will next consider the order of March 30th. The action of the court in failing to grant or deny relator's motion to set aside the temporary restraining order left that order in force. Between March 3d and March 30th no proceedings for contempt had been taken against the relator. As recited above, plaintiffs, on the hearing of their order to show cause on March 30th, offered their proofs and rested. When relator sought to introduce evidence in his own behalf, he was met with the objection that he had theretofore been adjudged guilty of contempt, and therefore was not entitled to be heard. The court sustained this objection. Relator was denied his right to defend,—his right to introduce evidence,—and was refused a hearing. Counsel for respondent contend that both on the hearing of March 3d and of March 30th relator was in contempt, and that the punishment of the court was in denying relator what he asked as a favor and not as a matter of right. Holding, as we do, that the court was without jurisdiction to inflict any punishment whatever upon relator for his alleged contempt, since he had been denied the rights and privileges granted him by statute and in justice due him, we are not called upon to decide whether the privileges refused him were of favor or of right.

Counsel for respondent contend that the remedy of relator is, not by certiorari, but by appeal. This cannot be true of the order of March 3d, since this order is not appealable, and in making it the court exceeded its jurisdiction; nor, for the same reasons, can this contention be maintained as to the order of March 30th, in so far as that order holds relator guilty of contempt. It appears, how-

ever, from the record that on April 30, 1900, the day the writs of certiorari issued out of this court, the court below, in an order which recites the proceedings had on March 30th, granted plaintiffs an injunction pending the final determination of the action. This order of the court in this regard is evidently based upon the testimony introduced by plaintiffs on the hearing had on the 30th of March and relates thereto. The order granting an injunction is by statute appealable, and on an appeal therefrom to this court the action of the court below in granting the injunction may be reviewed.

The position we have taken makes unnecessary a consideration of the other questions presented. The orders of March 3d and of March 30th, in so far as they hold relator guilty of contempt and punish him therefor, are hereby annulled and set aside.

BRANTLY, C. J., and PIGOTT, J., concur.

**WORLD PACKAGE, EXPRESS & MES-
SENGER CO. v. TRADES AS-
SEMBLY et al.**

(Supreme Court of Montana. July 30, 1900.)
INJUNCTION—APPEAL AND ERROR—FAILURE
TO EXCEPT—EFFECT—OBJEC-
TIONS—WAIVER.

Plaintiff, on the hearing of his application for an injunction, swore a witness whose testimony, in scope and definiteness, exceeded the allegations of the complaint, and in argument on its admissibility the court ruled that the complaint did not state facts sufficient to constitute a cause of action, to which plaintiff excepted, when defendants asked leave to withdraw their affidavits in support of their answer, and to be allowed to stand on the answer alone, which was granted, and on motion of defendant the court refused to continue the temporary order, and vacated the order to show cause, to which plaintiff excepted. *Held*, that plaintiff, by failing to insist on a ruling as to the admissibility of his evidence, and to object to the withdrawal of defendant's affidavits, and thereby allowing the question as to whether an injunction should issue to be submitted on the complaint and answer, waived his right to review the action of the trial court on appeal.

Appeal from district court, Silverbow county; H. C. Smith, Judge.

Action by the World Package, Express & Messenger Company against the Trades Assembly and others to restrain defendants from interfering with plaintiff's business. From an order dissolving a temporary injunction, and vacating an order to show cause, plaintiff appeals. Affirmed.

On July 23, 1899, the plaintiff applied to the district court of Silverbow county for an injunction to restrain the defendants from interfering with its messenger and express business, in which it is engaged in the city of Butte. The complaint alleges that in the conduct of said business the plaintiff makes use of electric call boxes, which it has installed in various houses and places of business in the city, and that these boxes are connected with its general office by means of

electric wires; that it also employs men and uses teams and wagons for the purpose of carrying packages and express matter and delivering the same to its customers; that all the means thus employed are necessary and indispensable to the proper conduct of its said business; that the defendants have entered into a conspiracy to ruin plaintiff's business by destroying the said call boxes and the wires and other appliances used in connection therewith, by forcing the employees of plaintiff to leave its employment, and by compelling the merchants of Butte and plaintiff's other patrons to cease their patronage; that the defendants threaten to effect their purpose by actual destruction of plaintiff's said appliances, and to drive away its employees and patrons by means of a boycott; that defendants are all insolvent; and that plaintiff will suffer irreparable damage unless defendants are restrained from their purpose. Upon this application one of the judges of said court made an order requiring the defendants to appear before the court on July 29th, at 10 o'clock a. m., to show cause why an injunction should not issue as prayed, and requiring them to refrain from molesting plaintiff's business in any way until a hearing could be had. At this time defendants McDonald, Maynard, Holden, and Geiger appeared in their own behalf, and filed their answer, with certain affidavits to resist the issuance of injunction. The answer denies directly all the material allegations contained in the complaint. No other defendants appeared. A hearing was had, at which, from the recitals in the record, it appears the following proceedings occurred: "The plaintiff swore a witness in support of the allegations of its complaint, but the testimony offered greatly exceeded in scope, character, and definiteness the allegations of the complaint, and upon the argument as to the admissibility of said testimony the presiding judge stated that he was of the opinion that the allegations of the complaint would not warrant the issuance of an injunction or restraining order, and that the complaint did not state facts sufficient to constitute a cause of action for an injunction." A recess was then taken until 2 o'clock p. m. At this hour, "the parties being present in person and by counsel, the defendants asked leave to withdraw their affidavits * * * from the files and stand upon their answer alone. Said leave was granted without objection. The court thereupon stated that he was of the same opinion in regard to the sufficiency of the complaint, to which ruling plaintiff duly excepted. Whereupon, on motion of defendants, the court refused to continue the temporary restraining order in force, and dissolved the same, and vacated the order to show cause, all upon the complaint and answer herein. Whereupon plaintiff moved the court for leave to amend the complaint, which motion was granted. Whereupon plaintiff duly excepted to order dissolving order to show cause and vacating temporary restraining order,

and was granted 30 days to prepare, serve, and file bill of exceptions. Whereupon and upon the same day, to wit, July 29, 1899, the plaintiff, in pursuance of the leave granted by the court, duly filed its amended complaint herein." From the order dissolving the restraining order, and vacating the order to show cause, the plaintiff appeals.

O. M. Hall and Geo. A. Clark, for appellant. John N. Kirk, for respondents.

PER CURIAM. The condition of this case, as presented by the recitals of the record quoted, is anomalous. The appellant obtained from the court no ruling upon the admissibility of evidence under the allegations of the complaint. If such a ruling had been obtained, and the court had held the pleading bad, an amendment framed to meet the views of the court could have been filed, and thus the order to show cause and the restraining order would have been preserved in force until a hearing was had upon the evidence. This course is always proper, upon a motion to dissolve an injunction, if the facts contained in the amendment existed at the time the original complaint was filed (*Pfister v. Wade*, 59 Cal. 273; *Barber v. Reynolds*, 33 Cal. 497; *Shipman v. Superior Court* [Cal.] 12 Pac. 787); and the rule applies as well to the situation presented by the record in the present case. Either this course should have been pursued, or the plaintiff should have offered its proof, and then stood upon the ruling by which it was excluded. The plaintiff would then have been in position to assign error upon the action of the district court, and properly to present it for review on appeal to this court. We think the court was wrong in the opinion that the complaint does not state a cause of action; but this expression of opinion, though it may explain the plaintiff's subsequent action, was not a decision of any question presented for determination. No evidence was offered and excluded. No objection was made to the withdrawal of the affidavits filed in support of the denials made by the answer. The question as to whether an injunction should issue was without objection submitted to the court upon the complaint and answer. As the answer met and directly denied all the material allegations of the complaint, the action of the court thereon cannot be disturbed. Though in form the order vacated the restraining order, and discharged the order to show cause, it was in legal effect a refusal to issue the injunction upon the showing then made. In this there was no abuse of discretion. But, conceding that the opinion expressed by the court was in effect a ruling excluding plaintiff's evidence on the ground that the complaint was bad, the plaintiff is in no position to complain. The record fails to disclose any exception to the ruling taken at the time. The plaintiff, having thus submitted without complaint to the court's action, thereby waived its right to

have this court review it and correct the error thus committed. The order appealed from is affirmed. Affirmed.

RALEIGH v. DISTRICT COURT OF FIRST JUDICIAL DISTRICT.

(Supreme Court of Montana. July 16, 1900.)
RES JUDICATA—CONTEST OF WILL—MANDAMUS.

1. Where a contest of a will was dismissed because not stating a cause of action, such dismissal did not deprive contestant of the right to maintain a subsequent contest based on other grounds.

2. Under Code Civ. Proc. pt. 3, tit. 12, c. 2, arts. 1, 2, one desiring to contest a will may file statement of opposition at any time prior to the hearing of proof of the will.

3. Where a district court erroneously struck from the files a contest of a will on the ground that it was inadmissible, because of a former contest, which had been dismissed as not stating a ground of contest, as an appeal would not lie from the order a writ of mandamus will be granted to compel the court to take jurisdiction.

Application in the supreme court by Medora T. Raleigh for writ of mandamus against the district court of the First judicial district to compel it to restore to its files a second contest to the probate of a will. Writ granted.

T. J. Walsh, Sanders & Sanders, and Massena Bullard, for plaintiff. Clayberg & Gunn, H. G. McIntire, and H. S. Hepner, for respondent.

PIGOTT, J. This is an application for a writ of mandate to the district court of Lewis and Clarke county, commanding it, among other things, in substance, to reinstate and entertain jurisdiction of a contest instituted by the plaintiff on the 5th day of May, 1900, of the alleged will of one Albert G. Clarke, deceased. An alternative writ was issued, and the court, through its judges, showed cause by answers. The petition and answers disclosed these facts: On the 10th day of January, 1900, the Honorable Sidney H. McIntire, one of the judges of the district court of Lewis and Clarke county, appointed the 23d day of January, 1900, as the time for the hearing of a petition praying for the probate of the alleged will, and of two alleged codicils thereto (one bearing date the 16th day of January, 1899, and the other having been made on the 27th day of June of that year), of Clarke, deceased. On the day appointed for the hearing the plaintiff in the present proceeding appeared and filed the statement of her grounds of opposition to the probate of the purported will, in so far as the codicil of January 16, 1899, was concerned; alleging that such codicil was no part of said will, the testator having been induced to make the codicil by the fraud and undue influence of certain devisees and legatees. The petitioners for the probate of the will traversed the averments of the contestant touching the fraud and undue influence, and also pleaded matter

in avoidance. The contestant, by reply, joined issue on the new matter. On the 2d day of May, 1900, the contest came on for hearing before the court sitting with a jury, whereupon the proponents of the will objected to the introduction of evidence and to the court's proceeding further in the cause, and moved that the grounds of opposition be overruled, for the reason that the execution of the second codicil was a republication of the original will as modified by the codicil of January 16, 1899, and because the grounds of opposition were confined solely to the first codicil; there being no allegation that the testator was of unsound mind at the time of the execution of the last codicil, or that he was induced to make it by fraud, duress, or undue influence. Before the submission of the motion the contestant offered to file and serve amended grounds of opposition, alleging that at the time of the making of each of the codicils the decedent was not free from fraud or undue influence, but, on the contrary, that certain of the legatees and devisees had exercised, and did then exercise, over him, undue influence, and practiced fraud upon him, whereby he was induced to make the codicil dated January 16th, and also the later one of June 27th. The proponents objected to the allowance of the amended statement of grounds of opposition to the will, for the reason that the proposed amended protest set forth a new and different cause of action from that originally filed, which objection was sustained on the 4th day of May. On the same day the objection theretofore interposed to the reception of any evidence in support of the allegations of the contest and the motion to overrule the contest were, respectively, sustained and granted, and the contest was dismissed. The court then adjourned the hearing of the petition to prove the will to the 5th day of May, at the hour of 2 o'clock in the afternoon. On that day, and before the hour appointed, the contestant filed a duly-verified statement of her grounds of opposition to the probate of the will, the statement setting up the same objections that were contained in the amended statement of opposition offered to be filed on the 2d day of May. At the hour of 2 o'clock on the 5th day of May the proponents of the will moved to strike from the files the statement of contest. On May 26th the court granted the motion, and refused to proceed further with the contest; the court basing its action upon the supposed fact that the contestant had, at the time originally appointed for the hearing of the petition to prove the will, filed her written opposition to the probate of the will, assailing the first codicil only. The court held that one contest had already been filed and disposed of upon law points, and that the statute will not permit successive contests before probate. After the court, through Judge McIntire, had stricken the grounds of opposition from the files, the matter of hearing proof of the execution of the alleged will and codicils was, upon motion of the contestant, transferred by

Judge McIntire to the other department of the district court, presided over by the Honorable Henry C. Smith as judge, with the request that Judge Smith act in the place of Judge McIntire in hearing the proof touching the execution of the will and codicils. Since the transfer to Judge Smith's department, no hearing has been asked for or had. Upon the foregoing facts the defendant moves this court to quash the alternative writ of mandate and dismiss the proceeding, for the reason that neither the petition nor alternative writ states facts sufficient to authorize the granting of the peremptory mandamus, or any relief whatever. The plaintiff, on the other hand, moves the court to grant a peremptory writ of mandate herein, notwithstanding the answers.

Two questions are presented: (1) Did the plaintiff have the right to file written grounds of opposition to the probate of the will after the dismissal of the first contest, and subsequently to the day originally appointed for hearing the petition for the probate of the will, but at the time to which the hearing was postponed? (2) Is mandamus the proper remedy? These two questions, only, are necessarily involved. Whether or not the court erred in refusing to permit the plaintiff to amend her grounds of contest, and whether or not the court was right in dismissing the first formal contest, we need not inquire. Nor is it essential that we consider the scope or effect of that part of section 2 of article 8 of the constitution of Montana providing that the supreme court "shall have a general supervisory control over all inferior courts, under such regulations and limitations as may be prescribed by law." This provision was touched upon in *State v. Second Judicial Dist. Ct.*, 22 Mont. 220, 56 Pac. 219; and provisions resembling it have been considered in *Vine v. Jones* (S. D.) 82 N. W. 82; *State v. Johnson* (Wis.) 79 N. W. 1081; *State v. Judge*, 31 La. Ann. 794; *Railroad Co. v. Judge*, 44 Mich. 479, 7 N. W. 65; *City of Detroit v. Judge*, 79 Mich. 384, 44 N. W. 622; and *Ex parte Walker*, 54 Ala. 577. With regard to the doctrines announced in these cases, which we have cited for convenient reference, no opinion is expressed.

1. The court held that the first contest failed to state any ground of opposition to the will, and therefore dismissed it. Before the hearing of the petition the plaintiff caused to be filed the statement of the new grounds of opposition to the will. This the court refused to consider, and struck from the files, for the reason that the plaintiff had already attempted to maintain a contest which had been disposed of upon law points; the statute not permitting successive contests before probate. It is to be observed that the first attempted contest was dismissed because it failed utterly to state any ground of opposition to the probate of the will, and that the second contest was dismissed because there had already been a contest instituted against the will. Without commenting upon this

seeming inconsistency, it is enough to say that the institution and dismissal of the first intended contest did not deprive the plaintiff of the right to commence and maintain a subsequent contest based upon other grounds. Neither the common law nor the statute recognizes the doctrine applied by the court in striking from the files the second statement of contest. In this court, counsel for the defendant argue that, because the plaintiff failed to institute the second contest at the time originally appointed for the hearing of the petition for probate, the court was correct in striking it from the files. Their contention is that one desiring to contest a will before probate must, at the time appointed for the hearing, file his statement of the grounds of opposition, and that a contest instituted thereafter, even though it be at the time to which the hearing was postponed, is too late. In our opinion, such is not the interpretation of those sections of articles 1 and 2, c. 2, tit. 12, pt. 3, of the Code of Civil Procedure, pointing out the procedure with respect to the probate and contest of wills. We are satisfied that the statement of opposition to the probate of the will may properly be filed at any time prior to the hearing of proof of the will. The interpretation contended for by counsel cannot be indulged without giving to the statutes a meaning of which their language is not fairly susceptible.

2. Is mandamus the proper remedy? The plaintiff possessed the absolute right to institute the second contest. The district court struck the contest from the files for the reason that, as the court believed, the law did not permit it to be filed. But the law specially enjoined upon the district court the duty to entertain jurisdiction and proceed in the regular exercise thereof, and to refrain from striking a contest for the reason assigned. Refusal to take jurisdiction, or, after having acquired jurisdiction, refusal to proceed in its regular exercise, or the erroneous determination of a preliminary question of law, upon which the court refused to examine the merits, will be corrected by mandamus. The rule that mandamus will not issue to control discretion or to revise judicial action, but only to direct the court to act in such matter, is to be understood as applying only to the act to be commanded by the writ, and not to the decision of purely preliminary questions of law only. If the rule applied to such preliminary questions, then, to use the language of Mr. Hayne in section 323 of his treatise on New Trials and Appeals, "no writ of mandamus could ever issue, and the machinery provided by the Code for trying such questions would be useless. The distinction above stated applies not only where the act to be performed is purely ministerial, such as the signature of a warrant, the payment of a claim, or the like, but also where it is judicial in its nature." In *Castello v. Circuit Court*, 28 Mo. 259, it was held that "where an inferior judicial tribunal declines to hear a cause upon what is termed a preliminary

objection, and that objection is purely a matter of law, a mandamus will go, if the inferior court has misconstrued the law." Judge Scott, in concurring, expressed the opinion that, if the inferior court had quashed the proceeding upon an erroneous interpretation of the statute requiring a notice to be given, mandamus would not lie, but that, if notice was not required by any law or rule of practice, then the inferior court had no authority to exact the giving of such notice, and mandamus would lie. In the present proceeding there was no law or rule of practice which prevented the institution of the second contest at any time prior to the hearing of the petition for the probate of the will. Possibly the right may continue until the admission to probate. If the statute or the law required that a contest be commenced at or prior to the time originally appointed for the hearing of the petition, or prescribed that not more than one contest should be instituted by the same person, and the court, upon applying the facts to the statute or law, had erroneously decided against the plaintiff, holding that the contest of the plaintiff was within the inhibition of such statute or law, then, perhaps, the judgment or discretion of the lower court could not be controlled by mandamus. Mr. High, in section 151 of his work on Extraordinary Legal Remedies, says: "A distinction is recognized between cases where it is sought by mandamus to control the decision of the inferior court upon the merits of a cause, and cases where it has refused to go into the merits of the action, upon an erroneous construction of some question of law or of practice preliminary to the whole case. And while, as we shall see, the decision of such court upon the merits of the controversy will not be controlled by mandamus, yet if it has erroneously decided some question of law or of practice presented as a preliminary objection, and upon such erroneous construction has refused to go into the merits of the case, mandamus will lie to compel it to proceed." Although the writ of mandate will not lie to correct errors committed by a court while exercising its judicial discretion upon the merits of the case, either of law or of fact, within its jurisdiction, as was held in *State v. Smith*, 23 Mont. 329, 58 Pac. 857, yet, to adopt the language of the supreme court of the United States in *Ex parte Parker*, 120 U. S. 737, 7 Sup. Ct. 767, 30 L. Ed. 818, which case has been cited with approval in *State v. Eddy*, 10 Mont. 311, 25 Pac. 1032, the writ of mandate does "properly lie in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof." In the *Parker Case* the supreme court of the territory of Washington refused to hear a case taken to that court by appeal, because it considered, upon an erroneous interpretation of the statute that the parties were not in court for the purposes of appeal, and the court dismissed

the appeal for want of jurisdiction. The supreme court of the United States issued a peremptory mandamus commanding the territorial court to reinstate the appeal, and proceed, in the exercise of its jurisdiction, to hear and determine the same upon its merits. *Ex parte Schollenberger*, 96 U. S. 369, 24 L. Ed. 853; *Harrington v. Holler*, 111 U. S. 796, 4 Sup. Ct. 697, 28 L. Ed. 602; *In re Parker*, 131 U. S. 221, 9 Sup. Ct. 708, 33 L. Ed. 123; *Gaines v. Rugg*, 148 U. S. 228, 18 Sup. Ct. 611, 37 L. Ed. 482; and *In re Hohorst*, 150 U. S. 853, 14 Sup. Ct. 221, 37 L. Ed. 1211,—in which writs of mandate were issued, are well-considered cases upon this subject. The doctrine announced by the supreme court of the United States, and the principles deduced by the text writers mentioned from a consideration of the cases, are well-nigh universally recognized and followed by the English and American courts, as will appear by an examination of the following citations: *Castello v. Circuit Court*, *supra*; *State v. Cape Girardeau Court of Common Pleas*, 73 Mo. 560; *State v. Laughlin*, 75 Mo. 358; *State v. Hunter*, 3 Wash. St. 92, 27 Pac. 1076; *Ferguson v. Kays*, 21 N. J. Law. 431; *People v. New York Common Pleas*, 18 Wend. 534; *Wood v. Strother*, 78 Cal. 545, 18 Pac. 706; *Water Co. v. Rives*, 14 Nev. 431; *State v. Murphy*, 19 Nev. 89, 6 Pac. 840. Nor is this court without the authority of its own adjudications which either expressly or tacitly recognize the doctrines and principles referred to. *State v. Eddy*, *supra*; *State v. District Court of First Judicial District*, 13 Mont. 370, 34 Pac. 298; and *State v. District Court of Third Judicial District*, 14 Mont. 476, 37 Pac. 7. It is therefore unnecessary now to determine whether, in striking from the files the statement of the grounds of opposition to the will, the district court refused to take jurisdiction of the second contest, or, after having obtained jurisdiction, refused to proceed in its exercise, or (if this differs from a refusal to proceed in the exercise of jurisdiction) erroneously decided a pure question of law or practice presented as a preliminary objection, and upon such erroneous interpretation refused to entertain the contest. Manifestly, the court did the one thing or the other or both; and in either case mandamus is the proper remedy, unless there are other grounds for the denial of the writ. The plaintiff is therefore entitled to a peremptory writ, unless she has a plain, speedy, and adequate remedy in the ordinary course of law. There is no appeal allowed from the order striking the grounds of contest from the files; but, conceding that the error committed by the district court in striking the grounds of contest from the files might be reviewed in this court on an appeal from the judgment admitting the will to probate, yet such remedy would not be plain, speedy, and adequate. In the present state of the calendar of this court, and under the present rules, an appeal from a judgment admitting the will to probate could

not be heard within two years after the filing of the transcript, and before that time the right of the plaintiff, conferred by section 2360 of the Code of Civil Procedure, to contest after the probate, would have expired. In *Re Hohorst*, *supra*, the court said: "The Hamburg-American Packet Company being liable to this suit in the circuit court of the United States for the Southern district of New York if duly served with process in the district, and having been served, and the order of that court dismissing the suit as against the corporation not being reviewable on appeal at this stage of the case, there can be no doubt that mandamus lies to compel the circuit court to take jurisdiction of the suit as against the corporation." In *Gaines v. Rugg*, *supra*, the court said: "In the present case, as we have before observed, there was no discretion to be exercised by the circuit court; and, although it might have been admissible to raise the question by a new appeal to the proper court, yet, in view of the delay to be caused thereby, we do not consider that such remedy would have been, or would be, fully adequate, or that a writ of mandamus is now improper." To the same effect is *State v. Murphy*, *supra*. Much stress has been laid upon the case of *State v. Smith*, *supra*. Counsel for the defendant assert that it is decisive of the proceeding at bar. That case, however, is not in point. There the district court did not refuse to entertain the action, but took jurisdiction of it, and, if the court erred, the error was not committed in the decision of a question of law preliminary to any investigation, but in a matter in relation to an interlocutory order involving discretion, which could not be controlled by a writ of mandate. There it was also properly held that an appeal from a judgment against the plaintiff therein would furnish a plain, speedy, and adequate remedy in the ordinary course of law for the correction of any error committed in refusing to change the venue. An appeal was the only remedy in that case, and, in contemplation of law, it was in every respect ample. A peremptory writ will be granted as prayed, commanding the district court to restore the second contest to the files, and to proceed therewith in the due exercise of its jurisdiction. Writ granted.

BRANTLY, C. J., and WORD, J., concur.

STATE v. LUCEY.

(Supreme Court of Montana. July 16, 1900.)
CRIMINAL LAW—HOMICIDE—EVIDENCE—RES GESTÆ—INSTRUCTIONS—IDENTIFICATION.

1. Where the state's theory was that a homicide was committed for the purpose of robbing deceased of money which defendant knew he intended to draw from the bank, evidence as to the amount of deceased's deposit was admissible, as tending to prove the motive.

2. Where deceased, departing from home, took

with him a satchel, leaving behind a packed trunk, testimony as to the similarity of the laundry marks on linen contained in a satchel found after his death and those on linen contained in the trunk was admissible to identify the contents of the satchel as deceased's.

3. Conversation had between defendant and deceased, before starting out on a journey which, according to the state's theory, was planned by defendant to entice deceased to his death, was admissible as a part of the res gestae, notwithstanding it had no apparent significance.

4. Testimony of the sheriff that, when arrested, defendant turned away, "as though he was about to be devoured," was admissible, in the absence of a specific objection that the expression was vague.

5. Evidence of efforts made to apprehend defendant after the discovery of a crime was admissible to show defendant's flight and concealment, from which guilt might be inferred.

6. Where defendant accounted for his scratched appearance shortly after deceased's death by saying he had been ejected from a certain train, testimony of the train's crew that they were the only persons on the train, and that no one had been put off on the day in question, was admissible.

7. Where proper instructions were given distinguishing murder in the first and second degrees, and telling the jury to find the degree, and there was no proof from which manslaughter could be inferred, failure to instruct the jury specifically that they might find defendant guilty of either degree of murder or manslaughter was not error.

8. A party cannot complain of an instruction which he himself requested.

9. Where, in a criminal case, indorsements required by Code Civ. Proc. § 1080, subd. 7, as amended by Sess. Laws 1897, p. 241, providing that the court shall mark each instruction "Given," "Refused," or "Modified," and all shall be filed as part of the record, were not made at the time of the trial, as the better practice requires, they may be identified subsequently by an entry ordered to be made in the minutes.

Appeal from district court, Silverbow county; William Clancy, Judge.

Daniel Lucey was convicted of murder in the first degree, and he appeals. Affirmed.

On July 1, 1890, in the district court of Silverbow county, the defendant, Daniel Lucey, was found guilty of murder of the first degree, and on September 26th thereafter was condemned to death. From the judgment and an order denying him a new trial he has appealed. The evidence disclosed by the record tending to connect defendant with the homicide is entirely circumstantial, but no contention is made that it is not amply sufficient to sustain the finding of the jury. It is sought to reverse the judgment and order appealed from upon alleged errors in rulings by the trial court upon questions arising upon the admissibility of certain evidence, and in a failure to properly instruct the jury upon the law applicable to the case. The story of the crime, as shown by the evidence, is the following: On September 2, 1898, the defendant and deceased, who had been residing in Butte, Mont., made preparations to go to the mining districts in the Cœur d'Alene country, Idaho, to seek work in the mines there. About 3 o'clock in the afternoon they went together to the house of Michael Regan, a brother of deceased,

where the deceased had been boarding. In a few minutes the two left; the deceased stating that he was going to the bank, where he had a deposit of \$550, to obtain expense money. The bank was closed for the day, and the money was not obtained. Returning presently to his boarding house, deceased borrowed from a friend, who also boarded there, \$25, consisting in part of a \$20 gold piece. At about 25 minutes to 9 o'clock in the evening the defendant came to the house, bringing a valise, which was almost empty. He remained about five minutes, during which he and deceased put into the valise the clothes of deceased which were deemed necessary for the trip. Defendant apparently took no extra clothing. The deceased had a trunk, but locked it and left it behind, after putting into it his other belongings, taking the key with him. He also put into the trunk his certificate showing the amount of his deposit in bank. Thereupon the two left in company, ostensibly to take the train for Anaconda, about 28 miles to the northwest. About 10:30 o'clock they were seen together at Rocker, three miles from Butte, on the wagon road leading to Anaconda. There they entered a saloon, bought some beer and a bottle of whisky, and then departed for Silverbow Junction, five miles further along the road, intending to find lodging for the night there. Neither was seen thereafter until the following morning, when the defendant came down the Butte, Anaconda & Pacific Railroad, walking from towards Butte to Gregson station, carrying the valise. His clothes were wet and torn, and his face and hands scratched and bleeding. This station is 18 miles from Butte, towards Anaconda. He accounted for his condition by saying that he was on the early morning train, going from Anaconda to Butte, and had been thrown off by a brakeman, falling into the water at the roadside. He at once began to drink at a saloon near the station house, offering in payment a \$20 gold piece. The Butte, Anaconda & Pacific Railroad connects Butte and Anaconda, winding down Silverbow cañon and along Deer Lodge river. At the mouth of the cañon the road turns west towards Gregson. During the forenoon of September 3d the body of deceased was found in Deer Lodge river, a short distance above the mouth of the cañon. The front of the head and face was crushed in as if by a blow from a blunt instrument. The pockets of the clothing upon the body were turned inside out, except the watch pocket in the pantaloons. A \$5 gold piece was found in this pocket. Nothing else of value was found. At a distance of 1,280 feet up the river, between it and the railroad, the ground showed evidences of a struggle. There were pools of blood by the track, and a trail of blood leading through a wire fence to the river, about 125 feet distant. The wire fence was broken. At the river bank, in the sand, were human tracks. Near the

pools of blood were picked up stones having upon them clotted blood and human hair. On the trail leading to the river were picked up some small coins, and the trunk key belonging to deceased. The body was brought to Gregson about 11 o'clock in the forenoon by the same train from which defendant claimed to have been thrown in the early morning, the crew discovering it on the return trip. The defendant had remained there and continued his drinking until shortly afterwards, when he disappeared. Before going he purchased a ticket to Butte. He left the valise at the ticket window in the station house. He was seen at Anaconda late the following night, but again disappeared; and, though search was made and rewards offered for him, his whereabouts were unknown until April 17, 1899, when he was apprehended at Cripple Creek, Colo. The evidence does not disclose, except from defendant's own statement, whether the defendant knew that the deceased had money upon his person. The defendant knew of the amount of the deposit of deceased, and claims, also, that he knew of deceased's failure to reach the bank in time to withdraw any of it, as well as the fact that deceased borrowed expense money necessary for their intended trip.

B. S. Thresher, for appellant. C. B. Nolan, Atty. Gen., for the State.

BRANTLY, C. J. (after stating the facts). 1. Exception is taken to the action of the court in permitting the witness Kate Regan, the sister-in-law of deceased, to state, over the objection of defendant, how much money the deceased had on deposit in the bank, and what evidence he held of such deposit. The theory of the state was that the homicide was committed for the purpose of robbery. The evidence on the part of the state up to this point tended to establish this theory. It showed that defendant and deceased had been engaged in the afternoon of September 2d in preparing for their proposed journey to Idaho; that the defendant probably knew of the amount of money deceased had on deposit, and that he held a certificate for it. It also showed that he probably knew that deceased intended to withdraw the money, or a part of it, during the afternoon; for the deceased came with the defendant to the house of the Regans during the afternoon, and after staying a few minutes the two hurried away again together; the deceased stating to the witness that he was going to the bank to get money for his expenses, and to pay her for board. Evidently their appearance at the house at this time was to secure the certificate, in order to draw the money. When deceased returned alone, presently, he told the witness that he had failed to get the money, because the bank was closed, and that he had borrowed \$25. The evidence was clearly admissible as tending to prove

motive. It furnished facts from which the jury could draw the inference of robbery, and the state was entitled to this inference. "Any evidence that tends to show that the defendant had a motive for killing the deceased is always relevant, as rendering more probable the fact that he did kill him." Underh. Cr. Ev. § 323. This rule is especially applicable to cases like the present, where responsibility for the homicide rests entirely upon circumstantial evidence. 1 McClain, Cr. Law, § 416; State v. West, Houst. Cr. Cas. 371; People v. Ah Fung, 17 Cal. 377. The presence or absence of it is not conclusive, however, but is to be considered as any other evidentiary fact bearing upon the ultimate question of the guilt or innocence of the defendant, and is more or less significant in the light of the facts of the particular case. The finding of a motive is not indispensable, however. Were this true, it would oftentimes be impossible to secure conviction; for such is the nature of the human heart, and so various are the springs of action hidden therein, that it is often impossible to fathom it and assign any motive whatever to the act under consideration. Under such circumstances it is the duty of the jury to convict, notwithstanding the lack of proof tending to show motive, if the crime is otherwise clearly established. Pointer v. U. S., 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208; Johnson v. Same, 157 U. S. 321, 15 Sup. Ct. 614, 39 L. Ed. 717. Whether the evidence complained of as improperly admitted was sufficient to satisfy the jury that the murder of Regan was committed for the purpose of robbery or not, it was proper matter for consideration. 1 McClain, Cr. Law, § 416; State v. Crowley, 33 La. Ann. 782; Howser v. Com., 51 Pa. St. 332; Early v. State, 9 Tex. App. 476; Kennedy v. People, 39 N. Y. 245; Marable v. State, 89 Ga. 425, 15 S. E. 453; Kerr, Hom. § 472. The relevancy and materiality of this evidence were not affected by the subsequent admission of the defendant, when sworn as a witness, that he knew all about the financial condition of deceased, and of his failure to obtain any money from the bank.

2. After the same witness had identified the articles of clothing taken from the valise left by defendant at Gregson on the morning after the homicide, the court permitted her to recount to the jury the opening of the trunk which deceased had left at her house. She stated that this was accomplished by means of the key which was shown to have been found on the trail leading from the supposed scene of the homicide to the river. The witness then proceeded, over the objection of defendant, to enumerate the articles found in the trunk, and to compare the laundry marks upon some shirts and collars taken from among them with the same character of marks upon others found in the valise. The marks were shown to be the same, and thereupon all the

articles were exhibited to the jury. Defendant alleges that this was prejudicial error. The evidence was properly admitted. The defendant took the valise to Gregson station and left it there, where it was afterwards found. It was competent to identify the articles found in it as the property of the deceased, both upon the question of motive, and as tending to corroborate the statements of witnesses who identified the defendant himself as the person who came to Gregson from the direction of the place where the body of deceased was found. The identification could properly be made by the testimony of the witness, who knew the articles, or by way of comparison of the laundry marks upon them with those upon the articles known and admitted to belong to deceased, or by both methods. The identity of these marks was also strongly corroborative of the statement of the witness, who claimed to know and recognize the articles taken from the valise as the property of deceased.

3 Exception is also taken to the part of the statement of the witness Maggie Donohue in which she related the substance of a conversation between defendant and deceased while engaged in packing the valise at the house of Michael Regan. Something was said about how deceased would manage to get his trunk to the Cœur d'Alene country, where they were going. Defendant told deceased that after they had settled down he (defendant) would send for his wife, and that she would call at Regan's for the trunk and take it with her. This statement was clearly a part of the *res gestæ*. The parties were engaged in preparation for their proposed journey, upon the first stage of which the homicide was committed. Upon the theory (which, in the light of all the proof, is not improbable) that the defendant deliberately enticed his unsuspecting companion to an untimely death, the jury were properly allowed to consider all that was then said and done, as a part of the entire transaction. It matters not that the particular remark had no apparent significance, nor does it alter the case that the defendant subsequently testified that he was never married. The office of the jury was to inquire into the whole transaction, from the time of its inception until its completion, and to draw therefrom their own conclusion as to the guilt or innocence of the defendant. *Kerr*, *Hom.* § 429; *People v. Potter*, 5 *Mich.* 1; 1 *O'Clain*, *Cr. Law*, § 411; *State v. Donelson*, 45 *La. Ann.* 744, 12 *South.* 922.

4. Jerry D. Murphy, the undersheriff of Silverbow county, who went to Cripple Creek, Colo. to bring the defendant back to Montana after the arrest, was sworn as a witness, and testified as to the appearance and behavior of the defendant at the time the witness first saw him. The witness was asked to describe defendant's actions. He replied: "He was shaking and very nervous, and went by me and turned his head away from me, as though he had run onto something he didn't

want to see. He turned right away, as though he was about to be devoured." Counsel moved the court to strike the last sentence of this answer from the record, but assigned no ground for the motion. The motion was denied. Exception is taken to this ruling. The demeanor of a defendant at or about the time he is charged with a crime is always proper matter of evidence to go to the jury, as indicative of a guilty mind. So, also, the jury may, for the same reason, be permitted to consider his acts and conduct at the time of his arrest, and to draw such inference from them as experience and observation of human conduct may suggest. Caution should be observed in considering such evidence, however, lest an inference of guilt be improperly drawn from the fear and excitement naturally evinced by an innocent man when he is suddenly confronted with a serious charge, and is overcome by contemplation of the possible consequences to himself and family. 1 *Rice*, *Ev.* § 318; *Greenfield v. People*, 85 *N. Y.* 75; *McAdory v. State*, 62 *Ala.* 154; *Bish.* *New Cr. Proc.* § 1249. The evidence elicited was clearly competent. *Com. v. Sturtivant*, 117 *Mass.* 122; *Whart. Cr. Ev.* §§ 459, 460. The whole statement is a compound of fact and conclusion,—a "shorthand rendering of the facts" as they were observed by the witness,—and falls within the exception to the general rule excluding opinion evidence, under which a witness may be permitted to state his conclusion upon matters with which he is specially acquainted, but which cannot be specifically described. *Id.* § 460. The use of the expression, "as though he was about to be devoured," was perhaps objectionable on the ground that it is vague and conveys no definite idea. But, in the light of the other part of the statement, it is reasonably certain that the witness intended to convey the idea that the defendant appeared to be in fear, and that the jury so understood him. The defendant suffered no prejudice by the ruling, though the expression might well have been rejected if the motion had been made upon the proper ground.

5. Proof was admitted showing the effort made by the officers of Silverbow county immediately after the homicide, and subsequently up to the date of the arrest, to find and apprehend the defendant; and, as a part of this proof, it was shown that a reward was offered, and that notices containing a description of defendant were sent to different places throughout the country. All this evidence was proper. It tended to show flight and concealment on the part of defendant, both of which are circumstances ordinarily indicating guilt. 1 *Rice*, *Ev.* § 318; *People v. Ogle*, 104 *N. Y.* 511, 11 *N. E.* 53. The flight or concealment may be apparent only, and may be susceptible of explanation, but proof tending to establish either is always competent.

6. The persons constituting the crew which took the early morning train from Anaconda to Butte, from which defendant stated he had

been thrown, when accounting for his condition on reaching Gregson, were all sworn, and permitted to state that they were the only persons on the train, and that no one had been put off on that particular morning. That this evidence was competent does not admit of discussion. It tended to show that defendant gave a false account of himself at Gregson, and was a circumstance strongly indicative of his guilt. *State v. Benner*, 64 Me. 267; *Wills*, Circ. Ev. 108, 109.

7. Counsel complain that the trial court committed error prejudicial to the defendant in failing to instruct the jury specifically that they were at liberty to find the defendant guilty of either degree of murder or manslaughter. The information charges murder of the first degree. An examination of the instructions shows that the court, after giving to the jury the statutory definitions of all grades of homicide, submitted, also, instructions clearly and correctly distinguishing murder of the first and second degrees. They were also instructed that, if the proof justified a verdict of guilty of the crime charged in the information, they should find the degree. There was no proof tending to establish facts from which the jury could infer the crime of manslaughter. Under the proof, the defendant was guilty of murder, or he was innocent. This being the case, the instructions were sufficient. The court was not required to leave to the jury the question as to whether the defendant was guilty of manslaughter. *State v. Calder*, 23 Mont. 504, 59 Pac. 903; *State v. Fisher*, 23 Mont. 540, 59 Pac. 919. For while, under the rule as stated in *State v. Fisher*, it was necessary to instruct upon murder of the second degree, in order that the jury might be left to consider the question of the presence or absence of deliberation, it was, perhaps, not necessary for the court to go further, and define manslaughter, although it was entirely proper to do so. By the definition of this latter grade of homicide the jury were given a clearer understanding of the elements necessary to constitute the only crime of which the defendant could properly be found guilty; that is, murder of the first or second degree. No juror, after hearing or reading the instructions as a whole, could have been mistaken as to his duty in the premises; nor could he have understood that the court intended to exclude from his consideration the question as to whether the defendant was guilty of murder of the second degree. In the particular under consideration, the instructions furnish no ground for complaint.

8. Among the instructions are two paragraphs submitted at defendant's request. Complaint is made that they are comments upon the weight of the evidence, and were therefore prejudicial. It is not necessary to quote these paragraphs or to comment upon them. Conceding that they are open to the criticism counsel make, the defendant cannot complain. *Territory v. Burgess*, 8 Mont. 57, 19 Pac. 558; *Newell v. Meyendorff*, 9 Mont.

254, 23 Pac. 333, 8 L. R. A. 440. They are not inconsistent with the other instructions, and are favorable to the defendant, rather than the contrary. We take occasion in this connection to remark upon the duty of trial courts in regard to the identification of instructions. Under the various provisions of our Code of Civil Procedure and the Penal Code, the instructions given and refused are deemed excepted to, without a bill of exceptions, and are made part of the judgment roll and the record on appeal. Code Civ. Proc. §§ 1080, 1151, 1176, 1196; Pen. Code, §§ 2070, 2176, 2229; *Wastl v. Railway Co.*, 24 Mont. —, 61 Pac. 9. The same rule applies to both civil and criminal cases. Subdivision 7 of section 1060 of the Code of Civil Procedure, as amended by the act of 1897 (Sess. Laws 1897, p. 241), provides: "The court shall either give each instruction as requested, or positively refuse to do so, or give the instruction with a modification and shall mark or endorse upon each instruction so offered in such manner so that it shall distinctly appear what instructions were given in whole or in part, and, in like manner those refused. All instructions given by the court must be filed together with those refused, as a part of the record." The amended section is identical with the old section, except that the old section required parties requesting instructions to sign them, while this provision is omitted from the amended section. The amendment was overlooked in the discussion in *Wastl v. Railway Co.*, supra, because not called to our attention, but this in no wise affects the decision upon the point presented. The provision of the subdivision quoted requires the trial court to identify the instructions as those given to the jury, either in the form requested or as modified, as well as those requested and refused. This identification is directed to be made by the indorsements upon the instructions themselves, and the clear implication is that the indorsement should show, also, at whose instance the particular instruction was given. In this way it is made clear to this court what reviewable errors, if any, have been committed by the trial court to the prejudice of the complaining party. Being thus identified and filed with the record, as required under the section cited, they are a part of the record on appeal. As was said in *Wastl v. Railway Co.*, they may also be identified and made a part of the record by bill of exceptions. Inasmuch as the minutes of the trial in criminal cases must also be a part of the judgment roll and record on appeal (Pen. Code, § 2229), we see no reason why, if the indorsements are not made under the requirements of section 1080, supra, the identification may not be made subsequently, by an entry in the minutes of the trial. In the present case, the record failing to properly identify the instructions, upon proper motion by the attorney general the identification was permitted to be made by the court below, by an order made as of

the date of the trial, and the record amended accordingly. Much the better practice, however, is for the court to follow the statute in spirit as well as in the letter, and make the proper indorsements at the time of the trial.

9. Several other assignments of error are made by counsel. We have carefully examined them all. They are without merit. The judgment and order appealed from are therefore affirmed. Affirmed.

PIGOTT and WORD, JJ., concur.

(22 Utah 273)

POTTER v. AJAX MIN. CO.

(Supreme Court of Utah. July 11, 1900.)

RES ADJUDICATA—GENERAL RULE—OBITER DICTA—CHAMPERTY—ATTORNEY'S COMPENSATION—CONTRACT—RIGHTS OF PLAINTIFF—RIGHTS OF ATTORNEYS—LOAN BY ATTORNEY TO CLIENT—PAYMENT OF COSTS—PUBLIC POLICY—CHAMPERTOUS CONTRACT—CANNOT BE QUESTIONED BY THIRD PARTY—CANNOT AVOID AS DEFENSE TO A LEGAL OBLIGATION—DEFENSE OF CHAMPERTY—MUST BE SPECIALLY PLEADED.

1. As a general rule, a previous ruling and decision by an appellate court upon questions arising in a case before it is a final adjudication of those questions in that suit upon the same state of facts, from the consequences of which the court will not depart in a subsequent appeal; but the rule does not apply to the argument, or to expressions or illustrations in the argument that are obiter, and not pertinent or required for a disposition of the particular questions arising and decided in the case.

2. Section 3683, Comp. Laws Utah 1888, modified the force and effect of the common law as to champertous contracts, and left the mode and manner of compensation of attorneys to agreement between parties.¹

3. Where a contract made between attorneys and plaintiff at a time when section 3683, Comp. Laws Utah 1888, was in force, gave the attorneys power to act in the case, and, as compensation, one-half the amount received by plaintiff either by judgment or settlement, plaintiff, although having the right to settle his damages, could not defeat the rights of the attorneys under the contract by a fraudulent settlement; and after such settlement by plaintiff the attorneys still had a right, under the statute, to proceed to judgment for the purpose of ascertaining the amount of their compensation under the contract.

4. It is not against public policy for an attorney to loan his client money with which to pay costs of suit, nor to advance the money necessary to carry on the suit, as needed, when such advances are made as a loan, with the express understanding or agreement for its repayment, and there is no contract of indemnity against the client's liability to pay costs.

5. A stranger to a contract has no right to question its validity in a collateral attack, even though such contract, as between the parties to it, may be champertous.¹

6. A defendant cannot avoid a legal obligation simply because the plaintiff and his attorneys have entered into a champertous contract, affecting the proceeds to be recovered.

7. Where champertous contracts are questions between the parties who made them, a plea or answer of the fact on the part of the defendant is necessary in order to make the defense availing.^{1 2}

Baskin, J., dissenting.

(Syllabus by the Court.)

¹ Croco v. Railroad Co., 54 Pac. 985, 18 Utah, 321.

² Reed v. Insurance Co. (Utah) 61 Pac. 21.

Appeal from district court, Juab county; Edward V. Higgins, Judge.

Action by Joseph F. Potter against the Ajax Mining Company. Judgment for plaintiff. Defendant appeals. Affirmed.

This cause was before this court on a former appeal, and is reported in 19 Utah, 421, 57 Pac. 270. The statement of facts as found in that case is substantially the same as in this, the trial being upon substantially the same state of facts. It appears from the record that on October 11, 1897, plaintiff filed his verified complaint against the defendant in Juab county, alleging that he was injured through the negligence of the defendant while in its employ, and prayed judgment in the sum of \$15,000. The complaint was signed by J. E. Page and Powers, Straup & Lippman, attorneys for the plaintiff. On October 30, 1897, the defendant, by its attorneys, filed its verified answer, denying all the material allegations in the complaint. Prior to the commencement of this suit, and on the 23d day of July, 1897, said plaintiff entered into a written contract with the said attorneys, Page and Powers, Straup & Lippman, agreeing to give said attorneys, as full compensation for their services in said cause, one-half of any amount that may be recovered, either by way of judgment or settlement of said cause, no settlement to be made without the consent of both parties to the agreement, and that the attorneys should advance the necessary court costs and witness fees. Said attorneys afterwards advanced the necessary court costs, which plaintiff testified the attorneys loaned him because he had no money to enter suit with. While the case was so pending and undetermined on issues joined, one Thomas Marioneaux, an attorney located at Salt Lake City, and who was acting for the London Guaranty Company, which company had insured the defendant company against damages by reason of accidents to its employes, and had agreed to indemnify it against such accidents, went to Payson, where plaintiff resided, and where Page, one of plaintiff's attorneys, resided, and, without consulting with plaintiff's attorneys, induced plaintiff to execute on March 9, 1898, a release and discharge of said defendant to said insurance company of and from all claims and demands, liabilities, and causes of action against the said Ajax Mining Company in said cause pending against it for the injury sued for in said action, in consideration of the sum of \$1,200 then paid by the said company to the plaintiff, and also executed a receipt, in consideration of the sum of \$10 paid by said company to plaintiff, for all wages, loss of time, and damages on account of the accident sued upon, and afterwards procured an order to be entered in said court dismissing and discharging said action at the costs of the plaintiff. Thereupon the attorneys for the plaintiff, learning of said settlement and dismissal, entered a motion, based upon affidavit, to set aside such order of dismissal.

The affidavit set up the contract for services, fraud on the part of the plaintiff and said company, through its attorney, to procure said settlement and dismissal, to defraud the said attorneys, without any notice to them, and that said plaintiff was irresponsible and unable to respond in damages, and that said attorneys were injured and defrauded thereby. Upon a hearing the court made an order setting aside the dismissal of said action, and allowing said plaintiff's attorneys to prosecute said cause of action for the purpose of determining the amount of their fees and expenses. On March following the defendant company filed its supplemental answer, whereby it set up as a separate defense such release, discharge, and settlement made March 9, 1898. The cause came on for trial for the purpose of determining the amount of compensation the attorneys were entitled to receive under their contract. Plaintiff introduced evidence showing defendant's negligence and his consequent injury thereby, and claimed that the attorneys were entitled to a verdict, as their compensation in the case, for one-half of the amount the jury should find the plaintiff entitled to recover. The defendant introduced the release in evidence, and the plaintiff thereafter introduced the contract for services, which was objected to. The court instructed the jury, in substance, among other things, that if they found that the settlement was made between the plaintiff and the defendant collusively and fraudulently, and for the purpose of cheating the attorneys out of their compensation for services rendered and agreed to be rendered in the case, with knowledge of the rights of the attorneys, and without notice to them, as claimed, the attorneys would have a right to prosecute the cause so as to determine the amount of their compensation for services as agreed, which would be one-half of the amount the jury found the plaintiff was entitled to recover from the defendant for his injuries, had the settlement not been made; that the contract was valid. In this case the record shows that no motion for a rehearing was made. The case was tried upon the same pleadings and evidence given in the former trial, and a verdict and judgment were rendered in favor of the attorneys, fixing their compensation at \$2,500. From this judgment defendant appealed.

Bennett, Harkness, Sutherland & Van Cott, for appellant.

Powers, Straup & Lippman and Joseph E. Page, for respondent.

After stating the facts, MINER, J., delivered the opinion of the court.

The appellant alleges that the court erred: (1) In setting aside the entry of dismissal of the case by the plaintiff. (2) In admitting in evidence, over the objection of the defendant, the contract between plaintiff and his attorneys. (3) In instructing the jury that plaintiff's attorneys had a lien upon the

plaintiff's cause of action for their fees. This instruction, however, was not given.

(5) In instructing the jury that, if the plaintiff was entitled to recover, their verdict should be for 50 per cent. of the amount of damages which the plaintiff was entitled to recover under their contract, if anything.

1. The respondents, the attorneys, insist that the former decision is *res adjudicata*; that the same evidence, based upon the same state of facts, is now before the court on this appeal as was on the former, and that all the issues and questions now before the court were decided adversely to the appellant on the former appeal; and that such decision is final in this case. Upon this question we recognize the general rule to be that a previous ruling and decision by the appellate court upon questions arising in a case before it is a final adjudication of those questions in that suit upon the same state of facts, from the consequences of which the court will not depart in a subsequent appeal. But this rule does not apply to the argument, or to expressions or illustrations in the argument that are obiter, and not pertinent nor required for a disposition of the particular questions arising and decided in the case. The reasoning and illustrations do not constitute the decision, although important in determining what was decided. *Wixson v. Devine*, 80 Cal. 885, 22 Pac. 224; *Elliott, App. Proc.* § 578; *Barney v. Railroad Co.*, 117 U. S. 228, 6 Sup. Ct. 654, 29 L. Ed. 858; *Brimm v. Jones*, 13 Utah, 440, 45 Pac. 46, 352; *Silva v. Pickard*, 14 Utah, 245, 47 Pac. 144; *Venard v. Green*, 4 Utah, 458, 11 Pac. 337; *Bank v. Lewis*, 13 Utah, 509, 45 Pac. 890; *Krantz v. Railway Co.*, 13 Utah, 1, 43 Pac. 623, 32 L. R. A. 828; *Leese v. Clark*, 20 Cal. 417; *Horton v. Jack*, 115 Cal. 29, 46 Pac. 920. Upon an examination of the opinion in the former case, it will be seen that the court held that the settlement and dismissal of the action, as shown by the proof, were collusive, fraudulent, and prejudicial to the rights of the attorneys, and were made for the purpose of cheating and defrauding them out of their just compensation for services rendered and agreed to be rendered in that action, of which fact the guaranty company, through its agents, had actual notice; that the order setting aside and vacating the satisfaction and dismissal of the action so collusively and fraudulently obtained could properly be made by the court, under the common law, to protect one of its officers from the fraud of a client; that permitting the attorneys to continue the prosecution of the case and proceed to judgment, so as to determine the amount of compensation due the attorneys for services rendered and agreed to be rendered by them in the case upon a written agreement, was a proper mode of reaching the amount of such compensation, without reference to section 135, Rev. St. 1898, under the proof of fraud in the case; that, instead of pursuing this remedy, the attorneys based their right to

have the dismissal set aside, and the case tried alone upon section 135, but that this act was not retroactive in its operation, and did not affect the plaintiff's case, based upon a contract made prior to its enactment. This holding and opinion cover the right of the attorneys to have vacated and set aside the order of dismissal of the action, fraudulently and collusively obtained for the purpose of cheating and defrauding them out of their fees and compensation for their services (there having been no plea set up alleging the champertous provisions of the contract), and in allowing the attorneys to continue to prosecute the case to determine the amount of their compensation for services under the contract, because of the fraud shown, as well as the holding that they had no right to proceed under section 135. As to these matters the decision in the former case is decisive of this case. While that decision was a little too broad to come within the decisions of some courts as to attorneys' liens on the cause of action for fees and compensation, under the common-law rule, before judgment, yet it is clearly within the rule as applied to the costs of attorneys. The rule announced, however, has been carried in some cases to the extent that where plaintiff's attorneys have contracted in writing for compensation for services in a sum equal to a certain amount of the judgment recovered as a measure of their compensation, of which the plaintiff has notice, and who is shown to be irresponsible, and thereafter the plaintiff and defendant collusively, fraudulently, and for the purpose of cheating the attorneys out of their fees, settle the case without their knowledge, it is held that the attorneys have a vested interest in the claim and suit, depending upon the amount ultimately realized by the plaintiff, and to establish the claim the court will permit the attorneys to continue in the name of the plaintiff, to determine and satisfy their claim.

In *Stewart v. Hilton*, 19 Blatchf. 290, 7 Fed. 562, it is said, quoting from the syllabus: "A. appeared on the record as attorney for S., as plaintiff in a suit at law founded on a contract, under an agreement between S. and his son and A. that A. should have a permanent lien on the claim and the suit for his fees, charges, and disbursements, and that the control of the suit should be in the son, to secure the agreement. An irrevocable power of attorney, with power to employ other attorneys, was made by S. to the son. A. and the son had incurred liabilities and expenses, and A. had made charges, none of all which had been repaid or reimbursed. S. afterwards agreed with the defendant to discontinue the suit, against the wishes of A. and the son. B. then entered an appearance for the plaintiff, the power of attorney was revoked, and, on the call of the case in court, A. desired to have it set for trial, and B. asked to discontinue it. Held, that A. and the son had a vested interest in the claim and

the suit, and that A. must be allowed to control the proceedings in court in the name of the plaintiff." Substantially the same rule was announced in *Wright v. Wright*, 41 N. Y. Super. Ct. R. 432, where it held that the attorney may so recover his costs and for his services. In this case the agreement was that the attorney should be paid for his services and costs out of the amount collected in the suit. In *Terney v. Wilson*, 45 N. J. Law, 282, it was held, in substance, that an agreement between an attorney and his client that the attorney shall have a lien upon a certain judgment to be recovered, for a specified sum, as compensation for his services, constitutes a valid equitable assignment of the judgment, pro tanto, which attaches to the judgment as soon as entered. In *Jones, Liens*, §§ 223, 224, it is said: "Where a client agrees that his attorney shall have a paramount lien upon the claim in suit for fees, charges, and disbursements, and, to secure this agreement, executes a power of attorney to a third person, giving him the control of the suit, such power of attorney, with the agreement, operates to vest in the attorney an interest in the claim, of which he cannot be divested by the client of his own motion, without satisfying his part of the agreement. It is the duty and practice of courts to protect attorneys in rights so acquired, against hostile acts of those from whom they are acquired." In *Weeks, Attys. at Law*, p. 746, § 369, it is said: "But, where the attorney's only chance of payment depends upon the result of the case, the courts will not allow even a release obtained from the plaintiff pending the proceedings to be set up to defeat the claim, unless the proceedings are taken by an unauthorized attorney, when they may be adjusted without the concurrence of the attorney." In *Weeks v. Circuit Judges*, 73 Mich. 256, 41 N. W. 269, it is held: "An agreement between attorneys and their client that they are to be paid for their services rendered in the prosecution of a suit, and reimbursed for moneys advanced, from the proceeds of the judgment which should be obtained, operates as an assignment of the judgment to the attorneys, to the extent of such claims, and until the same are paid the plaintiff can give no valid discharge of the judgment. The rule that courts look with favor upon a compromise and settlement made by the parties to a suit, to prevent the vexation and expense of further litigation, only applies where all the rights and interests of all of the parties concerned, both legal and equitable, have been respected, and in good faith observed." In *Read v. Dupper*, 6 Term R. 361, the rule is settled that a party should not run away with the fruits of a case without satisfying the legal demands of his attorney. *Railroad Co. v. Wilson*, 138 U. S. 507, 11 Sup. Ct. 406, 34 L. Ed. 1023. See, also, *Talcott v. Brenson*, 4 Paige, 500; *Ely v. Cooke*, 28 N. Y. 365; *Rooney v. Railroad Co.*, 18 N. Y. 368; *Howard v. Town of Osceola*, 22 Wis. 433; *Williams v. Ingersoll*, 89 N. Y. 508; *Harrington v. Bogue*,

15 Vt. 179; *In re Wilson* (D. C.) 12 Fed. 235; *Hesiter v. Mount*, 17 N. J. Law, 438; *Koons v. Bench* (Ind. Sup.) 45 N. E. 601; *Clark v. Smith*, 6 Man. & G. 1051. We are not unaware of the line of authorities at common law holding that a lien for costs only attaches to the cause of action before judgment, and for fees and compensation after judgment. But section 3683, Comp. Laws 1888, which was operative at the time the contract was made, has modified the force and effect of the common law as to champertous contracts, and the mode and manner of compensation was by it left to agreement between counsel and client, and no legal restrictions were placed on such agreement at the time this contract was made. *Croco v. Railroad Co.*, 18 Utah, 321, 54 Pac. 985. By this section, as we have seen, the question of the measure, mode, and manner of the attorney's compensation was left to the agreement of the parties, express or implied. This power conferred necessarily included the power to take security for the payment of the fees, and for the services rendered and to be rendered in the case. The use of the words "mode of compensation" seems to leave open to agreement the manner of obtaining or securing the payment of the fees agreed upon. The right to contract for the measure and amount of compensation, and the mode, manner, or way of receiving or securing its payment, whether in cash, or security upon the judgment, or for a share of the proceeds of the judgment to be obtained, was left to the agreement of the parties, express or implied. After entering into the contract with the plaintiff, the two corporations (the defendant and the indemnity company) could not, by conspiring together, nullify and abrogate its terms, and absolve the defendant from liability thereon. One party cannot be held to have such power over the vested rights or contract of another. The agreement being made, either party had a right to enforce it, as against the fraud of the other to his injury. Under section 135 the lien attached without any express agreement as to the mode or manner of compensation. While the facts present an extreme case of wrong, yet, in determining the liability of the defendant, we do not mean to disturb the so-called common-law rule, except as it is affected by statute. The contract gave to the attorneys the power to act in that case, and, as full compensation for their services in the courts of Utah to recover plaintiff's damages, they were to have one-half of any amount received either by judgment or settlement. The plaintiff and defendant fraudulently conspired with the indemnity company to prevent the attorneys from fully carrying out their agreement, and collusively settled the case for \$1,200,—being for less than plaintiff's actual damages,—so as to deprive the attorneys of their rights under the contract. This payment was an admission of the claim of the plaintiff against the defendant for \$1,200 over and above the

attorneys' agreed compensation, of which plaintiff was aware, and was quite as effectual in fixing the rights of the attorneys to their agreed compensation out of a judgment to be thereafter rendered, and to determine it as if a judgment had already been rendered for the amount of plaintiff's full damages, whereto an attorney's lien would attach. While plaintiff may have had a right to settle his damages, he had no right fraudulently to settle the rights of the attorneys under the contract, which were known to the defendant, nor prevent them from doing as they agreed they should do to recover their compensation. The attorneys had a right, under the statute, to proceed to judgment for the purpose of ascertaining the amount of their compensation under the contract, and, when ascertained, collect the same.

2. The distinguished counsel for the appellant ably contend that the contract for services was against public policy, champertous, and void, because it provided that the attorneys should receive one-half of any amount that might be recovered from the defendant on a judgment or settlement, and further provided, "No settlement to be made without the consent of both parties." It is further provided that "the parties of the second part shall advance the necessary court costs and witness fees." The same question was raised on the motion to set aside the dismissal of the action, and when the contract was offered and received in evidence against the objection of the defendant, and again when the court refused the defendant's request for a nonsuit. Practically the same question is also raised in the exceptions to the instructions of the court to the jury. Section 3683, Comp. Laws Utah 1888, which was in force at the time this contract was made, provides that "the measure and mode of compensation of attorneys and counselors at law, is left to the agreement, express or implied, of the parties." In *Croco v. Railroad Co.*, 18 Utah, 321, 54 Pac. 985, this court held that the common law was in force in Utah at the time of the adoption of our present constitution, so far as compatible with our situation and government, but that its force and effect as applied to champertous contracts was modified by the above section. We also held that under this section it was competent and legal for an attorney and client to agree upon the attorney's compensation; that no legal restrictions were placed upon their agreement for compensation at the time it was made by section 3683, and a right to enforce it was implied; that such compensation may legally be made contingent upon success in the case, and payable, by percentage, share, or otherwise, out of the judgment or proceeds of the litigation, but that it was not competent to agree to pay the advance fees and costs of a suit thereafter to be commenced, as a consideration for such agreement, irrespective of the client's liability to refund the same. This

holding may properly be extended to cover this case, with the addition that in no case should the agreement be champertous or illegal, when the attorneys simply agree to advance the necessary costs and witness fees, under an agreement, as testified to by plaintiff, "that the costs were advanced by his attorneys because he had no money to enter suit with; that the attorneys loaned him that much money." It is not against public policy for an attorney to loan his client money with which to pay costs of suit, nor to advance the money necessary to carry on the suit, as needed, when such advances are made as a loan, with the express or implied understanding or agreement for its repayment, and there is no contract of indemnity against the client's liability to pay costs. A contrary rule would embarrass the profession in its legitimate practice, and render attorneys a constant mark for dishonest clients. This is so because it is seldom that for some cause attorneys are not required to advance fees with which to commence suit, and to pay officers and witnesses and other necessary expenses, when their clients may not be accessible, or when they may have a meritorious cause, but are so impecunious as to be unable to meet at the time the necessary expenses. In this view, we find no merit in the contention that the contract to advance the costs was illegal or champertous. But that part of the agreement contained in the contract providing, "no settlement to be made without the consent of both parties," was inoperative and against public policy, as the law then stood, because settlements of causes and differences between persons are encouraged by the law. While this sentence in the contract is against public policy and inoperative, yet the making of the contract with that provision in it is neither *malum prohibitum* nor *malum in se*. No criminal liability attaches to the persons entering into such a contract, nor is the making of it reprehensible; neither is it always considered of questionable propriety. The balance of the contract is not affected by it. Therefore courts, although refusing to enforce that part of such a contract, will allow compensation for valuable services rendered under the remaining portion of it, which is separable therefrom. In *Davis v. Webber* (Ark.) 49 S. W. 825, the court said: "While the contract sued on is against public policy, and therefore void, yet the making of such a contract is neither *malum prohibitum* nor *malum in se*. It is not even of questionable propriety. Therefore the courts, although refusing to enforce such a contract, will nevertheless grant compensation for valuable services rendered under it, upon the rule of *quantum meruit*." In *Stearns v. Felker*, 28 Wis. 594, it is said: "There is almost or quite an unbroken line of authorities which hold that, although attorney and client may have entered into an agreement in respect to the compensation for the serv-

ices of the former which is void for champerty, yet the attorney does not thereby forfeit his right to full compensation for his services, nor the client his right to the fruits of the litigation after paying for such services what the same are reasonably worth. Such is undoubtedly the law, and it harmonizes with the plainest principles of justice." 5 Am. & Eng. Enc. Law (2d Ed.) 828, 829; *Zeigler v. Mize*, 132 Ind. 408, 31 N. E. 945. Under the circumstances of this case, we are of the opinion that the objectionable feature of the contract was separable from, and forms no part of, an otherwise binding contract, upon which a liability arose for services rendered and in good faith performed. With these exceptions, the contract was authorized by section 3683, heretofore referred to.

3. Heretofore we have discussed the case independent of the pleadings. In this case the attorneys for the plaintiff are seeking to set aside a fraudulent and collusive settlement and dismissal of this case made between the plaintiff and the defendant and the London Guaranty Company, which company had insured the defendant against loss and damage by reason of accidents and injuries to defendant's employees, and had agreed to indemnify it against damages arising from accidents such as were claimed in this action. The settlement was made in the interests of this company and the defendant. Plaintiff's attorneys seek to prosecute the suit, for their own use and benefit, in the name of the plaintiff, because of the fraud practiced upon them by both plaintiff and defendant. The defendant's attorneys disclaim, and are not chargeable with, any agency in procuring the settlement, although the defendant is anxious and willing to receive the benefits, if any, arising from it, notwithstanding its collusive and fraudulent character. The petition of the attorneys on motion to set aside the order of dismissal of the case set out the contract between the plaintiff and the attorneys, including the objectionable features thereof, and alleged fraud in the settlement of the case, and the irresponsibility of the plaintiff. After this the defendant amended its pleadings by setting up in its supplemental answer the settlement and compromise of said action and all claims arising therein, but in no way pleading the unlawful or champertous nature of the contract. The plaintiff's attorneys contend that this contract is not between the plaintiff and defendant, but between plaintiff and his attorneys; that the defendant is not affected by it, and has no right to intermeddle in this suit, and that in no case can it do so; that neither can the defendant be heard without pleading by way of abatement or defense the unlawful or champertous nature of the contract relied upon. We believe the attorneys for the plaintiff are correct in their contention. In the case of *Croco v. Railroad Co.*, 18 Utah, 311, 54 Pac. 986,

this court held: "(4) If it be conceded that the common law, as modified, was in force at the time the contract was made, and that it was of a champertous character, and therefore void, yet it appears the contract was entered into between the plaintiff and his attorney, and that the defendant was in no way a party thereto. The defendant, being a stranger to the contract, had no right to question its validity in a collateral attack. There seems to be no sound reason in a rule which would allow a party to defeat a just cause of action because the opposite party has made a contract which is absolutely void, and which therefore cannot be enforced by either of the contracting parties. As to the defendant the rights of the parties are the same as if the illegal contract had never been executed. The champertous contract, being void, would divest the plaintiff of no cause of action. He is still the real party in interest. While the parties to the illegal contract might be allowed to repudiate it, other persons, not parties to it, should not be permitted to exonerate themselves from their just obligations on account of it. If, for instance, a defendant, when sued upon his valid promissory note, can avoid payment thereof, and interpose a bar to a recovery, by showing that the plaintiff made a champertous contract with his attorney for its collection, then is a meritorious plaintiff placed, to a large extent, at the mercy of a dishonest debtor. Under such circumstances, it does not lie in the mouth of the defendant to set up that fact for the purpose of escaping the payment of an honest debt or avoiding a just liability. The law in such a case will compel the defendant to perform his undertaking, and leave the question of champerty to be determined between the plaintiff and his attorney. We are of the opinion that the defendant is not in a position to avoid a legal obligation because the plaintiff and his attorney may have entered into a champertous contract to enforce the obligation. *Small v. Railroad Co. (Iowa)* 8 N. W. 437; *Hoffman v. Vallejo*, 45 Cal. 564; *Burnes v. Scott*, 117 U. S. 582, 6 Sup. Ct. 865, 29 L. Ed. 991; *Duke v. Harper*, 66 Mo. 51; *Thalhimer v. Brinckerhoff*, 8 Cow. 623; *Boone v. Chiles*, 10 Pet. 177, 9 L. Ed. 388; *Hilton v. Woods*, L. R. 4 Eq. 432; *Elborough v. Ayres*, L. R. 10 Eq. 867; *Allison v. Railroad Co.*, 42 Iowa, 274; *Pike v. Martindale*, 91 Mo. 263, 1 S. W. 858; *Courtwright v. Burnes (C. C.)* 13 Fed. 317." *Gage v. Du Puy*, 137 Ill. 652, 24 N. E. 541, 26 N. E. 386; *Hart v. State*, 120 Ind. 88, 21 N. E. 654, 24 N. E. 151; *Zelgler v. Mize*, 132 Ind. 403, 31 N. E. 945; *Insurance Co. v. Way*, 62 N. H. 622; *Chamberlain v. Grimes*, 42 Neb. 701, 60 N. W. 948; *Davis v. Settle (W. Va.)* 26 S. E. 557. It does not appear that the liability or obligation of the defendant is enlarged or affected by the contract in its entirety, even if champertous and against public policy. Whatever damage followed

the injury complained of by the plaintiff was a liability of the defendant. This liability was irrespective of the alleged champertous contract, or of the plaintiff's claim under it. Damages for the personal injuries was a question between plaintiff and the defendant. How much of such sum recovered as damages was paid or agreed to be paid to plaintiff's attorneys for success in recovering it was no concern of the defendant. The liability was not increased if the attorneys agreed to take all the damages, nor was it affected if they took one-quarter of them. The amount of the attorneys' compensation depended upon the judgment, but the amount of the defendant's liability did not depend upon the contract of the attorneys or their compensation. The general rule applicable to this case, as held in *Croco v. Railroad Co.*, 18 Utah, 324, 54 Pac. 985, is that, where such champertous contracts are questions between the parties who made them, a plea or answer of the fact on the part of the defendant is necessary in order to make the defense availing. It is just as necessary as it is to plead the statute of limitations or a fraud in proper cases. *Section 2968, Rev. St. 1898; Croco v. Railroad Co.*, 18 Utah, 324, 54 Pac. 985; *Moore v. Ringo*, 82 Mo. 468; *Pike v. Martindale*, supra; *Brumback v. Oldham*, 1 Idaho, 710; *Allison v. Railroad Co.*, 42 Iowa, 275; *Reed v. Insurance Co.*, 61 Pac. 21, 21 Utah, —; *Vimont v. Railroad Co.*, 69 Iowa, 304, 22 N. W. 906, 28 N. W. 612; *McMullen v. Guest*, 6 Tex. 275; *Suit v. Woodhall*, 116 Mass. 547; *Bliss*, Code Pl. § 364; *Dickson v. Burk*, 6 Ark. 412; 2 *Saund. Pl.* 1041; 4 *Enc. Pl. & Prac.* p. 370. This plea was not interposed by the defendant, as it could have been, and therefore the defense that the contract was against public policy and void and was champertous is unavailing to the defendant in this case.

The instructions of the court to the jury were in accordance with the views expressed herein and in the former opinion. We find no reversible error in the record. The judgment of the district court is affirmed, with costs.

BARTON, C. J., concur. BASKIN, J., dissents.

(22 Utah, 332)

McPHERSON v. McCARRICK.

(Supreme Court of Utah. July 9, 1900.)

OBJECTIONS TO JUROR—COLOR—ACTION FOR DAMAGES.

1. Color is not a test of one's right to render jury service, under section 1297, Rev. St. 1898.

2. A written objection by a juror to serving on a jury with another certain juror, on account of the color of the latter, although frivolous, unwarranted, and unworthy, forms no basis for an action at law for damages, especially where the objection was not accompanied by either abusive language or assault or defamation of character.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; A. N. Cherry, Judge.

Action by J. Gordon McPherson against Edward McCarrick. Action dismissed, and plaintiff appeals. Affirmed.

This is a suit for damages alleged to have been occasioned by acts of the defendant which prevented the plaintiff from serving upon a jury. It is alleged in the complaint, substantially, that the plaintiff is a colored man; that on February 26, 1900, he possessed all the qualifications requisite under the laws to serve as a juror in Salt Lake county; that on said day the district court in and for Salt Lake county ordered a special venire to be issued, requiring 10 persons to be summoned to serve as jurors in an action then pending entitled, "The State of Utah v. John H. Benbrook;" that the plaintiff was summoned as one of said jurors, examined touching his qualification, accepted by both sides, and duly sworn to try the cause; that after the jury had been sworn the defendant herein, "who had also been accepted and sworn as a juror in said action, willfully and maliciously, and with intent to injure and humiliate this plaintiff, and to prevent him from serving on said jury, prepared, or caused to be prepared, and signed, a written statement, directed to the court, refusing to serve as a juror unless the said plaintiff should be excluded therefrom, basing his objections to serve as a juror with this plaintiff on the sole ground that this plaintiff is a colored man"; that said writing or petition was presented to the court by this defendant, or by his direction and with his knowledge and consent, on or about the 27th of February, 1900; that "thereupon the attorneys for the respective parties, being, as plaintiff is informed and verily believes, afraid of jeopardizing the interests of their respective clients by resisting the said petition," with the consent of the court, excluded this plaintiff from further participation in the trial of said action, and caused him to be discharged from further attendance at said trial as a juror; that, had he been permitted to serve as a juror during said trial, he would have been entitled to receive as fees the sum of \$22; and that he was greatly humiliated and put to shame in the community in which he resides, and suffered greatly in mind, because of the open and public insult, and was damaged by reason thereof in the sum of \$5,000. To this complaint defendant interposed a demurrer on the ground that no cause of action was stated. The demurrer was sustained, and, upon the plaintiff failing to amend, the case was dismissed.

C. S. Patterson and Geo. W. Moyer, for appellant. S. H. Lewis, for respondent.

After a statement of the case, made as above, BARTCH, C. J., delivered the opinion of the court.

The sole question for determination on

this appeal is whether the complaint states a cause of action, it being admitted that the court had jurisdiction of the cause. This question, upon careful examination of the allegations relied upon, must be answered in the negative. The fact that the respondent informed the court that he would not serve as a juror with the appellant, because he is a colored man, of itself gave rise to no cause of action, notwithstanding that under our statute a colored citizen, if otherwise qualified, has the same right to serve on a jury as a white citizen, and the same means of redress in the event of an infringement of that right. Color is not a test of one's right to render jury service. Section 1297, Rev. St. The black man, in this country, now enjoys full citizenship with the white man. All the rights and privileges incident to such citizenship attend him, the same as the white man. This is so by virtue of the constitution of the United States. The colored man, therefore, stands upon perfect equality with all others before the law. In accordance with the divine law, the humane and enlightened judgment of our country has ordained that "all men are equal before the law." Hence, while socially people may do as they choose, within the law, and may associate with some and exclude others, yet in matters public a white man is entitled to no rights or privileges which are denied a black man, and vice versa. That one person is colored differently from another is, in law, wholly immaterial. "Because," says Mr. Justice Morse in *Ferguson v. Gies*, 82 Mich. 358, 46 N. W. 718, 9 L. R. A. 589, "it was divinely ordered that the skin of one man should not be as white as that of another, furnishes no reason that he should have less rights and privileges under the law than if he had been born white, but cross-eyed, or otherwise deformed. The law, as I understand it, will never permit a color or misfortune that God has fastened upon a man from his birth to be punished by the law, unless the misfortune leads to some contagion or criminal act; nor, while he is sane and honest, can he have less privileges than his more fortunate brothers. The law is tender, rather than harsh, towards all infirmity; and, if to be born black is a misfortune, then the law should lessen, rather than increase, the burden of the black man's life." If, then, the appellant, who is a colored man, had been injured by any misdeed of the respondent, the law would afford him redress. The difficulty in this case, however, is that the complaint fails to show any language, act, or conduct on the part of the respondent which is actionable. There is nothing to show that he abused or assaulted the appellant or attempted to expel him from the jury, or even that he employed abusive language towards him in his presence, or asked for his discharge. Nor was there any defamation of character or any libelous accusation, so far as shown by the record. The writing referred to in the complaint, of

itself, did not injure the appellant. If he suffered any damage, it was caused by the action of the attorneys and the court in discharging him from further participation in the trial as a juror. Whether, under the circumstances, such action was warranted, we are not called upon to decide. It is clear, however, that the respondent cannot be held responsible for it. The sole charge, as to him, is that he objected, in writing, to serve on the jury with the appellant, because of his color. While such objection was frivolous, unwarranted, and unworthy of one who had taken an oath to do his duty as a juror, still, under the circumstances as shown here, it was not such as to cause a pecuniary liability. If, however, it be true, as seems to be indicated by the record, that the respondent sat quietly by, without objection, until all the jurors were examined and sworn to try the cause, and then for the first time made his objection, maliciously, and that such objection led to the discharge of himself and the appellant from the jury, the court, to maintain its own dignity, would have been justified in adjudging him guilty of contempt, and in imposing an adequate penalty therefor. Such conduct and trifling ought not be permitted in a court of justice. We are of the opinion that the demurrer to the complaint was properly sustained. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

(23 Utah 238)

FUNK v. ANDERSON et al.

(Supreme Court of Utah. July 9, 1900.)

ACTION FOUNDED ON REAL PROPERTY—WHEN BARRED—LEGAL TITLE—PRESUMPTION OF POSSESSION—ADVERSE POSSESSION—TITLE NOT FOUNDED ON WRITTEN INSTRUMENT—POSSESSION AND OCCUPANCY—ESSENTIALS OF ADVERSE POSSESSION—PRESCRIPTIVE RIGHT—BY ANALOGY—EASEMENT—BY PRESCRIPTION—WHEN ARISES.

1. An action or a defense founded on real property is barred by section 2860, Rev. St. 1898, when there has been an adverse possession for a period of seven years prior to the committing of the act concerning which the controversy arose.

2. Under section 2861, Rev. St. 1898, the presumption is that one holding the legal title has been possessed of the land within the time required by law, unless it appears that the property was held and possessed adversely to him for seven years.

3. Section 2864, Rev. St. 1898, declares when and under what circumstances the possession of real estate under claim of title not founded upon a written instrument, judgment, or decree shall be deemed to have been held adversely.

4. Section 2865, Rev. St. 1898, declares what constitutes possession and occupancy, and section 2866, *Id.*, provides that, to make complete adverse possession, the party claiming it must have paid all taxes during the period.

5. A prescriptive right can only arise by analogy to the statute when the facts attending the use and enjoyment are such as the statute requires.

6. A prescriptive right to an easement can only arise after use and enjoyment for a period of 20 years.¹

(Syllabus by the Court.)

Appeal from Seventh district court; Jacob Johnson, Judge.

Action by George A. Funk against Andrew Anderson and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. D. Livingston and A. H. Christensen, for appellants. James W. Cherry and Wm. K. Reid, for respondent.

BARTCH, C. J. This is an action for damages and for injunctive relief. The plaintiff claims that the defendants committed, and threatened to commit, trespass upon his land. In the answer it is averred that the acts of trespass complained of were the lawful acts of the defendants in removing obstructions placed across the road over plaintiff's land by the plaintiff for the purpose of annoying them while traveling to and from their home, and that for more than 10 years prior to the bringing of this suit the defendants and those having occasion to go to and from the premises of defendant Mads Anderson have continuously, openly, notoriously, with the knowledge of the plaintiff, and under claim of right, passed over the land in question, as their only means of entrance and exit for all ordinary purposes of a road to the said premises. From the evidence it appears that the plaintiff is the owner of the land over which the road referred to passes; that the defendant Mads Anderson owns the land to which the road leads; that the defendants have enjoyed a right of way over the land in dispute for more than 10 years; that they have so used it during all that time, openly, notoriously, and under claim of right, with the plaintiff's knowledge and acquiescence, until May 22, 1899, when he obstructed the roadway with posts and poles; and that the defendants removed such obstructions. At the trial the court entered judgment in favor of the plaintiff, and the defendants appealed.

The controlling question presented is whether an uninterrupted user and enjoyment by the owner of one tract of land of what he claims as an easement in that of another will ripen into a prescriptive right during the period prescribed by the statute of limitations for quieting titles to land. The appellants contend that the right to an easement by adverse user becomes complete in the same length of time as would bar an action in ejectment, which in this state would be seven years, while the respondent maintains that, to acquire a right of way by prescription, it is necessary that the adverse user should be for 20 years. In ancient times a right to an easement could only be established upon an adverse use and enjoyment from time immemorial; that is, when the origin of such use was no longer within the memory of man. Later, to obviate the uncertainty of title arising from adverse user for whatever length of time, and to avoid the rule of legal memory, the time of uninterrupted use and enjoyment was changed to a period of 20 years, by presuming a grant by deed. This legal presumption of such title,

¹ Harkness v. Woodmansee, 26 Pac. 291, 7 Utah, 227.

however, is not conclusive, and may be rebutted by other evidence. "The fiction," says Mr. Washburn, "of presuming a grant from twenty years' possession or use, was invented by the English courts in the eighteenth century, to avoid the absurdities of their rule of legal memory, and was derived by analogy from the limitation prescribed by the statute of 21 Jac. I. c. 21, for actions of ejectment, not upon a belief that a grant in any particular case has been made, but on general presumptions. * * * This period, unless other provision was made in the local statutes of the state in which the questions have arisen, has been assumed to be the term of twenty years. So that now an enjoyment of an easement for the term of twenty years raises a legal presumption that the right was originally acquired by title." Washb. Easem. (4th Ed.) 125, 126. At the present day the presumption of a grant of an incorporeal hereditament is, in many jurisdictions, limited to a period analogous to that of the statute of limitations, relating to the quieting of titles to corporeal hereditaments. The presumption of a grant is the foundation of the doctrine of prescription, and is, in effect, the same, whether it arises because of an adverse user for a period of 20 years, or, by analogy, because of such user for the period prescribed by the statute of limitations. Where, however, it is sought to establish a prescriptive right to an incorporeal hereditament by the presumption of a grant, analogous to the statute, the facts from which the presumption arises under the statute must be shown to exist, and the burden of showing their existence is upon the party claiming the easement. To ascertain what facts must exist to bar an action as to real property in this state, and determine whether the period of limitation prescribed by the statute applies by analogy to this case, resort must be had to the statutory provision upon which the appellants rely. Section 2860, Rev. St. 1898, provides: "No cause of action, or defense or counterclaim to an action, founded upon the title to real property or to rents or profits out of the same, shall be effectual unless it appear that the person prosecuting the action, or interposing the defense or counterclaim, or under whose title the action is prosecuted or defense or counterclaim is made, or the ancestor, predecessor, or grantor of such person, was seized or possessed of the property in question within seven years before the committing of the act in respect to which such action is prosecuted or defense or counterclaim made." Under this provision an action or defense founded on real property is barred when the possession has been adverse for a period of seven years prior to the committing of the act concerning which the controversy arose. Section 2861, Id., reads: "In every action for the recovery of real property, or the possession thereof, the person establishing a legal title to the property shall be presumed to have been possessed thereof within the time re-

quired by law, and the occupation of the property by any other person shall be deemed to have been under and in subordination to the legal title, unless it appear that the property has been held and possessed adversely for seven years before the commencement of the action." According to this the presumption is that the legal title is in the owner, unless it appears that the property was held and possessed adversely to him for seven years. In section 2864, Id., it is provided: "Where it appears that there has been an actual continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, shall be deemed to have been held adversely." This provision declares when and under what circumstances the possession of real estate under claim of title not founded upon a written instrument, judgment, or decree, shall be deemed to have been held adversely. Section 2865, Id., declares what constitutes possession and occupancy, and reads: "For the purpose of constituting an adverse possession by a person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only: (1) Where it has been protected by a substantial inclosure. (2) Where it has been usually cultivated or improved. (3) Where labor or money has been expended upon dams, canals, embankments, aqueducts, or otherwise, for the purpose of irrigating said lands, amounting to the sum of five dollars per acre." Section 2866, Id., reads: "In no case shall adverse possession be considered established under the provisions of any section of this Code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party or persons, their predecessors, and grantors, have paid all taxes which have been levied and assessed upon such land according to law." It will be noticed upon examination that in none of these provisions of the statute is there any reference to a right of way or any easement by prescription. None of the requisites enumerated in section 2865 are shown to have existed in the case at bar. The facts attending the use and enjoyment by the appellants are not such as the statute requires, and hence a prescriptive right cannot arise by analogy to the statute. This court, in *Harkness v. Woodmansee*, 7 Utah, 227, 26 Pac. 291,—a case very similar to the one at bar, where a like statute was construed,—said: "The statute does not, in effect, presume a grant, and give the person relying upon it the title, from seven years' possession alone. The presumption is made from the fact that the land was held adversely; and to make the holding adverse the land must have been protected by a substantial inclosure, or it must have been usually cultivated or improved, or labor or money must have been expended to irrigate it, amounting

to the sum of five dollars per acre. And in either case the occupation and claim must have been continuous for the seven years, and during that time the claimant, his predecessors or grantors, must have paid all taxes levied and assessed upon the land according to law. This statute does not apply to rights of way, or any other class of easements by prescription. It can only be applied by analogy. The plaintiffs' use and enjoyment of the land in dispute, or the facts attending the same, were not such as the statute above quoted required, or their equivalent; hence a prescriptive right cannot arise in favor of the plaintiffs therefrom by analogy thereto. It is conceded that the use and enjoyment, such as it was, was for less than twenty years, so that period of limitation cannot apply." Here, as there, it is conceded that the use and enjoyment of the easement was for a less period than 20 years, and therefore that limitation does not apply. Since the same point was raised, presented, and decided in that case, that decision must be regarded as authority in this. See, also, *Durkee v. Jones* (Colo.) 60 Pac. 618. The decision in *Yeager v. Woodruff*, 17 Utah, 361, 53 Pac. 1045, does not militate against the doctrine of this case. The cases cited from California are not applicable here, because in that state, by express enactment, the statutory limitations apply to rights claimed by prescription. Civ. Code Cal. § 1007. We perceive no reversible error in the record. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

(22 Utah 216)

CULMER et al. v. CAINE et al.

(Supreme Court of Utah. July 9, 1900.)

FINDING—PERFORMANCE OF CONTRACT—WHAT INCLUDES—EVIDENCE NOT BEFORE APPELLATE COURT—PRESUMPTION AS TO FINDINGS—MECHANIC'S LIEN—NOTICE—SUFFICIENCY—INCORRECT STATEMENT OF INDEBTEDNESS—CONTINUOUS WORK—SEPARATE CONTRACTS—WHEN LIEN ATTACHES—SUMMONS—SERVICE—WITHIN WHAT TIME—PROOF—SERVICE OF SUMMONS ON CROSS COMPLAINANT UNNECESSARY—CROSS COMPLAINANT SERVED WITHIN REASONABLE TIME—DISCRETION OF TRIAL JUDGE—FORECLOSURE OF MECHANIC'S LIENS—CROSS COMPLAINANTS CONCLUDED BY THEIR PLEADINGS AS TO AMOUNT CLAIMED—TIME LIEN DATES FROM—DAMAGES—DISCRETION.

1. A finding that a contract was performed in all its terms and requirements includes all the conditions and provisions of the contract.

2. When the evidence is not before the appellate court, it will be presumed that the findings are supported by the evidence.

3. Under the provisions of chapter 30, Sess. Laws 1890, a notice of mechanic's lien containing a notice of the intention to claim a lien, a description of the property to be charged, an abstract of indebtedness, showing the whole amount of the debt and credit, and the balance due or to become due, with a verification by one of the claimants, is sufficient; and, under section 14 of said chapter, an incorrect statement of the amount due does not invalidate the claim, unless made in bad faith.¹

4. Under the provisions of section 17, c. 30, Laws 1890, where the work was continuous the lien attached even if the work was done or materials furnished under separate contracts.

5. Section 3203, Comp. Laws Utah 1888, does not require the service of summons within the year, but the summons is required to be issued within a year from the filing of the complaint; and under said section, and section 3204, Id., a sufficient proof of service is the defendant's indorsement to that effect.

6. It was not necessary to have a summons issued and served on a cross complaint filed under section 3231, Comp. Laws Utah 1888, nor to serve the cross complaint within one year from the time of the filing of the original complaint.

7. The time for serving a cross complaint not being fixed by statute, it should be served within a reasonable time, and what is a reasonable time is within the discretion of the trial court; and a finding by such court, supported by evidence, will be upheld.

8. In a mechanic's lien foreclosure, cross complainants must be held as concluded by their claim as set up in their pleadings, and they cannot recover more than they asked, but the lien may relate back to the commencement of work or first furnishing of materials.²

On Cross Appeal.

1. Where interest is recoverable, not as a part of the contract, but by way of damages, the giving or withholding of interest is largely in the discretion of the court, and laches of parties may be considered in the award.

2. Where the evidence is not before the court on appeal, the general rule is that the correctness of findings will not be questioned, except in so far as they are contradictory or conflicting.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by G. F. Culmer and others against Annie Hooper Caine and others. Duvall & Mills filed a cross complaint. Judgment for plaintiffs, and defendants Caine and Hooper appeal, and Duvall & Mills file a cross appeal. Appeal of Duvall & Mills dismissed, and decree affirmed.

On May 2, 1890, F. M. Wright, principal contractor, contracted with defendants Caine and Hooper to erect the Hooper Block, in Salt Lake City, at a total contract price of \$49,874. Respondents Duvall & Mills contracted with Wright to do the foundation work, rubble stone work and brick work for \$16,636, to be paid at 85 per cent. weekly estimates; the final payment to be made when the contract was completed. Subsequently other contracts were made for work on the building. The work was completed on March 1, 1891. Duvall & Mills, the joint contractors, filed a lien for \$2,812.31, and served notice of the same upon Caine and Hooper and Wright. On December 15, 1891, the plaintiffs, Culmer Bros., filed an action against the appellants, Caine and Hooper, and F. M. Wright, principal contractor, and Duvall & Mills, subcontractors, and the cross complainants in said action, and others, for the foreclosure of a mechanic's lien which they claimed upon the property on

¹ *Garner v. Van Patten*, 58 Pac. 684, 20 Utah, —.

² *Morrison v. Carey-Lombard Co.*, 33 Pac. 238, 9 Utah, 70.

which the Hooper Building was erected; and on the 2d day of January, 1892, said plaintiffs filed a supplemental complaint for the foreclosure of the mechanic's lien alleged to have been assigned to them by the defendant F. W. Krafft. In the meantime, however, after the filing and service of the Duvall & Mills notice of lien, and while the time for the bringing of a suit thereon had not expired, the defendants Caine and Hooper, with actual notice that Duvall & Mills claimed a lien, effected a settlement of all matters arising out of the construction of said Hooper Block, upon disputed items of account between themselves and F. M. Wright, by paying a compromise sum to Wright in July, 1891. On February 1, 1892, the cross complainants, Duvall & Mills, filed their answer and cross complaint to the said supplemental complaint of plaintiffs, and claimed a lien upon said property to secure the payment of \$2,812.31, the balance due them. The cross complainants failed to serve said cross complaint, or any copy thereof, upon the defendants Hooper and Caine until the 1st of October, 1896, and until said time they were not aware and had no notice that the said cross complaint had been filed, or of the pendency thereof; and in the meantime Wright, the principal contractor, had become insolvent, and had left the state, and his sureties had also become insolvent. No service of the cross complaint was made upon Wright, but in October, 1896, the attorneys for the cross complainants mailed him a copy of the cross complaint, at Butte, Mont., and he accepted service on the back thereof, as follows: "Received a copy of the within answer and cross complaint. [Signed] F. M. Wright." Defendants Caine and Hooper in October, 1896, moved to dismiss the cross complaint on account of laches and want of prosecution, which motion was overruled by the court. Upon the trial of the cause the lower court rendered its judgment and decree in favor of said cross complainants, Duvall & Mills, and against the appellants, Hooper and Caine, for the sum of \$1,798.20 and costs, but without interest, from which judgment and decree the said appellants appeal to this court.

Rawlins, Thurman, Hurd & Wedgwood, for appellants. Breeze & Burris and Dey & Street, for appellees Duvall & Mills.

After stating the facts, MINER, J., delivered the opinion of the court.

The appeal in this case is taken from the judgment. No bill of exceptions was settled or testimony returned.

1. Appellants' first contention is that the cross complaint does not set forth the contract between Wright, the contractor, and the owners of the property, Caine and Hooper, either in terms or legal effect, and no compliance with the terms of the contract is alleged, as required by sections 2, 10, c. 30, p. 25, Laws 1890. Upon an examination of the rec-

61 P.—64

ord, we find that the cross complaint was amended so as to obviate the objection made, and that as amended it was in compliance with the statute of 1890, prior to the change in its provisions in 1894, as held in *Morrison v. Salt Co.*, 14 Utah, 201, 46 Pac. 1104. The case of *Morrison, Merrill & Co. v. Willard*, 17 Utah, 306, 53 Pac. 832, was applicable to section 1372, Rev. St. 1898. It is true that the subcontractor can have no higher or greater right against the owner than the contractor. The contract with the latter measures and limits the rights of both. *Bolsot, Mech. Liens*, § 228; *Phil. Mech. Liens*, §§ 58, 62, 143.

2. Appellants also contend that no compliance with the provisions of the contract requiring that the work was to be done to the satisfaction of the architect, to be evidenced by his certificate, is shown. With reference to this objection the court found that Duvall & Mills, the cross complainants, "fully completed all work contracted to be performed on said building under said subcontract, in accordance with the requirements and terms of said subcontract, on the 1st day of March, 1891." This is a finding of the ultimate facts, which included within its terms a certificate from the architect, and rendered it unnecessary for a finding of the particular evidentiary facts with reference to the actual proof of the architect's certificate. The finding that the contract was performed in all its terms and requirements included all the conditions and provisions of the contract. When evidence is not before the appellate court, it will be presumed that the findings were supported by the evidence. *Blethen v. Blake*, 44 Cal. 117. If the owner or principal contractor intended to insist upon their rights to a final certificate from the architect, they could have notified the contractor; and, if the certificate was refused, they could properly refuse payment for that reason. Besides, the findings show that the principal contractor agreed with the subcontractor upon the amount due, showing a balance of \$2,812.30 due the subcontractor after the completion of the work. *Bannister v. Patty's Ex'rs*, 35 Wis. 215; *Blethen v. Blake*, 44 Cal. 117.

3. Appellants' third contention is that there is a fatal variance between the allegations of the cross complaint, wherein the contract price is specifically alleged at \$16,636, and the notice of the lien claimed, \$18,363.58,—that being the reasonable value for labor and materials furnished,—and that the former was by individuals, and the latter by a partnership, and that the notice was not signed or sworn to. Upon an examination we find that the notice or statement for a lien was subscribed, "Duvall and Mills, by Richard Duvall," and was sworn to by Duvall, one of the claimants and joint contractors. The claim was properly sworn to, and the jurat was sufficient, under the provisions of section 10, c. 30, Laws 1890. Neither section 10, 15, nor 17, *Id.*, required the statement to contain the conditions of the contract, or that the several contracts should be

separately stated. The statement was required to contain a notice of the intention to claim a lien, a description of the property to be charged, an abstract of indebtedness, showing the whole amount of the debt and credit, and the balance due or to become due, with a verification of one or all of the claimants, or by some one for them. The notice or statement contained sufficient facts to justify a lien under the statute as it then existed. By section 14, an incorrect statement of an amount due did not invalidate it, unless made in bad faith. Phil. Mech. Liens, § 355; *Garner v. Van Patten*, 20 Utah, —, 58 Pac. 684.

4. Appellants' fourth contention is untenable. The notice was in compliance with sections 10, 17, Sess. Laws 1890; and it was not necessary to state the amount of work done or materials furnished, and amount due on each of the separate contracts. Under section 17, where the work is continuous the lien attaches, even if the work is done or materials furnished under separate contracts. The notice complied with section 10, and stated the total amount of debt and credit, and the balance due.

5. The appellants contend that the notice for lien was not filed within 40 days from the last day of doing work and furnishing materials. We find that the notice of lien was filed March 28, 1891. The complaint, as amended, alleges the completion of the contract, last work done, and materials furnished, March 1, 1891. The notice was filed within 40 days from the completion of the contract, as required by the statute. Under this head appellants also contend that, under section 21, no lien shall hold the property longer than one year after filing the statement, unless an action be commenced within that time to enforce the same; that the statement was filed March 21, 1891, and that the cross complaint of Duvall & Mills was filed to enforce the contract February 1, 1892, but that no summons was ever issued on the cross complaint, or service had thereof, until October 1, 1896, either upon Wright, the principal contractor, or the defendants Caine and Hooper, and that Wright had never appeared; that a purported copy of the cross complaint was mailed to Wright, at Butte, after October, 1896, and returned indorsed, "Received a copy of the within," and signed by Wright (but no proof of Wright's handwriting is shown), and that by reason of the delay defendants have lost all means of indemnity against Wright and his bondsmen on account of the intervening insolvency of Wright and his bondsmen; that the action was not commenced within the year, as required by section 21; that under section 31, c. 30, Laws 1890, the practice is declared to be in accordance with the Code of Civil Procedure; that section 305 of said Code (being section 3221, Comp. Laws 1888) provides that "the cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint." Upon an inspection of the rec-

ord, we find that the original summons was issued December 15, 1891, and personally served on Duvall & Mills on January 7, 1892, together with a copy of the complaint. A stipulation was filed February 1st, giving Duvall & Mills until February 1, 1892, in which to answer. On that day they appeared and filed their answer and cross complaint. The notice of lien was recorded on March 28, 1891. The answer and cross complaint were filed within the year. Defendant Wright admitted service on the back of the summons, as follows: "I hereby accept service of the within summons this 8th day of January, 1892. [Signed] F. M. Wright." On October 1 1896, the answer and cross complaint were mailed to Wright, at Butte, Mont., by the attorneys for the cross complainants, and at their request he wrote on the back thereof the following: "Received a copy of the within answer and cross complaint. F. M. Wright." The same was thereafter filed. No service of the cross complaint, or copy thereof, was made upon the defendants Caine and Hooper until October 1, 1896. As to the service of the summons on Contractor Wright, we are of the opinion that his admission of service, as it appears on the back of the summons in the principal case, was sufficient proof of service of the summons in that case, under sections 3203, 3204, Comp. Laws Utah 1888. Personal service of the original summons was also made upon Caine and Hooper. In our opinion, the provision of section 3203 does not require service of summons within the year, but the summons is required to be issued within the year from the filing of the complaint. The summons on the original complaint was issued within the year, and service had. From the time of the service of the summons, as stated, the court had acquired jurisdiction of the parties, and control of all the subsequent proceedings in that case. Section 3214, Id. Section 3231, Id., provides: "Whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or by permission of the court, subsequently, a cross complaint. The cross complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to an original complaint." Caine and Hooper, Duvall & Mills, and Contractor Wright were all made defendants and served with summons in the original case. They were all before the court. As to these parties, it was not necessary that summons be issued on the filing of the cross complaint of Duvall & Mills, but it was necessary that the cross complaint should be served upon Caine and Hooper & Wright, as they were parties affected by the allegations thereof. This cross complaint was served, but not until October, 1896. Until such service the court would have jurisdiction over the parties, but not over subject-matter in-

volved in said cross complaint, so as to be able to determine the rights of the parties thereunder. *White v. Patton*, 87 Cal. 151, 25 Pac. 270. Section 3231 does not require the cross complaint to be served within one year from the time of filing the complaint. It may be filed at the same time with the answer, or, by permission of the court, it may be filed at a subsequent date, and it must be served upon the parties affected thereby; and such parties may demur or answer thereto as to an original complaint. The cross complaint by Duvall & Mills was filed February 1, 1892,—less than one year following the date of filing the notice of lien. The cross complaint was therefore filed within one year from the time of filing the statement or notice of lien, under the requirements of section 21, c. 30, Laws 1890. The time for serving the cross complaint is not fixed by statute, but no unreasonable delay should be allowed for service thereof. It should be served within a reasonable time. What was a reasonable time in this case was a question within the discretion of the trial court. The motion of defendants Caine and Hooper to dismiss the cross complaint for laches in the service thereof, and for want of prosecution, was denied. We are not disposed to question this ruling. The cross complaint was served long before the time of the trial, and defendants Caine and Hooper filed their answer thereto. The parties and the subject-matter were before the court, and the issue was determined against Caine and Hooper. Comp. Laws 1888, §§ 3214, 3678, 3231. In *Society v. Fella*, 54 Cal. 598, the supreme court set aside a judgment in favor of the cross complainant because the cross complaint was not served; and the case was remanded, with instructions to allow the defendant to serve her answer and cross complaint upon the defendants affected thereby, after which they were to try the issues. The answer by way of cross complaint set up matters involving the defendant's right to a judgment lien upon the property in question. As to the proof of the signature of the defendant Wright to the admission of the service of the cross complaint on him, the findings show that the admission of service was signed by defendant Wright. This finding is presumed to be supported by the evidence. Comp. Laws Utah 1888, §§ 3214, 3678.

6. Appellants claim that the lien does not relate back to the time when the first work was done, as the notice simply claims a lien on the premises for \$2,812.31, with legal interest from the time of the completion of the contract, which is alleged to be March 31, 1891. The cross complainants must be held as concluded by their claim as set up in their complaint and cross complaint. They claim a lien from the date of the completion of their contract, which was alleged to be March 31, 1891. Under the statute, however, the lien may relate back to the time of the commencement of the work and the furnishing of materials. *Morrison v.*

Carey-Lombard Co., 9 Utah, 70, 33 Pac. 238; Laws 1890, c. 30, §§ 1, 19.

Cross Appeal of Duvall & Mills.

In this case Duvall & Mills, the cross complainants, recovered a judgment lien for the sum of \$1,798.20 against Caine and Hooper, but without interest to the date of the decree. Duvall & Mills appeal from the judgment, and claim that the court erred in not awarding interest at 8 per cent. from March 1, 1891, the date as alleged when the contract for work and material was completed, and ask a modification of the decree in this and other respects. The court, by its findings, allows \$1,798.20, as the just sum for which Duvall & Mills were entitled to a lien under their subcontract for material furnished and labor performed, but without interest. Interest is given in money demands as damages for delay in payment. When it is reserved expressly in the contract, or is implied by nature of the premises, it becomes part of the debt, and is recoverable as of right; but, when it is given as damages, it is often a matter of discretion. Where the interest is recoverable, not as a part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his case, or of unreasonable delay in filing his cross complaint, or other unreasonable and unnecessary delay, it may properly be withheld, although the plaintiff may be entitled to recover the principal sum due him. The giving or withholding of interest being, under the circumstances, largely in the discretion of the court, it had a right to take into consideration the facts of the delay and laches, if any, of Duvall & Mills in filing their cross complaint, and for that reason withhold interest and allow damages. *Stewart v. Schell* (C. C.) 31 Fed. 65; *Redfield v. Iron Co.*, 110 U. S. 174, 3 Sup. Ct. 570, 28 L. Ed. 109; *Express Co. v. Milton*, 11 Bush, 49; *Bann v. Dalzell*, 3 Car. & P. 376. The findings show that Duvall & Mills delayed the service of their cross complaint for about four years after it was filed. It is quite probable that the trial was delayed for this cause. Although there is no finding to this effect, the fact of the delay appears. The court could properly refuse to grant interest because of such laches, and yet find in plaintiffs' favor for the amount of damages due on their contract. It appears, however, that there is no bill of exceptions in this case, and there is no testimony before this court. In such case the general rule is that, where the evidence is not before the court on appeal, the correctness of the findings will not be questioned, except in so far as they are contradictory or conflicting. 2 Enc. Pl. & Prac. p. 487; *Morrow v. Lander*, 77 Wis. 77, 45 N. W. 956; *Claybaugh v. Hennessy*, 21 Ill. App. 124. The court found that Duvall & Mills were entitled to a lien for \$1,798.20, without interest. This being the finding of

an ultimate fact, without contradiction, and there being no evidence before this court, the presumption follows that the findings are supported by evidence that would justify the court in withholding interest on the amount of the lien prior to the date of the decree. *Blethen v. Blake*, 44 Cal. 117; *Smith v. Acker*, 52 Cal. 217; *Same v. James*, 131 Ind. 131, 30 N. E. 902; *Perry v. Quackenbush*, 105 Cal. 399, 38 Pac. 740.

We find no merit in the other assignments of error contained in the cross appeal. Upon the whole record, we are of the opinion that the appeal of Duvall & Mills should be dismissed, with costs to defendants Calne and Hooper, and that the decree of the district court should be affirmed, with costs to the cross complainants, Duvall & Mills, and it is so ordered.

BARTCH, C. J., and BASKIN, J., concur.

(9 Wyo. 178)

UNDERWOOD v. DAVID et al.
(Supreme Court of Wyoming. Aug. 1. 1900.)
APPEAL AND ERROR—RECORD—TRANSCRIPT—
RECORD AND PROCEEDINGS IN
ANOTHER SUIT.

1. Rev. St. § 4254, requiring that there shall be filed with the petition in error a transcript of so much of the record as shall be necessary to exhibit the errors complained of, is complied with by the filing of a petition reciting that a transcript of the record and proceedings, duly certified, "are hereto annexed and made a part of this petition."

2. The pleadings and proceedings in another suit are improperly embraced in the transcript on appeal, where they do not appear in the bill of exceptions, since they could only have been properly considered in the lower court by their introduction in evidence, and, if so introduced, could only have been preserved by bill of exceptions.

3. In proceedings for review of an order made by a trial court vacating a former order confirming a judicial sale, it appeared that the order confirming the sale and the order vacating the confirmation each recited that the cause came on to be heard on the protest on file against the confirmation, and the transcript stated that the protest was lost from the files; but its contents were not set forth, and it did not appear what matters were considered by the court in regard thereto. *Held* that, as it did not affirmatively appear that the protest was made on the record alone, the transcript was insufficient to authorize a review of the proceedings.

Error to district court, Laramie county; Charles W. Bramel, Judge.

Action by A. Underwood against James B. David and Edward C. David. From a judgment in favor of defendants, plaintiff brings error. Motion to dismiss. Granted.

Water R. Stoll, for plaintiff in error. John C. Baird, for defendants in error.

POTTER, C. J. The defendants in error move for a dismissal of the proceedings in error in this cause. The first ground of the motion is that there is no transcript of the record. Attached to the petition in error is what purports to be a transcript of the rec-

ord, and in the petition in error occurs the following: "A transcript of the files, records, and papers of said final order and judgment, and the orders and proceedings, are duly certified to by the said clerk of court of said district, under the seal thereof, and are hereto annexed and made a part of this petition in error." Counsel for defendants in error contends that this is not a compliance with the provisions of the statute (section 4254, Rev. St.) and rule 11 of this court, requiring that there shall be filed with the petition in error a transcript of so much of the record as shall be necessary to exhibit the errors complained of. The proposition urged is that annexing the transcript to the petition in error, and making it, by an allegation therein, a part of it, do not amount to a filing of the transcript with the petition in error. We think there is no merit in the contention. The distinction, if any, is altogether too technical. By being attached to the petition, and in that manner filed, the transcript is filed with the petition,—as much so as if filed as a separate paper. We cannot perceive that the statement making it a part of the petition renders the separate filing of another transcript necessary.

Another ground upon which the motion is based is that there is no bill of exceptions, and it is insisted that the record discloses no question for consideration in the absence of a bill. Counsel for plaintiff in error, on the other hand, contends that the order complained of was made solely upon the record proper, and that a bill is not required for a consideration of the errors assigned. No bill of exceptions is contained in the record. A bill of exceptions is only required to make that a part of the record which is not otherwise a part of it. If counsel for plaintiff in error is correct in his view that the record proper discloses all that is required for a determination of the questions presented by the petition in error, then it is evident that, upon the ground of the absence of a bill of exceptions, the proceedings should not be dismissed. These proceedings are instituted for the review of an order made by the district court vacating a former order confirming a sale to plaintiff in error upon an execution issued upon a judgment in a certain cause, wherein Valentine Baker et al. were plaintiffs, and Helen Jenkins, Edward C. David, James B. David, Alexander G. McGregor, and Alice Parshall were defendants. The order appealed from not only vacated the previous order of confirmation, but adjudged the sale to plaintiff in error to be null and void. The suit above mentioned was brought to subject certain real estate belonging to Helen Jenkins to the payment of judgments theretofore recovered against her by the plaintiffs in the suit. Edward C. David, James B. David, and Alexander G. McGregor, defendants in the suit, respectively held mortgages covering various tracts of the lands in question.

The final decree awarded personal judgments to each of the last above named defendants, declared the mortgages of Edward C. and James B. David, respectively, to be first and prior liens upon the lands covered by them, and ordered the sale of all the property by a special master commissioner therein appointed for that purpose. No sale was made by such commissioner, but three years after the entry of the final decree an execution was caused to be issued by the Davids, and in June, 1895, a sale was had thereunder, the sheriff of the county officiating, and the Davids became severally the purchasers; part of the property being bought by Edward C. David, and part by James B. David. That sale was confirmed. A few days prior to any action on the part of the Davids to obtain an execution, the assignee of the McGregor judgment caused execution to issue thereon, and certain lands were levied on, being some of the same lands embraced in one or the other of the David mortgages. Notice of sale was published, but the execution was returned unsatisfied and without sale, for the reason, as stated in the officer's return, that he had received notice that the district court had allowed an injunction to issue in the case of Helen Jenkins against Alexander G. McGregor, and he therefore returned the execution not satisfied, by order of the court. In June, 1896, the assignee of the McGregor judgment caused an alias execution to issue thereon, under which the sale was made to plaintiff in error of the lands in question; they being part of the same lands covered by one or the other of the David mortgages, and purchased by one or the other of them at the sale held under the execution issued at their instance in 1895. That sale to plaintiff in error was confirmed, over a protest filed by Edward C. and James B. David. Subsequently they moved a rehearing of the order of confirmation, which was granted, the sale declared null and void, and the prior order of confirmation vacated; this last order being the one now complained of. The foregoing facts are all obtainable from an inspection of the record proper. Some matters are incorporated in the transcript which are not part of the record, and cannot be considered. The order appealed from was made in the case of Valentine Baker et al. against Helen Jenkins et al., already mentioned. We observe in the transcript the pleadings, proceedings, orders, and judgments in a case wherein Helen Jenkins was plaintiff, and Alexander G. McGregor, Albert Chapman, and Ira L. Fredendall were defendants. Chapman was the assignee of the McGregor judgment, and Fredendall was the sheriff of the county. That case is probably the one wherein the injunction issued which prevented the sale under the McGregor execution issued in 1895. Without a reference to the record of that case, however, the court would have no means of knowing that to be the fact; nor is there anything else-

where in the transcript to show what final disposition was made of that suit. That action was an independent one. Neither of the Davids were parties to it, nor was the plaintiff in error. The proceedings in that action (although certain of them, such as the pleadings and orders, constitute the record in the suit wherein filed or made) are not, in any sense, in and of themselves, part of the record proper in these proceedings, seeking the reversal of an order made in an altogether different cause. They could not have been properly considered in the district court in making the order complained of, unless introduced as evidence; and, if so introduced, they could not be preserved as part of the record except by a bill of exceptions. They do not appear in a bill of exceptions, and therefore are clearly improperly embraced in the present transcript. It is noticeable that the clerk does not authenticate them as papers and proceedings in the action wherein the order appealed from was entered, but they are certified as the papers and proceedings in the suit of Helen Jenkins against Alexander G. McGregor and others, and very properly so. Incorporated in the transcript, also, is a written opinion of the district court, certified to as filed in the cause of Baker et al. against Jenkins et al. Although the opinion may, and seems to, have been filed in the cause wherein the order in question was made, it is not a paper which is of itself part of the record. It cannot be referred to or considered, therefore, for any effective purpose, upon the motion to dismiss. So much for that embodied in the transcript which is not part of the record.

The transcript contains the pleadings, the orders, and judgment of the court in the cause wherein the order in controversy was entered, and also the various executions, and the officers' returns thereon, as recorded in the execution docket. These are all matters of record, and require no bill of exceptions to entitle them to consideration in this court. Sections 3775, 3848, Rev. St. If such matters of record as are embraced in the transcript are sufficient to present any question raised upon the petition in error, no bill of exceptions would be required for the determination of such question, and the proceedings ought not in such case to be dismissed. They must be regarded as sufficient in case the order, which is here assigned as error, was made and entered solely upon such record, and without the consideration of any extraneous matter. Whether or not they constitute all that is essential to a review of the order must be disclosed by the authenticated record itself. The order confirming the sale to plaintiff in error, which was subsequently set aside, recites: "This cause coming on to be heard on the protest, on file herein, of Edward C. David and James B. David, to the confirmation of a sale of certain real estate, made by Ira L. Fredendall, then sheriff of Laramie county,

Wyoming, under an execution issued out of this court in favor of Albert Chapman, and to the granting of a sheriff's deed to A. Underwood, the purchaser at the aforesaid sale, and Edward C. David and James B. David appearing by their attorney, J. C. Baird, and Albert Chapman and A. Underwood appearing by their attorneys, R. W. Breckons and D. W. Elliott, argument was heard by the court, on the 1st day of October A. D. 1897, the same being one of the regular days of the May, A. D. 1897, term of this court; and the court, having taken the matter under advisement, and being fully informed in the premises, now, on this day, all the parties being present and represented by their respective attorneys, doth render decision herein, and doth find that said proceedings and sale, as shown by the return of the aforesaid sheriff, filed herein, was made in all respects in conformity to law." The order continues by confirming the sale, and ordering the execution of a deed to the purchaser. Thus it expressly appears that the hearing was had upon a certain protest filed in the cause. The nature of that protest, or the grounds thereof, is not stated in the order. Neither is the protest incorporated in the transcript. It is true, the transcript states that the protest is lost from the files and cannot be found, but its contents are not set forth. It is doubtful, to say the least, whether the clerk, who authenticates the transcript, would have had any authority to give a description of the protest or its contents, even if his knowledge had enabled him to do so. It would seem that the only power to effectively supply the loss of the protest by a statement of its contents resided in the court. Doubtless, the court might so preserve it by signing a bill containing a full description of it. This, however, has not been done. Had the order shown that it was made upon a protest based upon the record, it is probable that enough would have appeared, in the absence of the protest itself, to warrant a review of the order upon the record alone. But the order is silent respecting the character of the protest. It is also silent (and the same is true of the entire record) as to the matters considered by the court in arriving at its conclusion. Irregularities appearing upon the record, or matters shown thereby, do not comprehend all the objections possible to be urged in opposition to the confirmation of a judicial sale. Objections which will readily occur to the mind of every lawyer to be shown by matters aliunde might be preferred in resistance of confirmation, and might be sufficient to vitiate the sale. *Ror. Jud. Sales* (2d Ed.) 110, 121.

At the same term of court, the protestants having filed a motion for rehearing, as appears by the orders of the court made in the premises, such motion was heard and taken under advisement. Subsequently, the

order complained of, granting a rehearing, vacating the previous order, and adjudging the sale null and void, was entered. That order states that: "This cause having come on heretofore to be heard on the motion for rehearing on the protest against the confirmation of a certain sale made herein on the 3d day of August, A. D. 1896, which sale was returned as having been made to one Abram Underwood, and embracing the following described lands, * * * which protest was on the 4th day of October overruled, and said sale confirmed by order of this court on last said day, and a deed ordered to be made by the sheriff and delivered to said purchaser; and the court, having had the said motion for rehearing under advisement, doth order, adjudge, and decree that a rehearing on said protest be, and the same is hereby, granted and allowed; and the court, having said return of the said sheriff under consideration, the protest against the confirmation of the same having been argued by counsel, and being fully advised in the premises, doth find generally for the protestants and against the said return of said sheriff, and saith that the said sale was and is void and of no effect." The sale is then disapproved, and the previous order of confirmation canceled and set aside. This order observes the same silence as the prior one regarding the nature of the protest and objections to confirmation. We have not failed to note the fact that no reference is made to the introduction of evidence, and that nothing is said in the orders about a consideration of matters dehors the record. But the entries do not affirmatively declare or clearly disclose that the record alone constituted the foundation of the protest, or the basis of the court's determination. Counsel, we assume, must have had some reason for bringing into the transcript the record in the separate injunction suit. Were the proceedings in that case considered by the district court? If so, they are not properly before this court. The trial court speaks only by the record, and the record does not speak as to that matter. It appearing affirmatively that the hearing was had, and the order complained of made and entered, upon consideration of a written protest not in the record, we cannot say that the decision was founded alone upon the record proper. Again, without the protest this court must remain unenlightened as to the matters which entered into the determination of the court below, and as to the points or questions really decided. For the reasons aforesaid, the record is insufficient to authorize a review of the order complained of. The other grounds of the motion to dismiss do not require consideration. The motion will be granted. Dismissed.

CORN and KNIGHT, JJ., concur.

APPEL, Chairman County Com'rs, v. STATE
ex rel. SHUTTER-COTTRELL.

(Supreme Court of Wyoming. Aug. 1, 1900.)

COUNTIES — MANDAMUS — PRESUMPTIONS —
 PLEADING—DENIAL ON INFORMATION AND
 BELIEF—COUNTY BOARD—RIGHT TO EMPLOY
 ASSISTANT TO COUNTY ATTORNEY—ACTS OF
 COMMISSIONERS — RATIFICATION — CLAIMS—
 RECONSIDERATION.

1. A petition for mandamus to compel the chairman of the board of county commissioners to sign a warrant, which states that the board allowed petitioner's claim and ordered it paid, and that the clerk drew a warrant therefor, is not demurrable for failure to state that there were funds in the treasury to pay the same, and that an itemized statement of the claim was filed, since Rev. St. § 1216, forbidding the issue of demand warrants unless there are funds on hand to pay the same, and Const. art. 16, § 7, prohibiting the audit, allowance, or payment of claims unless a sworn itemized statement be filed, apply to the drawing the warrants in the first instance, and on demurrer it will be presumed that the officers did not violate the law.

2. In mandamus to compel the chairman of the board of county commissioners to sign a warrant, an allegation in the answer that defendant has no knowledge or information sufficient to form a belief as to whether there are sufficient funds in the treasury to pay the warrant, and therefore denies that there are sufficient funds, is not such a denial of the existence of funds as will put the petitioner to proof of the fact; the fact attempted to be denied being one which defendant ought to know, and had means of knowing, by reason of his office.

3. Under Rev. St. § 1104, providing that the county attorney shall appear for the county in all proceedings wherein said county is a party, but that such section shall not prevent the county commissioners from employing an attorney to assist the county attorney, the county commissioners were authorized to employ an attorney to assist the county in defending the county in proceedings to compel the county board to designate a particular paper as the official paper of the county.

4. It is a sufficient compliance with Rev. St. § 1104, requiring that, when an attorney is employed by the county commissioner in a proceeding against the county, the nature and necessity of the employment shall appear on the record of the board, if a resolution be entered on the records, at the time when the claim of such assistant attorney is allowed, describing the suit in which he was employed, and its nature, stating his employment to assist the county attorney, and that such employment was necessary for a successful defense.

5. Under Rev. St. § 1104, providing that, when an attorney is employed by the county commissioners to assist a county attorney in a proceeding against the county, the nature and necessity for such employment must appear on the record of the board, the board is the judge of the necessity for such employment, and its determination thereon can only be attacked for fraud.

6. Where an attorney was employed by two county commissioners, at a time when the board was not in session, to assist the county attorney in defending a proceeding against the county, the passage of a resolution accepting such employment, and the allowance of such attorney's claim, are a complete ratification of the act of the commissioners.

7. Where a county board refused to allow a claim, and on the following day reconsidered the disallowance and allowed it, no rights of third parties having intervened, their action was within their powers.

Error to district court, Sweetwater county; David H. Craig, Judge.

Mandamus by G. W. Shutter-Cottrell against Peter Appel, as chairman of the board of county commissioners. From an order overruling a demurrer, and from a judgment awarding a peremptory writ, defendant brings error. Affirmed.

D. A. Reavill, D. A. Preston, and John H. Chiles, for plaintiff in error. M. C. Brown, for defendant in error.

POTTER, C. J. This was an application in the district court, on the relation of G. W. Shutter-Cottrell, for a writ of mandamus to compel Peter Appel, the chairman of the board of county commissioners, to sign a warrant ordered to be issued by the board to the relator, in the sum of \$200. The allegations of the petition are substantially as follows: That said Appel is the legally chosen chairman of the board of county commissioners of Sweetwater county; that on April 5, 1890, the said board, at a regular session thereof, allowed a claim of the relator in the sum of \$200, and ordered it paid out of the general fund of the county, and ordered the county clerk to draw a warrant for the same in relator's favor; that the clerk drew said warrant, and signed and sealed the same, and the county treasurer countersigned it, but that Peter Appel, the chairman of the board, refused to sign said warrant, although relator had demanded of him that he sign it, as ordered and drawn by the board. A copy of the warrant, as made out by the clerk, is set out, by which it appears that it is numbered 13,741, dated April 5, 1890, and commands the county treasurer to pay to G. W. Shutter-Cottrell, or order, \$200, for county-attorney assistance, out of the general fund, and represents that it is issued by order of the board, and bears the signatures of the clerk and treasurer of the county. It is alleged that without the signature of the chairman of the board the warrant is of no value, and that relator is without remedy except in this proceeding. The prayer is for a writ of mandamus commanding the defendant (plaintiff in error here) to sign said warrant as chairman of the board. Upon the filing of the petition, and its presentation, with affidavits and copies of records, as is shown by the order of the district judge, an order was made by said judge that the application be fixed for hearing at a date named therein, and that the defendant appear and show cause why a peremptory writ of mandamus should not be issued in accordance with the prayer of the petition. On the day fixed by said order, the defendant filed a demurrer to the petition on the ground that the same does not state facts sufficient to constitute a cause of action. This demurrer was submitted without argument and overruled, and the defendant excepted thereto. Thereupon defendant filed an answer alleging that on March 7, 1890, the relator presented to the board a claim of \$200 (the same mentioned in the petition) alleged to be due him for

services as an attorney and counselor at law in assisting the county and prosecuting attorney of said county in the case of Robert Smith against the board of county commissioners of Sweetwater county, pending in the district court of Sweetwater county, which was a mandamus proceeding brought to compel the board to designate the Rock Springs Miner, a newspaper, as the official paper of said county. It is averred that at all times from the institution of that case until its final determination the county and prosecuting attorney of said county was present in said county, and not absent therefrom; that the relator was never employed by the board in said case, or in any other cause; that no necessity existed for the employment of counsel, and no minutes or record of said board were ever made, kept, or entered, showing the necessity and nature of said alleged employment. It is further alleged by the answer that on the 4th day of April, 1899, the board rejected and disallowed the relator's said claim, and that the action of the board in reconsidering the matter and allowing the claim as alleged in the petition was without jurisdiction, illegal, and void; that the said claim has never been allowed by the board, and, if so allowed, the action was without jurisdiction, illegal, and void; that said claim is not a valid charge against said county, and the board exceeded its power in allowing it. The following also appears in the answer: "That the defendant has no information or knowledge sufficient to form a belief as to whether or not there are any funds in the county treasury of the said county with which to pay the said warrant, and therefore alleges the truth to be that there are no funds with which to pay the same." The cause was finally heard and determined upon the petition, answer, and an agreed statement of facts. The agreed statement is as follows: "That on the 12th day of February, A. D. 1899, D. G. Thomas, claiming to act by direction of two of the commissioners, requested the relator to aid him in representing the county in resisting certain mandamus proceedings brought by Robert Smith against the board of county commissioners of Sweetwater county to require said board to designate the Rock Springs Miner, a newspaper published in Sweetwater county, as the official paper of the county; that thereafter, and on or about the 15th day of February, and before said matter was tried and considered by the court, T. B. Davis and Marcus Outson, being both county commissioners of said county, and being there in the office of D. G. Thomas, at Rock Springs, Wyoming, talked with relator about his employment in the said matter of mandamus, and consulted with him about the case; that on the 25th day of February, 1899, said case came on for hearing, and was tried and determined by the court, judgment being rendered in favor of the said board of commissioners. That in said

trial the relator in part represented the said board, and performed such service therein as an attorney at law as required by his employment; that thereafter the relator prepared his bill for services in due form as by law required, and presented same to board for allowance. That the action of said board and its proceedings upon said bill fully appear in the certified copy of the proceedings of the board hereto attached." From the copy of the board's proceedings attached to the statement, it appears that at a meeting held March 7, 1899, the bill of relator was presented and referred to the county attorney. That officer, by a communication dated March 21, 1899, announced as his opinion that the claim was legal and ought to be paid. At a subsequent meeting of the board, held April 4, 1899, several claims against the county were allowed, and warrants ordered to be issued for the same, and the relator's claim was rejected. The board adjourned until the following day, April 5, 1899. On that day the board met pursuant to adjournment, and the record of that meeting contains the following: "Mr. G. W. Shutter-Cottrell being present in person, it was moved by Mr. T. V. Davis, and seconded by Mr. Outson, and carried, that the minutes of April 4, 1899, be reconsidered, in that part having reference only to the rejection of Mr. G. W. Shutter-Cottrell's bill. Moved by Mr. T. V. Davis, and seconded by Mr. Outson, and carried (Mr. T. V. Davis and Mr. Outson voting in the affirmative, and Mr. P. Appel in the negative), that the following resolution be made a part of the record of the proceedings of the meeting of April 5, 1899: 'Resolution. Whereas, on the 9th day of February A. D. 1899, Robert Smith sued the board of county commissioners and P. E. Du Sault, county clerk of Sweetwater county, upon mandamus proceedings, in this, to wit, to compel the said board to grant and give to him, the said Robert Smith, the county printing; it further appearing to said board that the county attorney, D. G. Thomas, desired and needed legal assistance in the defense of said suit, and to protect county interests therein, and that said county attorney, by the advice of a majority of said board, did employ G. W. Shutter-Cottrell to assist in the defense of said suit, at a time when the commissioners were not in session; that said employment was necessary for the successful defense of said cause against the said board of the county commissioners and the said county clerk, P. E. Du Sault.' " Then appears the following: "It was moved by Mr. T. V. Davis, and seconded by Mr. Outson, and carried (T. V. Davis and Mr. Outson voting in the affirmative, and P. Appel in the negative), that the following bills be examined, audited, and allowed, and the clerk ordered to draw warrants for same (Mr. Appel stating that it was his belief that the payment of Mr. Shutter-Cottrell's bill was not legal): G. W. Shutter-Cottrell, Co. attorney's,

assistance in the mandamus case of *R. Smith vs. the board of the county commissioners and the clerk of Sweetwater county, \$200.00.* The copy of the proceedings in the record shows that other bills were at the same time allowed, and warrants ordered drawn to pay them; but the items thereof are not given, for the reason, as stated, that they do not refer to the claim in controversy. The court decided in favor of relator, and awarded a peremptory writ.

The overruling of the demurrer to the petition is assigned as error. Under this assignment it is urged that the petition is fatally defective, for two reasons: (1) Because it fails to show that there were moneys in the proper fund in the treasury sufficient to pay the warrant; (2) because it fails to state that the claim of relator was itemized in writing, and verified as required by law.

It is provided by the statute that county warrants payable on demand shall be drawn and issued only when at the time of drawing and issuing the same there shall be sufficient moneys in the proper fund in the treasury to pay the same. Rev. St. § 1216. And the constitution prohibits the audit, allowance, or payment of claims against the county until a full itemized statement thereof, in writing, verified by affidavit, shall be filed with the officer or officers whose duty it may be to audit the same. Article 16, § 7. It may be conceded, as a general proposition, that mandamus will not lie to compel the issuance or signing of a county warrant payable on demand, in the absence of sufficient money in the appropriate fund in the treasury to pay the same, and that a return or answer alleging that there was not sufficient money in the proper fund for the payment of the warrant would set forth a good defense. High, Extr. Rem. § 484. The same may be conceded as to the requirement for an itemized statement and verification of the claim. The question here, however, affects the sufficiency of the petition. It is only necessary that the petition should make out a *prima facie* case entitling the aggrieved party to the extraordinary aid of the court. Rev. St. § 4204; High, Extr. Rem. §§ 448-450. We think such a case is presented by the allegations that the board of county commissioners allowed the claim of relator, ordered it paid out of the general fund, and ordered a warrant for the amount drawn in favor of the relator. It is the duty of the board to audit and allow all accounts chargeable against the county, and, when allowed, to draw and issue county warrants or orders therefor upon the proper funds in the treasury. Rev. St. §§ 1058, 1216. The chairman of the board is required to sign such warrants or orders, and they are required, also, to be signed or attested by the county clerk, and countersigned by the treasurer. Id. §§ 1091, 1142, 1216. But the authority for the chairman and other officers to sign and deliver the warrants proceeds from the order of the board. The

prohibition upon the drawing of warrants when the treasury is without funds affects and controls the board in the first instance, and the same is true of the provision for itemized and verified vouchers. Conceding that the claim of relator is of a character which a county may legally pay, it will be presumed, in the absence of a showing to the contrary, that the board performed its duty, and did not violate the statutory and constitutional requirements. It is well settled that, within the scope of their powers, public officers will be presumed to have performed their duty, and to have observed the requirements of law in their official action. *State v. Barber*, 4 Wyo. 56, 32 Pac. 14. It is upon this principle that municipal and county orders for the payment of money are held to constitute a *prima facie* cause of action, and that their impeachment must come from the defendant. *Ray v. Wilson* (Fla.) 10 South. 613, 14 L. R. A. 773; *In re Fremont Co.*, 8 Wyo. —, 54 Pac. 1073; *Board v. Sauer* (Okla.) 61 Pac. 367. Hence, from the allegation in the petition respecting the action of the board, the presumption follows that the claim was presented in due form to authorize its allowance and payment, and that the warrant was ordered drawn against funds then in the treasury, sufficient in amount to pay it. "It is not necessary to allege and show affirmatively matters of fact which the law presumes from other facts which are alleged." *State v. Barber*, *supra*.

The cases cited by counsel for plaintiff in error are clearly distinguishable from the case at bar. With a few exceptions, they were mandamus proceedings brought to compel action upon the part of the board or other auditing officers. In *McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863, the proceedings were against the city clerk, to require the drawing of a warrant ordered by the board of trustees, and the petition alleged that there was money in the treasury to pay the same. In *Ray v. Wilson* (Fla.) 10 South. 613, 14 L. R. A. 773, the treasurer was defendant, and the payment of warrants was sought to be compelled by mandamus, and the petition alleged the existence of funds. In the California case it was said that the matters alleged were the essential facts entitling the petitioner to the writ, and in the Florida case it was said that the petition stated a *prima facie* case. In neither case was the question involved whether the petition would have been sufficient had it only averred that the auditing board had allowed the claim, and ordered a warrant issued for its payment. It may be that, in a proceeding to require payment by a treasurer, ability on his part to pay should be alleged, but that is not this case. Where the indebtedness is one which the board is ordinarily authorized to incur, the duty of the chairman to sign a warrant ordered by the board to be issued in payment of a claim duly audited and allowed is ministerial, and mandamus will lie to compel him to sign it, unless he is able to show, and does

show, facts sufficient to impeach the validity of the claim, or establish illegality in the action of the board. No doubt, the officer upon whom devolves the duty of signing or issuing warrants ordered by the board has the right to justify his refusal to obey the mandate of the board by showing that they would be void for want of jurisdiction in the board, or other plain and palpable violation of law. *McFarland v. McCowen*, 98 Cal. 329, 33 Pac. 113. That he may excuse or justify his refusal to sign the warrant by showing that there are no funds on hand against which the warrant can be legally drawn cannot be seriously questioned, we think, in view of our statutory provisions, as the court will not require an illegal or useless thing to be done, or a worthless piece of paper to be signed. This the defendant attempted to do by an allegation quoted in an earlier part of this opinion. The agreed statement of facts is silent respecting this matter, and, to overthrow the presumption flowing from the action of the board, defendant rests entirely upon the allegation of his answer. While it is charged that there are no funds with which to pay the warrant, the charge is accompanied by the statement that defendant is without any knowledge or information sufficient to form a belief upon the subject. The allegation does not reach the dignity of one upon information and belief. The averment is that he has neither knowledge, information, nor belief. It affects a fact which ought to have been within his knowledge and information, and, by reason of the office held by him, he was in a position to obtain the requisite knowledge to have made his allegation positive and certain. *McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863. In mandamus it is incumbent upon a respondent seeking to excuse nonperformance to state the matters of excuse or justification upon which he relies in direct and positive terms, and to state them with such precision and certainty as will disclose the propriety of his nonperformance, and enable the court to pass upon the sufficiency of the justification. *High*, Extr. Rem. §§ 473, 474. Although the statement of facts makes no mention of the matter of funds available to pay the warrant, it appears from the proceedings of the commissioners that other claims were allowed, and warrants ordered drawn for their payment, on the same day that relator's warrant was ordered. The objection of the defendant, as noted upon the journal of the board, to the allowance of the claim of relator, does not seem to have had any relation to the question of funds. As stated, his objection was that in his belief the claim was not legal.

It is contended that the judgment is not sustained by sufficient evidence and is contrary to law, and that the court erred in awarding the peremptory writ. The grounds of this contention are: First, that the relator, if employed at all, was not employed by the board, but by two members thereof, without authority to do so, and that such

employment was therefore illegal; and, second, that in actions where the county or board are parties the board has no authority to employ an attorney, except in the absence of the county attorney. The nature of the suit in which the services of the relator were rendered has already been stated. It was a mandamus proceeding brought against the board to compel certain official action on its part. In support of the proposition that the board, in such a suit, is without authority to employ counsel to assist the county attorney, the provisions of sections 1078, 1079, Rev. St., are particularly relied on, together with the provisions of section 1106, which constitutes the county attorney the legal adviser of county officers, and of section 1104, which in other respects prescribes his duties. Section 1078 provides that, "in all legal proceedings against the county, process shall be served on said board of county commissioners or any member thereof; and they shall have the right, and are authorized in the absence of the county attorney, to employ an attorney to prosecute or defend, for which they may make an appropriation out of the general county fund." Section 1079 prohibits the giving of any fee to any attorney by the board for any services not required by law, and, if any attorney be employed by the board under the provisions of the chapter in which said section is embraced, the nature and necessity of such employment shall appear in the record of the board. Counsel's position is that the only authority possessed by the board for the employment of an attorney in such a case as the one in which the services of relator were rendered is to be found in section 1078, above quoted. We are unable to agree with counsel. We think that section 1104 has an important bearing upon that question. That section provides that: "Every county and prosecuting attorney shall appear in the district court in behalf of the state and the county in which he may be elected or appointed, in all indictments, suits and proceedings which may be pending or arise in said county, wherein the state or the people thereof, of [or] said county may be a party. * * * Nothing contained in this section shall be so construed as to prevent the county commissioners of any county from employing one or more attorneys to appear and prosecute or defend or assist said attorney in so doing, in behalf of the people of the state or such county in any such indictment, action or proceeding; but in such case the nature or necessity of such employment shall appear in the record of the board." The word "or," above placed in brackets, is the word used in section 1894 of the Revised Statutes of 1887, and the word "of" in the late revision is evidently a misprint. That such a suit as the one in which relator appeared for the board is embraced in and covered by the section is plain. The duty of the county attorney to appear in that character of proceeding is to be found ex-

pressed only in this section. No other provision of the statute imposes the duty upon him. And it is the kind of suit and proceeding in which the county attorney is required to appear that is included in the last clause of the section above quoted. It is declared that, as to such an action or proceeding, nothing in the section contained shall be construed as to prevent the board from employing an attorney to appear, prosecute, or defend, or to assist the county attorney in so doing. It is reasonably clear that the employment referred to is not limited to occasions when the county attorney is absent, for it may be to assist that officer. It is evident, also, that it was intended to confer authority upon the board to employ an attorney or attorneys. It is provided, "but in such case the nature and necessity of such employment shall appear in the record of the board." The statement is not that the section shall not be construed as preventing the employment when otherwise provided by law. Such a provision would be of use only as a matter of great precaution. The board is empowered generally to represent the county, and have the management of the business and concerns of the county, in all cases where no other provision is made by law. Section 1058. The county has authority to make all contracts, and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate or administrative powers. Section 1073. And the powers of the county are exercised by the board of county commissioners. Section 1055. It is the duty of the board to designate an official paper of the county, where there is more than one paper published within the county. Section 1071. The suit wherein relator was employed was one to compel the board to designate a particular paper as the official paper of the county. It became the duty of the county attorney to represent the board in that proceeding, but the section of the statute imposing that duty upon him declares that it shall not be construed as preventing the employment of an attorney to assist him or to defend the action. Section 1078 authorizes the board, in a certain class of cases, to employ counsel in the absence of the county attorney, but it does not expressly prohibit or negative the right of such employment in other cases. Were there no other provision of law upon the subject, it might be held to restrict the right by implication, by the application of the maxim, "*Expressio unius est exclusio alterius.*" We think the employment of relator was within the power of the board.

The requirement that the nature and necessity of the employment shall appear in the record of the board was sufficiently complied with by the entry of the resolution on the day when the claim was allowed, describing the suit, and its character, in which relator was employed, the character of the services rendered by him, viz.

to assist in the defense of said cause, and stating that "said employment was necessary for the successful defense of said cause." As to the necessity for that character of employment, the board must and should be the judge, and their determination thereof is not open to question, except upon an allegation and showing of fraud. The statute does not prescribe the time when the record shall be made to disclose the requisite facts. The purpose of the requirement being evidently to guard against the giving of a fee or allowance to an attorney for services not required by law (section 1079), it is sufficiently subserved by the making of the required entry at the time of the allowance of the claim for the services performed.

The objection that the employment was made or consented to by two of the commissioners when the board was not in session is fully overcome by the subsequent action of the board. The adoption of the resolution showing and accepting the employment, and the allowance of the claim, amounted to a complete and sufficient ratification. In fact, the tenor of the resolution shows an intention to ratify the acts of the two commissioners in advising and consenting to the employment. The right of a county, through its board of commissioners, to ratify the previously unauthorized acts and contracts of its agents and officers, cannot be doubted, provided the act or contract be within its powers, and not otherwise illegal. Dill. Mun. Corp. § 385; 1 Am. & Eng. Enc. Law (2d Ed.) 1182.

Finally it is contended that, having once rejected relator's claim, the board had no power to reconsider its action and allow the same. But it is settled that at any time before the rights of third persons have become vested, which would be interfered with by a reconsideration, a corporate board may, if not inconsistent with its charter and the law creating and governing it, and its rules of action, reconsider and rescind previous votes and orders. Dill. Mun. Corp. (3d Ed.) § 290 (228); *McConoughey v. Jackson*, 101 Cal. 265, 35 Pac. 863; *Estey v. Starr*, 56 Vt. 690. That principle applies to a board of county commissioners, and surely there is no reason why a vote rejecting a bill may not subsequently be reconsidered or rescinded, and the bill allowed. It may have been disallowed on account of insufficient information, or it may have been prematurely presented, and other reasons equally as potent might be suggested making a reconsideration entirely proper and reasonable.

Plaintiff in error having failed to show that the warrant was illegal, but it appearing that it was one which the board was authorized to draw, it was his duty to sign it, and the judgment awarding a peremptory writ must be affirmed.

CORN, J., and KNIGHT, J., concur.

ITALIAN-SWISS AGRICULTURAL COLONY
 v. BARTAGNOLLI et al.

(Supreme Court of Wyoming. Aug. 1, 1900.)

JUSTICES OF THE PEACE—JUDGMENT BY DEFAULT—MOTION TO SET ASIDE—NECESSITY—APPEAL—TRIAL DE NOVO—NOTICE OF APPEAL—PAYMENT OF COSTS.

1. Rev. St. § 4401, provides that, on appeal from a justice to the district court, the case shall be tried de novo, and on the pleadings and issue as filed and made in the court appealed from. Section 4387 declares that, when judgment is entered by default in a justice's court, a motion may be made within 10 days to set it aside, on notice and payment of the costs. Plaintiff obtained judgment in a justice's court by default, and defendant appealed to the district court, without filing a motion in the justice's court to set it aside. *Held*, that it was error to enter judgment in defendant's favor in the district court, since there was no issue presented in the justice's court by defendant, and hence there could be none in the district court to try de novo.

2. Under Rev. St. § 4398, providing that any person desiring to appeal from a justice's judgment, within 15 days after rendition of the judgment, shall file with the justice of the peace who rendered such judgment a notice of such desire, and within 15 days pay all the costs up to the time of the transmission of the papers to the district court, etc., where defendant obtained a transcript of the judgment rendered against him in the justice's court, to which he annexed an undertaking entitled in the case, and running to the people of the state, for the use and benefit of the county, but without filing any notice of his appeal or paying the costs, it was error to deny plaintiff's motion in the district court to dismiss the appeal, since the requirements of the statute as to appeals are mandatory.

Error to district court, Sweetwater county; David H. Craig, Judge.

Action by the Italian-Swiss Agricultural Colony against Joe Bartagnolli and G. Zambila. From a judgment in favor of defendants in the district court on appeal from the justice court, plaintiff brings error. Reversed.

John H. Chiles and T. S. Tallafarro, for plaintiff in error. D. G. Thomas, for defendants in error.

KNIGHT, J. This action was originally brought by plaintiff in error against defendants in error to recover on account; and before a justice of the peace, on March 22, 1899, plaintiff in error filed its bill of items, and caused summons to issue, which was duly served upon defendants as provided by law. On March 28, 1899, and upon the return day of said summons, the same was filed, with return as to service duly indorsed; and, defendants being in default, proceedings were had as provided and directed by section 4386, Rev. St., and judgment regularly given for plaintiff in the sum of \$50.52 and costs, the latter having been taxed at \$5. We have not been favored with a brief or appearance by defendants in error, but it would appear from the record that an appeal was attempted to the district court without complying with any of the provisions of law in such case made and

provided. A transcript of the proceedings in justice court was obtained, to which was attached an undertaking entitled in the case, and running to the people of the state of Wyoming, for the use and benefit of Sweetwater county, in the sum of \$125. This undertaking is not such as is directed by section 4398 or section 4403, *Id.*, or any existing statute on appeals, nor was it approved by the justice of the peace. It would appear, however, that, upon the filing of this transcript and undertaking in the district court, a notice was obtained from the clerk of the district court, and served upon the plaintiff in error, that an appeal had been taken, as provided by section 4400. Subsequently, at one of the regular days of the ensuing term of the district court, plaintiff in error presented a motion to dismiss the appeal so as aforesaid had and obtained, which said motion was denied by the court, to which ruling plaintiff in error duly excepted. Thereupon, after hearing evidence on the part of defendants in error, the court found and gave judgment for defendants in error, and the case comes to this court on error.

Plaintiff in error urges two grounds for error: First, that where a judgment has been rendered upon personal service of summons and upon default, and in compliance with the provision and direction of statute, such judgment cannot be reversed on appeal; second, that the right of appeal from a judgment rendered by a justice is statutory, and in taking such appeal all statutory provisions in relation thereto must be complied with.

Upon plaintiff's first ground of error, we find an interesting opinion by Justice Story in the case of *U. S. v. Wonson*, 1 Gall. 5, Fed. Cas. No. 16,750, wherein the right of appeal and review is very ably discussed; also, in *Wiggins v. Henderson*, 22 Nev. 103, 36 Pac. 459; *Clendenning v. Crawford*, 7 Neb. 474; *Strine v. Kingsbaker*, 12 Neb. 52, 10 N. W. 534; *Sawyer v. Railroad Co.*, 37 Mo. 261; *Plank-Road Co. v. Robinson*, 27 Mo. 390; *Brayton v. Delaware Co.*, 16 Iowa, 41; *Levy v. Riley*, 4 Or. 393; *People v. County Court*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328; *Rickey v. Superior Court*, 59 Cal. 661; and many others. In the case of *Martin v. District Court*, 13 Nev. 90, the court makes use of the following language: "We think, however, that the district court had no jurisdiction by appeal in this case. The judgment was entered upon the default of the defendants, and there was no issue of law or fact to be tried. All the district court can do in a case appealed from a justice's court is to try it anew. Comp. Laws, § 1643. And, if no sort of issue has been made or tried in the justice's court, there is nothing to be tried anew. *People v. County Court*, 10 Cal. 19; *Funkenstein v. Elgutter*, 11 Cal. 328. These decisions were approved by Judge Brozman (*Paul v. Armstrong*, 1 Nev. 96), and his decision has only

been so far qualified as to hold that an appeal lies to this court from a judgment by default in the district court upon the question whether the default has been properly entered. *Kidd v. Mining Co.*, 3 Nev. 385. This is correct, no doubt, because this court, on appeal from a judgment, may review any question affecting its correctness or validity which can be raised upon the record. But on appeal to the district court the case is different. All the district court can do is to retry issues of law or fact that have been made in the justice's court. If the defendant by making the default has failed to raise any sort of issue in the court of original jurisdiction, he will not be permitted to raise such issue for the first time in the appellate court. He cannot be allowed, at his option, to convert a court of appellate into a court of original jurisdiction." Our own statutes seem to be mandatory as to what proceedings shall be had before a justice of the peace where the defendant is in default, and are as follows: "Sec. 4386. If the plaintiff fail to appear at the return day of the summons the action must be dismissed. If the defendant fail to appear at the return day of the summons his default shall be recorded and the plaintiff may proceed to prove his claim, which being established judgment shall be rendered in his favor, and if either party fail to attend at the time to which a trial has been adjourned, or either fail in the proof on his part, the cause may proceed at the request of the adverse party, and judgment must be given in conformity with the proof on his part." And the following section of our laws makes provision for the correction of errors in proceedings had under the provisions of the former section, and is as follows: "Sec. 4387. When judgment shall have been rendered against a defendant in his absence, who, having been served with summons, failed to appear, the same may be set aside upon the following conditions, cause being shown by affidavits: (1) That his motion be made within ten days after such judgment was rendered upon notice to the opposite party; (2) that he pay the costs awarded against him; (3) that he notify in writing the opposite party, his agent or attorney, or cause it to be done, of the opening of such judgment, and of the time and place of trial, at least five days before the time, if the party reside in the county, and if he be not a resident of the county by leaving a written notice thereof at the office of the justice ten days before its trial." Our constitution contains the following provision: "Appeals shall lie from the final decisions of justices of the peace * * * in such cases and pursuant to such regulation as may be prescribed by law." Article 5, § 23. And subsequently our legislature regulated and prescribed the method of taking appeals from justices of the peace in the following: "Sec. 4398. Any person desiring to appeal shall within fifteen days, after rendition of the judgment from which his ap-

peal is to be taken, file with the justice of the peace by whom such judgment shall have been rendered, a notice of such desire, and shall, within said fifteen days, either pay all the costs of the cause appealed up to the time of the transmission of the papers to the district court, as hereinafter provided, including one dollar and fifty cents which shall be allowed to the justice for making a transcript and allowing the appeal, or shall give bond in double the amount of all such costs to the effect that he will pay the same in case judgment be rendered against him therefor in the district court, and such undertaking may be included in the undertaking in stay of execution hereinafter provided for in case such undertaking in stay shall be given." And also by the provisions: "Sec. 4400. The clerk of the district court, upon receiving such transcript and papers, shall file the same and docket the appeal, and shall receive such fees therefor as are allowed in other cases, and said clerk shall, on or before the second Saturday after the docketing of such appeal, issue, under his hand and official seal, notice to the appellee that such appeal has been docketed, which notice shall be returnable the second Monday after its date, and shall be placed in the hands of the sheriff for service, who shall serve same upon the appellee, or his attorney of record, in the manner provided for the service of summons out of the district court, and shall return same within the time therein limited. When such notice is returned, 'Not served,' or when the appellant deems the service defective, other notices shall be issued until the appellee is duly served therewith. In cases where the appellee cannot be served with notices aforesaid, the appellant may establish this fact by affidavit in the district court, and the case shall stand for trial the same as though such notice had been duly served." The next ensuing section seems to preclude any discussion as to what may be done on appeal by the district court. "Sec. 4401. The plaintiff in the court below shall be the plaintiff in the district court, and any case appealed shall stand for trial at the term of the district court, regular or adjourned, next following the service of the notice provided for in section four thousand four hundred, or the filing of proof that such service cannot be had. The case shall be tried de novo and the trial shall be had upon the pleadings and issues filed and made in the court appealed from; no objection shall be raised to any pleading or proceeding on appeal which was not raised in the lower court, provided it were possible to raise same there before judgment rendered, but all objections, demurrers and motions presented in the lower court shall be heard and considered by the district court at the request of the party presenting same, if made at the proper time."

Under the first ground of error above recited, we are of the opinion that, as no is-

sue was presented in the justice court by defendants in error, the district court had no issue to hear and determine; and it was error to permit the defendants to introduce evidence, and to render judgment against plaintiff in error thereon. No objections seem to have been made upon the record of the proceedings before the justice; and upon appeal from a default judgment rendered by a justice, in the absence of proceedings taken in the justice court to vacate the judgment as provided by section 4387, above quoted, there is nothing for the district court to determine, except such objections as might be made to the judgment upon the face of the record.

As to the second ground of error, that the statutory grounds for appeal must be strictly followed, many of the authorities above cited are in point, and the others at hand warrant us in the conclusion that there could be no denial of the statement as made, based upon a decision of a court. As has already been said, there does not appear to have been any attempt to comply with the provisions of our statutes as to notice of appeal, or paying costs, or giving bond therefor.

We are of the opinion that the motion of plaintiff in error, made in the district court, to dismiss the appeal herein, should have been sustained; and this case is remanded to the district court, with directions to set aside the judgment rendered against plaintiff in error, and to sustain the motion of plaintiff in error to dismiss the appeal, and to award said plaintiff in error all costs expended.

POTTER, C. J., and CORN, J., concur.

(37 Or. 446)

LIEUALLEN v. MOSGROVE et al.

(Supreme Court of Oregon. July 30, 1900.)

NEGLIGENCE—FIRE FROM THRESHING ENGINE—COMPLAINT—APPEAL—AMENDMENT AFTER REVERSAL—EVIDENCE—QUESTION FOR JURY—OPINION—WITNESSES—CROSS-EXAMINATION—INSTRUCTIONS—INSTRUCTION ALREADY GIVEN—REFUSAL.

1. An amendment to a complaint for damages by fire caused by defendants' negligence, which charges negligence, not only in depositing ashes and cinders at a place where fire therein would be liable to communicate to inflammable material, but also in not exercising requisite care in caring for and extinguishing the fire after it had been deposited on the ground, is germane to the controversy, and properly allowed by the trial court, even after reversal on appeal and remand for a new trial.

2. Defendants were operating a threshing machine run by a straw-burning engine, the method of removing ashes from which was by a trapdoor in the bottom of the ash pan, swung so that by tipping it the ashes would be dumped on the ground. Defendants were threshing in a field adjoining plaintiff's, on a windless day, and dumped ashes from the engine several times. Towards evening a wind arose, and a fire started near where the engine had stood, was communicated to stubble and inflammable material, and swept across plaintiff's field, causing him damage. An examination of the ashes on that evening disclosed live embers there-

in. Held, that the evidence presented a question of fact for the jury as to defendants' negligence in not extinguishing the fire, and that the overruling of a motion for a nonsuit was proper.

3. In an action for dumping ashes from a threshing engine on the ground, and negligently failing to extinguish fire therein, it is proper to permit a witness who had lived in the country many years, and was familiar with climatic conditions, to testify that at that season a wind usually arose on the evening of a hot, sultry day, such as that on which the fire causing the damage occurred; the likelihood of a wind arising being a material element in the question of defendants' negligence.

4. In an action for negligence in dumping ashes from a threshing engine, and failing to extinguish fire therein, where defendants' engineer has testified to the exercise of an exceptional care on the part of defendants' servants in extinguishing such fire because of a previous fire caused by defendants' negligence in that manner, it is proper to permit a cross-examination as to the location of the previous fire.

5. In an action for negligence in dumping ashes from a threshing engine in a field adjoining plaintiff's, and failing to extinguish fire therein, an instruction that a person who negligently sets or keeps fire on his own land, or permits its escape therefrom, is liable whether he might reasonably have anticipated the particular manner of its communication or not, and that in determining the question of diligence the jury could consider the dryness or dampness of the atmosphere and earth, the time of year, the likelihood of wind arising, and its probable direction and strength, are not objectionable, as seeking to charge defendants with the consequences of any extraordinary wind which might occur, but fairly present the rule that, under such circumstances, defendants would be liable for the results of an ordinary and probable wind.

6. A refusal to give an instruction already substantially covered by the court's general charge is not error.

Appeal from circuit court, Umatilla county; S. A. Lowell, Judge.

Action by J. T. Lieuallen against Matt Mosgrove and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

J. J. Balleray, for appellants. C. H. Carter and A. D. Stillman, for respondent.

BEAN, C. J. This is an action to recover damages for loss of property caused by fire, alleged to have been the result of defendants' negligence. The case was reversed at a former term because the plaintiff was allowed to recover upon a ground of negligence not alleged. *Lieuallen v. Mosgrove*, 38 Or. 282, 54 Pac. 200, 604. After the cause had been remanded to the court below, the plaintiff was permitted to amend his complaint by alleging that the defendants were negligent, not only in depositing the ashes and cinders at a place where the fire contained therein would be liable to communicate to inflammable material, but also in failing to exercise due care and caution in caring for and extinguishing the fire after it had been deposited on the ground. The allowance of such amendment is the first assignment of error relied upon. It must be regarded as settled in this state that the court may, before trial, allow a pleading to

be amended by inserting a new cause of action or defense, if it is germane to, and connected with, the subject-matter of the controversy. *Baldock v. Atwood*, 21 Or. 73, 26 Pac. 1058; *Talbot v. Garretson*, 31 Or. 256, 49 Pac. 978. And the trial court has power and authority to allow such an amendment after reversal on appeal whenever this court does not make a final disposition of the cause, but remands it to the court below for further proceedings. *Powell v. Railroad Co.*, 14 Or. 22, 12 Pac. 83; *Fowle v. House*, 30 Or. 305, 47 Pac. 787. It is equally well settled that the ruling of a trial court in refusing or permitting an amendment to a pleading will not be disturbed on appeal, unless there was a plain abuse of discretion, to the material injury of some substantial right of the appellant. *Foster v. Henderson*, 29 Or. 210, 45 Pac. 899; *Davis v. Hannon*, 30 Or. 192, 46 Pac. 785. The court, therefore, had power and authority to allow the amendment complained of, and, as there does not seem to have been any abuse of discretion, its ruling in reference thereto will not be disturbed. The amendment is not, as counsel argue, such a departure from the original complaint as to amount, in effect, to a new and wholly different cause of action. It does not change the substantial controversy between the parties. The real purpose of the action is to recover such damages as plaintiff may have sustained from the destruction of his property by fire, caused by the negligence of the defendants. The amendment was germane thereto, and tendered an issue on a material fact arising out of the transaction, which forms the basis of plaintiff's action, and was entirely proper. As said in *Talbot v. Garretson*, supra: "So long as the amendment is germane to the subject-matter of the controversy, we can see no objection to the court, in the exercise of a sound discretion, allowing the pleadings to be amended in furtherance of justice by inserting new and additional allegations material to such controversy, although they may, in effect, constitute a new cause of action or defense."

The next assignment of error is predicated upon the overruling of defendants' motion for a nonsuit, and the refusal of the court to instruct the jury to return a verdict in favor of defendants on account of a failure of proof. The evidence shows that during the harvest season of 1897 defendants were engaged in operating a threshing machine, the motive power of which was a straw-burning engine, so constructed that the only method of removing ashes or cinders therefrom was by a trapdoor in the bottom of the ash pan, swung on a rod through the center, so that by tipping it the ashes could be dumped on the ground. In the forenoon of August 7th the defendants were threshing in the field of one Bergevin, adjoining that of plaintiff, and during the time dumped the ashes or cinders from the engine on the ground several times. The day

was calm, hot, and sultry until evening, when a wind arose, and caused a fire, which started at or near the place where the engine stood, to communicate to the stubble and inflammable material, sweep over Bergevin's field, and into the adjoining field of plaintiff, and burn up and destroy large quantities of wheat, straw, and stubble pasture belonging to him. It seems quite probable, from the physical facts, that the fire originated in the ashes and cinders which had been dumped from the defendants' engine, and the witnesses Wood and McFarland testify that they examined the cinder pile on the evening of the fire, and found live embers in it. This evidence at least tends to show that the defendants did not extinguish the fire in the ashes or cinders before leaving the field, and for this reason a fire subsequently broke out, and destroyed the plaintiff's property. And while, as said in the former opinion, "no negligence can be imputed to the defendants from the mere fact that ashes, which necessarily contained some fire, were taken from the engine and placed upon the ground" (*Lieuallen v. Mosgrove*, 33 Or. 282), they were bound to exercise reasonable care and diligence to extinguish the fire, or take other reasonable precautions to prevent it from igniting the stubble and other dry and combustible material, and thus destroying the adjacent property. Whether they exercised such care was, under the testimony, a question of fact for the jury, and the court committed no error in overruling the motion for a nonsuit. 13 Am. & Eng. Enc. Law (2d Ed.) 491; *McClelland v. Scroggin*, 48 Neb. 141, 66 N. W. 1123; *Hanlon v. Ingram*, 3 Iowa, 81; *Hewey v. Nourse*, 54 Me. 256.

It is also insisted that the court erred in permitting the witness Coppock to answer the following question: "State whether or not a high wind usually follows, during the month of August, a close, sultry afternoon." The witness had previously testified that he had lived in that section of the country for many years, was acquainted with climatic conditions during the harvest season, and that the afternoon preceding the fire had been close, hot, and sultry. We think, under such circumstances, the question, and affirmative answer thereto, were proper and competent. The dryness of the season, the proximity to the engine of dry, combustible material, easily ignited, and the probability of a wind coming up, were proper matters to be considered by the jury in determining whether the defendants, under the surrounding circumstances, used the requisite degree of prudence and caution to prevent the fire from communicating to and destroying the adjoining property. They were using a dangerous element, under circumstances of special danger to adjacent property, and were therefore required to exercise care and vigilance commensurate with such danger; and, in this connection, the probability or likelihood of a wind arising was important. 13 Am. & Eng. Enc. Law (2d

Ed.) 418; *Needham v. King*, 95 Mich. 303, 54 N. W. 804; *Salisbury v. Herchenroder*, 106 Mass. 458; *Kellogg v. Railway Co.*, 26 Wis. 223. The defendants had resided in that section of the country for several years, and were necessarily familiar with the climatic conditions, and if a wind was liable to blow in the evening, and thus greatly enhance the danger from any fire that might be left in the ashes or cinders, they were bound to increase their care on that account. The line of liability is drawn in some of the adjudications between cases where the operation of a wind has been usual and ordinary, and where it has been extraordinary, or of a nature entirely unexpected; the defendant being held responsible in the former instance, but not in the latter. But it was not sought by the testimony of Coppock, as we understand it, to make the defendants liable for an extraordinary or unprecedented wind, but only on account of the intervention of that which was usual and ordinary.

Again, it is argued that the court erred in permitting the witness Kinney to show, on a map used at the trial, the place where another fire from defendants' engine occurred on the same day. Kinney was the engineer in charge of the engine on the day of the fire. On direct examination, he testified to the care and caution exercised by himself and defendants' other servants and employes in caring for and extinguishing the fire in the ashes or cinders taken from the engine, and on cross-examination stated that at the setting where the fire is claimed to have originated they used more caution than usual because of some previous fire. It was on account of this statement that he was interrogated by counsel as to the location of the previous fire, and we think it was proper cross-examination.

The next assignment of error is predicated upon the giving by the trial court of the eighteenth and twenty-first instructions. These instructions are very long, but it is only necessary to call attention to the objectionable parts pointed out by appellants in their brief. In the eighteenth the court said that a person who negligently sets or keeps a fire on his own land, or permits it to escape therefrom through negligence, is liable to his neighbor for injuries caused thereby, whether he might reasonably have anticipated the particular manner of its communication or not. And again: "In determining the question of diligence, you have a right to take into consideration the dryness or dampness of the atmosphere and the earth, the strength and probable direction of the wind," etc. In the twenty-first, the court, among other things, said: "Among other circumstances, you may consider the time of year when the fire occurred; the business in which defendants were engaged when it occurred; what, if any, probability there then was of winds arising." The objection urged to these instructions is that the court meant to have the jury understand that defendants were

liable for the result of any extraordinary wind that might occur. But we do not think this is a reasonable or fair interpretation of the instructions. The court evidently intended to, and did, state to the jury the rule of law already indicated, that the question of reasonable care and diligence must be determined from the circumstances, and in a measure depend upon the facts of each particular case.

The remaining assignments of error are based upon the refusal by the trial court to give divers and sundry instructions requested by the defendants. We have examined and compared the instructions refused with those given, and are of the opinion that the instructions refused were substantially covered by the general charge. It follows that the judgment of the court below must be affirmed; and it is so ordered.

BELLE et al. v. BROWN et al.

(Supreme Court of Oregon. July 30, 1900.)

EQUITY—ADVANCEMENTS—PARTITION—DISTRIBUTION—EQUITABLE LIEN—DECREE—RES JUDICATA—ENFORCEMENT—REMEDY.

1. Where real property belonging to an intestate's estate has been partitioned among the heirs without actual knowledge by any of them that property conveyed by intestate to certain of their number had been conveyed as advancements, equity will not impress on the lands apportioned to such grantees a lien in favor of the other heirs for their share of the advancements, in a collateral suit, though the discovery that the conveyances were advancements was not made until after rendition of the decree, since, as under Hill's Ann. Laws, § 3104, declaring that advancements shall be considered a part of an intestate's estate, in distribution thereof, and taken towards the share of the heir to whom advanced, such advancements might have been litigated in the partition proceedings, and their litigation was not prevented by fraud, the decree became conclusive thereof, so far as such lands are concerned.

2. Equity will not assume jurisdiction of a suit to impress an equitable lien for advancements on the undistributed shares of certain heirs of an intestate in lands admeasured as dower, which have reverted to the estate, and lands conveyed to all the heirs, as tenants in common, by another heir, to whom advancements were made, since, under Hill's Ann. Laws, §§ 3104, 3105, requiring such an advancement to be brought into hotchpot, and providing that, if it exceed the distributive share of the heir to whom advanced, he shall be excluded from further portion, though not required to refund, but if less he shall be entitled to the balance, suit in partition is the only remedy.

Appeal from circuit court, Marion county; R. P. Boise, Judge.

Suit by Nancy S. Belle and others against Charles A. Brown and others. From a decree in favor of plaintiffs, defendants appeal. Reversed.

This is a suit to establish and foreclose an alleged equitable lien upon certain real property. The facts are that Charles Swegle conveyed to the defendants Charles A. and Frank E. Brown about 50 acres of land in Marion county, Or., stipulating in the deeds

thereto that the premises so granted were intended as advancements to them equal to the sum of \$2,500, as the representatives of his deceased daughter. The said grantor died intestate, leaving surviving him Lucinda Swegle, his widow, and the plaintiffs, Nancy S. Belle, George Swegle, M. W. Swegle, Olevia Holmes, Emma Bender, and Albert Swegle, his children and the defendants, his grandsons, as his heirs. His estate having been settled, the defendants secured a distributive share of the personal property thereof, without the knowledge of the administrator or the heirs that any advancements had been made; and a suit having been instituted in the circuit court for said county to partition the real property therein of which Swegle died seised, and neither party having any knowledge of such advancements, a decree was rendered setting off to each of the plaintiffs and defendants certain of said lands in severalty, and to the widow, for her natural life, 125.01 acres as her dower; but, she having died, the land so admeasured to her reverted to the parties herein. After Swegle's death there was found with his papers a deed to his daughter Emma Bender for 80.25 acres of land in said county which was not partitioned in said suit; but, the deed never having been delivered, she, with her husband, executed a deed releasing to each of her brothers and sisters an undivided $\frac{1}{6}$, and to each of the defendants an undivided $\frac{1}{12}$, interest in said tract. The plaintiffs, having discovered that the conveyances made by their father to the defendants were intended as advancements, commenced this suit, alleging, in effect, that at the time the partition suit was instituted the defendants, well knowing that such advancements had been made, wrongfully concealed such fact, with intent to defraud the plaintiffs, who had no knowledge thereof; that the defendants have never paid any part of such advancements, $\frac{6}{7}$ of which is due the plaintiffs, who pray that the sum of \$2,142.85 be decreed a lien upon the defendants' interest in the lands so held by them as tenants in common and in severalty, and that said premises be sold to satisfy said lien. The answer, having denied the material allegations of the complaint, avers, in substance, that plaintiffs ought not to be permitted to say that the defendants had not paid the advances made to them, or that a lien should be impressed on their lands as security therefor, for that Charles Swegle, their grandfather, conveyed to each of the plaintiffs, in severalty, lands, for various considerations, all of which exceeded the sum of \$2,500, no part of which had ever been paid by either of them, and that in administering on the decedent's estate no account was taken of the advances made to the defendants, for the reason that there was due from each of the plaintiffs to said estate various sums of money, which offset the advances made to the defendants, in consequence of which the

personal property of the estate was distributed equally among the heirs; that plaintiffs ought not to be permitted to say that the defendants had not paid any part of said advances, for that, in a suit instituted in the circuit court for said county, in which Lucinda Swegle, Nancy S. Belle, and the said Charles A. Brown and Frank E. Brown were plaintiffs, and the plaintiffs herein, George Swegle, Olevia Holmes, M. W. Swegle, Emma Bender, and Albert Swegle, were defendants, a decree was rendered partitioning to the plaintiffs and to the defendants all the real property of which Charles Swegle died seised, except the land set off to Lucinda Swegle as her dower, and that described in the deed to Emma Bender, which decree was never appealed from or modified, and is now in full force and effect; that each of the defendants owns an undivided $\frac{1}{12}$ of the premises so conveyed by Emma Bender to her co-heirs, the title to which they claim under and by virtue of her deed. The court having sustained a demurrer to the new matter set out in the answer, a trial was had upon the remaining issues, resulting in a decree as prayed for, but directing that the unpartitioned lands be first sold to satisfy the lien, and that, if the amount realized therefrom should be insufficient to pay the sum of \$2,142.85, the real property of the defendants owned in severalty be sold to satisfy such deficiency, from which decree the defendants appeal.

Geo. G. Bingham, for appellants. W. T. Slater and Tilmon Ford, for respondents.

MOORE, J. (after stating the facts). It is contended by defendants' counsel that the estate of Charles Swegle having been fully administered upon, and the personal assets thereof equally distributed to his heirs, and the real property of which he died seised partitioned in a suit instituted for that purpose, the advancements made by the defendants' ancestor have thus become res judicata, and, this being so, the court erred in sustaining a demurrer to the estoppels alleged in the answer. Our statute upon the subject of advancements, so far as applicable herein, is as follows: "Any property, real or personal, that may have been given by the intestate in his lifetime as an advancement to any child, or other lineal descendant, shall be considered a part of the intestate's estate, so far as regards the division and distribution thereof among his issue, and shall be taken by such child, or other descendant, towards his share of the intestate's estate." Hill's Ann. Laws Or. § 3104. "If the amount of such advancement shall exceed the share of the heir so advanced, such heir shall be excluded from any further share or portion in the division or distribution of the estate, but shall not be required to refund any part of such advancement; and if the amount so received shall be less than his share, such heir shall

be entitled to so much more as will give him his full share or portion of the estate of the intestate." *Id.* § 3105. The testimony shows that when the personal property of the decedent's estate was distributed, and also when the real property of which he died seised was partitioned to the heirs, neither of them had actual knowledge that the deeds executed to defendants by their grandfather contained an expression that the grants so made were intended as advancements. The plaintiffs, by reason of such want of knowledge, having failed to charge the defendants with such advancements upon the settlement of said estate or in the partition suit, the question is, does the order of distribution in the probate proceedings, or the decree in partition, estop plaintiffs from maintaining this suit? The law affords to parties litigant their day in court for the enforcement of their rights or the redress of their injuries, but public policy, in the interest of the peace of society, demands that litigation should not be interminable, and, in enforcing such demand, the law limits parties to one day in court, thereby requiring them to bring forward all claims and demands properly belonging to the cause of suit or defense, as well as their evidence in support of their respective theories; and, as a corollary of this principle, courts usually hold that judgments and decrees are conclusive, not only as to what was actually tried, but also as to whatever might have been litigated. 2 Black, *Judgm.* § 731. A party, failing to assert a claim in a suit in equity in which it might have been litigated with propriety, will not be permitted afterwards to enforce it in a second suit, unless his failure to do so in the first instance was caused by the fraud of his adversary, and was not attributable to his own negligence. *Stewart v. Stebbins*, 30 Miss. 66; *Burford v. Kersey*, 48 Miss. 642. In a suit to set aside a judgment or decree, the character of fraud which will justify equitable interference is not constructive, merely, but actual, and usually consists in the intentional concealment of a material and controlling fact for the purpose of misleading and taking advantage of the opposite party. *Ross v. Wood*, 70 N. Y. 8; *Ward v. Town of Southfield*, 102 N. Y. 287, 6 N. E. 660; *Mayor, etc., v. Brady*, 115 N. Y. 599, 22 N. E. 237; *Mather v. Parsons*, 32 Hun, 338; *Jones v. Jones*, 71 Hun, 519, 24 N. Y. Supp. 1031; *Rice v. Bruff*, 87 Hun, 511, 34 N. Y. Supp. 501; *Baker v. Byrn*, 89 Hun, 115, 35 N. Y. Supp. 55; *Mining Co. v. Mitchell*, 59 Cal. 168. Notwithstanding the deeds executed by Charles Svegle to the defendants contain recitals that the considerations expressed therein were intended as advancements, and that they might reasonably be chargeable with notice thereof, yet they had no actual knowledge that the grants were so intended by their grandfather; and, this being so, they did not, in the settlement of his estate or in the partition suit, intentionally

conceal a material fact; and hence equity will not, in a collateral suit, correct or modify the former decree in so far as it may in any manner affect the title to the premises set off to them in severalty. *Morrill v. Morrill*, 20 Or. 96, 25 Pac. 362, 11 L. R. A. 155; *Finley v. Houser*, 22 Or. 562, 30 Pac. 494; *Crabill v. Crabill*, 22 Or. 588, 30 Pac. 320; *Christy v. Waterworks*, 68 Cal. 73, 8 Pac. 849; *Doolittle v. Don Maus*, 34 Ill. 457; *Irvin v. Buckles*, 148 Ind. 389, 47 N. E. 822; *Whittemore v. Shaw*, 8 N. H. 393. It may be said that the title to the lands so apportioned to the defendants is not assailed by this suit, nor can such title be affected thereby, except so far as a failure to pay the sum charged against the property by the decree may tend to accomplish the alienation thereof. But to permit such a result to follow would, in effect, be opening up in a collateral suit the original decree in partition, which has become *res judicata*.

The question of actual fraud being thus eliminated, the only remaining ground for impeaching the decree of partition is the plaintiff's discovery of the fact that advances had been made to the defendants which were not taken into account in the suit for partition. The rule is well settled, however, that newly-discovered evidence furnishes no ground to attack a judgment or decree, and that errors of fact in a suit in equity do not render the decree liable to be impeached in another suit. *Canal Co. v. Henderson*, 3 Ind. 3; *Pease v. Whitten*, 31 Me. 117; *Wright v. Trustees*, 1 Hoff. Ch. 202. Thus, in a partition suit, if the trustee under the will of the ancestor files a petition to charge one of the heirs with advancements, and is defeated, he cannot maintain a suit against the heir to recover the advancement upon the ground of special agreement, which was not set up in the former suit. *Wright v. Miller* (Sup.) 22 N. Y. Supp. 24; *Id.*, 147 N. Y. 362, 41 N. E. 698; *Id.*, 67 Hun, 649, 22 N. Y. Supp. 24. So, too, a decree fixing the amount of the distributive shares, based upon the advancement to one of the defendants, is conclusive evidence of such amount in a suit for partition. *Torrey v. Pond*, 102 Mass. 355. The defendants not having any knowledge that the real property so conveyed to them by their grandfather was intended by him as advancements, they were not guilty of any actual fraud in the partition suit, and hence the land so set off to them in severalty is freed from any claim thereon that the plaintiffs might have litigated in that suit. It will be remembered that *Emma Bender* released to each of the defendants an undivided $\frac{1}{12}$ of the real property described in the deed which was found with her father's papers after his death, thereby conveying to each an undivided $\frac{1}{84}$ interest in said premises, more than he inherited from his grandfather. If the defendants had secured title to real property from third parties, no equitable lien could be impressed thereon to secure

said advancements, and in any subsequent partition suit the plaintiffs can acquire no greater interest in the land so conveyed by Mrs. Bender than the defendants inherited from their grandfather. Any child or other lineal descendant who has received from his intestate ancestor an advancement is required to bring it into hotchpot. Hill's Ann. Laws Or. § 3104. This does not mean that his title shall be divested, but that the value of the advancement shall be taken into consideration in making the distribution. Jackson v. Jackson, 64 Am. Dec. 114. When advancements of unequal values have been made by an ancestor in his lifetime to his children or lineal descendants, in a suit for partition of the real property inherited from him it is proper for the court first to find the value of each advancement, and require the same to be brought into hotchpot. Pigg v. Carroll, 89 Ill. 205. So, too, it is held that, although jurisdiction is conferred by statute on the probate court in the matter of controversies as to advancements made by the decedent to his children, yet when the jurisdiction of the chancery court has attached, under a bill for the partition of land among them, the court may, before decreeing partition, require the parties to account for these advancements, taking the same as a part of their respective shares. Marshall v. Marshall, 86 Ala. 383, 5 South. 475. Each of the defendants has an undivided $\frac{1}{14}$ interest in 205.26 acres of land in Marion county, Or., which is subject to the claim of \$2,142.85 in favor of the plaintiffs, assuming that they have received from their father no advancements; and as the question of fraud, upon which the suit was founded, has been eliminated, a suit in partition is now the only remedy by which all the parties may be compelled to account for any advancement which they may have received. Hence the decree will be reversed, and the bill dismissed.

RADER v. BARR.1

(Supreme Court of Oregon. July 30, 1900.)
EQUITY—RESTRAINT OF LEGAL PROCEEDINGS
—COSTS—APPEAL.

1. Hill's Ann. Laws, § 550, provides that a cost bill shall be filed within five days after entry of judgment, or, if not filed until later, a copy thereof must be served on the opposite party, and that the opposite party must file objections within two days from the time allowed to file the bill. *Held*, that the allowance of costs not objected to, where made more than five days after the entry of judgment without copy served on the opposite party, was a sufficient ground to restrain their collection by injunction.

2. The cost of transcript is not an item of cost recoverable by the prevailing party, who was the respondent on appeal.

Appeal from circuit court, Grant county; M. D. Clifford, Judge.

Suit by George Rader against Emmet Barr to restrain collection of a judgment. From a decree dismissing the suit on demurrer.

1 For opinion on petition for rehearing see

plaintiff appeals. Reversed as to the dismissal of the suit, and affirmed as to the sustaining of the demurrer.

This is a suit to enjoin the collection in part of a judgment rendered for costs and disbursements by this court August 13, 1898, in favor of Emmet Barr as respondent and against George Rader as appellant, for \$215.85. 54 Pac. 210. The allegations of the complaint are, in substance, as follows: That in the case of Emmet Barr (respondent) v. George Rader (appellant) a judgment was rendered in favor of the respondent by the supreme court of the state of Oregon at its Pendleton May term for the year 1898. That thereafter, to wit, on September 5, 1898, the respondent filed a cost bill therein, composed of the following items:

Printing brief	\$ 39 00
Cost of transcript.....	139 00
Clerk's fee, \$40.00; paid on this, \$—;	
due	22 85
Costs	15 00
	<hr/> \$215 85

—That the item, "cost of transcript" was wrongfully and fraudulently inserted in said cost bill by the respondent or his attorneys. That the same was paid by the appellant before the cost bill was filed, and that therefore it should not have been included therein. That the clerk's fees upon the appeal were \$22.85, and no more. That of said amount the appellant paid \$10 prior to the rendition of judgment, and that at the time of filing said cost bill there was due for clerk fees \$12.85, and no more. That no objections were filed to said cost bill by the appellant within the time prescribed by law, and that the total amount thereof, to wit, \$215.85, was allowed and taxed by the clerk. That the Pendleton May term of said court adjourned for the term on August 13, 1898. That on October 13, 1898, by virtue of the mandate from the supreme court, a judgment was entered in the circuit court for Grant county in favor of Barr and against Rader for the sum of \$215.85, the full amount of said cost bill. That neither Rader nor any of his attorneys knew, nor were any of them informed, of the said wrongful and fraudulent charges contained in said cost bill until after the supreme court had adjourned for the term and the entry of the judgment in the circuit court. The prayer is that the judgment be set aside as to said items, that defendant be enjoined from enforcing the collection thereof, and for general relief. A motion to strike from the complaint the words "wrongfully and fraudulently" and "wrongful and fraudulent" being sustained, a demurrer was interposed upon the ground that the complaint does not state facts sufficient upon which to base equitable relief, which was also sustained, and a decree rendered dismissing the suit, from which plaintiff appeals.

S. A. Newberry, for appellant. C. H. Carter, for respondent.

61 Pac. 1127.

WOLVERTON J. (after stating the facts). The sole question presented is whether the complaint states facts sufficient to entitle the plaintiff to the relief prayed for. The incident of the filing and allowance of the motion to strike out is not material to the inquiry, and will not receive further notice. In order that the nature of the controversy may be made clear, a brief reference will be made to the manner of recovering costs and disbursements, and having the same taxed, so as to entitle them to be entered as a part of the judgment or decree. Costs are certain sums allowed the prevailing party by way of indemnity for his attorney fees in the suit or action, and disbursements comprise such expenditures as are necessary to maintain or defend the same, and include fees of officers and witnesses, the necessary expense of taking depositions, the publication of summons or notices, outlays for postage, compensation of referees, and the necessary expense of copying records, etc., used as evidence at the trial. Every witness, officer, or other person required to do or perform any act or service for any party to an action or suit is entitled to demand and receive his compensation in advance; but the party may pay the fees of officers, or give an undertaking therefor, at his option. Costs and disbursements are allowed by the clerk; but no disbursements can be allowed unless the party claiming them shall have filed with the clerk, within five days from the entry of the judgment or decree, a statement of the same, which shall be verified except as to fees of officers. Such statement may be filed, however, at any time after five days; but in such case a copy thereof must be served upon the opposite party. A statement of disbursements thus filed must be allowed, of course, unless the adverse party, within two days from the time allowed to file the same, shall file his objections thereto, stating the particulars thereof. When objections are preferred, provisions are made for filing an amended verified statement, and an allowance or disallowance by the clerk of the charges claimed. Hill's Ann. Laws Or. §§ 548, 553, 555-557; Nicklin v. Robertson, 28 Or. 278, 42 Pac. 993.

The item of \$15 in the statement contained in the complaint, being presumably for the statutory attorney fees in this court, is properly denominated "costs." All the other items are disbursements. The item of \$139, as we understand from the complaint, is for a disbursement incurred by Rader upon his own account, and which Barr could in no event recover. As it respects the \$10 item, it is not apparent that Rader was entitled to it in the first instance; but, if Barr paid it once, it would be inequitable and unjust to require him to pay it again. Notwithstanding this palpable injustice, it is insisted that, as plaintiff did not file objections to the statement of disbursements, and the objectionable items having become a part of the judgment, he is now precluded from resorting to a court

of equity for relief; in other words, it is argued that plaintiff had a good defense at law, which he neglected to interpose at the proper time, and is therefore precluded by the judgment. The proceeding was at law, and the defense by way of interposing objections purely legal in its nature; but these conditions do not, of themselves, constitute an insuperable barrier to equitable interference. "Injunctions to restrain proceedings at law are granted," says Mr. Chief Justice Searls, in *Reagan v. Fitzgerald*, 75 Cal. 230, 17 Pac. 198, "in instances where the facts show it to be against conscience to enforce such proceedings, and at the same time show that the injured party could not have availed himself of such facts in a court of law, or of which he might have availed himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence on his part."

* * * A case for relief by way of injunction against a judgment at law must present facts, not only showing the equitable rights of the complainant, but also showing that he could not have availed himself of such facts in the legal forum." So, in *Navigation Co. v. Gates*, 10 Or. 514, an injunction was sustained, relieving a garnishee from the payment of a judgment rendered against it for a demand which it had previously satisfied, but had by mistake made answer in the garnishee proceedings that it was still indebted to the debtor of the attaching creditor. The doctrine of that case is that, in order to obtain the injunction, it must be made to appear that the failure to make the appropriate answer or interpose the requisite defense was not attributable to any negligence or want of diligence on the part of the party invoking the equitable remedy, but was the result of accident or fraud, or the act of the opposite party, and, further, that the plaintiff has a good defense to the whole or such part of the cause of the action he proposes by his complaint to litigate, and thereby show that it would be unfair and inequitable to permit the judgment complained of to be enforced. To the same purpose, see *Freeman v. Miller*, 53 Tex. 372; *Wingate v. Haywood*, 40 N. H. 437. Applying this settled doctrine of equitable jurisprudence, we are readily enabled to determine the controversy here. By the allegations of the complaint, the judgment rendered in this court must have been entered on or prior to August 13th, so that it is apparent the statement of costs and disbursements was not filed within five days from the entry of judgment. This made it incumbent upon the respondent in that cause to serve the appellant with a copy of the statement; otherwise, he was not bound to take notice of it. He was only bound to take notice of what was done with respect to filing the statement for the space of five days after the entry of the judgment, but after that time had run he should have been notified by service of a copy; otherwise, he could not be charged with notice of the filing of the statement, and thereby be

precluded by the action of the clerk. In such case, negligence or want of diligence cannot be imputed to the party failing to file the objections. Indeed, the omission would be attributable to the act of the party filing the statement in not giving the requisite notice thereof. The "cost of transcript" was not a proper item for which the respondent was entitled to recover of appellant under any circumstances. So with the item of clerk's fees. It is shown that plaintiff had paid \$10 towards it. It would seem, therefore, that he has a good defense to that portion of the cost bill which he now seeks to controvert, and it would be inequitable and unjust to compel him to pay it again under execution for the enforcement of the judgment.

In testing the sufficiency of the complaint by the demurrer, it must be construed most strongly against the pleader. It is alleged that neither George Rader nor any of his attorneys knew or were informed that such charges had been inserted in the cost bill until after the supreme court had adjourned and the judgment had been entered in the circuit court. This is somewhat in the nature of a statement of a conclusion. By another allegation we are advised "that no objections to said cost bill were filed by said appellant within the time prescribed by law." This would imply that he was required to file objections, but had not. If such is the case, his excuse for not filing them is not sufficiently alleged by the statement that neither he nor his attorneys had notice or knowledge of the insertion of the charges complained of. Under this allegation, we cannot say that the appellant had not been served with a copy of the statement of costs and disbursements, and that it was not his duty to have appeared and filed objections; otherwise he would have been precluded by the clerk's taxation of costs and disbursements and their entry in the judgment. The complaint is faulty in this particular, while in other respects it appears to be sufficient; but, with a view of giving the plaintiff an opportunity of yet stating a good cause, if he has one, the decree of the court below will be reversed in so far as it dismissed the suit, and affirmed in sustaining the demurrer, and the cause will be remanded for such other proceedings as may seem proper.

WOOD LIVE-STOCK CO. v. WOODMAN-
SEE et al.

(Supreme Court of Idaho. July 9, 1900.)

NEW TRIAL—EXCESSIVE DAMAGES.

In an appeal from an order granting a new trial, the record containing the evidence, and there appearing only a difference of some \$20 or \$30 between the amount of damages shown by defendant's proofs and that allowed by the jury, and the expense of a new trial would greatly exceed the amount of difference, a new trial should not be granted.

Quarles, J., dissenting.
(Syllabus by the Court.)

Appeal from district court, Fremont county; Jo. C. Rich, Judge.

Action by Wood Live-Stock Company against Charles H. Woodmansee and others. Verdict for plaintiff. From an order granting a new trial, plaintiff appeals. Reversed.

Hawley & Puckett, for appellant. P. Averitt and F. S. Deitrich, for respondents.

HUSTON, C. J. This is an appeal from an order of the district court granting a new trial. The cause of action arose upon a contract for the sale and delivery by the plaintiff to the defendants of a lot of sheep consisting of 3,700 yearling ewes and 150 buck lambs. The contract expressed the time and place of delivery, and amount to be paid, and the terms of payment, and also that said sheep were to be "free from scab or disease." It was also provided in the contract as follows: "Third. In the event that the parties of the second part request and notice is given to the parties of the first part on or before March 15, 1897, the parties of the first part agree to buy back said ewes and rams at the purchase price mentioned above, and receive the same at Beaver Canyon, Idaho, April 15, 1897, and further agree to pay for 3 per cent. in excess of the number counted out at delivery (this 3 per cent. to cover winter loss liable to be sustained by said parties); also agree to pay 10 per cent. per annum on the amount advanced, viz. \$2,000.00, from December the 1st, 1896, to April 15, 1897; also further agree to waive the payment of interest on balance of pay, viz. \$5,040.00, due from the parties of the second part April 15, 1897, and drawing 10 per cent. interest per annum from November 1st until paid." The defendants having failed to meet the delayed payments as provided in the contract, plaintiff brought this suit to recover same. It is not denied by plaintiff that, at the time of the delivery of the sheep by the plaintiff to the defendants under the contract, a few of said sheep were afflicted with scab. This being so, it was optional with the defendants either to avail themselves of the option provided in the contract, and return the sheep as therein provided, or to retain the property, and bring their action for breach of contract. They elected to take the latter course, in effect at least, by asserting their claim for damages in this suit.

The only question involved in this case would seem to be the amount of damages defendants are entitled to by reason of the fact that some of the sheep sold and delivered to them by the plaintiff were at the time of such delivery afflicted with scab. For any loss or damage, the proximate cause of which was the existence of the scab among the sheep sold and delivered by plaintiff to defendants under the contract, the defendants are entitled to recover. It appears by the record that immediately upon the discovery by the defendants that said sheep were afflicted with scab they advised the plaintiff.

through its officers, of the fact, and that, acting under the advice of such officers, defendants took every available means to prevent the spread of the disease among the flock, and in so doing it appears from the evidence on the part of the defendants that they incurred an actual expense of \$296.05. In addition to said last-mentioned amount, defendants claim that they lost 613 head of sheep, of the value of \$2.50 per head. But it is by no means clear from the evidence that this loss was the result of, or justly attributable to, the existence of the scab among the sheep purchased by defendants from plaintiff. Mr. C. H. Woodmansee, one of the defendants, and the person principally in charge of the sheep after their delivery by the plaintiff to defendants, testifies: "We had 613 head of sheep die from the date of delivery up to shearing time in June." Again, the same witness testifies upon cross-examination: "I personally counted the sheep from the shearing pen. I do not know that the whole number 613 died. We were that many short is what I meant. The sheep included the Singleton sheep, and the Davis sheep, as well as the sheep we bought of the plaintiff's company. In the winter and spring I had purchased 1,276 head of sheep from Mr. Singleton and Mr. Davis of Wilford. I received the Singleton sheep February 9th, and the Davis sheep March 20th. The ewes that I bought of Singleton were passed in with the Wood sheep. The rams were kept separate. 613 head of the whole stock was missing at shearing time." It cannot be contended upon any principle of law or equity that the plaintiff is chargeable upon this evidence with the loss of the 613 head of sheep as having been incurred by reason of said sheep sold by plaintiff to defendants being afflicted with scab at the time of delivery of same by plaintiff to defendants. The evidence is altogether too vague and inconclusive to support a right of recovery against the plaintiff for any portion of the 613 head. The answer of defendants also contains a counterclaim predicated upon an alleged unauthorized sale by the plaintiff of certain wool belonging to defendants. The evidence upon this point is conflicting, and the claim would seem to have been ignored by the jury. The record contains the following statement: "Thereafter the jury, being brought into court, returned a verdict in favor of defendants for \$200, and the court, having found said verdict to be in improper form, further instructed the jury that they should deduct from the amount due plaintiff on the contract any amounts, in any they might find, due defendants by reason of their counterclaims." The jury thereafter returned a verdict in favor of plaintiff for the sum of \$1,972.50. The greater part of appellant's brief is taken up with the discussion and elaboration of matters which are really not contested, to wit, the existence of scab among the sheep sold by plaintiff. By their verdict the jury would seem to have allowed defendants, as damages, about the

sum of \$270. This is some \$26 less than the testimony on the part of the defendants shows their expenditures to have been on account of the existence of the scab among the sheep sold by plaintiff to defendants at the time of their delivery. The jury failed to find, evidently, that any loss of sheep by defendants was attributable to the scab as it existed in the band at the time of the delivery by plaintiff to defendants. The sheep were delivered as provided in the contract, to wit, on or about the 31st of October, 1896, and on the 21st of the following January, to wit, January 21, 1897, C. H. Woodmansee, one of the defendants, and a person who seems to have had the direct charge of the sheep, writes plaintiff that "the sheep are looking fifty per cent. better than they were when we received them; in fact, are fat." The evidence of any direct loss by reason of the existence of the scab among the sheep at the time of delivery is of the most unsatisfactory character, and, it is apparent, was so considered by the jury. We have examined the evidence in this case with the most scrutinizing care, and we are unable to see how, under the evidence, the jury could have arrived at a different conclusion. We find no error prejudicial to the defendants in the instructions of the court.

The question brought here for review is the action of the district court in granting a new trial. This is made an appealable order by statute. In reviewing the action of the district court we are not, as would seem to be, as insisted by counsel for respondents, confined to the question of whether there has been an abuse of discretion by the trial court in granting a new trial, but are we satisfied from the record before us that an injustice has been done; or, in other words, does "the promotion of justice" demand that a new trial should be granted? The case seems to have been fully and carefully presented to the jury upon issues fairly made. It is urged that but nine of the jury signed the verdict. If that is to be made a ground for a new trial, the statute authorizing such a verdict is a mere nullity. Trials in the district court involve great expense, not only to the litigants, but to the public, and they should not be granted unless the "promotion of justice" demands it; and we are unable to say, from the record presented, that such a demand is warranted in this case. We think this is a case in which the maxim, "De minimis non curat lex," may be properly invoked. The order of the district court granting a new trial is reversed. Costs to appellant.

SULLIVAN, J., concurs.

QUARLES, J. (dissenting). It is admitted that the sheep sold by appellant to respondents were afflicted with scab, which afterwards broke out among them. The undisputed evidence is to the effect that respondents, in their efforts to eradicate said dis-

ease, incurred necessary expenses to the extent of \$296.05. They had pleaded special damages by reason of such expenditure in the sum of \$300. The jury only awarded the respondents damages, all told, growing out of the diseased condition of said sheep, in the sum of \$200. This was less than the undisputed testimony shows had been incurred in the effort to eradicate the disease from the sheep to the extent of \$96.05. But it is contended that one of the items in this expenditure was for a dipping vat that cost \$55, and that this should be deducted from the \$296.05, which would leave the expenses incurred \$241.05, or \$41.05 less than was expended by respondents. I do not think that the special damages incurred by the respondents should be reduced by the amount which such dipping vat cost. The evidence shows that such vats should not be on or near a sheep ranch or feeding ground; that they should be, and are, usually, located in some isolated and remote quarter; that, owing to the severity of the weather, it being very cold, when the disease reached such stage as made dipping necessary, it was necessary to construct such vat at the ranch of respondents. Mr. Woodmansee testified concerning the vat as follows: "The vat I referred to was constructed upon our ranch. It is still there. It is not necessary to have a dipping vat upon a sheep ranch. I have used it some. I think I will dig it up. It might be a permanent fixture, but it is likely to affect the ranch with the scab." I think that under this evidence it could not be held that the presence of such dipping vat on the ranch was necessary or desirable, but that it was detrimental, and a menace. So, leaving entirely out of consideration the other damages claimed by respondents, I think that the jury failed to allow the sum of \$96.05, which respondents were entitled to as special damages by reason of said expenses. But it is contended that the trial court should not have granted a new trial on this ground, but should have reduced the judgment in favor of the plaintiff to the extent of \$96.05, or such sum of undisputed damages as the jury failed to give the respondents. I do not agree with such contention. While, in case of a verdict for excessive damages, the trial court may make an order directing that a new trial shall be granted unless the successful party remits that certain portion of the damages awarded as are excessive, yet I know of no rule of law or practice that will permit a court to add to the amount of a verdict damages to which the successful party is entitled, but which have not been awarded to him by the jury. The undisputed evidence before us shows that the respondents were entitled to more damages than the jury awarded them. On this ground alone the trial court was authorized to grant a new trial. The rule is well established in this jurisdiction that an order made by the trial court or judge thereof granting a new trial will not

be disturbed on appeal unless the record shows a clear abuse of discretion. The record before us shows that the trial court did not abuse its discretion in granting a new trial, for which reason, if for no other, the order granting a new trial should be affirmed. For the reasons above set forth, I am unable to concur in the opinion of the court in this case.

On Rehearing.

(Aug. 7, 1900.)

SULLIVAN, J. After a careful consideration of the petition for a rehearing in this case, we find no ground on which to base a rehearing. A rehearing is therefore denied.

HUSTON, C. J., concurs.

QUARLES, J. For the reasons stated in the opinion heretofore filed by me in this case, and wherein I dissented from the views of my associates, I think that the petition of the respondents for a rehearing should be granted.

BROSSARD et al. v. MORGAN et al.

(Supreme Court of Idaho. June 23, 1900.)

FINDINGS — REVIEW ON APPEAL — WATER RIGHTS — LIMITATION — ADVERSE POSSESSION — PLEADING AND PRACTICE — AMENDMENT TO CROSS COMPLAINT.

1. In the absence of the evidence the findings of fact cannot be reviewed upon appeal, or their correctness questioned.

2. To bar the claim of a senior appropriator of water, by limitation or lapse of time, in favor of a junior appropriator, the latter must show continuous adverse possession and use in himself, accompanied by claim of title, and such possession and use as exclude the senior appropriator from the possession and use of such water.

3. A right to the use and possession of the water of a stream may be acquired by prescription only when accompanied by claim of title, and by such possession and use as exclude other claimants from the use and possession thereof.

4. Plaintiffs appropriated, diverted, and used for the irrigation of their certain lands 220 inches of the water of Stockton creek, and continuously used same from the date of appropriation, May 1, 1870, to the commencement of the action, July 25, 1893. Defendant appropriated 150 inches of water from said stream May 1, 1880, and continuously used same for irrigating his land up to the time of the commencement of the action, but did not deprive the plaintiffs of the possession and use of the water claimed by them. *Held*, that plaintiffs were not bound by limitation from asserting prior rights to the use of said stream against the defendant, and that the right of the latter is subordinate to those of the plaintiffs.

5. It is not necessary to deny affirmative allegations in an amendment to a cross complaint made by a defendant, when such allegations were contained, in substance, in the original cross complaint of the defendant, and denied by the answer of plaintiff thereto.

(Syllabus by the Court.)

Appeal from district court, Bannock county; Jo. C. Rich, Judge.

Action by Alphonse Brossard and others against John T. Morgan and another. Judgment for plaintiffs. Defendants appeal. Affirmed.

Dietrich & Stevens, A. A. Fraser, and John T. Morgan, for appellants. W. E. Borah, for respondents.

QUARLES, J. This action came before us and was considered upon a former appeal (see *Brossard v. Morgan*, 56 Pac. 163), when this court refused to reverse an order granting a new trial. Upon a retrial of the cause the lower court found that the plaintiffs (respondents here) were prior appropriators of the water of Stockton creek, claimed by them, and which is in dispute, and decreed their rights to be prior in time to those claimed by the appellant. This appeal is upon the judgment roll, so far as the appeal from the judgment is concerned; the evidence not being in the record, either by way of bill of exceptions, or statement on motion for new trial. The findings were filed April 28, 1899, and a decree in accordance therewith was made and entered on that day. August 8, 1899, the appellant moved the court to correct the findings and decree in certain particulars. This motion was denied, and appellant also appeals from the order denying said motion. The appellant waives, on this appeal, his said motion, in so far as it seeks to correct the findings of fact, and it is well that he does so. In the absence of the evidence, the findings of fact cannot be reviewed on appeal, or their correctness questioned.

The court found that the lands of all the parties were arid,—not susceptible of producing crops without irrigation,—and that the appropriation, diversion, and user of the water of Stockton creek by the parties and their predecessors in interest, respectively, had been continuous, and for useful and beneficial purposes, and that same had been in quantity and at times as follows: By plaintiff Brossard, 115 inches, May 1, 1870; by plaintiff Van Ness, 105 inches, May 1, 1870; by the intervener, Hadley, 25 inches, May 1, 1870; and that by defendant, Morgan, 150 inches from and since May 1, 1880. The court also found that the quantity of water claimed by each of the parties was necessary for the irrigation of their said lands, respectively, and that there was no source of supply, other than Stockton creek, from which water could be obtained for the irrigation of said lands. The findings are supported by the pleadings, and the judgment follows the findings. It follows that the appeal from the order denying the motion made by the defendant to correct the judgment is without merit.

The appellant urges that the judgment should be reversed upon the judgment roll, and discusses a number of questions tending to such result, all based upon the statute of limitations. He argues that a water right

is real estate, that it is appurtenant to land, that it passes with land, and that, like the land itself, the title thereto may be lost by adverse possession and user, or gained by prescription. We do not controvert any of these propositions, but agree with them. Appellant then argues that inasmuch as the findings of fact establish that he has used 150 inches of the waters of Stockton creek continuously since May 1, 1880, a period of 13 years prior to the commencement of this action, he has acquired a prescriptive right thereto as against all the world, and that he is fully protected by the statute of limitations. There is no merit in this contention. The findings establish that during the time that defendant was appropriating, diverting, and using the waters claimed by him the plaintiffs were appropriating, diverting, and using for beneficial purposes (not wasting) the waters claimed by them, respectively. Hence there was no adverse user of the waters claimed by the plaintiffs by the defendant. As against the plaintiffs, the use of waters from Stockton creek lacked every essential element of adverse use and possession. There was no deprivation of possession or use as against plaintiffs, and no claim of adverse title asserted against them by defendant. Without these essentials, there was and could be no adverse possession or user of the water claimed by the plaintiffs on the part of the defendant. Hence, his plea of the statute of limitations must fail. The right to divert and use for necessary irrigation the water of a stream in this state may be acquired by prescription, and consequently may be lost by adverse user. But, to bar the claim of a prior appropriator to such use of water appropriated by him on the ground of continuous adverse user by a junior appropriator, the former must be excluded from such use by the latter. No such condition is shown by the record before us. It is true that the findings are that defendant has continuously used 150 inches of the water in dispute, but it is also found that plaintiffs have continuously used the water claimed by them. Hence plaintiffs have not been deprived of the possession or use of such waters, and it necessarily follows that the appropriation of the defendant, being subsequent in time to that of plaintiffs, is and must be subordinate in right to the appropriations of the plaintiffs. It is a matter of common history that in this intermountain region the snow fall in the mountains is the source of the water supply for our streams. This snow fall varies, being heavy some years and light in other years. In the winter of 1888-89 the snow fall was very light, with the result that all streams were low, and in many instances did not furnish near water enough for the settlers, out of which many disputes arose. It requires but little reflection to realize that under such circumstances it would be impossible to give a junior appropriator all of the water that he might have

used for the five next preceding years, when by reason of failure in supply the stream in a given year should be inadequate to supply the prior appropriations without interfering with the rights of prior appropriators. The rule in this state, both before and since the adoption of our constitution, is, in cases like the one under consideration, that he who is first in time is first in right. This rule is not only just and equitable, but is based upon reason and necessity. Tested by this rule, the judgment in the case at bar is correct, and must be affirmed.

It was argued on behalf of the appellant, in the oral argument, that the judgment and findings are not supported by the pleadings, inasmuch as the defendant filed an amendment to his cross complaint, alleging affirmative matter and that the allegations of such amendment had not been denied by the plaintiffs. We have carefully examined the pleadings, and find that the allegations of said amendment to defendant's cross complaint are, in substance, a reiteration of allegations setting forth facts upon which to base a plea of the statute of limitations contained in the original cross complaint of the defendant, and which had been denied in the answer of plaintiffs to said cross complaint. Hence said amendment was not material, being simply a repetition by the defendant of matter upon which issue had theretofore been joined by the parties, and no answer to said amendment was necessary. An order striking said amendment from the files would have been proper. Judgment and order appealed from are affirmed. Costs awarded to respondents.

HUSTON, C. J., and SULLIVAN, J., concur.

(7 Idaho, 257)

STATE v. SEYMOUR.

(Supreme Court of Idaho. July 28, 1900.)

LARCENY—INSUFFICIENCY OF EVIDENCE—FLIGHT OF DEFENDANT—POSSESSION OF STOLEN PROPERTY.

1. The flight of the defendant after he had been arrested and held to answer is not conclusive evidence of his guilt. While flight is very strong evidence of guilt, it is open to explanation.

2. The possession of stolen property, unexplained, is evidence of guilt. But where a reasonable explanation is given, and there is no conflict of evidence in regard thereto, and the witness is not impeached, the jury cannot arbitrarily ignore such evidence.

3. Before a legal conviction can be had, the state must have established the accused person's guilt of the crime charged by legal evidence, and beyond a reasonable doubt. Until that is done the presumption of innocence is an absolute shield to the defendant.

(Syllabus by the Court.)

Appeal from district court, Fremont county; Jo. C. Rich, Judge.

Emery H. Seymour was convicted of larceny, and appeals. Reversed.

Hawley, Pucket & Hawley and Caleb Jones, for appellant. S. H. Hays, Atty. Gen., for the State.

PER CURIAM. The defendant was convicted of the crime of grand larceny, and from the judgment of conviction and from the order denying a new trial this appeal is taken. The defendant was arrested upon a charge of grand larceny, in the stealing of a certain head of live stock. He had a preliminary examination before a committing magistrate, upon which he was committed to appear and answer any indictment or information that might be filed against him upon said charge at the next term of the district court. Defendant gave bail for his appearance at the district court. At the next term of the district court an information was regularly filed by the county attorney against the defendant, charging him with the crime for which he had been held to answer. At the next term of the district court the defendant failed to appear and answer, and his bail was forfeited. A reward for his apprehension was offered, and he was subsequently arrested in the northern part of the state, and was brought to trial, upon which trial he was convicted of the crime of grand larceny, and duly sentenced for a term of years in the state penitentiary.

There are four specifications of error assigned in the brief of the appellant, the first of which is, to wit, "that the evidence was insufficient to justify the verdict," etc. These facts seem to be established by the evidence: The identity of the animal alleged to have been stolen. That said animal was slaughtered by or for the defendant, and by his direction. Much of the transcript is taken up with evidence going to prove the possession of the animal and its slaughter by defendant,—a fact which does not appear to have been contested or denied by defendant.

The only question remaining is, was the possession of the animal by the defendant a felonious possession? The bare possession of property recently stolen is not conclusive evidence of guilt. Especially is this so of property of the kind involved in this case. The only question for us to consider in this case, then, is, does the evidence as presented by the record show that the possession of the animal by the defendant was a guilty possession? The only evidence on the part of the state tending to establish this fact is that of the alleged owner, who states that he never sold the animal. Against this evidence is that of the defendant that one Williams was employed by him to purchase and drive to his place of business, or to the place where the animals for his business were slaughtered, animals of the kind alleged to have been stolen; that the animal in question, or one answering to its description, was so delivered to him by said Williams; that he (defendant) accounted to and paid said Williams for the animal. This testimony of the defendant is corroborated by the testimony of D. C. Bruce, who states that he was present when Williams purchased the animal and witnessed the transaction, and states the particulars thereof. Williams was

not present at the trial. No attempt was made to contradict or impeach these witnesses by the prosecution. But it is urged by the prosecution that the flight of the defendant after he had been arrested and held to answer must be held as conclusive of his guilt. We do not understand this to be the rule. While the flight of one accused of crime is very generally regarded as an evidence of guilt, it has never been held as conclusive. It is always open to explanation, and is never of itself, alone, held to be sufficient to support a conviction. The defendant explains his flight by saying that his counsel advised him that, while he did not believe (presumably, from the statement of facts he received from defendant) that he (defendant) was guilty, still, in view of the feeling and sentiment prevailing in the community, it was safer for the defendant to absent himself, at least for a time. While such advice may be recognized as "sharp practice," it is not such as would come from one having that high sense of professional honor which should inspire and influence the conduct of every member of the profession who places a higher estimate upon professional integrity than he does upon mere temporary or incidental success. It is admitted that the defendant was found in the possession of the animal alleged to have been stolen, and that he caused it to be slaughtered, had its carcass sent to his butcher shop, and appropriated the same to his own use. Unexplained, those facts might be sufficient to warrant his conviction of the crime alleged against him. But the defendant explained his possession of said animal by his own testimony and that of the witness Bruce; and, if the facts as stated by himself and witness Bruce are true, the defendant is not guilty of the crime of which he was convicted. That evidence is not contradicted in a single particular, and neither the defendant nor Bruce was impeached. In case of a substantial conflict in the evidence, the verdict of a jury will not be disturbed. But this is not a case where the evidence is conflicting. There is an absolute lack or want of legal evidence to sustain the verdict. In such a case the jury cannot arbitrarily ignore the evidence, when there is no conflict, and the witnesses are not impeached. If the jury could do that, it could find a defendant guilty without any evidence, and thus violate the well-established rule that a defendant cannot be legally convicted except upon legal evidence that establishes his guilt beyond a reasonable doubt. Any other rule would make the jury arbitrary judges of the guilt of a defendant, irrespective of the evidence produced on the trial. On the face of the record, it is shown that the defendant gave a reasonable explanation of his possession of said animal, and was corroborated by witness Bruce, and we also think that he gave a reasonable explanation of the cause of his flight, both of which, however, may be false. Be that

as it may, it devolves upon the state to establish a defendant's guilt by legal evidence, and until that is done the presumption of innocence is an absolute shield for him. The possession of the animal and the flight of the defendant, under the explanations set forth in the evidence, of which there are no contradictions or conflicts, sufficiently indicate the innocence of the defendant.

We have examined the instructions, and find no error in them, provided the evidence was sufficient to sustain the verdict, and we think there was no error in refusing to give the instruction requested by counsel for the defendant. We have examined the other errors assigned, and find no prejudicial error in the admission of certain evidence objected to by counsel for the defendant. The judgment must be reversed, and the cause remanded for a new trial, and it is so ordered.

STATE v. CORCORAN.

(Supreme Court of Idaho. July 3, 1906.)

MARTIAL LAW—DISABILITY OF SHERIFF TO ACT—CORONER—DUTIES AND QUALIFICATIONS OF COUNTY ATTORNEY—APPOINTMENT OF TEMPORARY COUNTY ATTORNEY—CHALLENGING GRAND JURY—CHANGE OF VENUE—POSTPONEMENT OF TRIAL—CHALLENGING TRIAL JURY—PRACTICE ON APPEAL—WITNESS—EVIDENCE—DECLARATIONS OF CO-CONSPIRATOR—INSTRUCTIONS—JURY—INTOXICATING LIQUORS—HARMLESS ERROR—PRESUMPTION AS TO ERROR—WHAT RECORD MUST SHOW AS TO ERROR.

1. Martial law having been declared to exist in a certain county, and the sheriff of such county being detained in prison by the military authorities, the court properly directed the coroner to perform the duties of sheriff.

2. Where the county attorney is incapacitated from acting in a certain criminal case, it is the duty of the district court having jurisdiction of such case to appoint some suitable person to perform for the time being the duties of county attorney; and such appointee has authority to perform all of the duties of county attorney in such case, and may appear before the grand jury to assist in the examination of witnesses.

3. A person is not disqualified from acting as temporary county attorney, under appointment, by reason of his residence in another county.

4. A defendant in a criminal action who is, at the time the grand jury was impaneled which afterwards indicted him for a murder growing out of a riot in which he participated, in open court with his counsel, he being under arrest at the time and detained pending an investigation of such riot, and declines to challenge such panel, and declines to challenge any of the individual grand jurors, is held to answer, within the meaning of section 7730, Rev. St. Idaho, and cannot, after indictment, have the indictment set aside for the reason that he had good ground for challenge to the panel or to any individual grand juror.

5. The existence of martial law to a limited extent, and an excited condition of the public mind, to the prejudice of the defendant, are questions pertinent to a motion for change of venue, but are not pertinent or relevant upon the hearing of a motion for a postponement of the trial.

6. A postponement of a trial in a criminal case on the ground of the absence of material witnesses is properly denied, where the defend-

ant fails to use any diligence to procure their presence, and makes no effort so to do.

7. On appeal, the action of the trial court in denying the challenge of the defendant to the panel of trial jurors upon the ground that the officer who summoned the jurors upon special venire was biased against the defendant will not be reviewed, where the record on appeal shows that such challenge was heard and decided upon the evidence of the officer summoning such jury, and his evidence is not in the record upon appeal.

8. A party who introduces a witness may not impeach him by evidence of bad character, but may show that he has made at other times statements inconsistent with his present testimony.

9. It is not competent for the defense in a criminal case to ask an adverse witness if his employer intends to claim damages against the county for the acts constituting or connected with the offense for which defendant is being prosecuted, as such question does not tend to show the state of mind of the witness towards the defendant.

10. Defendant was being tried for murder. The coroner's inquest upon the body of the deceased was not closed, but in progress. Defendant asked that the testimony of certain witnesses, who had also testified before the coroner's jury, should be produced by the coroner. The prosecution had not asked said witnesses in regard to their testimony before the coroner's jury. The court denied the defendant's request to compel the coroner to produce the testimony of such witnesses at the inquest. *Held*, that the action of the trial court was correct.

11. The declarations of one conspirator (the conspiracy being established), made during the pendency of the criminal enterprise, with reference to the common object thereof, are competent against his co-conspirators.

12. An erroneous instruction to the effect that one who abets "or" aids in the commission of a crime, though absent at the time of its commission, shall be prosecuted, tried, and punished as a principal, is cured by other instructions to the effect that before they can convict the defendant they must believe from the evidence, beyond a reasonable doubt, that he knowingly aided the commission of such offense, with guilty purpose and intent.

13. While it is error to permit the jury to use intoxicating liquors to any extent during the progress of a trial, yet a verdict will not be set aside on such ground unless it is shown that the jurors were under the influence of such liquors, or that the defendant was prejudiced thereby.

14. To obtain a reversal upon the ground of error committed during the progress of the trial, such error must affirmatively appear in the record.

(Syllabus by the Court.)

Appeal from district court, Shoshone county; George H. Stewart, Judge.

Paul Corcoran was convicted of murder in the second degree. From an order denying a new trial, and from the judgment, he appeals. Affirmed.

A. A. Fraser, Peter Breen, Patrick Reddy, F. C. Robertson, and Jones & Morphy, for appellant. J. H. Forney, W. E. Borah, J. H. Hawley, and S. H. Hays, Atty. Gen., for the State.

QUARLES, J. The defendant was indicted by a grand jury of Shoshone county upon the charge of murdering one James Cheyne, in said county, tried and convicted of murder in the second degree, and sentenced to

serve a term of 17 years' imprisonment in the state prison. Defendant moved for a new trial, which was denied him, and he has appealed to this court from the judgment of conviction, and also from the order denying him a new trial. The evidence is not in the record before us, only such portions thereof as tend to show the object and character of defendant's exceptions being in the record. Appellant has assigned 32 errors which he claims were committed by the court in the progress of the cause. We cannot set forth each of these specifications of error in full, or treat each of them separately, without making this opinion much longer than is necessary or proper. Therefore, although we have carefully considered each and every of these specifications of error, we will, in the main, treat of them generally.

The two first specifications of error are based upon the ground that the trial court recognized that J. D. Young, sheriff of Shoshone county, was in the custody of the federal authorities, and directed the coroner of the county, Dr. Hugh France, to act as sheriff. We are of the opinion that the court acted properly in these matters. Said Young was in custody of the military authorities. Martial law was in force in said county at that time,—not to the exclusion of civil authority, but, as we held in *Re Boyle*, 57 Pac. 706, to a limited extent. The sheriff, being under confinement and deprived of his liberty, was incapacitated from performing the duties of his office. Section 2085, Rev. St., is as follows: "The coroner must perform the duties of sheriff in all cases where the sheriff is interested, or otherwise incapacitated from serving, and in cases of vacancies by death, resignation, or otherwise, in the office of sheriff, the coroner must discharge the duties of such office until a sheriff is appointed or elected and qualified." Under the conditions that existed, and under the express terms of the statute quoted, the court committed no error in directing the coroner to perform the duties of the office of sheriff.

The third specification of error is based upon the action of the trial court in making an order designating J. H. Forney as special prosecutor and acting county attorney of Shoshone county. In determining whether the court acted correctly in this regard or not, we should keep in view the conditions that existed. In the proclamation of the governor of May 4th, which put martial law in force in Shoshone county to a limited extent, it was said, after setting forth the riot of April 29, 1899, which resulted in the death of James Cheyne, for which appellant is being prosecuted in this action, that "the perpetrators of said outrages seem to enjoy immunity from arrest and punishment through subservience of peace officers of said county of Shoshone, or through fear on the part of said officers to such bodies of lawless and armed men." In the face

of this charge, either of complicity, or of disqualification through fear, the county attorney of said county, in open court, stated to the court that he was disqualified from acting as county attorney, and that he was unable to attend to the duties of said office in matters connected with or growing out of the alleged riots of April 29, 1899, in Shoshone county. It is evident to our minds that said county attorney was unable to discharge the duties of his said office, within the meaning and intent of the act of February 2, 1899. It therefore became the duty of the district court to appoint some suitable person to perform, for the time being, the duties of said office. But appellant urges that J. H. Forney was disqualified, because the record shows that he lived, not in Shoshone, but in an adjoining county, and that he was attorney for the owners of the mining property destroyed in said riot. The action of the court in this matter is to be tested solely by the provisions of the act of February 2, 1899 (Acts 1899, pp. 24, 25), the first two sections of which are as follows:

"Section 1. No person shall be eligible to the office of county attorney who is not an attorney and counselor at law duly licensed to practice as such in the district courts of the state. No county attorney shall hold any other county or state office during his term of office as county attorney.

"Sec. 2. When there is no county attorney for the county or when he is absent from the court, or when he has acted as counsel or attorney for a party accused in relation to the matter of which the accused stands charged, and for which he is to be tried on a criminal charge, or when he is near of kin to the party to be tried on a criminal charge, or when he is unable to attend to his duties, the district court may, by an order entered in its minutes, stating the cause therefor, appoint some suitable person to perform for the time being or for the trial of such accused person, the duties of such county attorney, and the person so appointed has all the powers of the county attorney, while so acting as such."

There is no showing or claim that said Forney is not a suitable person, other than the claim that he is not a resident of the county, and that he was attorney in one case for the mining company. Section 2 of the act of February 2, 1899, quoted supra, does not require that the appointee, who only acts temporarily, should be a resident of the county. We can readily see that contingencies might arise and had probably arisen in this case when it would be the duty of the court, in subserving the public interest, to appoint, through necessity, some lawyer living outside the county to perform, for the time being, the duties of the office of county attorney. Mr. Forney was not disqualified from acting as county attorney pro tem. by reason of his having been attorney for the Buukerhill & Sullivan Mining Company in a civil case. This action is between the peo-

ple of the state, on one side, and the appellant, upon the other. We think that the trial court was justified in appointing Mr. Forney to act temporarily as the prosecuting officer of Shoshone county. But, even if we be mistaken in this, he acted as such, and his acts were those of an officer de facto, and entitled to recognition as such. And we do not find anything in the record before us which indicates that any substantial right of the defendant has been prejudiced by Mr. Forney's appointment, or that the result would have been different if some other suitable person had acted as prosecutor instead of Mr. Forney.

The third assignment of error is without merit.

The fourth specification of error is, "The court erred in denying defendant's motion to set aside the indictment." This motion was predicated upon numerous grounds, several of which appear to have been abandoned. Those discussed in appellant's brief we summarize as follows: (1) That J. H. Forney, who had been appointed by the court to act temporarily as county attorney, was present before the grand jury, contrary to law; (2) that defendant had good ground for challenge to the grand jury that indicted him, because said jurors had formed and expressed unqualified opinions of the guilt of the defendant at the time they were impaneled, and entertained malice and ill will towards the defendant. What we have said as to the appointment of J. H. Forney to discharge the duties of prosecuting attorney for Shoshone county temporarily virtually disposes of the first ground for setting aside the indictment above set forth. Being for the time the de facto county attorney, and clothed with the powers and duties of that officer, he was authorized to appear before the grand jury. Paragraph 4 of section 3 of the act of February 2, 1899 (Sess. Acts 1899, p. 25), relating to the duties of county attorneys, is as follows: "To attend, when requested by any grand jury, for the purpose of examining witnesses before them; to draw bills of indictments, informations, and accusations; to issue subpoenas and other process requiring the attendance of witnesses." Appellant contends that this statute authorizes the county attorney only, not one appointed temporarily to fill his place, to be present before the grand jury while witnesses are testifying. We are unable to give our assent to this contention. It would be an idle thing to provide that, in case of the disability of the county attorney to perform his duties, the court should appoint a suitable person to discharge his duties, and then hold that such appointee has no authority to act in the performance of such duty. The reason, object, and necessity of the grand jury having the services and assistance of the county attorney continue, notwithstanding that the county attorney is incapacitated from acting in a given case that is being investigated by the

grand jury. Construing section 2 and paragraph 4 of section 3 of the act of February 2, 1899, together, it is evident that it was the intention of the legislature that, where the county attorney was disqualified from acting in a certain case, the person appointed to discharge his duties should perform all of them. It follows that the indictment should not have been set aside because J. H. Forney, the substitute for the county attorney appointed by the court, was before the grand jury during the examination of witnesses. There is no pretext or claim that he obtruded himself before the grand jury without request or permission. In support of the second ground urged here in favor of the proposition that the court should have sustained the motion of defendant to set aside the indictment, the defendant stated in his affidavit in support of said motion that Hugh France, the coroner, did summon each of the individual grand jurors comprising the grand jury that found said indictment, knowing them to be prejudiced against the defendant, and for the purpose of getting a jury that would indict the defendant. We quote the allegations in said affidavit with regard to the grand juror Henry E. Hawes, as follows: "That said France, in disregard of said instruction, also summoned Henry E. Hawes, a merchant, residing at Wallace, whom the said France well knew had formed and expressed an unqualified opinion as to the guilt or innocence of this defendant, and who entertained ill will towards this defendant." The allegation in said affidavit as to the grand jurors Charles Bender, W. F. Goddard, W. J. Baker, S. P. Fairweather, C. W. Vance, Thomas Ray, Jerry Savage, Albert Otto, Frank Roland, Theodore Brown, Thomas Gilbert, I. E. Coulson, and N. R. Penny is substantially the same as that above quoted, relating to the grand juror Henry E. Hawes. The allegations as to the other two of said grand jurors in said affidavit are as follows: "That said France, in disregard of said instruction, summoned Frank F. Johnson, a banker residing at Wallace, and whom the said France well knew to be biased and prejudiced, and who, as defendant is informed and believes, had formed and expressed an unqualified opinion as to the guilt of defendant, and who bore malice and ill will towards him." "That said France, in disregard of said instruction, also summoned W. S. Bryden, a merchant residing at Wardner, and who, as defendant is informed and believes, was, at the time of his selection and summoning by said France, a deputy sheriff under appointment by said France, and who, as the said France well knew, was a bitter enemy of this defendant and all persons accused of participating in any way in the riot of April 29, 1899." These allegations were positively denied by the affidavit of said Hugh France, whose affidavit and that of the defendant constitute the only evidence shown by the record to have been

used on the hearing of said motion. It is also shown in the record that at the time the said grand jury was impaneled the defendant and his counsel were present in court, and were then informed by the court of their right to challenge said panel or any individual juror, as provided by law, and were then and there given an opportunity so to do. Appellant contends that under subdivision 4, § 7730, Rev. St., said motion to set aside the indictment should have been sustained, as he had not been held to answer before the indictment. We are referred to two decisions of the California supreme court (*People v. Geiger*, 49 Cal. 643, and *People v. Phelan*, 123 Cal. 551, 56 Pac. 424), under a similar statute, as supporting appellant's contention. But in each of these cases the court held that, although there had been no preliminary examination and no order by a committing magistrate, yet, as the defendant was in jail, having been arrested upon warrant charging him with the crime for which he was afterwards indicted, such defendant was held to answer, within the meaning and intent of the statute. The reasoning of the court in those two cases applies to the case at bar. The defendant here was arrested by the military authorities, acting in conjunction with the civil authorities, with several hundred other men, and detained until their connection with the riot of April 29, 1899, and resultant loss of life and property, could be examined into and ascertained. The defendant at the time the said grand jury were impaneled must have known that he was being held to answer later for participating in said riot; and we do not see how his position would have been different if a warrant of arrest, charging him with the murders and arson committed in said riot, had been issued, and he arrested under such warrant. The object of subdivision 4, § 7730, Rev. St., is to give to a defendant who did not have the opportunity to challenge the panel or individual jurors of the grand jury that indicted him, before the finding of the indictment, the opportunity to do so afterwards. But the defendant in the case at bar had that opportunity. He was given the opportunity to challenge the panel, and failed to do so. He was given the opportunity to challenge the individual jurors, and declined to do so. If any of the jurors were his personal enemies and prejudiced against him, he should have challenged them. A careful study of the affidavit of the defendant shows that as to 14 of the jurors he does not allege bias, but simply that the officer who summoned them knew that they were biased. The allegations are not as to the fact, so far as the jurors are concerned, but as to the knowledge of the officer. Such knowledge is positively denied by the officer. And the allegations as to the other two jurors having opinions are matters of opinion, expressed in a vague, indefinite way, and are overcome by the affidavit of the coroner.

Taking into consideration the object of section 7730, Rev. St., the character of the affidavit used upon the hearing of the motion, and the fact that the defendant and his attorney were present when the grand jury was impaneled, and then given the opportunity to challenge the panel and to challenge the individual jurors, but declined to do so, we are clearly of the opinion that the trial court properly overruled the motion to set aside the indictment.

We now come to the fifth specification of error, which is that "the court erred in denying defendant's motion for a postponement of the trial." The motion for continuance is in words as follows: "Comes now the defendant, Paul Corcoran, and by his attorneys, Patrick Reddy, F. C. Robertson, Jones & Morphy, and Peter Breen, and hereby moves the court for an order vacating the time for the hearing of this cause, and for an order continuing this cause until the next term of this court, and for grounds of motion says: (1) That the defendant cannot, under martial law, as now existing in Shoshone county, have a fair and impartial trial. (2) That the laws of the state of Idaho have been, by the proclamation of the governor of the state of Idaho, suspended in the county of Shoshone, and have no operation therein, and that this court, in proceeding to administer or attempting to administer the law in the county of Shoshone, is administering laws for its own government that have been suspended by the proclamation of the governor of the state of Idaho promulgated on the 3d day of May, A. D. 1899, declaring the said county of Shoshone in a state of insurrection; that this defendant is being proceeded against without due process of law, and in violation of the fourteenth amendment of the constitution of the United States, and in violation of the constitution of the state of Idaho; that the matters and facts set forth in the various affidavits herein constitute a federal question, and this court has no jurisdiction to hear and determine the cause against said defendant while said county of Shoshone is under martial law; that the military law and authority is supreme in the county of Shoshone, and the civil authority and the power of this court are subordinate to the said military authority in the county of Shoshone, and this court cannot exercise its functions as a co-ordinate branch of the government, but is not, and cannot, under martial law, be deemed to be, a co-ordinate branch of the government, and the processes and functions of this court are subject to such limitation as the said martial authorities see fit to impose upon it; that this court is powerless to protect witnesses in attendance on this court, or to administer the law in behalf of them, by reason of the dominion and control of the said Frank Steuenberg, governor, and Bartlett Sinclair, over the said county of Shoshone and of the people thereof, as commanders of the military forces. And for further grounds of motion the defendant

says that John Chidester and William H. Mitchell are material and proper witnesses, and necessary witnesses, for the defense of the defendant herein; that due diligence has been exercised on the part of the defendant to secure the attendance of said witnesses, but that said defendant has so far been unable to secure the attendance thereof at this term of this court, but if this cause is continued the defendant will be able to secure the presence of said witnesses; and that defendant cannot safely go to trial without said witnesses being in attendance upon the court. This motion is based upon the records and files herein, and the affidavits of Boyle, Corcoran, and Eugene Sage, John Chidester, William H. Mitchell, Fred T. Deane, John W. Glass, John J. Hogas, John F. Clark, Joseph F. Whelan, Lawrence J. Simpkins." In support of this motion the affidavits of the defendant, Paul Corcoran, and of L. J. Simpkins, William H. Mitchell, John Chidester, Eugene Sage, Fred T. Deane, John W. Glass, John J. Hogas, John F. Clark, Joseph F. Whelan, and William Boyle were filed and used on the hearing of the motion. With the exception of the affidavits of Mitchell and Chidester, the statements in the affidavits simply go to show the condition of the public mind, in the opinion of the affiants, growing out of the presence of the military authorities in Shoshone county, and the existence of martial law therein. Some of these affidavits might well be termed legal curios,—notably, that of William Boyle, in which the learned counsel who drafted the affidavits, speaking through the affiants, are seeking to bring before the court their construction of the action of the lower court and of this court in *Re Boyle*, reported in 57 Pac. 706. In none of the affidavits does it appear that any of the witnesses would state any facts material to the defense, except the witnesses John Chidester and William H. Mitchell. It was claimed that these last two named witnesses would testify that at the time the explosion occurred, and the deceased, Cheyne, was killed, the defendant was in the vicinity of Burke, 17 miles from the place where Cheyne was killed. The tendency of the evidence of these two witnesses, if they had been produced at the trial, would have been to establish an alibi on the part of the defendant. But in none of the affidavits was it shown where the said witnesses were,—whether in the state or out of it; nor was it shown that subpoenas had been issued for said two witnesses, or either of them, or any legal steps taken to procure their attendance. The defendant knew where said witnesses were. He procured their affidavits. The only excuse for their nonappearance was that they feared arrest if they should appear at the trial. No reason is shown why said witnesses could not have been subpoenaed, or why their depositions were not taken on behalf of the defendant. The following paragraph we quote from the affidavit of said John Chidester: "That the

affiant will keep the attorneys for said Paul Corcoran informed of his whereabouts, and when martial law shall have ceased to exist in said Shoshone county, and affiant will be safe from unlawful and arbitrary arrest, imprisonment, and annoyance, such as he has heretofore suffered at the hands of said military authorities, affiant will be willing to, and will, return to said Shoshone county, and testify before this court as in this affidavit set forth." The identical paragraph, in the same words, is found in the affidavit of William H. Mitchell. The matters contained in these affidavits, except the testimony of said Chidester and Mitchell as to the whereabouts of the defendant at the time of the commission of the crime of which he is charged, while relevant upon the hearing of a motion for a change of venue, were irrelevant, and should not have been considered, upon a motion for a continuance. The effect of the course pursued by the defendant tended to show that he wanted a trial in Shoshone county, but not until after martial law had ceased to exist. While the affidavits show that John Chidester and William H. Mitchell were material witnesses for the defendant at the trial, yet he was not entitled to a continuance by reason of their absence, as he utterly failed to show that he used due diligence to procure their attendance. To entitle the defendant to a postponement of the trial on the ground of the absence of a witness, he must show what he expects to and will prove by such witnesses; that such evidence is material to his defense; that such evidence is true; that the witness is not absent by his procurement or with his consent; that he has used due diligence to procure the presence of said witnesses at the trial, and failed so to do; and that there is a reasonable probability that he can and will procure the attendance of said witnesses at the next term of the court. The defendant in the case at bar failed to show these things, for which reason, and those above given, the motion for a postponement of the trial was properly denied.

The sixth specification of error is, "The court erred in denying defendant's challenge to the panel of the trial jurors." This challenge was based upon the ground of implied and actual bias on the part of Angus Sutherland, the officer who summoned the panel of jurors, against the defendant. Upon the hearing of this challenge on the ground of implied bias, the defendant called said Angus Sutherland to the witness stand and examined him, and the challenge was submitted and decided by the court upon the testimony of said Angus Sutherland. The court denied the challenge, whereupon the defendant asked that triors be appointed to try the challenge upon the ground of actual bias, but the court refused to appoint such triors. We are now asked to reverse the judgment in this case because of the action of the court in denying said challenge. The evidence showing the state of mind of the officer is not in the rec-

ord before us. If that evidence was in favor of the appellant's contention, it would probably be here. In the absence of the evidence upon which the court acted, we cannot presume error, but must presume that the court acted correctly. For aught that we can tell from the record before us, the officer was examined upon both the charge of implied and actual bias, and his testimony showed that none existed. Without the entire proceedings and evidence before the trial court upon the hearing of this challenge, we will decline to review it. It is well to bear in mind that the defendant does not appear to have been prejudiced by reason of the jurors having been summoned by said Angus Sutherland. The record shows that he challenged two of said jurors for actual bias, one of the challenges being sustained by the triors, and the other being denied by them, and that the defendant only challenged eight of the persons called as jurors peremptorily, accepting the jury while he yet had the right to peremptorily challenge two others. The exception under consideration is technical, and one which we must, under the provisions of our Penal Code, ignore. Section 8236, Rev. St., is as follows: "Neither a departure from the form or mode prescribed by this Code in respect to any pleading or proceeding, nor any error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right." In the absence of the evidence upon which the challenge was tried and decided, and in the face of the record, showing that the defendant accepted the jury while he still had peremptory challenges that he might exercise, we cannot presume that he was prejudiced by the action of the court.

During the trial, and while the witness John Clark was testifying, he stated that he thought he saw the defendant on a train returning from Wardner, with a large number of miners. On cross-examination the witness stated that he was not positive that the man was Paul Corcoran; that he thought it was at the time; that circumstances had since occurred—statements made by others—which caused him to doubt his own mind. On re-examination the witness stated that he testified about the same matter before the coroner's jury called to inquire into the death of James Cheyne. Witness was then shown his examination before the coroner's jury, in writing, which stated that he read and understood before he signed same. He was then asked if he made answers to questions as follows before said coroner's jury, to wit: "Ans. No, sir; I did not see Paul Corcoran on the road going down. Q. Did you see him when you got there? A. I did not see him in Wardner. I saw him on the train going back. Q. On the train going back? A. Yes, sir. Q. Where? A. He was sitting on the top of a box car when I saw him. Q. Before you got to Burke? A. Yes, sir; between Wardner and Wallace. Q. How long have you known Paul Corcoran? A. About

three years. Q. You know him intimately, do you? A. Well, sir, I may say I do. I am not a particular intimate friend of his, but to see him I know him. Q. Then you could not be mistaken in the man? A. Hardly. Q. Whereabouts on the train did you see him that day? A. Sitting on top of a box car. I was going back,—walked down by the side of the box car, going to get into another box car. Q. He was sitting on it? A. Yes, sir. Q. You are not mistaken in the man, were you? A. No. Q. He was sitting on the end of the box car? A. On the side. Q. No one sitting with him? A. I don't remember. There was quite a crowd on top of the box car. Q. How was he dressed? A. I don't remember, exactly, that. Q. Does Paul Corcoran hold any official position in your union? A. Yes. Q. What is it? A. Financial secretary. Q. You are positive you saw him sitting on the box car? A. Yes, sir. Q. Did you speak to him? A. No. Q. Did you see him in Burke at any time in the morning? A. I did not. I saw him in Burke in the evening." The witness admitted that he gave the foregoing answers at the coroner's inquest. This evidence was objected to by defendant on the ground that it was introduced to support or corroborate the testimony of the witness in chief, and not to contradict him, and for the reason that it was incompetent. This objection was overruled by the court, to which defendant excepted, and this action of the court constitutes the seventh specification of error. The prosecution contends that this evidence was inconsistent with that given by the witness on the trial, for which reason it was admissible, under the provisions of section 6080, Rev. St., which reads as follows: "The party producing a witness is not allowed to impeach his credit by evidence of bad character, but he may contradict him by other evidence, and may also show that he has made at other times, statements inconsistent with his present testimony." The evidence given by the witness at the trial was inconsistent with that given by him before the coroner's inquest, and the evidence set forth above was, for that reason, under the provisions of section 6080, Rev. St., admissible.

William Burch testified as a witness for the prosecution, and on direct examination stated that he was the superintendent of the Bunker Hill & Sullivan Mine. On cross-examination he was asked the following question by counsel for defendant, to wit: "I will ask you, Mr. Burch, if it is not a fact that your company is interested in this prosecution, and that they have made a claim, or notified the county that they will hold the county responsible for the destruction of the mill?" An objection was made to this question by the prosecution on the ground that it was incompetent, irrelevant, and immaterial, which objection was sustained by the court, and this action of the court is the basis of appellant's eighth specification of error. We think the court properly sustained said ob-

jection. The witness had already stated his relation (that of an agent and employé) to the corporation whose property was shown to have been destroyed in the riot of April 29, 1899; and whether the said corporation intended to make a claim against the county or not did not tend to prove or disprove any issue before the jury, nor did it tend to show the state of mind or feeling on the part of the witness towards the defendant, or his personal interest in the result. It was competent for the defense to ask said witness on cross-examination any question touching his personal feeling or bias towards the defendant, but the question asked did not have that tendency.

The ninth, tenth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth specifications of error are based upon the action of the court in refusing to call the coroner before the jury, and require him to produce the testimony of several witnesses who testified before the coroner's jury, so that defendant could cross-examine said witnesses touching their testimony before said coroner's jury. We do not think that the court erred in regard to these matters. The evidence shows that at the time the coroner's inquest was not closed, but was proceeding. The state had not asked the witnesses as to what their testimony before the coroner's jury was, or shown that they had testified at the inquest. The trial court held that it had no authority to interfere with the said inquest, and have the partial proceedings thereof brought into court. The claim of appellant that he asked the production of the testimony of said witnesses for the purpose of cross-examination is without merit, as said witnesses had not been asked about their testimony before the coroner's jury. Defendant's counsel were evidently bent upon a voyage of discovery, which the trial court was not inclined to encourage. We are unable to find wherein any substantial right of the defendant was prejudiced by this action of the court.

The eleventh and twelfth specifications of error are based upon the action of the court in denying the objection of the defendant to the following two questions asked the witness Nicholas Hardy, to wit: "Did you have a talk with him [Hinchman] in April last?" And, "What was said in said conversation, by Mr. Hinchman, in regard to the union?" As we have heretofore remarked, the evidence before the jury upon which the defendant was convicted is not before us,—only such portions as tend to elucidate the exceptions of the defendant taken during the trial. However, the small amount of testimony before us, and the instructions of the court to the jury, show that the case was tried upon the part of the state upon the theory that the members of the miners' union in Shoshone county entered into a conspiracy to drive from the employment of the Bunker Hill & Sullivan Mining & Concentrating Company, by intimidation, force, and

threats of violence, all nonunion employes; that the defendant was one of a large number of conspirators who participated in the unlawful object and purpose of the conspiracy; that in the doing of the unlawful act the destruction of said mill was affected and the deceased, Cheyne, was killed. The testimony of the witness Hardy was introduced by the state as tending to show such conspiracy. The answers of said witness to the above two questions are as follows: To the first one: "Yes, sir." To the other: "Well, he said, 'I guess we will win it out' (meaning the strike). And he said he would not say anything about it; let it lay for a few days; get some help there and do the thing up; but they did not want the Bunker Hill to know that they was going to do anything, because they would cut off the air that run the machines in the Last Chance, the air being supplied from the Bunker Hill. He said he would get help up the cañon; that they were going to work for a few days; that they would get help from above; there would be so many detailed to help the matter out; he would go on to work. And then he went away, and I saw him no more. He said about twenty-five would be detailed from the cañon and neighborhood." This evidence might or might not be competent. The declaration of one conspirator, the conspiracy being established, while he is acting in furtherance of the common design, is competent evidence against his co-conspirators; and the declaration of a conspirator during the pendency of the criminal enterprise, with reference to the common object thereof, is competent against his co-conspirators. Whether the alleged conspiracy was established, and, if so, whether the defendant and said Hinchman were members of such conspiracy, we are unable to tell, in the absence of the testimony. The appellant, to obtain a reversal, must affirmatively show error by the record. We cannot presume error where none is shown. We must therefore presume that the lower court acted correctly in admitting the said evidence.

The nineteenth specification of error specifies the giving of instructions numbered 28, 34, 36, 38, 39, and 47 as error. Said instructions are as follows: "No. 28. An act done by a party to an unlawful conspiracy in furtherance of, and naturally flowing from, the common design, is the act of each and all of the conspirators, even if the identity of the conspirator who did the act be not established; and, where murder is committed as the result of a conspiracy, each one of the conspirators is guilty, even though he was not present at the place of the crime, if he aided, abetted, or encouraged the commission of the unlawful acts resulting in the crime charged." "No. 34. And if you believe in this case, beyond a reasonable doubt, that the defendant aided, abetted, advised, or encouraged the killing of James Cheyne, as charged in the indictment, or aided, abetted, advised, or encouraged such unlawful acts as

had a tendency to destroy life, and, as a result of such aiding, abetting, advice, or encouragement, the said James Cheyne was killed, as charged in the indictment, then he is guilty; and it would be immaterial whether he was actually present at the killing or not." "No. 36. On the other hand, even though you believe from the evidence, beyond a reasonable doubt, that a conspiracy existed to destroy the mill belonging to the Bunker Hill & Sullivan Mining & Concentrating Company, and by force and violence to interfere with and drive from their employment the nonunion employes of the said company, and that in pursuance of such conspiracy such mill was destroyed, and James Cheyne was killed, yet, unless you are convinced, beyond a reasonable doubt, that the defendant was a member of such conspiracy, and advised, encouraged, aided, or abetted therein, you should find him not guilty." "No. 38. If you believe from the evidence, beyond a reasonable doubt, that the defendant advised, encouraged, or directed an unlawful act which had a tendency to destroy life, he cannot escape responsibility by quietly withdrawing at the time of the commission of such unlawful act. He must notify the other members of the conspiracy of his intention to withdraw. Neither can he escape responsibility by remaining away from the actual commission of the crime after the same had been encouraged or advised by him, if you find the same was so encouraged or advised. If, therefore, you should find from the evidence, beyond a reasonable doubt, in this case, that the defendant advised and encouraged, aided or abetted, in the killing of Cheyne, or if he advised, encouraged, aided, or abetted such unlawful acts as had a tendency to take human life, and as a result of such advice and encouragement said Cheyne was killed, then the defendant is as guilty as though he took the deceased's life with his own hand. No. 39. I further instruct you that if you find from the evidence, beyond a reasonable doubt, that a conspiracy existed, and that the defendant was a member of such conspiracy, or aided, advised, or encouraged the same, and that as a result of such conspiracy the life of James Cheyne was taken by a member of such conspiracy, then I instruct you that, whatever crime or grade of crime the conspirator who caused the death of said James Cheyne was guilty of, the defendant would be guilty of the same crime or grade of crime, as the act of one is the act of all." "No. 47. It is lawful for miners to form miners' unions and associations for the betterment of their condition, and to preserve and advance the scale of wages paid to said miners by all proper and legal means, and to solicit others to join such organization. For the accomplishment of such legal business, they may refuse to work, if they see fit, and persuade and solicit others so to do. They may lawfully aid striking miners by advancement and contribution of money and by all lawful means, and when so doing they

are acting within the law; and no member of such organization who has only acted as a member of such association in the accomplishment of its lawful business can be held responsible for the acts of such association or union in violation of law, unless he consented or advised or aided or abetted therein, or in some manner intentionally contributed to said unlawful act." The principal objection urged against these instructions by the appellant is that the words "aid, abet, counsel, and advise" are used disjunctively. This, it is claimed, is, under section 7697, Rev. St., error. Said section is as follows: "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense or aid and abet in its commission though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment against such an accessory than are required in an indictment against his principal." In support of the appellant's contention we are cited to one authority, viz. *People v. Compton*, 123 Cal. 403, 56 Pac. 44. In this case the court, at page 412, 123 Cal., and at page 48, 56 Pac., says: "The court further instructed the jury 'that the distinction between an accessory before the fact and the principal in case of a felony is abrogated, and all persons concerned in the commission of a felony, whether they directly committed the act constituting the offense, or aided or abetted in its commission, though not present, shall be prosecuted, tried, and punished as principals.' As to this instruction, it is sufficient to say that it charges in the disjunctive that one who either aids or abets is guilty, when the language of the Penal Code (section 971), in consonance with justice, required that one shall both aid and abet. This precise error has been recently considered in the case of *People v. Dole*, 122 Cal. 486, 55 Pac. 581." This case was decided in January, 1890. The case of *People v. Dole* was decided in November, 1898. In the latter case (*People v. Dole*, 122 Cal. 486, 55 Pac. 581) the court, speaking through Beatty, C. J., at page 492, 122 Cal., and at page 584, 55 Pac., said: "The trial court, in submitting the case to the jury, gave the following instruction: 'If you believe from the evidence, beyond a reasonable doubt, that the defendant committed the offense charged in the information, or aided, abetted, or assisted any other person or persons to commit the same, then you should find the defendant guilty.' This instruction is clearly erroneous. Aside from the person who directly commits a criminal offense, no other is guilty as principal unless he aids and abets. Pen. Code, §§ 31, 271. A person may aid in the commission of an offense by doing innocently some act essential to its accomplishment; and this is especially true in regard to the crime of

forgery, for he may pass the forged instrument without knowledge that it is forged. The word 'aid' does not imply guilty knowledge or felonious intent, whereas the definition of the word 'abet' includes knowledge of the wrongful purpose of the perpetrator, and counsel and encouragement in the crime. The error in the instruction is therefore clear, and it cannot be held that it is harmless error to instruct a jury that they must convict upon proof of a fact which does not necessarily imply guilt. It was certainly possible for the jury to have found consistently, with the evidence in this case, that defendant did not forge or raise the check himself, but that it was forged by some other person, and that his only connection with it was to pass it to the loan and trust company after receiving it from the forger, and without any knowledge of its spurious character, in which case he would have been innocent of any crime. But the court, at the request of the defendant, instructed the jury as follows: 'If the evidence does not establish beyond a reasonable doubt that the defendant made or altered or forged or counterfeited the check in question, or any part thereof, with intent to defraud another, and if the evidence does not establish beyond a reasonable doubt that the defendant uttered or published or passed as true and genuine the said check, knowing the same to be false or altered or forged or counterfeited, with intent to prejudice or damage or defraud any person, then the mere possession by the defendant of the said check, and his indorsing and negotiating the same, is not sufficient, standing alone, to convict; for proof of the mere possession and negotiating of a forged check is insufficient to convict a defendant of forgery, in the absence of a guilty intent or guilty knowledge.' This specific instruction on the precise point affected by the error above noted in the charge of the court, we think, cured the error; for, construing the two instructions together, the jury could not have failed to understand that merely aiding or assisting in the commission of a crime, without guilty knowledge, is not criminal. In other words, they could not, in view of this instruction, have taken the charge as to aiding or assisting in its narrow and literal sense."

In the case at bar the court gave, of its own motion, instructions numbered from 1 to 59. In the instructions complained of and set forth above, the jury were given to understand that the state must prove beyond a reasonable doubt that the defendant knowingly and intentionally aided the commission of an unlawful act which had a tendency to destroy human life, or advised or encouraged the same, before they could convict him. Among said instructions are those numbered 33 and 40, which are as follows: "No. 33. To find a person guilty of a conspiracy to commit a crime, it is necessary for you to be satisfied from the evidence, beyond a reasonable doubt, that the

party accused shared in the criminal purpose; and in this case, if you find that the defendant did no overt act in carrying out the conspiracy, and did not enter into any unlawful agreement, then, even though you should be satisfied from the evidence, beyond a reasonable doubt, that the defendant knew of the conspiracy and did not dissent from it, then such knowledge of the conspiracy on the part of the defendant would be insufficient to warrant you in presuming that he was guilty of the crime charged." "No. 40. The burden is on the prosecution to prove beyond a reasonable doubt that a combination and conspiracy were formed (that is to say, that the defendant and others conspired and agreed to intimidate by force and violence, and threats of violence, the employees of the Bunker Hill & Sullivan Mining & Concentrating Company, and to drive from their employment all nonunion miners of the Coeur d'Alene), and that, in the execution or carrying out of such conspiracy and design, some one of the parties to said conspiracy and agreement shot and killed James Cheyne. The burden of establishing these facts is upon the prosecution throughout, and never shifts to the defendant; and, therefore, if the prosecution has failed to prove beyond a reasonable doubt each and every one of these facts, you should acquit him." The instructions, taken as a whole, informed the jury that they must find from the evidence, beyond a reasonable doubt, that the defendant acted knowingly and with guilty purpose and intent, and excluded the idea that they could convict because he innocently aided in the perpetration of a crime. While the instructions complained of are in part erroneous, yet no substantial right of the defendant was prejudiced. The instructions, taken as a whole, fairly gave the jury the whole law of the case. The last sentence above, in our opinion, is all that is necessary to be said in regard to the twentieth to the thirty-first specifications of error, based upon the action of the court in refusing certain requests of the defendant for instructions.

The thirty-second specification of error is as follows: "The court erred in denying defendant's motion for a new trial." The reasons urged in support of this specification of error are: First, because the court misdirected the jury in matters of law, and erred in the decisions of questions of law arising during the trial; second, because the verdict is contrary to law. What we have heretofore said disposes of the first ground. As to the second ground, it is urged that the evidence showed that James Cheyne did not die in Shoshone county, but in Spokane, Wash. This fact was testified to by a brother of deceased, and the bill of exceptions states that this was all of the testimony as to where the deceased died. The fifty-fifth instruction given by the court is as follows: "No. 55. In conclusion, let me instruct you that in this case the state must

prove beyond a reasonable doubt, and to a moral certainty, (1) that James Cheyne is dead; (2) that he came to his death in the county of Shoshone, state of Idaho; (3) that Paul Corcoran, the defendant, unlawfully, willfully, feloniously, and of his deliberately premeditated malice aforethought, by the means set forth in the indictment, killed and murdered the said James Cheyne; (4) that the deceased died within a year and a day after the stroke received or the cause of death administered. Subdivision 3 of this instruction must be read and considered by the jury in connection with the instructions governing conspiracies, herewith submitted." Appellant contends that the verdict was contrary to this instruction. We do not think so. The evidence showed that deceased was shot during the riot at Wardner, in Shoshone county, April 29, 1899, being badly wounded; that, in the effort to save his life, he was carried to the Sacred Heart Hospital, in Spokane, Wash., where he died. But he "came to his death," within the meaning of the instruction, in Shoshone county, by there receiving the injury of which he died, if such was the case. Defendant was tried upon the theory that in the riot of April 29, 1899, through the actions of a large body of conspirators, of which he was one, in doing an unlawful act such conspirators shot and wounded the deceased, of which wound said deceased died within a few days after its infliction. The jury so found. The venue was properly laid. The injury which produced death being inflicted in Shoshone county, the defendant "came to his death," within the meaning of the instruction, "in the county of Shoshone, state of Idaho." In the absence of the evidence showing the nature and necessary effects of the injuries received by the deceased in Shoshone county, we cannot overturn the verdict of the jury by presuming that the injuries which caused the death of deceased were inflicted elsewhere. The trial court had jurisdiction of the offense. Section 7491, Rev. St., is as follows: "The jurisdiction of a criminal action for murder or manslaughter when the injury which caused the death was inflicted in one county and the party injured dies in another county or out of the territory, is in the county where the injury was inflicted." Both under this statute and under said instruction, the deceased "came to his death" in the county where the injury which caused the death was inflicted.

Appellant argues in his brief that the evidence was insufficient. That is a matter that we cannot inquire into in the absence of the evidence.

It is also urged that the motion for a new trial should have been sustained because it was shown by the affidavits used on the hearing of said motion that the jury was guilty of misconduct, as follows: "First, in the inordinate use of intoxicating liquors while in the performance of their duty as

jurors, and without permission of the court; second, that the jury separated, contrary to the order of the court." To sustain these two alleged instances of misconduct of the jury, appellant filed numerous affidavits, which were considered on the hearing of the motion for a new trial. In these affidavits we find statements tending to show that the jury daily drank large quantities of beer and whisky; that they read the daily papers in which the proceedings of the trial were reported, the reports being unfair to the defendant and tending to prejudice him; that one of the jurors, during a recess of court, while the jury was in custody of a bailiff and were taking a walk, climbed upon a box car, and sat down on the edge of same in the manner in which some of the witnesses at the trial stated the defendant sat while returning on the train from Kellogg on April 29, 1890,—said juror, while on said box car, being watched by the other jurors; that on one occasion two women visited the jury in the jury room, and remained with the jury some 15 minutes; that during the progress of the cause, but before the final submission of the cause to the jury, jurors separated themselves from the body of the jury; and that during the progress of the trial one of the bailiffs (R. L. Duncan) said in the presence and hearing of one of the jurors (William Thomas) that "a miner's life has not been safe in this cañon [pointing up and down the cañon] for seven years." We have carefully examined all of the affidavits used upon the hearing of the motion for a new trial, both on behalf of the defendant and on behalf of the state, and are clearly of the opinion that the charges of misconduct on the part of the jury are not sustained. Each of the jurors and each of the bailiffs positively denied, by separate affidavit, each of the charges of misconduct. We are firmly convinced that the charges made against the conduct of the jury during the progress of the trial are untrue. There is only one particular in which we think the jurors acted indiscreetly, and this is shown by the following quotation from the affidavit of one of the jurors: "Affiant further states that no member of the jury at any time during the trial was in the slightest degree intoxicated or under the influence of liquor; that said jury was permitted to have liquor in small amounts on three or four occasions, but never to the extent that the effects of same were felt or noticed to any extent whatever, so far as being intoxicated was concerned. Affiant further states that no liquor was given them after the case was submitted to them." All of the jurors and several other persons depose to the same effect. It was improper to supply the jurors with liquor to any extent. Officers in charge of jurors should not furnish them liquor, nor permit it to be furnished to them. Men while sitting upon a jury should not, during a recess of the court or otherwise, partake of intoxicants, espe-

cially where, as in the case at bar, a life depends upon their verdict. Every one who is tried upon a criminal charge is entitled to a fair and impartial trial. The trial, and especially the conduct of the jury, should not only be fair in fact, but should also be fair and free from all misconduct in appearance. Hence the use of intoxicating drinks by individuals who are acting as jurors at any time during the progress of the trial deserves severe condemnation. Nevertheless we cannot, under the weight of present authority, overturn the verdict of the jury in this case unless it appears from the record that the defendant was prejudiced by the jurors using intoxicating liquors. No showing to this effect is made. The jurors used but little liquor, and none of them were intoxicated to any extent. We are satisfied that the defendant was not prejudiced by the conduct of the jury in any particular, and that the use of liquor by the jury worked no harm to the defendant. See *State v. Reed* (Idaho) 35 Pac. 706.

It is stated in one of the affidavits introduced by the defendant that two of the jurors, before the trial commenced, made statements tending to show that they were biased against the defendant. We held in *State v. Davis*, 53 Pac. 678, that such affidavits did not show a ground for new trial. The jurors were examined upon their voir dire, but the testimony given by them upon such examination is not before us. We must conclude that they stated that they were not biased or prejudiced against the defendant, and had not formed or expressed any opinion as to his guilt or innocence, or that they would have been excused for cause. Error must affirmatively appear in the record, or the judgment will be affirmed. See *State v. Hurst* (Idaho) 39 Pac. 554; *State v. Haverly* (Idaho) 42 Pac. 506.

A careful consideration of the record before us convinces us that the defendant had a fair and impartial trial; that the law was fully, correctly, and ably given to the jury in the instructions; and that no error affecting any substantial right of the defendant was committed during the trial. Wherefore the judgment and the order appealed from are both affirmed.

HUSTON, C. J., and SULLIVAN, J., concur.

On Rehearing.

(Aug. 4, 1900.)

HUSTON, C. J. We have considered the petition for a rehearing filed in this case. There is no question presented by the petition which has not been fully and repeatedly presented to and passed upon by this court. A reiteration of our conclusions would add nothing to their force, and a detailed review of the questions presented by the petition would be but an act of supererogation. The petition for a rehearing is denied.

QUARLES and SULLIVAN, JJ., concur.

WILSON v. WOOD et al.

(Supreme Court of Oklahoma. June 30, 1900.)

TAX CERTIFICATE—ASSIGNMENT—DEED—EVIDENCE—CONCLUSIVENESS—CONSTITUTIONAL LAW.

1. A tax certificate represents an interest in real estate, and can only be assigned, so as to entitle the assignee to a deed thereon, by the assignor executing such assignment, and acknowledging the same before some officer having power to take acknowledgment of deeds. If the assignment is made by an attorney in fact, the power of attorney must be executed and acknowledged in the same manner that deeds are executed and acknowledged. No mere agent has power or authority to assign and acknowledge the assignment of a tax certificate so as to authorize a tax deed to issue to such assignee.

2. A tax certificate, and a valid assignment thereof, where the assignee claims title under a tax deed, are essential and necessary to the validity of the deed, and to the authority of the taxing powers to divest the title of the former owner or those claiming through him.

3. The legislature has no power to declare a tax deed, or the recitals therein, as conclusive evidence of a compliance with those matters which are essential to the exercise of the taxing power, or to those matters which are necessary to be done in order to divest the title of the former owner, or those claiming through him, and to execute a valid deed of conveyance.

4. In judicial investigations, the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce his proofs. Except in those cases which fall within the established doctrine of estoppel at the common law, or cases resting on like reasons, it is not within the power of the legislature to declare that a particular item of evidence shall preclude a party from establishing his rights in opposition to it. (Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice B. F. Burwell.

Action by Wallace Wood, Jr., against Jane Wilson and others. Judgment for plaintiff, and defendant Wilson appeals. Affirmed.

J. S. Jenkins, for plaintiff in error. H. B. Mitchell, for defendants in error.

BURFORD, C. J. This was a suit in equity to cancel a tax deed. The plaintiff in the court below was the holder of a mortgage upon the real estate described in the tax deed. Alfred P. Bond was the owner of the land, and Jane Wilson the holder of the tax deed. The land was sold for taxes, and a certificate of sale issued to W. J. Patterson, and it was alleged in the petition that the tax certificate had never been properly assigned to Jane Wilson, but that a pretended assignment had been made by one John Holzapfel, as agent, who had no authority to make said assignment, and that on said pretended assignment the county treasurer had executed a pretended deed to Jane Wilson, which was in violation of the rights of the mortgagee. It was further alleged that a tender of a sufficient sum of money had been made to pay all taxes, penalties, costs, and interest for which the property had been liable, and the tender was further offered in court. The plaintiff asked for a foreclosure

of his mortgage, the cancellation of the tax deed, and sale of the land to pay his mortgage debt. The tax certificate and assignment thereon and the tax deed were each made exhibits to the petition. The certificate shows that it was issued by the county treasurer of Oklahoma county on the 18th day of November, 1895, to W. J. Patterson, the purchaser at tax sale of the real estate described therein. It bears a written assignment, executed January 13, 1898, to Jane Wilson, signed, "W. J. Patterson, by John Holzapfel," and on the same day Holzapfel acknowledged the execution of the assignment before a notary public, as his own free act and deed, as agent for W. J. Patterson. The tax deed was executed on June 28, 1898, by the county treasurer, to Jane Wilson, on presentation of the certificate and assignment above described. A demurrer was filed to the petition, and overruled. The defendant, Jane Wilson, then filed her answer, in which she denied that her tax deed was void; denied that the tax certificate or the assignment from Patterson was void or invalid; and averred that she paid full value for the same, and received said certificate, and that she delivered said certificate to the county treasurer, and received said deed, and that no tender of the amount of taxes "admitted to be due" had been made to her. She prayed that her title be quieted, and plaintiff's mortgage canceled. A demurrer was filed to this answer, which was sustained by the court. The defendant elected to stand on the answer, and the court rendered judgment for plaintiff as prayed in his petition. From this judgment Jane Wilson appeals.

But one question is presented and argued by plaintiff in error. It is contended that the statute (section 5667) makes a tax deed conclusive "that the grantee named in the deed or his assigns was the purchaser," and that the court erred in considering the assignment of the tax certificate, and holding such assignment void. This incidentally presents two questions, viz.: First, how may a tax certificate be legally assigned? and, second, are the certificate and assignment essential to the validity of the estate conveyed by the tax deed?

Section 5667 provides: "The purchaser of any tract of land sold by the county treasurer for taxes will be entitled to a certificate in writing describing the land so purchased and the sum paid and the time when the purchaser will be entitled to a deed, which certificate shall be assignable, and said assignment must be acknowledged before some officer having power to take acknowledgment of deeds; such certificate shall be signed by the treasurer in his official capacity, and shall be presumptive evidence of the regularity of all prior proceedings." Section 5666 provides "that if the land is not redeemed within two years, and the certificate of purchase has not been returned for cancellation, the treasurer shall execute a deed to the purchaser, his heirs or assigns, which deed shall

vest in the grantee an absolute estate in fee simple in such land."

While the tax certificate does not pass title to the land, it is evidence of an equitable interest, which may ripen into a legal title, and therefore does convey an interest in land. The certificate is a part of, and is essential to, the sale. There cannot be a completed sale without it. It is one of the essentials necessary to confer title on the owner, and hence cannot be dispensed with. It is not a negotiable instrument, and cannot be assigned except where authorized by statute. Then the statutory mode of assignment must be followed. In the absence of a statute authorizing an assignment of a tax certificate, the interest in the land of which the certificate is the evidence can only be conveyed in the manner that real estate is conveyed. Where an assignment is made without authority of law, and a tax deed is made to the assignee, the deed will be void. Black, *Tax Titles*, §§ 312-320. Our statute provides that tax certificates "shall be assignable, and such assignment must be acknowledged before some officer having power to make acknowledgment of deeds." Acknowledged by whom? Certainly by the owner, or some one authorized to execute this power for him. It cannot be seriously contended that a mere agent may assign a certificate which conveys an interest in land, and personally acknowledge the execution of such assignment. The statute (Laws 1897, c. 8) prescribes how conveyances may be executed. Section 3 provides: "Any instrument affecting real estate may be made by an attorney in fact, duly appointed and empowered as hereinafter provided." Section 19 provides: "A power of attorney in fact for the conveyance of real estate or any interest therein, or for the execution or release of any mortgage therefor, shall be executed, acknowledged and recorded in the manner required by this act for the execution, acknowledgment, and recording of deeds and mortgages, and shall be recorded in the county where the land is situated." It will be observed that the assignment by the agent of Patterson did not comply with the statute regulating assignments of tax certificates, nor with the law governing conveyances; hence the assignment indorsed on the certificate is not valid for any purpose.

Counsel for plaintiff in error insist that the assignment was good as between Patterson, the purchaser, and Wilson, the transferee. Conceding this proposition to be correct, it does not follow that the assignment is sufficient to transfer such an interest in the land as will defeat the title of the owner or the mortgagee. This assignment must be sufficient to transfer an interest in real estate, and to entitle the assignee to a conveyance which will divest the title or interest of the mortgagee. The assignment, as between Patterson and Wilson, was probably sufficient to entitle her to the redemption money, or, as between them, to have a valid assign-

ment executed, and a good deed made, but not as against others having an interest in the land adverse to them. We think the trial court was correct in holding that the assignment of the certificate, and deed based thereon, were void as against the mortgagee's interest as shown by the petition.

This brings us to the second branch of the question: Is a certificate an essential to the validity of the title conveyed by a tax deed, and is the deed conclusive as against the mortgagee in this cause? There has been much discussion by the text writers and jurists as to how far the legislature may go in making matters of evidence conclusive without infringing on the constitutional limitations. The supreme court of the United States in *Marx v. Hanthorn*, 148 U. S. 172, 13 Sup. Ct. 508, 37 L. Ed. 410, said: "It is competent for the legislature to declare that a tax deed shall be prima facie evidence, not only of the regularity of the sale, but of all prior proceedings, and of the title of the purchaser; but the legislature cannot deprive one of his property by making his adversary's claim to it, whatever that claim may be, conclusive of its own validity, and it cannot, therefore, make the tax deed conclusive evidence of the holder's title to land." In *McCready v. Sexton*, 29 Iowa, 356, the supreme court, after an exhaustive review of this question, sums up as follows: "We conclude, therefore, upon principle, as well as upon precedent and authority, that the legislature does not possess power to declare the tax deed to be conclusive evidence of compliance with those matters which are essential to the exercise of the taxing power; but as to non-essentials, or matters merely directory, such power may exist, and the deed becomes conclusive of their due performance." This rule requires some modification, or rather extension. It may be said to be correct that the legislature has no power to declare the tax deed to be conclusive evidence of compliance with those matters which are essential to the exercise of the taxing power, but we think it equally as correct that the legislature cannot make the tax deed conclusive evidence of compliance with any act or condition required to be done or performed which is necessary to divest title to, or interests in, real estate, and vest the same in the grantee in a tax deed. Judge Cooley, in his valuable treatise on *Constitutional Limitations* (6th Ed. p. 452), states the true rule as follows: "But there are fixed bounds to the power of the legislature over this subject which cannot be exceeded. As to what shall be evidence, and which party shall assume the burden of proof, in civil causes, its authority is practically unrestricted, so long as its regulations are impartial and uniform; but it has no power to establish rules which, under pretense of regulating the presentation of evidence, go so far as altogether to preclude a party from exhibiting his rights. Except in those cases which fall within the familiar doctrine of estoppel at the common law, or

other cases resting upon the like reasons, it would not, we apprehend, be in the power of the legislature to declare that a particular item of evidence should preclude a party from establishing his rights in opposition to it. In judicial investigations, the law of the land requires an opportunity for a trial, and there can be no trial if only one party is suffered to produce proofs. The most formal conveyance may be a fraud or a forgery. Public officers may connive with rogues to rob the citizen of his property, witnesses may testify or officers certify falsely, and records may be collusively manufactured for dishonest purposes; and that legislation which would preclude the fraud or wrong being shown, and deprive the party wronged of all remedy, has no justification in the principles of natural justice or of constitutional law. A statute, therefore, which should make a tax deed conclusive evidence of a complete title, and preclude the owner of the original title from showing its invalidity, would be void, because being, not a law regulating evidence, but an unconstitutional confiscation of property." This same doctrine was announced by this court in *Weeks v. Merkle*, 6 Okl. 714, 52 Pac. 929.

As the certificate, and the proper assignment of it, were necessary steps precedent to the issuing of a valid tax deed in the case under consideration, we think the legislature had no power to preclude the persons interested in the real estate sought to be conveyed from having their validity inquired into. The assignment relied upon was in fact void. Without an assignment, no valid deed could issue to the plaintiff in error; and, as there was no assignment made in the manner required to transfer the interest in the land represented by the tax certificate, it follows that the deed was not valid as against the mortgagee.

It is next contended that, inasmuch as the answer denied the allegation of tender, an issue of fact was presented for trial which precluded the court from rendering judgment on demurrer. We do not think this objection is well founded. While it is true that the allegation was made in the petition that the plaintiff had tendered to the defendant in lawful money a sufficient sum to cover all taxes, interest, costs, and penalties for which the real estate was liable, in addition to this the offer was made in the petition to pay into court for use of defendant all such sums as the court might find to be due for taxes, interest, penalties, and costs. The answer contained this averment: "No payment of the amount of the taxes admitted to be due has been tendered or paid." This is not a denial of the averment in the petition. It limits the denial to taxes "admitted to be due." This is a negative pregnant, and denies nothing. There was no error in the rulings of the district court, and the judgment is affirmed, at the costs of plaintiff in error. All the justices concurring, except BURWELL, J., who tried the case below, not sitting.

PIERCE, Sheriff, v. ENGELKEMEIER.

(Supreme Court of Oklahoma. June 30, 1900.)

REPLEVIN—PARTIES DEFENDANT—SUBSTITUTION—CONTINUANCE—APPEAL—CASE-MADE.

1. In an action in replevin, in which the sheriff was defendant, and an application was made by the judgment creditors to be "substituted as defendants herein," and in which the property had not been replevied by the plaintiff, but was in the possession of the judgment creditors, who were nonresidents, and in which the application was not made before answer, and was unverified, and in which no security for costs was offered or given, it was properly refused by the district court.

2. The permission to substitute is, at any rate, discretionary with the court, and error cannot be assigned upon it unless the discretion is abused.

3. Under the circumstances as shown in this case, an application for continuance on the ground of the sickness of one of the attorneys in the cause was rightly refused by the trial court. The sickness of an attorney is not one of the statutory grounds entitling the party to a continuance. It is discretionary with the court to grant or refuse it.

4. The case-made should show in itself that it contains all the evidence, and when it is manifest from internal evidence that the case-made is seriously imperfect, and does not in fact contain all the evidence produced in the cause, it is impossible to determine assignments of error touching the improper admission of evidence, the propriety of certain instructions asked by the defendant, or the proposition that the verdict is not sustained by sufficient evidence.

(Syllabus by the Court.)

Error from district court, Kay county; before Justice Bayard T. Hainer.

Action by Elizabeth Engelkemeler against W. F. Pierce, sheriff. Judgment for plaintiff. Defendant brings error. Affirmed.

This action was brought in the district court of Kay county on the 28th day of September, 1897, by the defendant in error, who was the plaintiff below, to recover the value of 3,000 bushels of wheat, 150 head of hogs, 1 frame store building, and a frame house. On the 29th day of July, 1897, the Bank of Blackwell obtained a judgment in the probate court of Kay county against Henry Engelkemeler for the sum of \$351.91, and two days thereafter the United States School-Furniture Company and the Acme Harvester Company obtained judgments against the same defendant in the same court for the respective sums of \$764.95 and \$145.15. Executions were issued upon these judgments, and placed in the hands of the plaintiff in error, as sheriff of Kay county, and by him levied upon the property described in the petition, as the property of Henry Engelkemeler, the husband of the defendant in error. It was claimed by the plaintiff that about July 19, 1897, her husband, Henry Engelkemeler, had transferred to her all of the property thus taken, in settlement of a debt of \$3,825 claimed to be due to her in consideration of the proceeds of the sale, some years prior thereto, of 85 acres of land in Nebraska, which had belonged to her, and which had

passed by her consent, and as a loan, into the hands of her husband. A jury was impaneled to try the cause. It returned a verdict in favor of the plaintiff (defendant in error here) for the recovery of the property, or the value thereof, assessed at \$2,821.75, in case a delivery thereof could not be had, and judgment was rendered thereupon. The property had not been taken under the writ of replevin.

W. S. Cline and Ira A. Hill, for plaintiff in error. Dale & Blerer, for defendant in error.

MCATEE, J. (after stating the facts). When the case came on for trial, application was made by the United States School-Furniture Company, the Acme Harvester Company, and the Bank of Blackwell to be "substituted as defendants herein." This application was denied, and the denial is assigned as error. The application was based upon section 3917 of the Code of Civil Procedure, which provides that "In an action against a sheriff or other officer, for the recovery of property taken under an execution, and replevied by the plaintiff in such action, the court may, upon application of the defendant and of the party in whose favor the execution issued, permit the latter to be substituted as the defendant, security for the cost being given," and upon section 3908, which provides that "any person may be made a defendant that has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved." The property in this case was not "replevied by the plaintiff in the action." The defendant made no request to be admitted to the cause as associate defendant with Pierce, the sheriff, and no security for costs was proffered on behalf of the judgment creditors who sought to be substituted in lieu of the sheriff. The judgment creditors are nonresidents, and, since no security for costs was given or proffered, if the order which was sought for had been made the court would have done to the plaintiff the injustice of permitting nonresidents to be substituted in lieu of the resident sheriff; and, if the order had been made as requested by the creditor companies, the plaintiff would have been compelled to seek for the recovery of costs, not against the resident sheriff, but against the nonresident companies or corporations. It will be found upon an examination of section 3917 and the two sections which precede it, to wit, sections 3915 and 3916 of the Code of Civil Procedure, that the relief provided for in the former section must be sought in the terms and under the provisions of the preceding sections, one of which (3915) is that: "Upon affidavit of a defendant, before answer, in any action upon contract, or for the recovery of personal property, that some third party, without collusion with him, has or makes a claim to the sub-

ject of the action, and that he is ready to pay or dispose of the same, as the court may direct, the court may make an order for the safe keeping, or for the payment or deposit in court, or delivery of the subject of the action, to such persons as it may direct, and an order requiring such third party to appear, in a reasonable time, and maintain or relinquish his claim against the defendant. If such third party, being served with a copy of the order, by the sheriff, or such other person as the court may direct, fail to appear, the court may declare him barred of all claim in respect to the subject of the action, against the defendant therein. If such third party appear, he shall be allowed to make himself defendant in the action, in lieu of the original defendant, who shall be discharged from all liability to either of the other parties in respect to the subject of the action, upon his compliance with the order of the court for the payment, deposit or delivery thereof." The application in this case was not made until after the issues had been made up and the case set for trial, and the application was not verified as provided by the statute. The defendants did not, therefore, bring themselves within the provisions of the statute relied upon, and conformity with which would alone have justified the court in making the order asked for; and the power given to the court by the statute is discretionary, and the court may exercise it or not. It was said by the supreme court of Kansas, upon the statute under consideration, in *Wafer v. Bank*, 36 Kan. 292, 13 Pac. 209 (Chief Justice Horton), that: "The permission of the substitution is discretionary with the court, and the refusal of such permission cannot be assigned for error unless the discretion is abused. A sheriff has no absolute right to be exempt from all liability for his acts, and the section authorizes the substitution upon giving security for costs, merely, leaving the damages claimed to depend upon the sole responsibility of the substituted defendants. This action was instituted to recover the goods replevied, and also \$500 as damages for their detention. In some cases, if the sheriff could evade altogether his responsibility for damages, and devolve it upon nonresidents, great injustice might ensue. *Sifford v. Beaty*, 12 Ohio St. 189. Where the rights of a plaintiff will not be injured, the court, however, should permit such substitution, within the terms of the statute." Neither can the plaintiff in error rely upon the provisions of section 3908 of the Code of Civil Procedure, since the provision there is that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff," since this provision does not contemplate the complete displacement of the original defendant and his liability, and the entire substitution thereof of other defendants, as was sought for here, nor were the judgment creditors who proposed the substitution necessary parties to a com-

plete determination or settlement of the questions involved in the cause.

On September 10, 1898, the case was assigned for trial on September 14, 1898, and upon that day an application was presented by the defendant for a continuance for the term because of the absence of one of the defendant's counsel, T. J. Blevens. This the court refused, but passed the case one day later, to wit, the 15th of September, 1898. Upon this, the next day (the 15th of September) an application for continuance on account of the sickness of T. J. Blevens was renewed. The application was refused, and the cause was then tried. This refusal of the court is also assigned as error. The affidavit for continuance made by T. J. Blevens set forth that he was the sole and only attorney for the judgment creditors, the United States School-Furniture Company and the Acme Harvester Company; that W. S. Cline, whose name is signed to the affidavit herein, represents the Bank of Blackwell; that Cline in no way represents the clients represented by this affiant; that these clients were non-residents, living in distant states, and had confided the management and control of the defense solely to the affiant, who was familiar with their defense; that since the assignment of the cause, on September 10th, he had been taken suddenly ill, and was unable to talk or confer with any one concerning the cause. It appeared that on the 20th day of November, 1897, the defendant had demurred to the petition, the attorneys presenting the demurrer appearing as "W. S. Cline and T. J. Blevens, Attys. for Deft.," and that, the demurrer having been overruled, on the 2d day of March, 1898, the defendant filed his answer by "W. S. Cline and T. J. Blevens, Attorneys for Defendant," and that on the 15th day of August, 1898, the defendant consented that the plaintiff may file a reply; the consent being given by "W. S. Cline, Attorney for Defendant." Mr. Cline appears to have occupied quite as prominent a place in the conduct of the suit on behalf of the defendant as did Mr. Blevens. Edward L. Peckham also appeared on behalf of the defendant, and participated freely in the trial of the cause. The sickness of an attorney is not one of the statutory grounds entitling a party to a continuance, and it has been repeatedly and often held that an application for continuance, under circumstances like the present, is discretionary with the court. It was so held in *Colorado in Keegan v. Donnelly*, 52 Pac. 292, in which the court said that: "It has become the settled rule in this jurisdiction, confirmed by repeated decisions of the highest appellate tribunals, that the action of trial courts upon applications for continuances is discretionary with them, and, while such action is subject to review on appeal, it is reviewable only in case of manifest abuse of discretion. *Dawson v. Coston*, 18 Colo. 493, 33 Pac. 189; *Michael v. Mills*, 22 Colo. 440, 45 Pac. 429. * * *

And it was held by the supreme court of Kansas in *Asso-*

ciation v. Hitchcock, 4 Kan. 36, that: "It is very doubtful if, in a case like the one at bar, and under the circumstances surrounding it, the absence of a particular attorney ought to be held as a good ground for a continuance, though cases might, and no doubt frequently do, arise, in which a court, in the exercise of a sound discretion, would feel bound to defer a trial for such reason, but we think that this whole matter is very greatly within the limits of, and should be held subject to, such sound discretion of the court to whom the application is addressed; and in such case a reviewing court would decline to interfere, unless it could be shown that the inferior court had abused its power in the premises. In this instance it does not seem to us that the court was liable to a charge of this kind." And it was said by the supreme court of Minnesota in *Adamek v. Manufacturing Co.*, 66 N. W. 981, that generally the continuance of an action is discretionary with the trial court, which discretion this court will not undertake to control. Other cases to a like effect are *Condon v. Brockway* (Ill.) 41 N. E. 634; *Baumberger v. Arff* (Cal.) 31 Pac. 53; and *Zelinsky v. Price* (Wash.) 36 Pac. 28. The matter was within the sound discretion of the court, and we cannot see that this discretion was in any degree abused. The cause appears to have been well tried on behalf of the plaintiffs in error.

Other assignments of error are touching the admission of improper evidence over the objection of the defendant, and the refusal to give instructions asked for by the defendant, and that the verdict is not sustained by sufficient evidence. These assignments of error require an examination of the evidence in the cause; but, in order to do this, the case-made should show that it contains all the evidence, and this court will not consider the case-made unless it does contain all of the evidence, although the certificate of the trial judge may contain a statement to that effect. *Wade v. Gould*, 8 Okl. 690, 59 Pac. 11; *Devine v. Silvers*, 8 Okl. 700, 58 Pac. 781; *Board v. De Lana* (Okl.) 57 Pac. 162. It appears, upon examining the case-made, that a Nebraska statute was offered and admitted in evidence, and is not contained in the record; that the petition and answer in the case of *United States School-Furniture Company v. Bank of Kildare*, including *Henry Engelkemeier*, the journal entry and execution in the same case, and the papers and files in the case of *Bank of Blackwell v. Henry Engelkemeier*, and the journal entry and execution and all the papers and files in the case of *Acme Harvester Company v. Henry Engelkemeier* (all records of the probate court), were offered and admitted in evidence; that page 406 of the *Miscellaneous Deeds Record*, from the office of the register of deeds of Kay county, was admitted in evidence, and also a deed from *Record B* of the same office; and that certain pleadings in the causes of the judgment creditors referred to

were read to the jury,—and are not found in the case-made. Various other deeds and records were offered and admitted in evidence, and are not to be found in the case-made. Since it is, therefore, manifest from internal evidence that the case-made is seriously imperfect, and does not in fact contain all the evidence produced in the cause, it is impossible to determine the assignments of error touching the improper admission of evidence, the propriety of certain instructions asked by the defendant, or the proposition that the verdict is not sustained by sufficient evidence. The judgment of the trial court will therefore be affirmed. All the justices concur, except HAINER, J., who presided below.

HANENKRATT v. HAMIL.

(Supreme Court of Oklahoma. June 30, 1900.)

PLEADING—DEMURRER—TAX DEED—RECITALS.

1. A general demurrer to the whole of a petition which contains several statements of causes of action should be overruled if any of the statements of causes of action contained in said petition are good.

2. It is not competent for a tax-deed holder to introduce evidence to contradict the recitals of his tax deed.

3. The statutory form of a tax deed is for voluntary purchasers, and, where such a deed is based upon a sale to the county, it must be modified so as to show the conditions upon which the county can lawfully become a purchaser. A tax deed which recites a sale to the county as a competitive bidder is void upon its face.

(Syllabus by the Court.)

Error from district court, Logan county; before Chief Justice John H. Burford.

Action by Nellie M. Hamil against D. V. Hanenkraatt. Judgment for plaintiff. Defendant brings error. Affirmed.

This is an action brought by the defendant in error against the plaintiff in error in the district court of the First judicial district, in the county of Logan and territory of Oklahoma, for the recovery of certain real estate described in her certain petition filed in said court February 3, 1898, which petition is in words and figures as follows, to wit:

"In the District Court, First Judicial District, Territory of Oklahoma, in and for Logan County. Nellie M. Hamil, Plaintiff, v. D. V. Hanenkraatt, Defendant. Petition. The above-named plaintiff, Nellie M. Hamil, for cause of action against the above-named defendant, D. V. Hanenkraatt, states: That said plaintiff is, and was on the 23d day of November, 1897, and prior thereto, the owner in fee simple of the following described real property, situated in Logan county, Oklahoma territory, to wit: Lot number (23) twenty-three in block number fifty-five (55) in the city of Guthrie, and in that part of said city commonly known as 'Guthrie Proper,' same being part and parcel of the east one-half of section eight in township sixteen north, of range two west of the Indian me-

ridian. That said defendant now is, and ever since the 23d day of November, 1897, has been, wrongfully in possession of said real property, and to the exclusion of plaintiff. That said defendant is so in possession of said property, and claiming to be the owner thereof adversely to this plaintiff, under and by virtue of a certain written instrument purporting to have been executed by Ferdinand Ritterbusch, as treasurer of said county, on behalf of said territory of Oklahoma, and purporting to convey said property unto the said defendant. That a true and certified copy of said written instrument, together with all indorsements thereon, is hereto attached, made a part hereof, and marked 'Exhibit A.' That said instrument purports to be a tax deed. That said instrument is illegal and void, and of no effect, and conveys unto said defendant no right, title, or interest in or to said property. That said deed is void for that said property was never advertised for sale for taxes as in said deed recited. That the pretended published notice of sale under which said property was offered for sale contained no description of said property. That said pretended published notice of sale does not state the property advertised for sale is in either the city of Guthrie, or in Logan county, or in the territory of Oklahoma. That the amount of taxes, if any, due on said lot at the time of publication of said pretended notice, is not stated therein or thereby. That said written instrument is void on its face and of no legal effect, and conveys no right, title, or interest in or to said property to the said defendant, in that said written instrument recites that said property was sold 'at the door of the court house in said county.' Said instrument does not recite that said property was offered for sale and sold at the treasurer's office. Said instrument recites that said property was sold to the county of Logan at public auction, and fails to recite that there were at said sale no other bidders for said property, and does not recite that said property was bid in by the treasurer of said county, or any person authorized so to do, or qualified to make such purchase. That said instrument is recorded in the office of the register of deeds of said county, in Book 1, on page 43, and is a cloud upon the title of this plaintiff. That heretofore, on, to wit, the 20th day of December, 1897, plaintiff, by and through her lawfully and duly authorized agent, tendered to said defendant the sum of one hundred and sixty-five dollars (\$165), in good and lawful money of the United States, and demanded of said defendant that said defendant quitclaim said property to plaintiff. That said sum so tendered is the full and total amount of all taxes, penalties, fees, costs, interest, and charges chargeable against said property by defendant, paid out and expended on that account, and interest thereon, together with a certain sum claimed to have been paid out and expended by defendant in repairs on said property and improvements. That said de-

defendant then and there refused to accept said money and to execute said deed. That at all times since plaintiff has been ready and willing to pay said sum, and now offers to pay same, or such sum as the court shall determine to be the true and just amount, into court for the use and benefit of defendant on such account. Second cause of action: That plaintiff is, and was on the 23d day of November, 1897, and prior thereto, the owner in fee simple, and entitled to the possession, of the following described real property, situated in Logan county, Oklahoma territory, to wit: Lot number 23 in block number fifty-five (55) in the city of Guthrie, and in that part of said city commonly known as 'Guthrie Proper'; same being part and parcel of the east one-half of section eight in township sixteen north, of range two west of the Indian meridian. That said defendant is now, and ever since the 23d day of November, 1897, has been, wrongfully and unlawfully in possession of same, to the exclusion of this plaintiff, and without consent of plaintiff. That said real property, with the improvements thereon, is of the reasonable value of twenty dollars per month. That, by reason of said defendant's said wrongful and unlawful possession, plaintiff has been damaged in a great sum, to wit, the sum of \$500. Wherefore plaintiff asks that it be adjudged and decreed by the court that said written instrument purporting to convey title to said property to said defendant is null and void and of no legal effect; that the same be canceled of record; that defendant be estopped from claiming or asserting any right, title, or interest in or to said property thereunder; and that plaintiff's title in and to said property be forever quieted as against any and all claims of defendant therein or thereto. Plaintiff also asks judgment against defendant for possession of said property, and the sum of five hundred dollars (\$500) as damages for the use of said property, for costs of this action, and all other proper relief. [Signed] H. S. Cunningham and Fred Elkin, Attorneys for Plaintiff."

To which petition the defendant on the 28th of February, 1898, filed a demurrer, which demurrer is in words and figures as follows:

"In the District Court of Logan County, Oklahoma Territory, Nellie M. Hamil, Plaintiff, v. D. V. Hanenkratt, Defendant. Demurrer. Comes now said defendant and demurs to the petition filed in the above cause, for that the same does not state facts sufficient to constitute a cause of action in favor of said plaintiff and against said defendant. D. V. Hanenkratt, by H. M. Adams, His Attorney. [Indorsed on back as follows:] 2,493. Hamil v. Hanenkratt. Demurrer. Filed February 28th, 1898. Louis E. Pitts, Clerk Dist. Court. H. M. Adams."

Which demurrer was on the 6th day of April, 1898, by the court overruled, to which ruling of the court the defendant excepted. Afterwards, to wit, on the 12th day of Sep-

tember, 1898, the defendant filed his answer, which is in words and figures as follows:

"Territory of Oklahoma, Logan County. In the District Court, Nellie M. Hamil, Plaintiff, v. D. V. Hanenkratt, Defendant. Answer. Comes now the defendant, and answering the petition herein, says: (1) That he denies each and every one of the material allegations in the petition contained, except as hereinafter expressly admitted. (2) For a second defense to the second cause of action, that on the 27th day of October, 1890, lot twenty-three in block fifty-five in that division of the city of Guthrie known as 'Guthrie Proper' was conveyed by town-site board number six to John C. Wicks, and on that day became and was liable for taxation. (3) That the proper authorities of Logan county, Oklahoma territory, duly and according to law assessed said lot for taxation for the year 1894, and taxes were duly and legally levied on and assessed against said lot to the amount of \$39.73 for said year, and said lot was in law liable for said taxes. (4) That said taxes were not paid, and became in arrear and delinquent, and the proper officer of Logan county, to wit, the treasurer of said county of Logan, duly advertised said lot for sale, to pay said taxes, in the manner and for the time required by law, to wit, by advertising said lot for sale once a week for three consecutive weeks, commencing the first week in August, preceding the date of the said sale, in the official newspaper in Logan county, which said notice contained a statement that said lot 23 in block 55, Guthrie Proper, and all other lands on which the taxes for the said year 1894 remained unpaid, would be sold to pay the same, together with the time and place of making said sale, and a list of the lands to be sold, and the amount of the taxes due thereon, which said list included lot 23 in block 55, Guthrie Proper, and the amount of the taxes due on said lot. (5) That said authorities of Logan county did and performed everything legally required of them to be done in order to subject said lot to the payment of said taxes, and the collection thereof by law. (6) That in pursuance of said advertisement said lot was duly and regularly offered for sale at the office of said county treasurer at the time required by law, and designated in said notice. (7) That at said sale there were no bidders for said lot, offering the amount due thereon, and the lot was therefore bid off by the county treasurer of Logan county, for said county, for the amount of the taxes, penalty and interest and costs, due thereon. (8) That the defendant purchased the interest of the county of Logan in said real estate, paying therefor to the said county the full amount of the taxes, penalty, interest, and costs of sale and transfer, up to the date of his said purchase, and obtained the tax-sale certificate for said lot from said treasurer. (9) That on the 23d day of November, 1897, more than two years after said sale for taxes, the treasurer of Logan county executed to this defendant a tax deed

for said lot, but by the mistake of the said treasurer said deed contained erroneous recitals of fact, in the following particulars: That said deed recites that said sale took place at the court-house door in Guthrie, and further recites that the county of Logan was a bidder at said sale. (10) That said recitals are false, as said sale was made at the office of the treasurer of Logan county, and not at the court-house door, and said county did not bid at said sale in opposition to other bidders, but in the absence of bidders willing to bid the amount of the taxes, penalty, interest, and costs then due on said lot, said county, by its treasurer, did then bid off said lot for the amount so due, as required by law. (11) That said false recitals were put in said deed by the mistake of the said treasurer. (12) That since the execution of said deed the defendant has cared for said property, and has paid the taxes accruing thereon, amounting to \$89.15, and has, in good faith, put valuable and permanent improvements thereon to the amount of \$17.80. Wherefore the defendant demands judgment: (1) That said deed be corrected in the particulars above set out. (2) That the defendant go without day, and receive of the plaintiff his costs. (3) For such other and further relief as may be just. [Signed] H. M. Adams and Jones & Devereux, Attorneys for Defendant. [Indorsed on the back as follows:] No. 2,493. Hamil v. Hanenkratt. Answer. Filed Sept. 12, 1898. M. C. Hart, Clerk Dist. Court."

The tax deed mentioned in and relied upon by the defendant in his answer is in words and figures as follows:

"Tax Deed. Whereas, D. V. Hanenkratt did on the 23rd day of November, A. D. 1897, produce to the undersigned, Ferdinand Ritterbusch, treasurer of the county of Logan, in the territory of Oklahoma, a certificate of purchase, in writing, bearing date of 18th day of November, 1895, signed by Joseph Stiles, who at the last-mentioned date was treasurer of said county, from which it appears that the county of Logan did on the 18 day of November, 1895, purchase at public auction at the door of the court house in said county the tract, parcel, or lot of land lastly in this indenture described, and which lot was sold to the county of Logan for the sum of thirty-nine and seventy-three one-hundredths dollars, being the amount due on the following tract of land returned delinquent for nonpayment of taxes, costs, and charges for the year 1894, to wit: Lot number twenty-three (23) in block number fifty-five (55) in that subdivision of the city of Guthrie, Logan county, Oklahoma territory, known as 'Guthrie Proper'; and it appears that the county of Logan did on the 7th day of January, 1896, transfer all right, title, and interest in said certificate of purchase to D. V. Hanenkratt; and it further appearing that the said D. V. Hanenkratt is the legal owner of said certificate of purchase, and the time fixed by law for redeeming the land

therein described having now expired, and the same not having been redeemed as provided by law, and the said D. V. Hanenkratt having demanded a deed for the tract of land mentioned in said certificate, and which was the least quantity of the tract above described that would sell for the amount due thereon for taxes, costs, and charges, as above specified; and it appearing that said lands were legally liable for taxation, and had been duly assessed and properly charged on the tax book or duplicate for the year 1894, and that said lands have been legally advertised for sale for said taxes, and were sold on the 18 (eighteenth) day of November, 1895: Now, therefore, this indenture, made this 23rd day of November, 1897, between the territory of Oklahoma, by Ferdinand Ritterbusch, the treasurer of said county, of the first part, and the said D. V. Hanenkratt, of the second part, witnesseth, that the said party of the first part, for and in consideration of the premises, and the sum of one dollar in hand paid, hath granted, bargained, and sold, and by these presents doth grant, bargain, sell, and convey, to the said party of the second part, D. V. Hanenkratt, his heirs and assigns, forever, the tracts or parcels of land mentioned in said certificate, and described as follows, to wit: Lot number twenty-three (23) in block number fifty-five (55) in that subdivision of the city of Guthrie, Logan county, Oklahoma territory, known as 'Guthrie Proper.' Filed Feb. 3, 1898. Louis E. Pitts, Clerk Dist. Court. To have and to hold said mentioned tract or parcel of land, with the appurtenances thereunto belonging, to the said party of the second part, D. V. Hanenkratt, his heirs and assigns, forever, in as full and ample manner as the said treasurer of said county is empowered by law to sell the same. In testimony whereof the said Ferdinand Ritterbusch, treasurer of said county of Logan, has hereunto set his hand and seal on the day and year aforesaid. [Signed] Ferdinand Ritterbusch, County Treasurer. Attest. [Seal.]

"Territory of Oklahoma, County of Logan—ss.: Before me, R. Emmett Stewart, a county clerk in and for the above-named county and territory, on this 24th day of November, 1897, personally appeared Ferdinand Ritterbusch, to me known (or proven) to be the county treasurer of Logan county, and executed the above conveyance of land, and acknowledged the execution thereof to be his voluntary act for the purposes named. Witness my hand and official seal the date above written. R. Emmett Stewart, County Clerk, by N. J. C. Johnson, Deputy. My commission expires ——. [Seal.]"

Deed indorsed on back as follows:

"C. 1,751. Tax Deed from Ferdinand Ritterbusch, Treasurer of Logan County, to D. V. Hanenkratt. Territory of Oklahoma, Logan County—ss.: This instrument was filed for record on the 6 day of November, A. D. 1897, at 1:30 o'clock p. m., and duly recorded in Book 1, on page forty-three (43). Fee, \$1.-

25, in advance. J. J. Nelson, Register of deeds. [Seal.]”

Attached to said deed is the following:

“Register’s Certificate. Territory of Oklahoma, Logan County—ss.: I, J. J. Nelson, register of deeds in and for said county, hereby certify that the within is a true and correct copy of a tax deed now on file at my office, in Guthrie, Oklahoma territory, this 1st day of February, 1898. J. J. Nelson, Register of Deeds.”

Afterwards, to wit, on the 17th day of November, 1898, plaintiff filed in said court her demurrer to the answer of the defendant, which demurrer was on the 6th day of December, 1898, sustained by the court, to which defendant then and there excepted. Thereafter, to wit, on the 9th day of December, 1898, defendant filed his amended answer to plaintiff’s petition, which is in words and figures as follows:

“Territory of Oklahoma, Logan County. In the District Court. Nellie M. Hamil v. D. V. Hanenkratt. Answer. Comes now the defendant, and, for answer to the first cause of action set out in the plaintiff’s petition, says: (1) That he admits that at the time set out in the said petition the plaintiff was the owner of the land therein described, and that the same was sold for taxes as therein set out. (2) Except as herein admitted, the defendant denies each and every one of the material allegations in said first cause of action contained. (3) Further answering, the defendant says that he admits the right of plaintiff to redeem said land upon payment to the defendant of the amounts paid by him in taxes and permanent improvements thereon, as required by law; and the said defendant hereby offers to convey said land to the plaintiff upon the payment to defendant of said sum, amounting at this time to \$——. For a defense and cross petition to the second cause of action in said petition set out, the defendant says: (1) That on the 27th day of October, 1890, lot 23 in block 55 in that division of the city of Guthrie known as ‘Guthrie Proper’ was conveyed by town-site board number 6 to John C. Wicks, and on that day became and was liable for taxation. (2) That the proper authorities of Logan county, Oklahoma territory, duly and according to law assessed said lot for taxation for the year 1894, and taxes were duly and legally levied on and assessed against said lot to the amount of \$39.73 for said year, and said lot was in law liable for the payment of said taxes. (3) That said taxes were not paid, and became in arrear and delinquent, and the proper officer of Logan county, to wit, the treasurer of Logan county, duly advertised said lot for sale to pay said taxes in the manner and for the time required by law, to wit, by advertising said lot for sale once a week for three consecutive weeks, commencing the first week in August preceding the said sale, in the official newspaper in Logan county, which said notice contained a statement that said lot 23 in block 55, Guth-

rie Proper, and all other lands on which the taxes for the said year 1894 remained unpaid, would be sold to pay the same, together with the time and place of making said sale, and a list of the lands to be sold, and the amount of the taxes due thereon, which said list included said lot 23 in block 55, Guthrie Proper, and the amount of taxes due on said lot. (4) That the said authorities of Logan county did and performed everything legally required of them to be done in order to subject said lot to the payment of said taxes and the collection thereof by law. (5) That in pursuance of said advertisement said lot was duly and regularly offered for sale at the office of said county treasurer at the time required by law, and designated in said notice. (6) That at said sale there were no bidders for said lot offering the amount due thereon, and the said lot was therefore bid off by the county treasurer of Logan county, for said county, for the amount of the taxes, penalty, interest, and costs due thereon. (7) That the defendant purchased the interest of the county of Logan in said real estate, paying therefor to the said county the full amount of the taxes, penalty, interest, and costs of sale and transfer up to the date of his said purchase, and obtained the tax-sale certificate for said lot from said treasurer. (8) That on the 23d day of November, 1898, more than two years after said sale for taxes, the treasurer of Logan county executed to the defendant a tax deed for said lot; but by the mistake of the said treasurer said deed contained erroneous recitals of fact, in the following particulars: That said deed recites that said sale took place at the court-house door in Guthrie, and further recites that the county of Logan was a bidder at said sale. (9) That said recitals are false, as said sale was made at the office of the treasurer of Logan county, and not at the court-house door, and said county did not bid at said sale in opposition to other bidders, but in the absence of bidders willing to bid the amount of the taxes, penalty, interest, and costs then due on said lot, said county, by its treasurer, did then bid off said lot for the amount so due, as required by law. (10) That said false recitals were put in said deed by the mistake of the said treasurer. (11) That since the execution of said deed this defendant has cared for said property, and has paid the taxes accruing thereon, amounting to \$89.15, and has in good faith put valuable and permanent improvements thereon to the amount of \$17.80. Wherefore the defendant demands judgment: (1) That said deed be corrected in the particulars above set out. (2) That the defendant go without day, and recover of the plaintiff his costs. (3) For such other and further relief as may be just. H. M. Adams, Jones & Devereux, Attorneys for Defendant. [Indorsed on the back as follows:] No. 2,493. Hamil v. Hanenkratt. Amended Answer. Filed Dec. 9, 1898. M. C. Hart, Clerk Dist. Court.”

On the 11th day of February, 1899, plaintiff filed a demurrer to the amended answer

and cross petition of the defendant, which demurrer was in words and figures as follows:

"In the District Court of Logan County, Oklahoma Territory. Nellie M. Hamill, Plaintiff, v. D. V. Hanenkratt, Defendant. Demurrer to Answer. Comes now Nellie M. Hamill, plaintiff in the above-entitled action, and demurs to that part of defendant's amended answer entitled 'Defense and Cross Petition to the Second Cause of Action' of plaintiff, for the following reasons, viz.: (1) For the reason that said defense and cross petition does not state facts sufficient to constitute a defense to the second cause of action stated in plaintiff's petition. (2) For the reason that said defense and cross petition does not state facts sufficient to constitute a cause of action against plaintiff in favor of defendant. (3) For the reason that there is a defect of parties defendant to said defense and cross petition, in that the treasurer of Logan county is not made a party defendant thereto. H. S. Cunningham and Fred M. Elkin, Attorneys for Plaintiff, Hamill. [Indorsed on back as follows:] No. 2,493. In District Court. Hamill v. Hanenkratt. Demurrer to Second and Amended Answer. Cross Petition. Filed February 11, 1899. M. C. Hart, Clerk Dist. Court. H. S. Cunningham and Fred M. Elkin."

Thereafter, to wit, on, to wit, the 18th day of February, 1899, the court overruled said demurrer to the second amended answer and cross petition of the defendant, to which the plaintiff excepted. On the 23d day of February, 1899, the plaintiff filed her reply to the amended answer and cross petition of the defendant. Thereafter, to wit, on the 29th day of April, 1899, this cause came on for trial upon the merits before the court, a trial by jury having been waived. The court, after hearing the evidence, and arguments of counsel, and being fully advised in the premises, finds for the plaintiff, the judgment of the court being in words and figures as follows:

"In the District Court of the First Judicial District, Territory of Oklahoma, in and for Logan County. Nellie M. Hamill, Plaintiff, v. D. V. Hanenkratt, Defendant. (No. 2,493.) Judgment. Now, on this 29th day of April, 1899, the same being a judicial day of the regular 1899 term of court, the above-entitled cause came on for trial upon the issues joined by the pleadings. The plaintiff herein, Nellie M. Hamill, appeared by her attorney, Fred M. Elkin, and the defendant herein, D. V. Hanenkratt, appears in person and by his attorney, John Devereux. Both parties announce ready for trial, and waive trial by jury, and thereupon respectfully offer all their evidence and rest. The court having heard the evidence and argument of counsel, and being fully advised in the premises, finds the facts to be as follows: That at the time of the commencement of this action the said defendant was, and ever since has continued, in the possession of the lot in controversy

herein, to wit, lot twenty-three (23) in block fifty-five in the city of Guthrie, Logan county, Oklahoma territory, and in that part of the city commonly known as 'Guthrie Proper'; that said defendant so in possession of said property claims title thereto under and by virtue of a certain tax deed executed by the treasurer of said county, as treasurer, on the 23d day of November, 1897; that all the proceedings for the sale of said property anterior to the execution of said deed were regular and in conformity with law; that the said deed so executed by said county treasurer is void upon its face, and conveys no title to the defendant; that prior to the 20th day of December, 1897, said defendant, in the procurement of said deed for, and in payment of taxes, penalties, and charges, and the making of necessary repairs upon, said property, paid out a large sum of money, and on said last-named date there was due and owing to said defendant on such account the sum of one hundred and sixty-five dollars $\frac{00}{100}$; that on said 20th day of December, 1897, said plaintiff tendered unto said defendant the sum of one hundred sixty-five dollars (\$165) in lawful money of the United States, and demanded of said defendant the possession of said property; that said plaintiff has ever since kept said tender good; that at the time of the execution of the aforesaid deed said plaintiff was the owner in fee simple of said property, and was and now is entitled to redeem same from said tax sale; that, upon making tender as aforesaid at the beginning of this action and at this time, plaintiff was and is entitled to the possession of said property; that since the making of the aforesaid tender the said defendant has paid taxes on said property in the sum of nineteen and $\frac{30}{100}$ dollars (\$19.30), which last-named sum, with interest thereon in the sum of forty-five cents, and the aforesaid sum of one hundred and sixty-five dollars, are now due and payable from plaintiff to defendant; that said defendant has been unlawfully in the possession of said property for a period of sixteen and one-half months; that the rental value of said property is ten dollars (\$10.00) per month; and that said plaintiff should recover from said defendant, for and on account of such rent, the sum of one hundred and sixty-five dollars (\$165), now due and payable. Now, therefore, it is by the court considered, ordered, adjudged, and decreed as follows: That the said plaintiff have and recover of and from said defendant the possession of said property, to wit, lot twenty-three (23) in block fifty-five (55) in the city of Guthrie, Logan county, Oklahoma territory, and in that part of said city commonly known as 'Guthrie Proper'; the costs of this action, taxed at — dollars; and that said deed be, and the same is hereby, canceled of record. It is further considered, ordered, adjudged, and decreed by the court that the said defendant have and recover of and from the said plaintiff the above balance of nineteen dollars and seventy-five cents, and that,

upon failure of plaintiff to pay said last-named sum into court for the use and benefit of said defendant, the aforesaid deed be reformed as in said defendant's counterclaim prayed; that execution herein is stayed for ten days from this date. Thereupon said defendant files a motion for a new trial, and the court, being fully advised in the premises, now overrules said motion, and each and every ground thereof; to which ruling the defendant excepts. Now, therefore, it is by the court further ordered that the said defendant have sixty (60) days in which to make and serve case-made; that plaintiff have ten (10) thereafter in which to suggest amendments thereto, and that said case-made be settled upon five days' notice in writing; that supersedeas bond be fixed at the sum of three hundred dollars. O. K. Jno. Devereux, Atty. for Defendant. O. K. Fred M. Elkin, Attorney for Plaintiff. [Indorsed:] No. 2,493. *Hamil v. Hanenkratt*. Filed May 6, 1890. M. C. Hart, Clerk District Court. Judgment."

To which judgment of the court the defendant then and there excepted, and thereupon filed a motion for a new trial, which motion was overruled by the court, and exception saved by the defendant. To which judgment of the court, and the overruling of said motion for a new trial, the defendant then and there excepted, and brings the cause here for review.

John Devereux and Adelbert Hughes, for plaintiff in error. Fred M. Elkin, for defendant in error.

IRWIN, J. (after stating the facts). The plaintiff in error in this case submits the case on two propositions only, to wit: That the petition of the plaintiff in the court below does not state a cause of action, and hence the trial court should have sustained the demurrer of the defendant to the petition of the plaintiff; and, second, that the court below erred in not sustaining the motion for a new trial.

In regard to plaintiff in error's first assignment, to wit, that the court erred in overruling the demurrer to the petition, it will be noticed that the demurrer is general, and goes to the whole petition, and not to each count thereof. Section 4005 of the Statutes of Oklahoma of 1893 provides: "In any action for the recovery of real property it shall be described with such convenient certainty as will enable an officer holding an execution to identify it." Section 4492 of the same statute reads as follows: "In an action for the recovery of real property it shall be sufficient if the plaintiff states in his petition that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same as required by section 127, and that the defendant unlawfully keeps him out of possession." It would not be necessary to state how the plaintiff's estate or ownership is derived. By a reference to the petition in this case it will be noticed that,

in the first three clauses thereof, plaintiff brings herself within the two sections of the statute above cited, by alleging that she is the owner in fee simple of the following described real property, situated in Logan county, Okl. Then follows a description of the property by lots and blocks. Then follows the statement that said defendant "now is, and ever since the 23d day of November, 1897, has been, wrongfully in possession of said real property, and to the exclusion of plaintiff. This statement in the said petition contained, under the provisions of the statute above cited, is a sufficient statement of a cause of action. The demurrer being to the whole of the petition, and a good cause of action being stated in the first three paragraphs of said petition, the demurrer was properly overruled. The doctrine is laid down in *Bliss*, Code Pl. (3d Ed.) c. 20, p. 417, § 417: "A demurrer may be made to the whole petition, or to the statement of any of the causes of action embodied in it; but, if made to the whole pleading, it will be overruled if any of the statements are held to be good." A similar doctrine is enunciated in *Pom.* Code Pl. (3d Ed.) p. 663, § 577: "Where a complaint or petition contains two or more different causes of action, a demurrer to it as a whole, or to all or some of the causes of action jointly, must fail and be overruled if any one of the separate causes of action included in the petition is good." The same author (page 688, § 606) uses this language: "If the demurrer is interposed to an entire answer, containing two or more separate defenses, or to an entire complaint, containing two or more causes of action, it will be overruled if there is one good defense or one good cause of action." And he there cites as authority for this statement *Railroad Co. v. Vancant*, 40 Ind. 233; *McPhail v. Hyatt*, 29 Iowa, 137; *Modlin v. Turnpike Co.*, 48 Ind. 492; *Draining Co. v. Brown*, 47 Ind. 19; and numerous other authorities.

The second assignment of error is that the court erred in overruling the motion for a new trial, and the plaintiffs in error complain that the court prevented them from introducing evidence to show that the recitals in the tax deed were a mistake, and their contention is that they should have been allowed to dispute or contradict the recitals in the tax deed by evidence. In the case of *Cartwright v. McFadden*, tried at the January term, 1881, and reported in 24 Kan. 662, the supreme court of Kansas say: "The defendant, however, for the purpose of bolstering up his tax deed, offered to prove that the sale of the lots was not made in gross, but that each lot was sold separately. The plaintiff objected to this evidence, and the court below excluded it. We think that the court below rightfully excluded it; for it did not tend to show that the defendant's tax deed is valid, but only that the sale was valid, and that he might have obtained a valid tax deed on the sale if he and the county clerk had been more careful, and had made

the tax deed speak the truth. Under the circumstances, he was really attempting to prove that his own tax deed was false, that it does not follow the sale that was actually made, and, really, that there was no such sale as described in his tax deed. He was really attempting to contradict the recitals of his own tax deed, and to show that it is founded upon a falsehood." And in the syllabus of that case the supreme court of Kansas lay down the rule that it is not competent for a tax-deed holder to introduce other evidence to contradict the recitals of his tax deed. The court in this case held that the tax deed was void, as showing by its own recitals that it was invalid. The tax deed in this case recites as follows: "Whereas, D. V. Hanenkratt did on the 23d day of November, A. D. 1897, produce to the undersigned, Ferdinand Ritterbusch, treasurer of the county of Logan, in the territory of Oklahoma, a certificate of purchase, in writing, bearing date of 18 day of November, 1895, signed by Joseph Stiles, who at the last-mentioned date was treasurer of said county, from which it appears that the county of Logan did on the 18 day of November, 1895, purchase at public auction, at the door of the court house in said county, the tract, parcel, or lot of land lastly in this indenture described, and which lot was sold to the county of Logan for the sum of thirty-nine and 73-100 dollars, being the amount due on the following tract of land, returned delinquent for nonpayment of taxes, costs, and charges for the year 1894." Then follows the description of the premises in controversy in this suit, and also the recital showing the assignment and transfer of all right, title, and interest in the certificate of purchase from Logan county to the plaintiff in error. We take the law to be well settled that where the recitals in the tax deed show a sale to the county, and a deed obtained by virtue of a sale to the county, the deed must contain recitals to show the right of the county to purchase at such tax sale; that, if the recitals of the tax deed show the county to be a competitive bidder at said tax sale, such recitals render the tax deed void; and that the recitals in a tax deed must show that the circumstances, surroundings, and conditions giving the county the statutory right to purchase at such sale existed at the time of such purchase by the county, and unless such deed does contain such recitals it is invalid on its face. In the case of *Larkin v. Wilson*, 28 Kan. [Dass. Ed.] 367, the supreme court of Kansas, in a case then pending before that court upon a tax deed which contained the following recitals: "Whereas, the treasurer of said county did on the third day of May, 1864, by virtue of the authority in him vested by law, at the sale begun and publicly held on the first Tuesday of May, 1864, expose to public sale at the county seat of said county, in substantial conformity with all the requisitions of the statute in such case made and provided, the real property above described, for the

payment of taxes, interest, and costs then due and remaining unpaid upon said property; and whereas, at the time and place aforesaid the treasurer of the county of Bourbon, state of Kansas, having offered to pay the sum of \$30.58, being the whole amount of taxes and interest and costs then due and remaining unpaid on said property, and there being no other bidder, the said property was struck off to it at that price, which was the least quantity bid for,"—the claim was made—First, that said deed was void, because it recites that the county, through the county treasurer, entered the lists at the tax sale as a competitive bidder; second, that the county of Bourbon assigned the certificate of the tax sale. The court say: "Within the decisions of this court, the claim of plaintiff in error that the county was a competitive bidder must be sustained, and the tax and the tax deed founded thereon are both void. The recitations in the deed show that the county, through the county treasurer, made the first bid on the land, offering itself to pay for the land the sum of \$30.58; being the whole amount of taxes, interest, and costs then due and remaining unpaid. There is nothing in the deed that shows or tends to show that the land could not have been sold to some other party for the same price, provided the treasurer had not made his bid or offer. If the treasurer had not made his bid, perhaps some other party might have been willing to offer and pay the amount of the taxes, penalty, and charges for the land; but as the county, through its treasurer, made that offer first, it thereby prevented others from making that bid, or, indeed, from making any bid as advantageous to themselves as that bid would have been." The court there cites *Norton v. Friend*, 13 Kan. 533; *Magill v. Martin*, 14 Kan. 67; *Babbitt v. Johnson*, 15 Kan. 252. In this latter case Judge Brewer, in rendering the decision, and holding that the tax deed in that case, which recited a sale to the county as a competitive bidder, was void, cites with approval the case above cited in 13 Kan., and the one in 14 Kan. The statute of Kansas provides: "If any parcel of land cannot be sold for the amount of the taxes, penalty and charges thereon, it shall be bid off by the treasurer, for the county, for such amount." The Statutes of Oklahoma of 1893 (page 1054, § 5660) provide: "The county treasurer of each county within the territory is hereby authorized at all tax sales hereafter made under the laws of this territory, in case there be no other buyers offering the amount due, to bid off all or any real estate offered at such sale for the amount of taxes, penalty, interest and costs, due and unpaid thereon in the name of the county in which the sale takes place, the said county acquiring all the rights both legal and equitable that any other purchaser could acquire by reason of said purchase." The two acts are practically the same, and the reasoning of the Kansas court will apply with equal force to the statute of

Oklahoma as to the statute of Kansas; and the courts, in construing the statute of Kansas, say: "Before a county or a county treasurer can bid at all, the treasurer must wait until all others have failed or refused to bid on the land the required amount." Now, if this is a necessary requirement as a condition precedent to a valid bid being made by the county treasurer, then this fact should be set forth in the recitals in the tax deed. As, in the language of the Kansas decision, there is nothing in the deed which shows or tends to show that the land could not have been sold to some other person for said sum, provided the treasurer had not made his offer, the sale and the deed are both void. Now, applying that doctrine to this case, what is the effect on the tax deed in question? In the tax deed in this case there is no attempt at any recital showing the absence of other bidders, or that anybody else had an opportunity to bid, or that it was necessary for the treasurer to bid it off for the county on account of the absence of bidders. But this deed relied upon by the plaintiff in error contains only the bald statement that this land was bid off by the treasurer of Logan county, and the interests of Logan county assigned to this plaintiff in error. This recital, we have no doubt, renders the deed void. Then, if this tax deed was void and of no effect, the plaintiff in the court below (the defendant in error) had a right to redeem from that tax sale, by tendering to the holder of the certificate or pretended deed the tax by him paid, and the interest, penalties, costs, and subsequent taxes paid thereon, which the proof in this case shows was \$165, which amount, the evidence shows, was tendered to the plaintiff in error prior to the commencement of this suit in the court below. For the reasons herein expressed, we think the judgment of the court below was correct, and should be affirmed, which is accordingly done. All of the justices concurring, except BURFORD, C. J., who, having presided in the court below, took no part in this decision, and McATEE, J., not being present.

MAASS v. PHILLIPS, Sheriff.

(Supreme Court of Oklahoma. June 30, 1900.)

HABEAS CORPUS—WILL NOT LIE, WHEN— BOARD OF INSANITY—ORDER.

1. When a defendant is brought into court for judgment and sentence, and files his motion in arrest of judgment, and files in support thereof an order of the county board of insanity adjudging him to be insane, and affidavits tending to prove that he is insane, and the court overrules such motion and sentences the defendant, he is not entitled to be discharged on a writ of habeas corpus, under the provisions of article 19 of chapter 68 of the Statutes of Oklahoma of 1893, which in effect provides that one cannot be tried, adjudged to punishment, or punished for a public offense while he is insane, and that when an indictment is called for trial, or upon conviction the defendant is brought up for judgment, if a doubt arises as

to the sanity of the defendant the court must impanel a jury to inquire into that fact. The only remedy, if a new trial is denied, is by appeal to this court.

2. An order of a board of insanity adjudging one to be insane has no bearing upon his legal mental status. The effect of such an order is to admit one to the territorial asylum for treatment; and it is not entitled to the faith and credit of a judgment of a court, as the members of such board do not act as judicial officers, but as a special board, clothed with special power only.

(Syllabus by the Court.)

Application by Louis Maass, as guardian of Conrad Maass, for a writ of habeas corpus directed to W. H. Phillips, sheriff. Writ denied.

R. B. Forrest, for relator. A. H. Campbell, Co. Atty., and Seymore Foose, for respondent.

BURWELL, J. Conrad Maass was indicted, tried, and convicted for the crime of murder in the district court of Blaine county. The defendant then filed his motion for a new trial, which was overruled. He then filed this motion in arrest of judgment, and in support thereof introduced in evidence, over the objection of the attorneys for the territory, certain affidavits and the records of the probate court, for the purpose of showing that the county board of insanity had adjudged Maass to be insane, and to establish by such records and affidavits that Maass was insane at that time; it being the contention of the attorneys for defendant that, if he was insane, the court could not lawfully pronounce judgment and sentence upon him. The court overruled the motion in arrest of judgment, and sentenced the defendant to serve a term in the territorial penitentiary, at hard labor, during his natural life. Louis Maass, as guardian of Conrad Maass, then commenced this action in this court. The writ was issued by the Chief Justice in vacation, and made returnable in open court. The respondent, for his return, set up the indictment, trial, and conviction of Maass, and also set up the order of judgment and sentence under which the defendant was held. Affidavits on behalf of each party were filed in support of their respective positions, together with certain stipulations.

Under this state of facts, the first question and possibly the only one, for us to decide, is, can this court, in an action for a writ of habeas corpus, inquire into the correctness of the orders of the district court in overruling the motion in arrest of judgment, and in sentencing the defendant? The attorneys for the plaintiff herein cite us to article 19 of chapter 68 of the Code of Criminal Procedure (Statutes of Oklahoma of 1893), which, so far as is necessary to refer to, is as follows:

"Sec. 5372. An act done by a person in a state of insanity cannot be punished as a public offense, nor can a person be tried, adjudged to punishment, or punished for a public offense, while he is insane.

"Sec. 5373. When an indictment is called for trial, or upon conviction the defendant is brought up for judgment, if a doubt arise as to the sanity of the defendant, the court must order a jury to be impaneled from the jurors summoned and returned for the term, or who may be summoned by direction of the court, to inquire into the facts.

"Sec. 5374. The trial of the indictment or the pronouncing the judgment, as the case may be, must be suspended until the question of insanity is determined by the verdict of the jury."

"Sec. 5377. If the jury find the defendant sane, the trial of the indictment must proceed, or judgment may be pronounced, as the case may be.

"Sec. 5378. If the jury find the defendant is insane, the trial or judgment must be suspended until he becomes sane, and the court, if it deem his discharge dangerous to the public peace or safety, may order that he be, in the meantime, committed to the care of the sheriff until he becomes sane."

"Sec. 5380. When he becomes sane the sheriff must thereupon, without delay, place him in the proper custody until he be brought to trial or judgment, as the case may be, or be legally discharged."

There can be no question but what this statute expressly prohibits a court from sentencing a defendant if at the time there exists in the mind of the court any doubt of his sanity, and it is immaterial whether that doubt is produced by affidavits, by judgments of other courts, by the evidence produced upon the trial, or by the conduct and appearance of the defendant. If the court entertains an honest doubt as to the sanity of a defendant when his case is called for trial, or when he is brought before the bar of the court for judgment, it must defer the trial or sentence until after the question of the defendant's sanity has been passed upon by a jury as provided in section 5373, and the court must conform its future actions in the case to the verdict of the jury. But who is to determine as to whether such doubt exists in the mind of the court? In reason only one answer can be given. The court alone must say if such doubt exists. The trial judge sees the defendant, and is necessarily more or less familiar with the circumstances surrounding him and his case; and the fact that the county board of insanity may have adjudged him insane prior to the time fixed for his sentence, even if the order of such adjudication was admitted in evidence or considered by the trial court, would not necessarily control its action, because such order is not an adjudication of finding of any court, and is not admissible upon a trial to prove the insanity of such person. Such an order amounts to no more than the expression of an opinion by any other person or persons out of court as to the mental condition of a defendant's mind, except where the right of the officers of the asylum to confine and treat such person is called in question, or in other

cases of a kindred character which fall within the spirit of the law authorizing such finding by the board of insanity. See *Dewey v. Allgire*, 37 Neb. 6, 55 N. W. 276, 40 Am. St. Rep. 468; *Knox v. Haug*, 48 Minn. 58, 50 N. W. 934; *Leggate v. Clark*, 111 Mass. 306. The boards of insanity are special boards created by law for a special purpose. It was only intended to clothe them with the power to determine who should be confined in the territorial asylum for treatment, and they have not the power to fix one's legal status (that is, to declare one to be, in law, sane or insane), and the fact that probate judges are made members of these respective boards changes not the rule. When a probate judge acts in this capacity, he acts as any other member of the board, and not as a probate judge or as a probate court. Under the laws of this territory, the power to adjudge one legally insane is vested in the judge of the probate court by sections 1517, 1518, and other sections of article 14 of chapter 18 of the Statutes of Oklahoma of 1893, and under these sections a guardian can only be appointed when it is made to appear to the judge of the probate court, after a full hearing, that such person is incapable of taking care of himself and managing his property; and this hearing can only be had after due notice as provided by the statutes, and the person sought to have adjudged insane, if able to attend, must be produced at the hearing. It is this kind of an order adjudging one to be insane that the authorities refer to as being entitled to faith and credit, and not to the orders of ordinary boards of insanity. Therefore the order of the board of insanity adjudging Maass to be insane, which was introduced in evidence in support of the motion in arrest of judgment, was not controlling upon the trial court; and, if the trial court committed error in pronouncing judgment and sentence upon the defendant, his only remedy is by an appeal to this court. Such matters cannot be reviewed in this action. The case of *In re Patswald*, 5 Okl. 789, 50 Pac. 139, and other cases cited by the petitioner, are not similar to the case at bar, and therefore have little, if any, bearing upon this issue. For the reasons herein stated, the writ will be denied, and the cause dismissed, at the costs of the petitioner, and Conrad Maass will be remanded to the custody of the respondent. It is so ordered. All of the justices concurring.

PETRIE v. COULTER.

(Supreme Court of Oklahoma. June 30, 1900.)
APPEAL FROM PROBATE COURT—TRANSCRIPT
—CORPORATION—SUBSCRIPTION.

1. It is not necessary, upon an appeal from the jurisdiction of the probate court to the district court, that such a transcript shall accompany the papers in the case, as is required upon appeal from a justice of the peace. In this case the pleadings in the cause, with the journal entry of judgment, certified by the probate judge with the seal of his court, togeth-

er with the appeal bond, approved by the probate judge, were brought into the district court with the papers in the cause. The case went to trial upon the merits, no defect in the record having been pointed out to the district court below, and, if any such existed, it was waived thereby.

2. Upon a proposal to organize a bank, the plaintiff in error signed the subscription list thereto for the sum of \$500, and gave his promissory note therefor. It is no defense to the action that the charter, which was in proper form, did not state all of the specific articles of the subscription list, which included qualifications of directors as to residence, with the method of filling vacancies in the directorship, and other things, does not state qualifications of directors as to residence, and that there was a method of filling vacancies which provided for a limitation upon the powers of the association to do business, and method of collecting assessments and making loans, selection of president, and procuring a charter; and the fact that provisions for all of these conditions existed in the subscription list, and were not embodied in the charter, constituted no defense to the action.

(Syllabus by the Court.)

Error from district court, Pawnee county; before Justice A. G. C. Blerer.

Action by J. N. Coulter, receiver, against J. E. Petrie. Judgment for plaintiff. Defendant brings error. Affirmed.

This is an action brought by Coulter, as receiver of the Farmers' & Citizens' Bank, upon a note for the sum of \$500, dated May 16, 1895, payable 12 months after date to the order of C. L. Berry, cashier, at the office of the Farmers' & Citizens' Bank, Pawnee, Okl. The amended petition, upon which the case was tried, averred that Coulter had been appointed by the district court of Pawnee county to be receiver of the Farmers' & Citizens' Bank, in an action in which one Mandel was plaintiff and the Farmers' & Citizens' Bank was defendant, and that the receiver had been directed by the district court to sue upon the notes and accounts in his hands as receiver, and that the note sued upon was one of the assets of the bank which had come into his possession as such receiver. Petrie set up in his answer, as a defense, that the note sued upon was "accommodation" paper, for the benefit of a corporation then to be organized, in which C. L. Berry was to be cashier, and defendant was to be a stockholder, and that the note was without any other consideration, and that the corporation was never organized as agreed upon. The action was begun in the probate court of Pawnee county, where Petrie had judgment, from which Coulter, as receiver, appealed to the district court of Pawnee county. The cause was tried by a jury, and resulted in a verdict and judgment in favor of Coulter, the receiver.

A. J. Biddison, for plaintiff in error. Morphis & Mosier, for defendant in error.

McATEE, J. (after stating the facts). When the cause was called for trial in the district court, the defendant objected to any proceedings therein, for the reason that the

court had no jurisdiction of the cause. The objection was overruled, and it is now contended that this ruling was erroneous, since there was no certificate attached to the record from the probate court, and that the transcript does not show that an appeal was taken. This contention is supported upon the authority of *Struber v. Rohlfis*, 36 Kan. 202, 12 Pac. 830, in which the court holds, upon a statute requiring justices of the peace to enter same in a book termed a "docket," that "If an appeal is taken, the undertaking, the time of entering into the same, and by which party taken, must affirmatively appear therein, and that the appeal was taken within ten days of the rendition of the judgment must appear from the transcript of the justice." The case does not support the contention here. The appeal is from the probate court, and not from the jurisdiction of a justice of the peace. The record shows that, at the time of the objection to the jurisdiction of the district court, it was not made "on account of the want of certificate or transcript of the probate judge, and the case was tried and presented as if duly certified," and that the first suggestion to the trial judge that the papers were not duly certified was made to him at the time the case-made was presented for settlement. The journal entry of judgment certified by the probate judge, with the seal of his court, together with the appeal bond, approved by the probate judge, were brought into the district court with the papers in the cause, including all the pleadings, and these were sufficient to give the district court jurisdiction. It is stated in the brief of the plaintiff in error that the receiver who sues in this cause was appointed in an action for the dissolution and winding up of the affairs of an insolvent bank, and that the "plaintiff in error had never attended any meeting, had taken no part in the organization, control, or management of the institution, and that it had been organized under different articles from those which he had signed, and agreed to, and that he had withdrawn the deposit that he carried with the bank while a partnership, and had nothing further to do with the institution." On the contrary, it is declared in the brief of defendant in error that the receiver was appointed in an action by a depositor who claimed that the bank owed him \$137.39, as a balance due on a general deposit. These declarations flatly contradict each other concerning a matter not in evidence.

It is, again, stated in the brief that the receiver was not appointed in a creditor's action, and that no special equities are in evidence that would entitle him to recover where the corporation itself would not. Petrie himself testified that he had signed the subscription list, subscribing to the proposed capital stock of the new bank the sum of \$500, the amount of the note sued upon, but that he had simply placed it in the possession of Berry, the cashier, as accommodation

paper. The jury found in favor of Coulter, the receiver, and made the following special finding of fact: "Q. Was the note sued upon given in payment upon the subscription introduced in evidence? A. Yes. G. S. Van Eman, Foreman." We think that the jury's finding was supported by a preponderance of the evidence.

It is contended, however, that the bank was not organized in accordance with the terms of the subscription, inasmuch as various provisions of the subscription list, to which the defendant had attached his name, and upon which he had made his subscription, were not incorporated in the charter, namely, that the charter does not state the qualifications of directors as to residence and other things; that the method of filling vacancies, providing for a limitation upon the powers of the association to do business, and the method of collecting assessments, making loans, selection of president, and procuring a charter in violation of the provisions of article 16, and the selection of directors, are omitted from the charter, but are stated in the original subscription list, to which the defendant, Petrie, had appended his name. These matters constitute no defense to the action. The articles of incorporation are in proper form, and contain all that is requisite under the statutes of the territory; and if any of the articles of the subscription were not complied with in detail as the defendant, Petrie, may have desired, they do not constitute a defense. After making the subscription, he turned over the organization, control, and management of the institution entirely to others, and, as is said by himself in his brief, "took no part in the organization, control, or management of the institution, and never attended any of its meetings."

We have read the evidence, and find that it strongly supports the conclusion of the jury, and we find no error in the instructions. The judgment of the court below will be affirmed. All the justices concur.

HERBEIN v. MOORE et al.

(Supreme Court of Oklahoma. June 30, 1900.)

EQUITY—REMEDY AT LAW—LACHES.

The powers of a court of equity cannot be invoked where it is clear from the facts pleaded in the petition that the plaintiff had a plain and adequate remedy at law, and by his own laches or neglect failed to avail himself thereof, and no valid cause or excuse is shown for such failure or neglect.

(Syllabus by the Court.)

Error from district court, Logan county; before Justice John H. Burford.

Suit by Henry Herbein against A. E. Moore and others. Judgment for defendants, and plaintiff brings error. Affirmed.

Henry Hudson and D. T. Jarvis, for plaintiff in error. W. E. Earl, for defendants in error.

HAINER, J. It appears from the record in this case that on the 27th day of February, 1890, A. E. Moore, one of the defendants in error here, brought an action in ejectment, under section 613 of the Code, in the district court of Logan county, against Henry Herbein, plaintiff in error, to obtain the possession of lot 1 of block 39 in the town site of East Guthrie. In pursuance to said petition a summons was duly issued, and served personally upon the said Henry Herbein, the defendant in said action. On the 31st day of March, 1890, judgment was rendered against the said defendant, Henry Herbein, by default, and the possession of said premises was awarded to A. E. Moore, defendant in error in this action. A writ of restitution was duly issued, and placed in the hands of the sheriff for execution. On the 29th day of April, 1890, the plaintiff in error filed his petition in the district court of Logan county to perpetually enjoin the defendant in error from executing the writ of restitution and enforcing the decree and judgment of the court. The petition reads as follows (omitting caption): "Your petitioner, Henry R. Herbein, respectfully shows and represents to your honor that he is a citizen of the United States; that he has resided in the county of Logan and territory of Oklahoma for more than ten years last past; that he arrived at Guthrie, in said territory, in the afternoon of the 22d day of April, A. D. 1889, and settled upon the northwest quarter of section nine, township sixteen (16) north, range two (2) west, in said county of Logan, and has resided upon said quarter section from the date last aforesaid until the present time, and still resides on said quarter section. Second. And your petitioner further represents that he was the first legal settler upon said quarter section after the hour of noon on said 22d day of April, 1889. That on or about the 30th day of April, 1889, he visited the land office in Guthrie, and asked to be allowed to file his application and affidavits for the purpose of homesteading said quarter section, but was refused by the officers in charge of said land office; that at divers and sundry times and dates thereafter he applied at the said land office for a like purpose, and was always refused until the 17th day of April, 1890, when he presented his said application and affidavits, which were duly received by the persons now in charge of said land office, and were duly filed, and his said application was rejected by the register in charge, from which decisions of said register your petitioner appealed to the commissioner of the general land office at Washington, which appeal is now pending, and, so far as your petitioner is advised, is still undetermined by the said commissioner of said general land office. Third. And your petitioner further shows and represents to your honor that he is informed and believes divers and other persons have filed claims or applications for homestead upon the premises hereinbefore described, and that various suits have been com-

menced, and that one of said suits, to wit, the case of Xenophon Fitzgerald, complainant, against divers and sundry persons, is still pending and undetermined in this honorable court, in which suit the said Fitzgerald claims title to said quarter section, and that, as your petitioner believes, there are still grave doubts; and your petitioner avers and charges that the real and equitable title to said quarter section of land remains in the government of the United States, and is not subject to taxation under the laws of the territory of Oklahoma, or the ordinances or any municipal laws of any city, township, or county within said territory. Fourth. Your petitioner further shows that during the year 1891 such proceedings were had by the land office in Guthrie, in said Logan county, and by the general land office in the city of Washington, that on or about the 25th day of January, 1892, a pretended patent to said land was issued to John Foster, William S. Robertson, and Andrew C. Schnell, to the land hereinbefore described, as trustees, for town-site purposes; but your petitioner charges and avers the fact to be that no title to said land was conveyed by said patent to said trustees, and that said patent is absolutely null and void, and of no force or effect, either in law or equity. Nevertheless the said Foster, Robertson, and Schnell, upon receiving such patent, proceeded at once to subdivide said land and to lay the same out into blocks and lots, and to sell the same to divers persons, and pretended thereby to convey the same to persons so purchasing or pretending to purchase; and your petitioner, fearing that, unless he made some arrangement with said pretended trustees, he would be forcibly ousted from possession, and from the improvements that he had made upon said quarter section, applied to the said pretended trustees and procured of them a pretended title to that portion upon which some of his improvements had been erected, and which proved to be lot one (1) in block thirty-nine (39) in said pretended subdivision so made by said pretended trustees, yet, notwithstanding the facts hereinbefore set out, no title was conveyed to said trustees, and said land still remains the property of the United States, as fully and completely as if no patent had been issued pretending to convey the same to the parties aforesaid, as such pretended trustees, for town-site purposes as aforesaid, and said premises are not liable to be assessed and taxes levied thereon by the said territory of Oklahoma, the county of Logan, or the city of Guthrie. Fifth. Your petitioner further shows and represents to your honor that, notwithstanding the premises aforesaid, the officers of the said territory, county, and city aforesaid during the years 1894 and 1895 levied upon the premises aforesaid, to wit, said lot one (1), block thirty-nine (39), in said northwest quarter of said section nine (9), for the said year 1894, the sum of \$9.14, and for the year 1895 the sum of \$11.68; that thereafter such proceedings were had that

said premises (said lot one) was advertised in some manner to your petitioner unknown, and thereafter the same was offered for sale by the treasurer of Logan county at public auction, contrary to law and contrary to equity and good conscience; that, no bidders being present, the same was passed by the said treasurer, and thereafter a certificate was issued by the said treasurer to the said county of Logan, as purchaser of said lot one, although no bid was ever made therefor by the said county of Logan, or by any person, corporation, or municipality, and notwithstanding the further fact that no process of law had been used or employed, no petition had been filed, no judgment had been asked or rendered, of or by any court of competent jurisdiction within the said county of Logan or the territory of Oklahoma, and no process or notice had been served either personally or by publication. And your petitioner avers that, at the time of said pretended sale by the said treasurer of Logan county, he, the said treasurer, had no right or authority, either in law or in equity, to issue any certificate of purchase to the said county of Logan, or to any other municipality, corporation, or individual. Sixth. And your petitioner further shows that, notwithstanding the want of authority or jurisdiction of the said treasurer to make such sale and to issue said certificate, such proceedings were afterwards had that on the 16th day of March, 1898, the said treasurer of said Logan county, being in possession of the said certificate, and having always been in possession thereof from the date of the issue thereof, pretended to transfer said false and fraudulent certificate so by him issued as aforesaid to one E. A. Moore, a citizen of the state of Kansas, and thereupon, at the request of the said E. A. Moore, or her agent or attorney, or upon his own motion and at his own suggestion, on the date last aforesaid issued a pretended deed of said lot one to the said E. A. Moore, who then claimed, through her agent or attorney, or by request of said county treasurer, to be the owner and entitled to the immediate possession of said premises, together with all improvements thereon; and your petitioner avers and charges the facts to be that the said pretended transfer of the said pretended certificate to the said county of Logan, so made as aforesaid, and said deed so as aforesaid made and executed by the said county treasurer to the said E. A. Moore, were false, fraudulent, and done without any legal right or authority in law or in equity. Seventh. And your petitioner further shows unto your honor that in pursuance of said fraudulent transaction hereinbefore set out, between the said E. A. Moore and the said treasurer of Logan county, she, the said E. A. Moore, on the 27th day of February, A. D. 1899, filed in the office of the clerk of this honorable court her petition for possession of said premises, to wit, said lot one, together with all improvements thereon, and thereupon a summons was issued out of said court, by the clerk

thereof, directed to the said sheriff, for service; and thereafter such proceedings were had in said court that on the 31st day of March, 1899, a judgment was rendered by said court in favor of the said plaintiff and against your petitioner for possession of said premises and the costs of said suit, and thereafter, during the month of April, at the request of said E. A. Moore, plaintiff in said suit, her agents or attorneys, a writ was issued by the clerk of this court against your petitioner, as defendant in said suit, and in favor of the said E. A. Moore, and placed in the hands of the sheriff of said Logan county for service, and for possession of said premises, and costs of suit, and said writ is now in the hands of said sheriff, who threatens to dispossess your petitioner from said premises, and place the said E. A. Moore in possession thereof; and your petitioner avers and charges that the said sheriff will carry out his threats and design to so dispossess your petitioner, unless restrained and enjoined by the order and injunction of this honorable court. Eighth. And your petitioner further shows that the said premises in question, together with the improvements thereon, are fairly worth the sum of \$1,000; that the whole amount claimed to have been paid by the said E. A. Moore for said pretended tax certificate was the sum of only \$39.47, including all pretended costs, etc., so pretended to have been levied for the years 1894, 1895, and 1896. Ninth. And your petitioner says that the taxes so pretended to have been levied as aforesaid for the several years last aforesaid, the advertising for sale without the judgment of any court or personal service, and said pretended sale, were all done without any authority of law, and contrary to the provision of the constitution of the United States, and contrary to equity and good conscience, and the said pretended deed was issued without any authority of law, and that the same is absolutely null and void, and of no force and effect, either in law or equity; but your petitioner says that if, upon the final determination of this suit, it shall be found that said taxes were legally and justly levied by the several officers hereinbefore mentioned, he will, upon the rendition of such final judgment, pay to the said E. A. Moore such sum as this court may direct. Your petitioner therefore prays that upon the final hearing and determination of this suit the pretended deed so made and executed by the said county treasurer to the said E. A. Moore may be declared null and void, to have conveyed no title whatever to said premises, and to have no force or effect either in law or equity; and your petitioner prays for such other and further relief in the premises as shall be agreeable to equity and good conscience, and as to your honor shall seem meet." A temporary injunction was granted by the court as prayed for in the plaintiff's petition. On May 10th the defendant in the

court below, E. A. Moore, defendant in error, demurred to the plaintiff's petition upon the following grounds: (1) That the petition does not state facts sufficient to constitute a cause of action against the defendant; (2) that the statute of limitation has run against said action, for the reason that said action was not brought within one year from the execution of said deed, as required by statute; (3) that the court has no jurisdiction over the subject-matter of the action. And on the same day the defendant filed a motion to dissolve the temporary injunction and dismiss the cause of action, for the following reasons: (1) That the petition shows by its averments that the plaintiff in the case had a full and adequate remedy at law for the wrongs set forth; (2) that the petition does not show sufficient equitable grounds to entitle the plaintiff to the writ of injunction; (3) that the petition does not state facts sufficient in equity to give the court jurisdiction to grant the relief demanded in said petition. It appears from the record that the motion and demurrer were presented to and considered by the court at the same time. The district court held that the petition did not state facts sufficient to grant the relief prayed for in the petition, and thereupon dissolved the temporary injunction and dismissed the action at the costs of the plaintiff. From this ruling and judgment the plaintiff appeals.

We think that the petition of the plaintiff wholly fails to state facts sufficient to constitute any cause of action and to grant the relief prayed for, and hence the court properly sustained the motion to dissolve the temporary injunction and dismissed said action. It clearly appears from the petition that the plaintiff had a plain and adequate remedy at law, and that by his own laches and neglect he failed to avail himself of it. It appears that in the ejectment suit the defendant was served personally by summons, and he failed and neglected to plead or answer thereto. There is no allegation in this petition that the failure of the plaintiff to answer or plead, or set up his defense, if he had one, to said action, was due to any wrong, misconduct, or fraud of the defendants, or either of them, and no reason or cause is shown for such failure. It is a well-settled and universal rule that the powers of a court of equity cannot be invoked where it is clear from the facts pleaded in the petition that the plaintiff has a plain and adequate remedy at law, and that by his own laches or neglect he has failed to avail himself thereof, and no valid cause or excuse is shown for such failure or neglect. *Twine v. Carey*, 2 Okl. 249, 37 Pac. 1006; *Bassett v. Mitchell*, 3 Okl. 177, 41 Pac. 601. There being no error in the record, the judgment of the district court is therefore affirmed. All the justices concurring, except BURFORD, C. J., who tried the cause in the court below, not sitting.

JORDAN, County Superintendent, v. DAVIS.
(Supreme Court of Oklahoma. June 30, 1900.)

SCHOOLS—FIRST-GRADE CERTIFICATES—INDORSEMENT.

1. St. Okl. 1893, § 5820, which reads: "No certificate shall be of force except in the county in which it is issued: provided, that the county superintendent may endorse unexpired first grade certificates issued in other counties on payment of the fee of one dollar, which certificate shall thereby be valid in the county in which such indorsement is made for the unexpired term of the certificate,"—imposes an imperative duty on the county superintendent to indorse proper certificates when presented to him, and such officer is vested with no arbitrary discretion in such cases.

2. Where a power is given to public officers, and the public interest or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. The power is deposited as a remedy to those entitled to invoke its aid. In all such cases the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty.

(Syllabus by the Court.)

Appeal from district court, Washita county; before Justice Clinton F. Irwin.

Application for mandamus by Lelah Davis against S. J. Jordan, county superintendent of schools of Washita county. From a judgment granting the writ, defendant appeals. Affirmed.

F. A. Edwards, for plaintiff in error.
Smith & Sitterly, for defendant in error.

BURFORD, C. J. But one question is presented by the record in this cause: Will mandamus lie to compel a county superintendent of schools to indorse an unexpired first-grade certificate issued in another county, so as to make it valid in the county in which such indorsement is made? The district court of Washita county issued a peremptory writ commanding the county superintendent of schools of that county to indorse such a certificate. The superintendent appeals from the judgment ordering the writ, and the case is before us for review. Is the statute authorizing the indorsement of such certificates mandatory or discretionary? The statute (article 5, c. 73, St. 1893) provides for a board of county examiners in each county, to be composed of the county superintendent and two competent persons, who are holders either of first-grade certificates, territorial certificates, or diplomas from some state university, state normal, or state agricultural college. This board is required, at certain periods, to publicly examine all persons proposing to teach in the public schools of the county, and issue certificates to all such applicants as shall pass the required examination, and satisfy the board as to their good moral character and their ability to teach and govern schools successfully. These certificates are by the amended Statutes of 1897 classified into three grades. The first grade

is issued to persons over 20 years of age who have taught successfully 12 school months, and have made a general average of 90 per cent. in certain designated branches. The second-grade certificates are issued to persons not less than 18 years of age who have taught successfully 3 school months, and who make a general average of 80 per cent. in the required branches. The third-grade certificates are issued to persons over 16 years of age who make an average grade of 70 per cent. in the required studies. The county superintendent may grant temporary certificates, in cases of necessity, upon written request of a district school board, to be good only in a designated district, and until the next regular examination by the county board of examiners. The territorial board of education, comprised of the territorial superintendent of public instruction, president of the territorial normal school, president of the University of Oklahoma, one superintendent of city schools, and one county superintendent, appointed by the governor, are authorized to grant territorial certificates to teachers, which are good in any of the counties of the territory. Section 5820, relating to county certificates, provides: "No certificate shall be of force except in the county in which it is issued: provided, that the county superintendent may endorse unexpired first grade certificates issued in other counties on payment of the fee of one dollar, which certificate shall thereby be valid in the county in which such endorsement is made for the unexpired term of the certificate." It is contended that the word "may" as used in this section, means "shall," and that it is the imperative duty of the county superintendent, on presentation of a first-grade certificate from another county, to indorse it as provided in this section. The supreme court of the United States, in the case of *Rock Island County Sup'rs v. United States*, 4 Wall. 435, 18 L. Ed. 419, had under consideration the question as to when the word "may," in a statute, imposes an imperative duty. Mr. Justice Swaine, speaking for the court, said: "The conclusion to be deduced from the authorities is that where power is given to public officers in the language of the act before us, or in equivalent language,—whenever the public interest or individual rights call for its exercise,—the language used, though permissive in form, is in fact peremptory. What they are empowered to do for a third person, the law requires shall be done. The power is given, not for their benefit, but for his. It is placed with the depository to meet the demands of right. It is given as a remedy to those entitled to invoke its aid, and who would otherwise be remediless. In all such cases it is held that the intent of the legislature, which is the test, was not to devolve a mere discretion, but to impose a positive and absolute duty." This rule has been repeatedly approved by the same court, and also by the courts of highest resort in a large number of the states. See authorities cited in 6 Notes U. S. Reports, 616.

Applying this rule to the statute under consideration, there can be no doubtful result. The county superintendent of Washita county is empowered by the statute to indorse a first-grade certificate issued by the examining board of any other county. This power is not conferred for the benefit of the superintendent of schools, but for the benefit of the holder of the certificate. The law empowers the officer to do this act for a third person. It is the third person who has a right to the performance of the duty, and, when demanded by a person holding the proper certificate, the law requires that the act shall be performed. There is no room for the exercise of discretion or judgment. There is no fact to be passed upon or determined. If the certificate presented is valid on its face, and the holder demands that it be indorsed, and tenders the required fee of one dollar, then all has been done that can be done to entitle the holder of the certificate to the indorsement necessary to make the certificate valid in the county where presented. It was the purpose of the legislature to make an exception in favor of first-grade certificates, and to favor the holders of such certificates. The purpose of the law is to enable the holders of such certificates, during their existence, to teach a school in any county of the territory, by having the certificate indorsed by the county superintendent. The law is for the benefit of the teacher, and not the superintendent. This power is deposited with the superintendent of schools to meet the demands of right, to encourage first-class teachers, and to prevent the public from being imposed upon. It vests him with the power to examine these certificates when presented from another county, and, if they are found regular and prima facie valid, to confer upon their holders additional rights by his official indorsement. It was not intended by the legislature to vest the officer with any arbitrary power of refusal, nor with a mere discretionary power to be exercised according to his whims or inclinations.

The defendant in error in this case held a first-grade certificate issued by the examining board of Roger Mills county. The certificate was in full force and unexpired. She was employed to teach a school in Washita county. It is admitted in the record that she is of exemplary character, an experienced teacher, and in all things entitled to the indorsement, if the statute is held to be mandatory. No objection is made to her or her certificate. The county superintendent simply claims the right to refuse on the ground that the law does not compel him to indorse. We cannot accept his interpretation of the statute. Under the rule hereinbefore stated, the statute is mandatory, and he will be required to make the proper indorsement on the certificate. The judgment of the district court is affirmed at the costs of plaintiff in error, and plaintiff in error is ordered to immediately indorse said certificate as of the date first presented

to him, and mandate is directed to issue at once. All the justices concur, except IRWIN, J., who presided below, not sitting.

KRAMER v. EWING.

(Supreme Court of Oklahoma. June 30, 1900.)

BROKER — COMMISSIONS — CONTRACT — ELECTION — APPEAL — REVIEW.

1. Where one party makes a proposition to another that, if he will find him a customer who will purchase or trade for a certain tract of land, he will pay for such services \$50 or \$60, and the proposition is accepted, and the customer furnished, who trades for the land, the contract will not be held void for uncertainty and indefiniteness.

2. A contract may be optional with one party and obligatory on the other, or it may be obligatory at the election of one of the parties.

3. Where one of the parties to a contract obligates himself to do one of two things on the performance of certain services by the other, the one making such alternative promise has a right to elect which alternative he will perform, provided he makes such election before default; but, if he fails to make such election in time, then the promisee may elect which alternative he will accept.

4. Where the promisee elects to take the less valuable of two alternatives, the promisor is in no position to complain.

5. When controverted questions of fact are submitted to a jury, and the evidence reasonably tends to support the verdict, the appellate court will not disturb the verdict.

(Syllabus by the Court.)

Appeal from district court, Oklahoma county; before Justice B. F. Burwell.

Action by John Ewing against P. C. Kramer. Judgment for plaintiff. Defendant appeals. Affirmed.

Fulton & Chambers and C. F. Smith, for plaintiff in error. J. S. Jenkins and J. L. Brown, for defendant in error.

BURFORD, C. J. The defendant in error, Ewing, sued plaintiff in error, Kramer, to recover on a specific oral contract for services in procuring a purchaser for certain real estate. It is alleged in the petition that Kramer agreed to give Ewing \$55 if he would find him a purchaser for a certain tract of land, and that he procured a purchaser who took the land, and Kramer refused to pay for said services. Kramer denied the alleged contract, and averred that he employed Ewing to show a party the land, and that his services in such matter were worth \$5, which sum he offered to pay. The cause was tried to a jury, and verdict rendered and judgment entered in favor of Ewing for the sum of \$50. Kramer appeals.

There is but one question presented for review. It is contended that there is no evidence to support the verdict. On the trial Ewing testified that Kramer agreed to pay him \$50 or \$60 if he would find a purchaser for the land; that he told Kramer some time afterwards that he did not think he could find a cash purchaser; that Kramer then told

him to find some one who would trade for the land, and he would give him \$50 or \$60, and that he found and took a customer to Kramer who did trade for the land. Kramer testified that he told Ewing he would give him \$50 if he would find a cash purchaser for the land at the sum of \$650, but that he had never promised or agreed to give him any sum to find a person who would trade for the land, and explicitly denied any conversation or agreement to modify the original proposition. The contention of plaintiff in error is that the testimony of plaintiff does not establish such an agreement as can be enforced in law; that an offer to give \$50 or \$60 is so vague and uncertain as to amount to no definite promise, and hence a court cannot determine which of the two sums was the agreed consideration. It is a well-settled rule governing contracts that the promise must be certain in its terms, and not so indefinite and illusory as to make it impossible to say just what was promised. *Lawson, Cont. § 10; Clark, Cont. p. 10.* Plaintiff in error earnestly insists that, tested by this rule, the contract or agreement established by the evidence of Ewing is so uncertain and indefinite that the court cannot say what sum he was to have for his labor. There is another rule applicable to contracts of this character that must not be lost sight of. Where an agreement or promise is in the alternative and is accepted, the promisor may elect which of the alternatives he will perform, provided he makes such election within the time the contract is to be performed. If he fails to make such election before default, then the promisee may make such election. *Disborough v. Neilson, 3 Johns. Cas. 81; Giles v. Bradley, 2 Johns. Cas. 253; Smith v. Sanborn, 11 Johns. 50; Patchin v. Swift, 21 Vt. 292; Gillett v. Ballou, 29 Vt. 296; Desert v. Scott, 58 Wis. 390, 17 N. W. 14.* The testimony on the part of Ewing shows that Kramer made a positive and certain promise to do one of two things in the event he found a customer for the land; that is, to pay him either \$50 or \$60. Either was a valid and sufficient consideration for the services to be performed. Kramer made the proposition in the alternative. He had a right at any time before default to elect which of the two alternatives he would perform. If the services were performed by Ewing, and Kramer failed to perform either alternative, then Ewing had a right to elect whether he would sue for the \$50 or the \$60. There was not such uncertainty as would render the proposition void.

There was a controverted question of fact presented to the jury, as to what the parol agreement was. The jury found in favor of Ewing. There is evidence reasonably tending to support the verdict, and we cannot disturb it. The judgment of the district court is affirmed at the costs of plaintiff in error. All the justices concur, except BURWELL, J., who tried the cause below, not sitting.

CECIL v. BOARD OF COUNTY COM'RS OF WASHITA COUNTY.

(Supreme Court of Oklahoma. June 30, 1900.)

APPEAL—REVIEW OF EVIDENCE—TRANSCRIPT.

This court will not undertake to review the evidence in a case brought here upon a transcript certified by the clerk of the district court, that it "contains a true, full, and correct copy of the petition, transcript, notice of appeal, journal entry of judgment, and bill of exceptions, as the same appears on file and of record," and which contains no statement in the record that it contains the evidence in the cause; and, since the assignment of errors is one such as requires an examination of the evidence, the judgment will be affirmed.

(Syllabus by the Court.)

Error from district court, Washita county; before Justice C. F. Irwin.

From an order of the board of county commissioners of Washita county declaring the result of an election under the stock law, Martin L. Cecil brings error. Affirmed.

R. B. Forrest and J. K. Little, for plaintiff in error. Smith & Sitterly, for defendant in error.

McATEE, J. This is an appeal from the board of county commissioners of Washita county, to the district court of that county, from an order of the board declaring, as the result of an election upon the subject, that "stock should be restrained from running at large in township ten, range twenty, in Washita county." The order of the board of county commissioners was affirmed in the district court, and the case is brought here upon a transcript certified by the clerk of the district court, that "the above and foregoing transcript contains a true, full, and correct copy of the petition, transcript, notice of appeal, journal entry of judgment, and bill of exceptions, as the same appear on file and of record." The judgment of the district court was that "from and after this date stock shall be restrained from running at large in township ten, range twenty, Washita county, and that the provisions of the herd law be in force and effect in said township, and that the order of the board of county commissioners of said county be affirmed." The assignment of error is that the court erred in giving judgment for the appellee below. In order to review the judgment here, and the questions presented in the briefs, it would be necessary to determine the result of the election in question, as found upon a canvass of the votes by the board of county commissioners; the poll list of all votes in township 10, range 20; testimony touching the number of resident voters in the township, and the number of votes cast at the election for and against the proposition to restrain stock from running at large; and, while there are some papers apparently purporting to be copies of certificates and affidavits showing those points, yet they are not brought here in such a form

as to be proper subject for consideration in this court. These are matters of evidence, and should be brought here by a case-made or a proper bill of exceptions. There is no statement or certificate in the record that it contains the evidence, or the whole or any part of it. The judgment of the district court will therefore be affirmed. All the justices concur, except IRWIN, J., who presided below.

(10 Okl. 383)

**MANSUR & TEBBETTS IMPLEMENT CO.
v. WILLET.**

(Supreme Court of Oklahoma. June 30, 1900.)
SALE—REFUSAL TO RECEIVE PROPERTY—
DAMAGES—EVIDENCE—FOREIGN STATUTES.

1. A clause or provision in a contract for the sale of personal property, where the legal title remains in the vendor, which stipulates for 20 per centum of the purchase price thereof as liquidated damages on failure to receive such property, is in conflict with sections 857 and 858 of the Statutes of 1893, and therefore void. The measure of damages in such a case is, if the property has been resold, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale, or, if the property has not been resold, the difference between the value of such property to the seller and the price fixed in the contract, plus all necessary expenses in marketing or reselling the same.—such sales to be made by the vendor in the same manner as if the property had been pledged to him; and where a plaintiff proves a violation of such a clause in a contract, but fails to prove that any actual damages were sustained by reason thereof, a demurrer to the evidence should be sustained.

2. Where one relies on the laws of another state to support a contract, they must be pleaded and proven; otherwise, it will be presumed that such laws are the same as those of our own territory. *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 60 Pac. 249, 9 Okl. 353. (Syllabus from the Court.)

Appeal from district court, Kay county; before Justice Bayard T. Hainer.

Action by the Mansur & Tebbetts Implement Company against George R. Willet. Judgment for defendant, and plaintiff appeals. Affirmed.

Tetrick & Rose, for appellant. Guy Graham and S. A. Jetmore, for appellee.

BURWELL, J. This is an action commenced in the district court of Kay county by the Mansur & Tebbetts Implement Company, a corporation, against George R. Willet, for the sum of \$88.40, as liquidated damages on account of the defendant's refusal to receive, pursuant to a certain contract, nine buggies which the plaintiff had sold to him. The defendant answered, setting up a set-off for \$119.25. To this answer the plaintiff filed a general denial. The case proceeded to trial, and, when the plaintiff rested, the defendant, by leave of court, dismissed, without prejudice, his claim for damages against the plaintiff, and demurred to plaintiff's evidence. The demurrer was sustained, and judgment for costs awarded to the defendant. Plaintiff excepted, filed its motion for a new

trial, which was overruled, and then appealed to this court.

The petition is not framed upon the theory that the plaintiff suffered actual damages, nor were any actual damages proven. The suit is brought upon section 4 of the contract, which the defendant admits he broke, and plaintiff must either win or lose upon the provisions contained therein. This section is as follows: "The purchaser agrees not to countermand this order, or any part of it, or have shipment held beyond present season, except on payment to Mansur & Tebbetts Carriage Mfg. Co. of 20% of the invoice prices of said order, as liquidated damages; and in the event we countermand said order, or prevent shipment as per this contract, we agree to pay said Mansur & Tebbetts Carriage Mfg. Co. said per cent., as liquidated damages. If shipment of this order is directed held beyond time specified in this contract, it may be so held or canceled at the option of said Mansur & Tebbetts Carriage Mfg. Co." The evidence shows that the Mansur & Tebbetts Carriage Manufacturing Company is a name used to designate one department of the business of the Mansur & Tebbetts Implement Company, and that the first name designated is used for convenience only. Section 7 of the contract also provided that the title to the buggies, and the money received from the sale thereof, should remain in the plaintiff until the buggies were fully paid for, but also provided that nothing in the contract should release the vendee from making payment as in the contract agreed. This contract, in so far as it attempts to fix a given sum or per centum of the purchase price of the goods as liquidated damages, is absolutely void, and cannot be enforced. Our statutes (St. 1893, §§ 857, 858) provide:

"Sec. 857. Every contract, by which the amount of damages to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided by the next section.

"Sec. 858. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damages sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

It would not be impracticable nor extremely difficult to fix the actual damages which plaintiff sustained by reason of the defendant's refusal to receive the goods. Therefore, under the laws of Oklahoma, the parties could not stipulate as to any specific amount as liquidated damages.

The plaintiff contends that the city of St. Louis, in the state of Missouri, is the place of the contract, and for that reason the contract should be governed by the laws of that state, citing authorities based upon facts similar to those in this case. Conceding for the sake of argument that this contention is true, the plaintiff has not pleaded the laws of that state,

and where the laws of another state are not pleaded they will be presumed to be the same as our own. The laws of Missouri not having been pleaded and proven, we must conclude that section 4 of the contract is also in contravention of a similar statute in force in that state. This rule is so well settled that we deem it unnecessary to cite authorities in support thereof.

The amount of damages which the plaintiff is entitled to recover from the defendant is governed by statute, and the parties cannot change the rule by fixing an agreed amount. The title to this property was to remain in the vendor. It had not passed to the vendee. And section 2628 of chapter 26, on "Damages," of the Statutes of Oklahoma of 1898, provides: "The detriment caused by the breach of a buyer's agreement to accept and pay for personal property the title to which is not vested in him, is deemed to be: First, if the property has been resold pursuant to section 4439, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or, second, if the property has not been resold in the manner prescribed by section 4439, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it." Section 4439, referred to above, is the section of that number in the Dakota Code, which section was adopted into our Code, and is now a part of section 2628, a part of which is quoted above; and we will now quote the remainder of the section: "One who sells personal property has a special lien thereon, dependent on possession for its price, if it is in his possession when the price becomes payable; and may enforce his lien in like manner as if the property was pledged to him for the price." This language is exactly the same as section 3208 of our Statutes of 1893, under the subject of "Liens."

The plaintiff cannot recover under section 4 of its contract, but must be content with the measure of damages fixed by the statutes. The petition did not state a cause of action, nor was the evidence sufficient to entitle it to recover, and the demurrer thereto was properly sustained. For the reasons herein stated, the judgment of the trial court is affirmed, at the costs of appellant. All of the justices concurring, except HAINER, J., who presided at the trial below, not sitting.

(10 Okl. 378)

BOARD OF COM'RS OF GARFIELD COUNTY v. ISENBERG.

(Supreme Court of Oklahoma. June 30, 1900.)
PLEADING—VERIFICATION OF ACCOUNT—DENIAL—COUNTIES—SUPPLIES FOR CLERKS OF COURT.

1. By the terms of section 3986, St. Okl. 1893, the correctness of any account duly

verified by the affidavit of the party, his agent or attorney, shall be taken as true, unless the denial of the same be verified by the affidavit of the party, his agent or attorney. The affidavit denying the correctness of an account verified as required by statute, which is made by agent or attorney, must set forth the reasons why it is not made by the party himself; and, if it fails to set forth such reasons, it is insufficient, under the law, to question the correctness of the account.

2. The statutes of Oklahoma give the power to boards of county commissioners to furnish necessary blank books, plates, blanks, and stationery for clerks of district courts; and all books and stationery which tend to expedite or facilitate business in such courts are included in the term "necessary," under this provision of the statute.

(Syllabus by the Court.)

Error from district court, Garfield county; before Justice John L. McAtee.

Action by J. T. Isenberg, successor to the Wave Printing Company, against the board of county commissioners of Garfield county. Judgment for plaintiff. Defendant brings error. Affirmed.

On December 1, 1897, defendant in error (plaintiff in the court below) filed his petition in the district court of Garfield county, alleging that defendant was indebted to him for furnishing material for and printing bar dockets to be used by the clerk of said court; that said dockets were printed by order of the county commissioners, and accepted by them, and used by the clerk of said court; that defendant refused to pay for said material and work. And to said petition was attached a copy of said account, duly verified, and marked "Exhibit A." Afterwards, on the 3d of December, 1897, defendant filed its demurrer to plaintiff's petition for the reason that said petition did not state facts sufficient to constitute a cause of action. Said demurrer was overruled by the court. Defendant given 10 days to answer. Within 10 days defendant filed its answer to plaintiff's petition: said answer denying each and every allegation of plaintiff's petition, except that it was a municipal corporation. Said answer was verified by defendant's attorney. On October 19, 1898, plaintiff filed a motion for judgment on the pleadings on the ground that defendant's answer was not verified as required by law. Said motion was by the court sustained. Judgment was rendered thereon as prayed for in plaintiff's petition, which action of the court was excepted to by the defendant. From said judgment and action of the court, plaintiff in error brings this cause here for review.

O. D. Hubbell, for plaintiff in error. Percy Glaze and John F. Curran, for defendant in error.

IRWIN, J. (after stating the facts). The first contention of defendant is that said petition does not show that the plaintiff in the court below was the owner of said account, nor show that said account was ever assigned to him. A reference to said petition will show that this suit was brought by the

plaintiff, Isenberg, as the successor of the Wave Printing Company, and the statements in said petition are that the material was furnished and the printing done by said successor, and not by the Wave Printing Company. Hence no allegation of assignment would be necessary, and the allegation that plaintiff, as such successor of the Wave Printing Company, furnished the material and actually did the work, would be a sufficient allegation of ownership of said account.

Second, it is contended by plaintiff in error that the court erred in sustaining plaintiff's motion for judgment on the pleadings. The Statutes of Oklahoma of 1893 (page 780, § 3986), among other provisions, contain the following: " * * * The correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." Section 3992 provides: "When the affidavit is made by the agent or attorney it must set forth the reason why it is not made by the party himself. It can be made by the agent or attorney only: First, when the facts are within the personal knowledge of the agent or attorney; second, when the plaintiff is an infant or of unsound mind, or imprisoned; third, when the pleading to be verified is founded upon a written instrument for the payment of money only, and such instrument is in the possession of the agent or attorney; fourth, when the party is not a resident of or is absent from the county." Now, it seems to us that a fair construction of this section would mean that some reason must be given by said affidavit why it was not signed by the party or the proper officer; that is, some showing should be made that this affidavit falls within one or the other of the four classes set forth in the section, because, unless it does, the agent or attorney has no authority to verify such an affidavit. Now, in this case the verification of the plea denying this account is signed and sworn to by the attorney. No reason is given why it is not signed and sworn to by the proper officer. No attempt is made to bring it within any one of the four classes or subdivisions mentioned in section 3992 of the statute. This being true, this verification comes far short of meeting the requirements of the statute, and hence must be held as no verification at all, and under the provisions of section 3986 the correctness of plaintiff's account must be taken as true. This being true, the court was correct in his ruling in sustaining the motion of plaintiff for judgment on the pleadings.

It is contended by plaintiff in error that the board of county commissioners had no power or authority to provide for bar dockets for the clerk of the district court. Section 1785, subd. 5, of the Statutes of Oklahoma of 1893, as to the powers of the board of county commissioners, reads as follows:

"To furnish necessary blank books, plats, blanks and stationery for clerks of the district court." Now, it is a well-known fact that bar dockets are necessary for the use and convenience of the clerk of the court, as well as the members of the bar, and they tend to facilitate and expedite the business of the court. And we take it that when the law provides that certain officers shall have the power to furnish necessary stationery, blanks, and books, it imposed upon them the duty to furnish all such books, blanks, and stationery as are necessary, and that included in the term "necessary" are all such books, blanks, and stationery as tend to facilitate and expedite the business of said court and tend to the convenience of the clerk in the discharge of his duty. And that bar dockets are of this class, no person who has given the subject the slightest attention will dispute. So far as we can ascertain, the courts have invariably held that the term "necessary" is not limited to such things as are absolutely indispensable, but includes all such things as are proper, useful, and suitable for the purpose; and, measured by this rule, there can be no doubt that the bar docket, such as is the subject of this controversy, is not only proper and useful, but necessary. In the case of *Board v. Beveridge*, 16 Ill. 312, the court held that although the statute had not specified lights and fuel, in express terms, as being among the items to be provided by the county for the clerk's office, such items were nevertheless a county charge, since the clerk's office was not sufficiently furnished for the convenience and comfortable transaction of public business without them. The court there said: "In provisions of this kind some things must necessarily be implied." While it might be contended that the business of the clerk's office and the discharge of the business of the court could be carried on without a bar docket, and that said bar docket was not absolutely indispensable, still, if such bar docket tends to the convenience of the clerk, and tends to expedite and facilitate business, then it is a proper and necessary expense, which it is the duty of the board of county commissioners to meet. Hence, in this case, we think the ruling of the court was correct, the judgment was just, and for that reason the judgment of the lower court is affirmed. All the justices concurring, except McATEE, J., who, having presided in the court below, took no part in this decision.

WILSON v. McCORNACK.

(Supreme Court of Oklahoma. June 30, 1900.)

JUDGMENT—NOTICE TO REVIVE—SERVICE.

1. Under the provisions of our Civil Code, the notice of an application to revive a dormant judgment must be served in the same manner, and returned within the same time, as a summons.

2. Hence the notice of an application to revive a dormant judgment, served and returned by an attorney of record, is void. Such notice

must be served and returned by the sheriff, or some person duly authorized by him to make such service and return.

(Syllabus by the Court.)

Error from district court, Oklahoma county; before Justice B. F. Burwell.

Proceedings by J. A. Wilson against James M. McCornack to revive a judgment. Proceedings set aside. Plaintiff brings error. Affirmed.

The record in this case shows: That on October 28, 1892, Joseph McMullen obtained a judgment against James M. McCornack in the district court of Oklahoma county upon two promissory notes for \$2,418, and costs of the action. On October 28, 1897, said judgment became dormant. On March 16, 1898, said Joseph McMullen, plaintiff in the court below, filed the following motion to revive said judgment:

"Comes now the plaintiff, Joseph McMullen, and represents and shows to the court that heretofore, to wit, on the 28th day of October, 1892, the above-named plaintiff obtained judgment in this court against the above-named defendant, James McCornack, for the sum of \$2,440, to bear interest at the rate of eight per cent. per annum from the said date of its rendition, and the costs of said action, taxed at \$——, which said judgment is cited and made a part hereof; that said judgment remains due and wholly unpaid; that by operation of law the said judgment has become dormant. Plaintiff therefore moves the court that said judgment be by the order of this court revived against the defendant, and for all other proper relief in the premises. Joseph McMullen, by J. A. Wilson, His Attorney."

That on February 16, 1898, the plaintiff served upon the defendant, James M. McCornack, the following notice (omitting caption):

"To the defendant, James M. McCornack: You will take notice that the plaintiff has filed in the office of the clerk of the above-named court his motion for a revivor of a certain judgment therein referred to and cited, a copy of which motion is hereto attached; that the same will be called up for hearing on said motion on the 16th day of March, 1898, or as soon thereafter as the court can hear the same. J. A. Wilson, for Joseph McMullen."

And on the back thereof appears the affidavit of J. A. Wilson, showing the manner of service of said notice, which is in words and figures as follows, to wit:

"J. A. Wilson, being duly sworn, deposes and says that he served a copy of the within notice, with a copy of the motion herein thereunto attached, on the defendant, James M. McCornack, on the 22d day of February, 1898, by delivering a true copy of said notice and motion to the said defendant personally. J. A. Wilson.

"Subscribed and sworn to before me this 25th day of February, 1898. Ed. L. Dunn, Clerk."

On March 16, 1898, the district court made

the following order to revive said judgment (omitting caption):

"And now, on this 16th day of March, 1898, the same being one of the regular judicial days of said court, this cause came on for hearing on the motion of the plaintiff for a revivor of this judgment; and it appearing to the court that said judgment was rendered on the 28th day of October, 1892, and that the same has become dormant by the lapse of time, and it further appearing to the court that the plaintiff has served due and legal notice of this motion for revivor upon the said defendant, and it further appearing that said judgment was rendered for the sum of \$2,397.96, and to draw interest from the 28th day of October, 1892, at the rate of seven per cent. per annum, and that said interest accrued to this date amounts to \$917.46, and that costs accrued herein amount to \$6.80, it is therefore considered, ordered, and adjudged by the court that said motion to revive said judgment be sustained, and that the same is hereby in all things revived, the same as if it had not become dormant by the lapse of time. It is further adjudged that there is due on said judgment the principal sum of \$2,397.96, and the further sum of \$917.45, interest accrued to this date since the rendition of said judgment of \$3,315.41, and that the costs accrued herein, which is a part of this judgment, is the sum of \$6.80; and it is further ordered by the court that execution issue herein on the præcipe of the plaintiff. J. R. Keaton, Judge."

On January 3, 1899, the defendant, James McCornack, filed the following motion to vacate the order of revivor (omitting caption):

"Comes now the above-named defendant, James McCornack, and moves the honorable court to set aside and vacate the order of revivor made on the 16th day of March, 1898, for the following reasons: First, that no such judgment was ever rendered against this defendant as that recited in the order of revivor complained of by this defendant; second, that no service of motion, process, writ, or summons, was ever made upon the defendant as required by law. Wherefore the defendant asks that said order of revivor be held for naught, and that the same be vacated and set aside as void for the reasons herein recited. A. B. Hammer, Attorney for Defendant.

"Plaintiff, by his attorney, hereby waives time, and asks that this motion be passed on by the court on this 16th day of January, 1899. J. A. Wilson, Attorney for Plaintiff."

On January 16, 1899, the district court sustained said motion, for the reason that no service of motion, process, writ, or summons was ever made upon the defendant as required by law, and as alleged in the second ground of said motion, to which ruling and order of the court the plaintiff reserved an exception, and brings the case here on appeal.

R. G. Hays and J. A. Wilson, for plaintiff in error. **A. B. Hammer, for defendant** in error.

HAINER, J. (after stating the facts). The sole question presented by the record and discussed in the briefs of counsel is the validity of the service of the notice to revive the judgment. The record discloses that the notice to revive the judgment was served upon the defendant by the attorney of record, and not by the sheriff of Oklahoma county. It is contended by the plaintiff in error that service of notice made by the attorney of record on the plaintiff is a valid service, and that the statute does not require the sheriff to serve such notice, and make return thereon, in order to revive a judgment. The district court held that the notice for the application to revive a dormant judgment must be served in the same manner and returned in the same time as a summons, and that such service must be made by the sheriff. We think that this is the correct interpretation of the statute. Section 454 of our Civil Code provides as follows: "If a judgment become dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment." Section 442 provides: "If the order is made by the consent of the parties, the action shall forthwith stand revived; and, if not made by consent notice of the application for such order shall be served in the same manner and returned within the same time as a summons, upon the party adverse to the one making the motion; and if sufficient cause be not shown against the revivor, the order shall be made." Section 59 provides that "the summons shall be issued by the clerk, upon a written præcipe filed by the plaintiff; shall be under the seal of the court from which the same shall issue, shall be signed by the clerk, and shall be dated the day it is issued. It shall be directed to the sheriff of the county, and command him to notify the defendant or defendants, named therein. * * *" etc. Section 61 provides that "the summons shall be served and returned by the officer to whom it is delivered, except when issued to any other county than the one in which the action is commenced. * * *" Section 63 provides that: "The summons shall be served by the officer to whom it is directed, who shall indorse on the original writ the time and manner of service. It may also be served by any person not a party to the action, appointed by the officer to whom it is directed. The authority of such person shall be indorsed on the writ. When the writ is served by a person appointed by the officer to whom it is directed, or when the service is made out of this territory, the return shall be verified by oath or affirmation." It will thus be seen from these various provisions of our Civil Code that summons must be served and returned by the sheriff, or by some person duly authorized by him to make such service and

return. We think that the language of section 442 of our Code, which provides that notice for the application for the revivor of a judgment shall be served in the same manner and within the same time as a summons, is mandatory in its terms. It is clear and unambiguous, and there is no room for construction. The judgment of the district court was right, and it is therefore affirmed. All the justices concurring, except **BURWELL, J.**, who did not participate in this decision, having tried the cause below.

WALTERS v. RATLIFF, Sheriff.

(Supreme Court of Oklahoma. June 30, 1900.)
**PROBATE COURT—JURISDICTION—REPLEVIN—
 FRAUDULENT CONVEYANCES—CHANGE
 OF POSSESSION.**

1. The probate court has jurisdiction of an action in replevin against a sheriff to recover personal property levied on under an execution against the property of another, where the value of the property does not exceed \$1,000.

2. An action of replevin to recover chattels levied upon by a sheriff as the property of another is not an action against an officer for misconduct in office.

3. Under section 2663, St. 1893, every transfer of personal property, other than a thing in action, if made by a person having at the time the possession or control of the property, and not accompanied by immediate delivery and followed by an actual and continued change of possession, is conclusively presumed to be fraudulent, and therefore void, as against those who are creditors of the person making such transfer while he remains in possession, and the successor in interest of such creditors.

4. Where the facts are undisputed, it is for the court to determine, as a question of law, whether such facts show such an actual and continued change of possession as will render a transfer of personal property valid as against creditors of the seller.

5. A sale of personal property may be valid and enforceable as between the vendor and vendee, and yet void as against creditors of the vendor, where such sale is unaccompanied by immediate delivery, and not followed by actual and continued change of possession.

(Syllabus by the Court.)

Appeal from district court, Kingfisher county; before Justice John C. Tarsney.

Action by Charles W. Walters against John A. Ratliff, sheriff. A judgment for plaintiff was reversed on appeal to the district court, and he appeals. Affirmed.

J. C. Robberts and George B. Robberts, for plaintiff in error. **Ellis, Reed, Cook & Ellis, for defendant** in error.

BURFORD, C. J. The plaintiff in error, Charles L. Walters, commenced his action in the probate court of Kingfisher county against John A. Ratliff as sheriff, to recover 4 stacks of wheat in the field, and 275 bushels of wheat in the elevator. The plaintiff alleged that he was the owner and entitled to the possession of said wheat, and that it was of the value of \$550, and that the defendant wrongfully detained said wheat from him. He prayed judgment for the return of said wheat or its value, and \$100 damages. An

affidavit in replevin was filed, but the property was never seized under the writ in replevin, and the action proceeded as one for the value of the property only. The answer was a general denial. Trial was had in the probate court, and judgment rendered in favor of plaintiff for the sum of \$371. Ratliff appealed to the district court, where the case was again tried to a jury, and judgment rendered for defendant on a demurrer to plaintiff's evidence. The defendant in error has moved in this court to dismiss the cause for the reason that the probate court was without jurisdiction of the subject-matter of the action, that the district court acquired no jurisdiction, and that this court is without jurisdiction. Before deciding the cause on its merits, it is incumbent on this court to determine this question of jurisdiction. The defendant, Ratliff, is named in the title of the action as "John Ratliff, as Sheriff of Kingfisher County, O. T." It is alleged in the petition that "the defendant is the duly elected, qualified, and acting sheriff of Kingfisher county, Oklahoma territory"; "that said defendant wrongfully and unjustly, as said sheriff, detains the same, and the possession thereof, from the plaintiff," "wherefore the plaintiff prays judgment against said defendant as sheriff," etc. The defendant, before trial in the probate court, moved to dismiss the cause for the reason that it was an "action against an officer for misconduct in office," and that the probate court had no jurisdiction of said cause. The motion was overruled, and after judgment the defendant appealed to the district court. In the district court the defendant renewed his motion to dismiss for want of jurisdiction in the probate court, and said motion was again overruled. He now again renews the motion here for same reasons.

The statute conferring jurisdiction on probate courts in civil causes (section 1562, St. 1893) provides: "Probate courts in their respective counties shall in addition to the powers conferred upon them by the probate chapter of the territory, have and exercise the ordinary powers and jurisdiction of justices of the peace, and shall in civil causes have concurrent jurisdiction with the district court in all civil cases in any sum not exceeding one thousand dollars, exclusive of costs, and in actions of replevin where the appraised value of the property does not exceed that sum; and the provisions of the chapter on civil procedure relative to justices of the peace and to practice and proceedings in the district court shall apply to the proceedings in all civil actions, prosecuted before said probate courts; provided, that probate courts shall not have jurisdiction: First, in any action for malicious prosecution; second, in any action against officers for misconduct in office except where like proceedings can be had before justices of the peace." The causes for misconduct of officers in which justices of the peace may entertain jurisdiction are governed by subdivision 7, § 4640, St.

1893, which reads as follows: "To proceed against constables failing to make return, making false return, or failing to pay over money collected on execution issued by such justice." This last provision is a part of the Civil Code, adopted from Kansas, while the former is a part of the act extending the jurisdiction of probate courts, which was ratified by an act of congress. It is contended by counsel for defendant in error that the probate court can in no case exercise any greater jurisdiction than that of a justice of the peace in actions against officers for misconduct in office, and that such courts in this class of cases are limited to proceedings against constables for misconduct. It is further contended that the case under consideration is one to recover damages against the sheriff for misconduct in office. We are not disposed to question the first contention, but is the second well founded? It does not necessarily follow that, because the wrongful act of the sheriff is an incident to the cause of action pleaded, it is an action against the officer for misconduct in office. Nor does it follow that the probate court loses jurisdiction of a cause of action, clearly within its jurisdiction, because it happens to involve the wrongful conduct of an officer. The probate court has no jurisdiction of the crime of horse stealing, yet it would have jurisdiction in an action to replevy the stolen horse, and it would not lose jurisdiction by proof of the fact that the subject of the replevin action had been feloniously stolen by the defendant. The probate court also has jurisdiction of common assault, but such jurisdiction will not be defeated because the assault was the wrongful act of an officer attempting to discharge an official duty. The question of jurisdiction must be determined from the gist and purpose of the action. The petition in the case at bar sets up a cause in replevin. It is an action to recover specific personal property or its value, and for damages for detention. It cannot be denominated an action against an officer for misconduct in office. It may be true, and probably is, that if the defendant, as sheriff, took the property in question upon a writ against some other person, and held the plaintiff's property on such writ, and by virtue of such writ, then he might be proceeded against for damages, and as such officer his bondsmen might be liable for his misconduct; but in this case the bondsmen are not sued, and there is no attempt to charge him as an officer for official misconduct, and, even though the facts proven might make a case of official misconduct, it would not change the character of the case made by the petition. The Kansas cases cited by defendant in error are not inconsistent with this theory. The case of Neal v. Keller, 12 Kan. 247, was an action brought before a justice of the peace against another justice of the peace to recover money which he had collected in his official capacity, and had failed to pay over on demand. The court held that this was an official act, and his offi-

cial duty required him to pay over the money, and his failure on demand constituted misconduct in office. It was held that the justice court had no jurisdiction, because the action was one of official misconduct. The case of *Brockett v. Martin*, 11 Kan. 378, was an action against a justice of the peace and his sureties on an official bond, to recover for money collected by the justice upon a judgment recorded on his docket. The only question decided was whether the justice held the money by virtue of his office, or as agent for the judgment creditor. There is nothing in the case applicable to the question at bar. The case of *Dodge v. Kincaid*, 30 Kan. 346, 1 Pac. 107, was an action on a constable's bond, to recover money collected by him on an execution issued by the justice and not paid over by such constable. It was properly held that by the terms of the statute the justice of the peace had jurisdiction of such action. It had been contended that the justice should proceed summarily, instead of by civil action on the bond. We do not question the correctness of any of these decisions, nor do they conflict with our views in this case. The case cited from the Ohio supreme court (*Smith v. Josselyn*, 40 Ohio St. 406) holds that a seizure of the goods of A. under color of process against B. is official misconduct in the officer making the seizure, and is a breach of the conditions of his official bond, for which his sureties will be liable, but it is not held that no other remedy would be available. We regard the Nebraska cases as sound in principle, and supported by logic and reason. That state has a statute identical with ours on the question of jurisdiction of justices of the peace. In the case of *Miller v. Robey* (Neb.) 4 N. W. 65, the plaintiff brought an action for conversion, and recovered damages. On appeal Mr. Justice Maxwell, for the court, said: "It appears from the record that Miller was sheriff of York county, and took the goods in question under an order of attachment in an action wherein J. E. Porter & Son were plaintiffs and Samuel Robey defendant, and judgment was rendered against Robey for the sum of \$38.60, and that the property so levied upon was applied in payment of said judgment. There is no allegation in the petition that the officer acted in bad faith in making the levy, or that he had reason to believe that the goods belonged to Mary E. Robey; the allegation of the petition being, 'And said plaintiff avers that then and there the said property being found and converted and disposed of the same to their (the defendants') own use and benefit, to the damage of said plaintiff in the sum of three hundred dollars.' The action is therefore not for misconduct in office, but for the value of the property taken. Misconduct in office may be defined as unlawful behavior or neglect by a public officer by which the rights of the parties have been affected. Thus, a sheriff or constable is liable to a plaintiff for refusal or neglect to serve process, or want of diligence

in service; for the escape of a defendant who was lawfully arrested on civil process, either mesne or final; for neglect or refusal to return process; for making a false return; for negligently caring for goods, whereby some of them are lost; for neglect to pay over moneys collected, and the like. * * * But this action, not being for misconduct in office, should have been brought before a justice of the peace." In the case of *Nelhardt v. Kilmer* (Neb.) 10 N. W. 531, where suit was commenced before a justice of the peace for taking and converting personal chattels, the defendant took the property as sheriff on process against another party. It was claimed that the action was against an officer, and for misconduct in office, and that the court was without jurisdiction. The court said: "There can be no doubt that under the authorities the plaintiff could have brought his action against the sheriff and his sureties, and, by proper averments and proofs, made this an action for misconduct in office, and the official sureties of the sheriff would be held for the damages caused by such misconduct. In such case a justice of the peace would not have jurisdiction, the same being prohibited by section 907 of the Code. But is the plaintiff restricted to this remedy, and consequently to a court of record in which to prosecute? None of the cases cited go that far. The fact of the defendants being sheriff and deputy sheriff, respectively, does not exempt them from the action of trespass or of trover and conversion. The petition, as the writer understands it, presents a cause of action of the latter designation, as actions at law were formerly known,—a cause of action of which a justice of the peace has unquestioned jurisdiction." The case of *Spleman v. Flynn* (Neb.) 27 N. W. 224, approves the two former cases, and states the law thus: "When the amount claimed does not exceed \$200, and an action is brought against the sheriff for the value of property sold by him under an execution in his hands, and there is no charge of misconduct, a justice of the peace has jurisdiction." In our opinion, the Nebraska cases quoted from properly state the law. It was not the purpose of the legislature to deprive the justices' courts of jurisdiction in the actions of replevin, trespass, and trover and conversion, because the defendant might happen to be a sheriff, or because of the fact that such sheriff had taken the wrong property under a writ of attachment, replevin, or execution. It is only in those cases where the action is against the officer as such, or on his official bond, and the gist of the action is the enforcement of a remedy for some violation or omission of official duty, and official misconduct is alleged and relied upon as the foundation for a recovery, that the statutory prohibition is intended to apply. The action in the case at bar is the ordinary action in replevin, or for conversion, to recover the value of the chattels taken. There is no allegation that the defendant, as sheriff, acted maliciously, will-

fully, or in bad faith, and it does not appear that it was the purpose of the pleader to charge or rely upon any official misconduct. We think the probate court had jurisdiction, and that the case is properly here for review.

We now proceed to review the case upon the merits. The cause was tried to a jury. The proof submitted by the plaintiff is to the effect that the plaintiff, Charles Walters, and John Walters were brothers; that John lived on a homestead in Kingfisher county, and was engaged in farming. Charles was a single man, and worked as a farm laborer, sometimes in Oklahoma, and sometimes in Kansas. In the summer of 1895 the brothers made an agreement whereby Charles was to go to Kansas, and work and earn money to procure seed wheat and send to John, and John would sow some wheat for Charles, and give him the crop in payment for the seed wheat. Pursuant to this agreement, Charles went to Kansas, and he procured and sent to John 30 bushels of wheat, which was planted, and a crop raised. The next fall (1896) John sowed 25 acres of wheat in a particular field on his place, which he intended for Charles, in payment for the 30 bushels of seed wheat. Charles returned to John's in the winter of 1896 or spring of 1897, and was informed by John that the 25 acres of wheat was his. Charles lived in John's family, and worked for him, as a farm laborer, for wages. The wheat matured, and was harvested and stacked on John's place. Charles hired John and a neighbor, who owned a reaping machine, to cut the wheat, and they hired Charles, as a laborer, to assist. The wheat was sowed by John on John's land, was harvested and stacked under his direction, and remained on his farm and under his control until after the alleged taking by the defendant. Prior to the bringing of this action the Buford & George Implement Company obtained a judgment in the district court of Kingfisher county against John Walters for the sum of \$1,304.77. On July 13, 1897, execution was issued on said judgment, and delivered to the defendant Ratliff, sheriff of Kingfisher county; and on July 17, 1897, the execution was levied on the stacks of wheat in question, as the property of John Walters. The plaintiff made demand for the wheat, and it was refused. During the period between the levy and the trial a portion of the wheat was threshed and stored in an elevator. It seems that the plaintiff and John Walters attempted to take possession of and thresh the wheat after the levy of the execution, but the sheriff interfered and stopped the further disposal of the wheat. Two ricks of wheat were afterwards turned over to John Walters by the sheriff as exempt property. The sheriff then had all the wheat threshed, and sold it on the execution, and applied the proceeds in favor of the Buford & George Implement Company. After the plaintiff had submitted this proof and rested, the defendant demurred to the evidence. The

court sustained the demurrer and rendered judgment for defendant for his costs. The ruling of the trial court on the demurrer to the evidence is assigned as error. We think there was no error in this ruling. Section 2663, St. Okl. 1893, provides: "Every transfer of personal property other than a thing in action * * * is conclusively presumed, if made by a person having at the time the possession or control of the property, and not accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things transferred, to be fraudulent, and therefore void, against those who are his creditors while he remains in possession and the successors in interest of such creditors." This section was adopted from the statutes of Dakota (Comp. Laws 1887, § 4657), and had been construed prior to its adoption by our legislature. In *Grady v. Baker*, 19 N. W. 417, the supreme court of the territory of Dakota, having this statute under consideration, said: "It means that the sale shall be open and public, that the world may be apprised of the change of ownership. The change of possession must be actual and continued, and not subject to some secret trust between the seller and buyer. If such is the character of the possession, the statute is satisfied, and the sale will not be avoided." California has the same statute, and it has been frequently construed by the courts of that state, and, we think, correctly. In *Stevens v. Irwin*, 15 Cal. 506, the supreme court of that state said: "The rule, as defined by our statute, is almost in the language of that given in the cases which establish the rule in England. It is true that some stress is laid on the words 'actual' and 'continued' possession, but these words are suggested by the facts and principles of the decided cases referred to. The word 'actual' was designed to exclude the idea of a mere formal change of possession, and the word 'continued' to exclude the idea of a mere temporary change. But it never was the design of the statute to give such extension of meaning to this phrase, 'continued change of possession,' as to require, upon penalty of a forfeiture of the goods, that the vendor should never have any control over or use of them. This construction, if adopted, would lead to very unjust and very absurd results. A vendor could never become trustee of the goods without their being forfeited or liable for his debts. If a livery stable keeper hired a horse to the original vendor, it would be liable for his debts; or, if a boarder came into a room, the furniture might be liable for his debts, if he once owned it. The 'continued change of possession,' then, does not mean a continuance for all time of this possession, or a perpetual exclusion of all use or control of the property by the original vendor. A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The de-

livery must be made of the property. The vendee must take actual possession. That possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property." In discussing the manner of making actual delivery, the California supreme court, in *Lay v. Neville*, 25 Cal. 546, said: "It was not intended by the fifteenth section of the statute of frauds to make a sale void, as against creditors and purchasers of the vendor, unless the vendee shall perform in every case what might in some cases be an impossibility. It was intended that the vendee should immediately take and continuously hold the possession of the goods purchased, in the manner, and accompanied with such plain and unmistakable acts of possession, control, and ownership, as a prudent bona fide purchaser would do in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property. The acts that will constitute a delivery will vary in the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. The same acts are not necessary to make a good delivery of a ponderous article, like a block of granite or a stack of hay, as would be required in case of an article of small bulk, as a parcel of bullion. It might properly be required that there should be a manual delivery of a single sack of grain at the moment of its sale, but upon the sale of two thousand sacks this could not be done without incurring great and unnecessary expense, and departing from the usual course of business. The same is true of the acts that may be required to manifest 'actual and continued change of possession' required by the statute. Each case must, in a great manner, depend upon its own circumstances." The same construction is given this statute by the supreme court of South Dakota in *Longley v. Daly*, 46 N. W. 247. In *Woods v. Bugbey*, 29 Cal. 466, the court says: "Our statute admits of no explanation excusing the delivery and change of possession. Therein is the difference which it is manifest the legislature intended, in order to exclude all inquiry as to the consideration paid by the purchaser, or as to his motives and intentions in the premises. If in fact there was not an actual and continued change of possession given, the statute pronounces the transfer fraudulent as to creditors, and courts have no right to seek to evade its force and effect. No excuse or explanation for want of an actual and continued change of possession can be entertained, and it is quite useless to cite decisions made under the statutes of Elizabeth and of New York, or other states, allowing the want of

an immediate delivery and an actual and continued change of possession to be explained or accounted for as authoritative expositions of the rule which our statute has prescribed." These authorities, we think, are consistent with the spirit and purpose of the statute, and may very safely be followed. In the case before us, we need not inquire whether there was a valid sale and transfer of the wheat as between John Walters and Charles Walters. The question to be determined is, was there a sale of the wheat by John Walters to Charles Walters, accompanied by immediate delivery, and followed by actual and continued change of possession? If there was not, then the sale was conclusive evidence of fraud, as against the creditors of John Walters, although the agreement and sale were such as that they might have been enforced between the seller and buyer, and even though the buyer had no knowledge of any fraud upon the part of the seller. *Stephens v. Hallstead*, 58 Cal. 193; *Merrill v. Hurlburt*, 63 Cal. 494; *Edwards v. Bank*, 59 Cal. 148; *Murphy v. Mulgrew*, 102 Cal. 547, 36 Pac. 857. The demurrer to the evidence presented the question to the court, as one of law, whether the evidence submitted by the plaintiff, considered in its most favorable light for the plaintiff, showed an immediate delivery, followed by an actual and continued change of possession, of the wheat. There was nothing in the evidence from which it could be fairly and reasonably inferred that any open, positive change of possession ever took place. There was nothing done by which the general public could discern any outward signs of a change in possession. There was no evidence of such a delivery as the circumstances of the case would reasonably admit of. Hence the court was bound to hold, as a matter of law, that the attempted sale or transfer of the wheat was fraudulent and void as to creditors of John Walters. There was no apparent change in the conditions at any time. John planted the wheat on his own ground. He planted his own seed with his own teams. He prepared the ground for the wheat, and it grew on his ground. During a portion of this time the plaintiff worked for him as a farm laborer, and assisted him in farming. When the wheat was ready to harvest, it was cut by John Walters and a neighbor, and was stacked on John's farm. It was treated the same as his own grain. There was nothing to indicate to the outside world that the plaintiff had any interest in the wheat, and he did no acts which to the public would indicate acts of ownership, or a purpose to control the wheat while growing or afterwards, until the sheriff levied the execution. It was then too late to take such possession as would defeat the levy of the execution. We think the court properly sustained the demurrer to the evidence and gave judgment for the defendant.

The only other ruling complained of is the refusal of the trial court to permit the plain-

tiff to reopen his case and introduce additional testimony after he had rested and the demurrer had been presented. Upon this question we cannot interfere. It was a matter wholly within the discretion of the trial court, and, unless it affirmatively appears that there was an abuse of discretion, the appellate court will not disturb the action of the trial court. It does not appear that there was such abuse of discretion as would be reversible error. The judgment of the district court is affirmed, at the costs of plaintiff in error. All the justices concur.

SANDERS v. CHICAGO, R. I. & P. RY. CO.
(Supreme Court of Oklahoma. June 30, 1900.)
COMMON CARRIER—NEGLIGENCE—EVIDENCE.

1. One is not justified in riding on the steps of a passenger car, outside of the vestibule door, even though he has a ticket for passage on that particular train, and is unable to secure admission to the coach; and if one voluntarily assumes such risk, and is accidentally thrown from the train while it is running, he is not entitled to damages for personal injuries received thereby.

2. A demurrer to evidence which does not reasonably support the allegations of a petition, and which will not support a verdict, should be sustained.

(Syllabus by the Court.)

Error from district court, Kingfisher county; before Justice John L. McAttee.

Action by Spencer E. Sanders against the Chicago, Rock Island & Pacific Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

D. K. Cunningham, for plaintiff in error.
M. A. Low, W. F. Evans, C. O. Blake, and E. B. Blake, for defendant in error.

BURWELL, J. Spencer E. Sanders commenced this action against the Chicago, Rock Island & Pacific Railway Company to recover the sum of \$20,000, as damages alleged to have been sustained by him on account of personal injuries caused by the negligence of the defendant while plaintiff was a passenger on one of its trains. Issues were joined, and a trial had. After the plaintiff introduced all of his evidence and rested, the defendant filed a demurrer to the evidence, which was sustained by the court, and judgment for costs entered for the defendant. The plaintiff saved his exceptions to this order, as well as to an order denying him a new trial, and brings the case here on error.

The facts in this case are brief. The plaintiff on the morning of the injury went to the passenger depot of the defendant in Kingfisher, and purchased from the agent a ticket from that place to Dover, which is located a few miles north of Kingfisher. At this time the north-bound passenger train was standing by the depot, having arrived some four minutes before, and other passengers had gotten on and off of it. A lady and gentleman entered the front end of the

chair car a short distance ahead of the plaintiff, but when the plaintiff reached the car the vestibule door was closed and locked. He stepped onto the car steps and shook the door, but could not get it open. He then walked back to the other end of the chair car and tried to open the vestibule door there, but could not. According to his statement, he stood on the steps until the bell rang for leaving, and then shook the door again. By this time the train was moving, and he concluded to remain on the steps, thinking that some of the trainmen would discover him and let him in. But the other witnesses say that after trying the vestibule door at the back end of the chair car, and finding himself unable to effect an entrance, he stepped down on the depot platform and started toward the north end of the car, and that at this time the bell began ringing and the train started, whereupon he stepped back onto the steps at the back end of the chair car and rode off. This difference, however, we deem immaterial. At the time plaintiff arrived at the train all of the passengers had gotten on and off, and all of the trainmen had returned to the train, or at least none of them were on the depot platform or in sight. The ordinary stop of this train at Kingfisher was five minutes, and this was about the time consumed that morning. Plaintiff rode on the car steps outside of the vestibule door until the train reached a point a short distance north of Dover. Here, without any force by or knowledge of the agents of the defendant, he accidentally fell off of the train, and received the injury complained of.

Viewing this evidence in its most favorable light, the plaintiff is not entitled to recover, and the demurrer was properly sustained. Many authorities are cited by the appellant to the effect that railway companies are bound to provide proper accommodations and to use all reasonable precautions for the safety of their passengers. The correctness of the decisions is not questioned in this opinion. However, the defendant company had used these precautions. Vestibule doors on cars are for the purpose of preventing passengers going from one car to another while the train is moving from falling off of the train, and to keep out smoke, dust, etc. The defendant knew, or at least, in law, it is presumed that he knew, that it was extremely dangerous for him to ride on the car steps, outside of the vestibule door; and while it is true he had purchased a ticket, possibly to ride on that train, the company did not agree that he might ride on the car steps. His ticket gave him passage in the car, and not on the steps outside, and when he voluntarily elected to ride on the steps he assumed all of the additional risks incident thereto. Persons have become familiar with the extreme danger of riding on the tops of cars or on the steps, and the courts have laid down the rule that such acts constitute negligence per

se. *Secor v. Railroad Co.* (C. C.) 10 Fed. 15; *Scheiber v. Railway Co.* (Minn.) 63 N. W. 1034; 4 Elliott, R. R. § 1630, and notes. While certain duties are imposed upon railway companies for the protection and safety of passengers, persons riding on passenger trains are required to use at least reasonable diligence and care for their own safety. If the plaintiff was denied a fair opportunity to get on the train after buying his ticket, provided he bought it in time to take passage on that particular train under the rules of the company, and the train was one from which passengers were permitted to alight at Dover, and he suffered any damages by reason thereof, he could have maintained his action for the same; but he cannot recover damages from the company for an injury which was the result of his own rash act, and which imperilled his life from the very moment the train reached full speed. The evidence of the plaintiff and his witnesses did not reasonably support the allegations of the petition, and if a verdict had been returned for the plaintiff the trial court would have been compelled to set it aside. Therefore the demurrer to the evidence was properly sustained. For the reasons herein expressed, the judgment of the court below is affirmed at the costs of plaintiff in error. All of the justices concurring, except McATEE, J., who presided at the trial below, not sitting.

POWERS v. HITCHCOCK. (Sac. 675.)

(Supreme Court of California. July 24, 1900.)

ELECTIONS—CONTEST—COMPLAINT—SUFFICIENCY—NOMINATION CERTIFICATE—ISSUANCE—NOMINATION BY PETITION—LEGAL PRESUMPTION.

1. Under Code Civ. Proc. §§ 1111-1127, which authorize an election to be contested for malconduct on part of the board of election, or the ineligibility of the person elected, or for bribery, or on account of illegal votes, a complaint which alleges that defendant was illegally elected justice of the peace, because no convention ever assembled nominating him, and that his nomination was never certified to the county clerk, does not state a cause of action.

2. Under Code Civ. Proc. § 1963, subd. 15, providing that a presumption that an official duty had been regularly performed is satisfactory if uncontradicted, where a complaint alleged that the county clerk placed the name of defendant on the ticket as a candidate for justice of the peace, and that a certificate of election had been issued to him, in the absence of an allegation to the contrary it will be presumed that the clerk regularly performed his duties.

3. Under Pol. Code, § 1188, providing that a candidate for a public office may be nominated by a petition signed by voters equal in number to 3 per cent. of the vote cast at the last election, where a complaint alleged that no convention of the township had assembled nominating defendant as justice of the peace, and that his nomination had never been certified to the county clerk, in the absence of an averment to the contrary, it will be presumed that he was nominated by a petition of voters equal to 3 per cent. of the votes cast at the last election.

Commissioners' decision. Department 2. Appeal from superior court, Solano county.

Action by O. B. Powers against A. F. Hitchcock. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

E. M. Billings, for appellant. Coghlan & Henry, for respondent.

COOPER, C. A demurrer was sustained to plaintiff's amended complaint, and judgment entered for defendant. This appeal is from the judgment, and for the purpose of reviewing the order sustaining the demurrer. The complaint alleges, in substance, as follows: That plaintiff was, at the general election held in 1894, duly elected to the office of justice of the peace in the township of Suisun, county of Solano, and qualified, and has continued to and was at the time of the commencement of this action, December 17, 1898, exercising the functions of such justice of the peace; that at a primary election held in said Suisun township, and at a Republican county convention held at the city of Vacaville, prior to the general election in November, 1898, the defendant claimed to have received the Republican nomination of Suisun township for the said office; that no secretary and chairman of any such convention ever certified any such nomination to the county clerk of said county, and that no delegates representing Suisun township ever organized or assembled together as a convention for the purpose of nominating any justice of the peace for said township, and that such Republican convention did not nominate defendant for such office; that the county clerk placed the defendant's name upon the tickets used at the general election held on the 8th day of November, 1898, but that by reason of the fact that defendant had not been properly nominated there was no legal election, and that plaintiff is entitled to hold over as justice of the peace by reason thereof; that there has been issued to defendant a certificate of election, and he will, unless restrained, attempt to exercise the duties and functions of the said office. The prayer is for an injunction restraining the defendant from attempting to exercise the office of justice of the peace, and that it be decreed that plaintiff was legally elected to the said office.

We think the demurrer was properly sustained. Counsel for appellant says in his brief: "The important and only question in this case is this: Can a man, by an unlawful process, obtain a nomination, and retain the fruits accruing as the direct result of this wrongful act?" There are two separate and distinct methods provided in the Code of Civil Procedure to test the title to an office. The first is by proceedings in the nature of quo warranto against any person who usurps or intrudes into a public office. Code Civ. Proc. §§ 802-810. Here there is no allegation or suggestion that the defendant has usurped or intruded into any office, but, on the contrary, it is alleged that the plaintiff is still

holding and exercising the office. Hence it cannot be claimed that this is a proceeding under the provisions of the above sections. The second is by contesting the election as provided in Id. §§ 1111-1127. The latter method provides that any elector of a county or political subdivision thereof may contest the right of any person declared elected to an office to be exercised therein for any of the following causes: "(1) For malconduct on the part of the board or judges or any member thereof. (2) When the person whose right to the office is contested was not at the time of the election eligible to such office. (3) When the person whose right is contested has given to any elector or inspector, judge or clerk, any bribe or reward, or has offered any such bribe or reward for the purpose of procuring his election, or has committed any other offense against the elective franchise defined in title four, part one, of the Penal Code. (4) On account of illegal votes." The complaint does not attempt to allege as grounds of contest any of the matters set forth in either of the said subdivisions. The right to contest an election is purely statutory, and must be determined in accordance with the terms of the statute. *Austin v. Dick*, 100 Cal. 201, 34 Pac. 655; *Carlson v. Burt*, 111 Cal. 129, 43 Pac. 593. The fact that defendant wrongfully procured his nomination or had his name illegally placed upon the tickets, not being within the provisions of section 1111, Code Civ. Proc., is not ground for contest. *Meredith v. Christy*, 64 Cal. 95, 27 Pac. 863. The statute having provided a mode for contesting an election, that mode must be followed. *McCrary, Elect.* §§ 436, 437; *Dickey v. Reed*, 78 Ill. 263. Even if we should hold that this action in its present form can be maintained, and that if defendant's name was wrongfully placed upon the tickets it would be cause for declaring his election illegal, still the complaint would fail to state a cause of action. It states that the county clerk placed the name of defendant upon the ticket used at the election, and that a certificate of election has been issued to him. We must presume that official duty was regularly performed. Code Civ. Proc. § 1963, subd. 15; *Weaver v. Fairchild*, 50 Cal. 300. While the complaint attempts to show that defendant was not nominated for the office, it nowhere alleges or shows that he was not nominated by a petition or certificate containing the signatures of 3 per cent. of the vote cast at the last preceding election in the township. Pol. Code, § 1188. In the absence of an averment to the contrary, we must presume that the defendant was nominated, and that he was elected, and the certificate of election duly issued to him. The judgment should be affirmed.

We concur: CHIPMAN, C.; GRAY, O.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

129 Cal. 263

FARMERS' EXCH. BANK OF SAN BERNARDINO v. ALTURA GOLD MILL & MINING CO. et al. (L. A. 632.)

(Supreme Court of California. July 20, 1900.)

BILLS AND NOTES—INDORSEMENT—DEMAND—PROTEST—NOTICE—WAIVER—EVIDENCE—ADMISSIBILITY—LOST NOTE—INDEMNITY BOND—COSTS.

1. Where plaintiff stamped on the back of a note, "I hereby waive demand and notice of demand, protest and notice of protest and nonpayment," and promised to discount it if the holder would secure the indorsement of the defendants, and, after such indorsements were procured, plaintiff discounted it, evidence of one of the indorsers that he did not intend to waive notice was inadmissible against the plaintiff.

2. One defendant took a note to plaintiff bank for discount, which the president promised to do in case he would obtain the indorsement of the other defendants, and stamped on the back of it, in red ink, "I hereby waive demand and notice of demand, protest and notice of protest and nonpayment," beneath which all of the defendants signed their names, when plaintiff discounted the note. *Held*, that the waiver of protest, etc., though in the singular number, was binding on all the indorsers.

3. Where a note had been lost, and plaintiff executed an indemnity bond securing defendants against any loss in case the note was found and came into the hands of an innocent purchaser, which he filed with his complaint, and averred that fact in the complaint, and defendants were defeated in the suit, plaintiff was not entitled to recover the costs which accrued before the bond was filed.

4. Where plaintiff sued on a lost note, and with his complaint filed a bond indemnifying defendants against any loss in case the note was found and came into the hands of an innocent purchaser, and the record on appeal did not show what costs accrued prior to the filing of the bond, an objection that plaintiff was not entitled to such costs cannot be sustained on appeal, since the court cannot tell what part of the costs to deduct.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by the Farmers' Exchange Bank of San Bernardino against the Altura Gold Mill & Mining Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

F. W. Gregg and Gordon Hall, for appellants. A. B. Stanton and John G. North, for respondent.

CHIPMAN, C. Action on promissory note for \$500, dated July 1, 1895, and payable six months after date, executed by defendant Hutson to defendant the mining company, and sold to plaintiff before its maturity. Plaintiff had judgment, from which defendants Maud and Newman appeal, and come here on bill of exceptions. It appears that plaintiffs sent the note to the Orange Growers' Bank of Riverside for collection. The latter bank subsequently remailed it to plaintiff bank, and it was stolen from the United States post office and never after recovered. The form of the note and its indorsements were proved by parol, as a lost instrument.

1. The principal question is whether, by

the indorsement on the note, appellants "expressly waived all rights to demand notice of payment, protest, and notice of protest, and nonpayment of said note," as found by the court. It appeared from the evidence that defendant Hutson made the note payable to the mining company; that defendant Otis, president of the company, requested plaintiff to discount it for the purpose of raising funds for the company. Plaintiff consented to do so on condition that Otis would procure the indorsement of three or four persons, stockholders of the company, whose financial standing had been inquired into. Otis agreed to get the indorsements, whereupon the president of plaintiff bank stamped at the top of the back of the note, with the rubber stamp used in the bank for that purpose, an impression in red ink, reading as follows: "For value received, I hereby waive demand and notice of demand, protest and notice of protest and nonpayment." Defendant Otis testified that the note was indorsed by the company, and that he took it and procured the other indorsements. It was also testified that the signatures on the back of the note were as follows:

"Geo. E. Otis, } Oct. 1st, 1895.

"C. E. Maud, }

"A. P. Morse, Oct. 3d, 1895.

"T. W. Duckworth, Oct. 4th, 1895.

"G. O. Newman, Oct. 8th, 1895."

The note was then taken to plaintiff by Otis and delivered on October 11th, and the face of the note and the accumulated interest paid him by plaintiff; and the money was passed to the credit of the mining company, which, it appeared, kept its account with plaintiff, and was checked out in due course. Defendant Otis, on behalf of plaintiff, testified: "I distinctly remember a waiver of demand, notice, and nonpayment at the end of the note," and he stated the circumstances which impressed the fact upon his memory. He further testified: "The stamp was affixed above the indorsements of all the indorsers upon the note. It was on the back of the note, and at one extremity of it; and the indorsements were underneath that, and were made after the stamp was affixed." This evidence was fully corroborated by the testimony of Mr. Drew, the president of plaintiff bank, who remembered distinctly having placed the stamp on the back of the note, and at its top, before handing it to Mr. Otis. He also instructed Mr. Otis to have the date given by each indorser when he signed, which, it seems, was done. Other witnesses also corroborated this evidence. Appellant Maud testified: "Judge Otis presented me the note signed by Mr. Hutson, and he appended his signature, and I appended mine. There was at that time no waiver of protest or indorsement of any kind on the note. Nothing was said about my waiving presentation or notice of protest or demand. When I indorsed my name on the note, I did not intend to waive presentation or notice. When I signed my name there was no waiver at all attached to

the note." Appellant Newman was not quite so positive, but he testified: "I am pretty sure there was not anything else on the back of the note. I surely haven't the least recollection that anything of that kind was on the note,"—referring to the waiver. Later in his examination he expressed himself as positive that there was no rubber-stamp impression on the note when he signed it. It is not the province of this court to decide which of these witnesses gave the facts as they existed. That duty devolved upon the trial court, and its finding, the conflict in the evidence being so obvious, is conclusive upon us. We do not think that the statement of appellant Maud that he did not intend to waive presentation or notice can change his liability. The court having found on sufficient evidence that the indorsement was there when he attached his signature, the intention of the indorser cannot be received as changing the effect of the indorsement. The evidence was inadmissible, but, being admitted without objection it still was irrelevant and immaterial. 2 Rand. Com. Paper, § 1364. Besides, as the court was convinced that the witness Maud was mistaken in one important fact testified to by him, the court had the right to reject the statement as to his intention. If the waiver was there when Otis signed, so, also, must it have been there when Maud signed; for the latter testified that they signed at the same time, and the date is the same.

It seems to me that there is no room for controversy, except as to the single proposition advanced by appellants, that the waiver was in legal effect the waiver of Otis only. It is contended that, because the waiver was expressed in the singular number, it is the contract only of the one who first wrote his name thereunder, and that subsequent signatures were mere blank indorsements. Appellants rely upon *Bank v. Davis*, 19 Pick. 373. The indorsement on the back of the note in that case was as follows: "Waiving right to notice. Moses Roberts. Joseph Davis." It was held that the waiver was that of Roberts alone, and that the signature of Davis was a blank indorsement. This case has been frequently referred to by authors and courts as correctly stating the rule of law on the subject. But, to understand the rule intended to be there laid down, some regard must be paid to the facts of that case. The note in question was a renewal note; the first note and its renewal being the note of one Baker, payable to one Moses Roberts or order. Defendant Davis had received the money on the first note, and plaintiff agreed to renew it for Baker if he would get the name of defendant Davis. This was done, and the first note was delivered to Baker, who absconded, insolvent, and hence the suit against Davis. He averred in his answer that the indorsement of the name of Roberts, the payee, was a forgery, which plaintiffs denied, but the court held that each party was left to the legal presumption in his favor on that

point. The court said: "In the decision of the case we must act upon the assumption that the first indorsement is valid, as it is implied by law to be genuine, and no proof is admissible to show the contrary." The court held that defendant was estopped from denying the genuineness of the signatures of the antecedent parties because plaintiffs derived their title through him, and plaintiffs could not show the forgery, and have their remedy for the consideration paid, because their title came by Roberts' indorsement, and they did not buy the note from defendant, nor did they pay the consideration to him. Such is not the situation here. The stamped form of waiver was placed upon the back of the note before any person indorsed it, and was not placed there by any of the indorsers. The note was given to Otis to be signed by the indorsers thus stamped, and the court found that each of them placed his signature under the waiver just as it left the plaintiff's hands. That the waiver reads in the singular number cannot, under the circumstances of this case, compel the enforcement of the rule on which appellants rely. If it was the promise of all who signed, it is presumed to be joint and several. Civ. Code, § 1660. Mr. Daniels says: "The words or acts constituting a waiver must, of course, be those of the person entitled to require that the regular steps of demand, protest, and notice shall be taken; for it would be a solecism to permit one person to waive away the rights of another. Therefore, if one indorser write a waiver over his name, it does not affect another."—citing *Bank v. Davis*, supra. 2 Daniel, Neg. Inst. (4th Ed.) § 1109. Mr. Tiedeman, in his work on Commercial Paper, at section 363, says: "If the waiver is made by one of the indorsers in writing, over his signature, it constitutes simply the personal waiver of that indorser, and is not binding upon the other indorsers, who do not become a party to the waiver,"—also citing the Massachusetts case, as also does Mr. Morse in his treatise on Banks and Banking (3d Ed.) vol. 1, p. 26. We must assume, however, that these authors, in deducing the rule on the authority, in part, of the case cited, did so in view of the all-important fact that the waiver was indorsed on the back of the note by the payee's own hand, and signed by him; and, proof to the contrary being inadmissible, the waiver necessarily became the several act of Roberts, and Davis' indorsement was in blank, over which the holder had no right to insert a contract of waiver. But in the case here the waiver was not so placed. It was stamped plainly in colored ink, and the first indorser in the order of the signatures was not the payee, nor did he place the waiver there. He was an accommodation indorser, like the rest of them, and signed, as they did, for the benefit of the mining company, of which he and they were stockholders. The plaintiff had a right to assume, on the return of the note thus signed, that each and every of the indorsers was severally

bound by the waiver. This view of the matter might be strengthened by reference to the distinction made when the waiver is printed on the back of the note, and not written by the payee or by the first indorser. Mr. Randolph speaks of a printed waiver on the back of a note as part of the note itself (section 106); and Mr. Daniel says that "the purport of the instrument is not only to be collected from the four corners, but from the eight corners; the memorandum on the back affecting its operation being regarded the same as written on its face." This rule is thus stated in 4 Am. & Eng. Enc. Law (2d Ed.) p. 456: "If the indorsement containing the waiver is placed on the instrument at the time of execution or before indorsement, it must be regarded as part of the original instrument, as much as if it has been written on the face thereof; and the rule as stated in regard to the parties affected by a waiver embodied in the instrument will apply." And in a foot note it is said: "Finding this printed formula on the back of the note, and placing their signatures with reference to it, the indorsers must be presumed to have seen and read the words, and to have adopted them as their contract."

2. It is claimed that the item of \$45.55 costs was improperly allowed, because no indemnity bond was tendered before the suit was begun; citing *Randolph v. Harris*, 28 Cal. 562. The complaint alleged "that plaintiff has tendered herewith, and has duly filed with the clerk of this court, a full and sufficient bond," etc. The court found the fact substantially as alleged in the complaint, and the evidence supports the finding. The only question is whether the filing the bond with the clerk of the court contemporaneously with the filing of the complaint, of which fact the service of the complaint gave defendants notice, was sufficient. In *Randolph v. Harris*, supra, plaintiff offered, in his complaint, to indemnify defendant, and before the trial filed a bond with the clerk, and at the trial tendered the same to defendant, who refused to accept it because insufficiently stamped, and because it had not been tendered before suit. The objection as to the stamps was cured on the spot, which left only the other objection; there being no objection to the form of the bond, or its sufficiency as security. The court, by Sanderson, J., said: "The proper course to pursue in such cases is for the plaintiff to prepare and tender before suit a reasonable indemnity. If it be refused, he can then sue, alleging the tender and refusal, and keep the tender good by filing the bond in court. If at the trial the court shall be of the opinion that the indemnity is reasonable and sufficient, he will be entitled to judgment, with costs. But he may sue and offer in his complaint to give such indemnity as the court may adjudge reasonable, and, upon complying with the order in that respect, take his judgment, but without costs." This course was recommended on the authority of cer-

tain English cases cited in the opinion, and on the assumption that the case was to be treated as one of equitable cognizance, because a suit at common law cannot be maintained in such a case, but resort must be had to a court of chancery, which always decrees indemnity against all future claims upon the maker or acceptor of the promissory note. The court further said: "In this case, as before stated, there is no averment of a previous tender, and, but for the fact that such tender seems to have been waived by the defendant, we should be compelled to reverse the judgment, so far as the allowance of costs is concerned. We think, however, that the allowance of costs was correct, in view of that fact." I do not find that the point has been before this court since *Randolph v. Harris*, and no later case is cited. The waiver referred to in the opinion arose from testimony given by the plaintiff that "he offered an indemnity bond before the suit was commenced, and that the defendant made some remark that amounted to a waiver of such bond." The waiver, therefore, did not spring from the fact that the defendant defended against the action. The opinion of Judge Sanderson certainly holds that, although the question of costs is left in such cases to the discretion of the court, it would nevertheless be error to allow costs to the plaintiff unless he had previously to the suit tendered indemnity, or indemnity had been previously waived. It will be observed, however, that the decision went off on the fact of waiver, and, while the proper course to pursue in these cases is as suggested in the opinion, it was not necessary to the decision to hold that costs should not be allowed unless there had been a previous tender of indemnity. The purpose of the bond is to protect the defendant against a possible action by some innocent holder of the lost paper, should it afterwards be sued upon. The bond is the equivalent for the surrender and cancellation of the paper at the trial to which the defendant is entitled. Except as to the question of costs, it does not concern the defendant whether the bond be furnished at the trial, or before suit commenced. In the latter case he would have an opportunity to discharge the debt and save all costs. In the former he would have an opportunity to avoid future costs by tendering payment, and would be entitled to costs accrued up to that time. I cannot see how any injury is visited upon the defendant in the one case more than in the other, except as to costs accrued when the tender is made. The filing of the bond at the time the complaint is filed, and averment of the fact in the complaint, of which defendant has notice as soon as he is served, it seems to me, should be regarded as a tender of indemnity at that time; and if the defendant then offers to pay, or let judgment be taken against him, he should be relieved from all costs then accrued. But, if he persists in making a defense to the

action, he should be held for costs thereafter accruing. It seems to me that this view of the matter is clearly within the spirit of section 475. Code Civ. Proc., which directs the court "to disregard any error * * * in the pleadings or proceedings which, in the opinion of the court, does not affect the substantial rights of the parties." In the case here the record does not show what costs had accrued at the time the bond was filed, or when it was tendered. We have no means of ascertaining what, if any, costs should be deducted as having accrued when the bond was tendered. We advise that the judgment be affirmed.

We concur: COOPER, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

129 Cal. 300

DALY et al. v. RUDELL. (S. F. 2,380.)
(Supreme Court of California. July 20, 1900.)
JUDGMENT—APPEAL—SUPERSEDEAS.

In an action to determine certain water rights, plaintiffs had judgment under which they were given the right to lay a certain pipe line through premises of defendant. Defendant appealed, and executed an undertaking, with two sureties, in the sum of \$300, as required by Code Civ. Proc. § 941. Section 949 provides that the perfecting of an appeal by giving the undertaking required under section 941 shall stay proceedings in the court below on the judgment or order appealed from. *Held*, that the execution of the undertaking operated to stay proceedings in the court below, and, where it appears that plaintiff is proceeding to construct the pipe line notwithstanding such appeal, a supersedeas will issue to restrain him.

In bank. Appeal from superior court, Los Angeles county.

Action by John E. Daly, administrator, and others, against J. T. Ruddell, in which plaintiffs recovered judgment, and defendant, having appealed, asks for a supersedeas to restrain any proceedings under the judgment. Supersedeas issued.

Geo. M. Holton and Long & Baker, for appellant.

PER CURIAM. This case is before us on the application of the appellant for a supersedeas. The purpose of the action is to determine certain water rights as between the parties. Plaintiffs had judgment, from which defendant appealed, and gave the statutory appeal bond in the sum of \$300. By the judgment one of the plaintiffs was given the right to lay a certain pipe line through premises of appellant, and, notwithstanding the appeal, said plaintiff attempted to lay said line, and was obstructed in doing so by defendant, who was cited for contempt for such obstruction. He now asks for a supersedeas to restrain any proceedings under the judgment during the appeal. The judgment does not contain any of the directions mentioned in the Code of Civil

Procedure from section 942 to section 945, inclusive, and therefore the undertaking in the sum of \$300, prescribed in section 941, "stays proceedings in the court below upon the judgment or order appealed from." Section 949. It cannot be said that appellant is "not allowing the property to remain as it was at the date of the decree." Dewey v. Superior Court, 81 Cal. 64, 68, 22 Pac. 333. Let the supersedeas issue as prayed for.

129 Cal. 297

HENNE v. LOS ANGELES COUNTY. (L. A. 780.)¹

(Supreme Court of California. July 20, 1900.)

TAXATION—MORTGAGES—RECOVERY OF TAXES PAID BY MORTGAGOR.

Where plaintiff did not furnish the assessor a sworn statement of his property, and his demand on the assessor to deduct the value of an unpaid mortgage from assessment, and his petition to the board of supervisors for a reduction, were made after both the assessor and the board had turned over their books, as required by Pol. Code, §§ 3652, 3655, 3656, 3672, and 3682, he could not recover taxes paid under protest on such mortgage, notwithstanding Const. art. 13, § 4, providing that the owner of lands shall be assessed the value thereof, less the value of unpaid mortgages thereon, which shall be assessed to their owners.

In bank.

Action by C. Henne against the county of Los Angeles. From a judgment in favor of defendant, sustaining a demurrer to the complaint, plaintiff appeals. The judgment in department (59 Pac. 780) reversed, and judgment of trial court affirmed.

VAN DYKE, J. The court below sustained defendant's demurrer to the complaint, and, the plaintiff declining to amend, judgment was entered thereon in favor of defendant, and the question presented on this appeal is as to the sufficiency of the complaint. Among other things, it is alleged that the plaintiff is the owner of certain property in the city of Los Angeles known as the "Henne Block," and that for the fiscal year 1888-89 the assessor of Los Angeles county assessed said property for the sum of \$96,530. It is also alleged that on the 1st day of March, 1898, and for more than a year prior thereto, there was, and still was, a mortgage against said property executed by the plaintiff to the regents of the University of California for the sum of \$35,000, and that no payment had been made on said mortgage. It is further alleged that no deduction was made, or credit given, by the said assessor upon said assessment on account of said mortgage for said fiscal year. The plaintiff further avers in his complaint that on the 23d day of July, 1898, he made a demand in writing upon the said assessor that he correct said assessment by deducting from the value of the said property assessed to plaintiff and affected by said mortgage the value of said security; that said assessor neglected and refused to make such correc-

tion or deduction; that thereafter, on the 3d day of November, 1898, the said plaintiff filed his verified petition before the board of supervisors of said defendant county requesting said board to correct, or order to be corrected, upon the assessment roll of said defendant county, the assessment of the plaintiff, by deducting from the value of said property, as assessed to plaintiff and affected by said mortgage, the value of such security; and that said board of supervisors thereafter denied said petition. It is then averred that plaintiff paid the taxes under protest, and presented a verified demand in writing to the board of supervisors of Los Angeles county for the sum claimed to have been overpaid, to wit, \$466.66%, and that said board of supervisors rejected said plaintiff's claim. There is no averment in the complaint that the assessor failed to make a demand on the plaintiff as a taxpayer for a statement of his property as required by law, nor is there any averment that the plaintiff, as a taxpayer, made and delivered to the said assessor a statement under oath. By the constitution (article 13, § 4) the value of property affected by a mortgage, with certain exceptions, is to be assessed and taxed to the owner of the property, less the value of said security, and the value of such security shall be assessed and taxed to the owner thereof. In this case the mortgage or security, being the property of the state, was exempt from taxation, and could not be assessed. Still, as was held in *People v. Board of Supervisors*, 77 Cal. 136, 19 Pac. 257, the value of such security should be deducted from the total value of the property. This value, however, depended upon what remains still due upon the debt and mortgage, and this fact the record of the mortgage would not disclose. Had the plaintiff furnished the assessor a statement of his property, it would have enabled him then to make a deduction. This not having been done, the plaintiff was furnished an opportunity to have the correction made by applying to the assessor prior to the time when the assessment roll is required to be passed over to the board of supervisors. The allegation in the complaint is that he applied to the assessor on the 23d day of July, 1898, which was some time after the work of the assessor had been delivered to the board of supervisors, as required by law. Pol. Code, §§ 3652, 3655, 3656, 3672. The assessor, at the time the application was made, had no jurisdiction in the premises, and could not make any correction, if any mistake had been made in his assessment. It is also alleged in the complaint that the plaintiff thereafter, on the 3d of November, filed his verified petition with the board of supervisors to have the correction made. This was also after the board of supervisors had lost jurisdiction of the matter. Id. § 3682.

The value of the property, aside from the assessment, is not stated in the complaint,

¹ Rehearing denied August 18, 1900.

and for aught that appears the assessment may have been for the value of such property over the amount of the mortgage. But, however that may be, for an overvaluation of the assessment of property belonging to a taxpayer a remedy is furnished him by statute, as already shown, first by an application to the assessor at any time before it passes out of his hand to the board of supervisors, and thereafter to the board of supervisors, until the assessments have been equalized and the matter has gone beyond their control. As was said in *Osborn v. Inhabitants of Danvers*, 6 Pick. 98: "But great mischiefs would follow if we were to hold that an excess of valuation would render an assessment illegal and void. And it is immaterial whether the excess is caused by including in the valuation property of which the person taxed is not the owner, or that for which he is not liable to be taxed. In both cases the remedy is the same. * * * His only remedy is application for abatement; for, when a new right is created by statute which at the same time provides a remedy for any infringement of it, that remedy must be pursued." It was the fault of the plaintiff himself in this case that he did not obtain relief by one or other of the modes indicated, inasmuch as his application was too late in both cases. Judgment affirmed.

We concur: HARRISON, J.; McFARLAND, J.; TEMPLE, J.

129 Cal. 273

SAN DIEGO INV. CO. v. SHAW. (L. A. 723.)

(Supreme Court of California. July 20, 1900.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—ASSESSMENT OF COSTS.
—VALIDITY.

Under St. 1891, p. 201, § 7, subd. 1, providing that the costs of grading streets shall be assessed against the lots fronting thereon, such assessment should be made against the lots fronting on both sides; and hence an assessment of the total cost of grading one side of a street against the lots fronting on that side was invalid.

Commissioners' decision. Department 1. Appeal from superior court, San Diego county.

Action by the San Diego Investment Company against V. E. Shaw to enforce collection of an assessment against defendant's property for street improvements. From a judgment in favor of plaintiff, and from an order denying a motion for a new trial, defendant appeals. Reversed.

V. E. Shaw, in pro. per. Collier & Collier, for respondent.

COOPER, C. Action to enforce a street-assessment lien. Plaintiff recovered judgment, and defendant has appealed from the judgment and from an order denying his motion for a new trial. The common council of the city of San Diego ordered that the

portion of Fourth street, on the east side of the center line thereof, from the south side of Ivy street to the south side of University avenue, be graded to the official grade. There are 17 blocks on each side of the portion of Fourth street so ordered to be graded. These blocks are subdivided into lots, there being 132 lots fronting on said street on the east side thereof and a like number on the west side. The total cost of the grading was \$6,838.32, and the whole thereof was apportioned and assessed against the lots fronting on the east side of the street. Defendant was the owner of one of the lots on the said east side, and the assessment against his lot was \$51.22, being the amount with which it is sought to charge the lot in this action. Whether or not the judgment is correct depends upon the validity of the assessment so made. Did the city authorities have any power to assess the entire cost of grading the street upon the lots on one side thereof? The act of 1885 (St. 1885, p. 147), commonly called the "Vrooman Act," as amended March 31, 1891 (St. 1891, p. 196), provides (section 2): "Whenever the public interest or convenience may require, the city council is hereby authorized and empowered to order the whole, or any portion, either in length or width of the streets * * * of any such city graded or regraded to the official grade." Section 7, subd. 1: "The expenses incurred for any work authorized by this act * * * shall be assessed upon the lots and lands fronting thereon except as hereinafter specifically provided; each lot or portion of a lot being separately assessed, in proportion to the frontage at a rate per front foot sufficient to cover the total expense of the work." Subdivision 7: "Where a subdivision street * * * terminates in another street * * * the expense of the work done on one-half of the width of the subdivision street * * * opposite the termination, shall be assessed upon the lot or lots fronting on such subdivision street * * * according to its frontage thereon, half way on either side respectively to the next street * * * or to the end of such street * * * if it does not meet another, and the other one-half of the width upon the lots fronting such termination." Subdivision 8: "Where any work mentioned in this act * * * is done on either or both sides of the center line of any street for one block or less, and further work opposite to the work of the same class already done is ordered to be done to complete the unimproved portion of said street, the assessment to cover the total expenses of said work so ordered shall be made upon the lots or portions of the lots only fronting upon the portions of the work so ordered."

It is elementary that proceedings upon which a street assessment are based being in invitum, the statute must be substantially complied with, or the assessments will be void. The authority to levy the assessment in this case in the manner in which

it was levied is not found in the statute. Subdivision 1 of section 7 of the act expressly declares that the expenses incurred for any work authorized by the act shall be assessed upon the lots and lands fronting thereon except as otherwise specifically provided. There are several specific provisions in the other subdivisions of section 7 as to the manner of making assessment in certain cases, but this case does not come within any of the specific provisions mentioned in the section. The street upon which the work was done was not a subdivision street, avenue, or lane, and the work was not done on one block or less, opposite work of the same class already done. Therefore the only authority under which an assessment could have been made for the grading is subdivision 1 of section 7, and the expenses should have been assessed upon all the lots and lands fronting upon the street. It is claimed that the words "fronting thereon" refer to the work done, and not to the street on which all the lots on both sides front. The position is untenable. The act of April 1, 1872 (St. 1871-72, p. 804), contained a similar provision to the one under discussion. In St. 1872, § 8, subd. 1, it was provided: "The expenses incurred for any work authorized by section 3 of this act shall be assessed upon the lots and lands fronting thereon except as hereinbefore specially provided, each lot or portion of lot being separately assessed in proportion to its frontage, at a rate per front foot sufficient to cover the total expense of the work." In *Diggins v. Brown*, 76 Cal. 822, 18 Pac. 378, the same contention was made in regard to the language quoted from the act of 1872, and this court said: "There is nothing in the language of the provision to indicate that such was the meaning of the legislature. The word 'thereon' must refer to the phrase, 'any work authorized by section 3 of this act.' And the natural meaning of the words used is that the expense of the whole work shall be assessed (ratably) upon all the lands fronting on the work." We think the construction given the correct one, and conclusive of this case. The words "fronting thereon" refer to the "work authorized by this act," which in turn has reference to grading the streets to the official grade, as provided in section 2 of the act. In our opinion, this is not only the correct construction of the statute, but it is the right method of making the assessment. The principle upon which assessments are made for grading or improving streets is that the improvement will add to the convenience of all persons residing upon each side of such street, and thus enhance the value of the property fronting upon the street so improved in proportion to its frontage thereon. The expense of grading a street may from many causes be much greater on one side of the center line than on the other, or, for the same reasons, it may be much greater in front of one lot than in front of another of the same width, but the public improvement,

when made, is equally for the benefit of each and every lot abutting on the street. If the lots on the east side of the street can be compelled to pay the entire cost of grading to the center thereof, then the street on the west side may never be improved, or the lots fronting thereon required to contribute to any portion of the grading. One side of a street might be graded one year, and the grading of the other side delayed for years. The owners of the lots on the side unimproved could use the improved side of the street without having paid a cent towards such improvement. Or it might be that, owing to the nature and formation of the land, the east side of the street would cost several times as much to grade as the west side. The street when graded would increase the value of the lots on each side equally. It follows that the judgment and order should be reversed, and the court below directed to dismiss the action.

We concur: CHIPMAN, C.; GRAY, C.

PER OURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and the court below directed to dismiss the action.

(129 Cal. 247)

SAN JOSE LAND & WATER CO. et al. v. ALLEN et al. (L. A. 635).¹

(Supreme Court of California. July 19, 1900.)
DISMISSAL—LACK OF PROSECUTION—WHEN GRANTED—LEAVE TO AMEND NO BAR.

1. Where plaintiff commenced an action in 1890, and failed to bring on a demurrer for hearing for over three years, and further failed to move for leave to amend till June, 1897, the demurrer having been sustained in January, 1894, an order dismissing the action for want of prosecution is not an abuse of the discretion of the court.

2. Leave to plaintiff to amend is no bar to granting defendant's motion to dismiss for lack of prosecution, made shortly thereafter.

3. Where an order sustaining a demurrer to a complaint was entered, and a court rule allowed ten days to amend, but no notice of the entry of the order was given, and plaintiff did not move for leave to amend for over three years, an order dismissing the action for lack of prosecution is not in conflict with Code Civ. Proc. § 476, providing that, where leave to amend within a stated time is given on sustaining a demurrer, the time runs from service of a notice of the order, since such section only affects the right to plead anew, and not the right to move to dismiss for failure to prosecute.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county.

Action by the San Jose Land & Water Company and another against Lyman Allen and others. From an order dismissing the action for lack of prosecution, plaintiffs appeal. Affirmed.

Anderson, Fitzgerald & Anderson, Anderson & Anderson, and Dunnigan & Dunnigan, for appellants. J. S. Chapman, for respondents.

Rehearing denied August 18, 1900.

CHIPMAN, C. Motion to dismiss the action, and judgment of dismissal thereon, from which plaintiffs appeal. The complaint was filed August 29, 1890; the object of the action being to have the judgment referred to in the complaint set aside, and to have the court grant the water company, plaintiff herein, a new trial. On April 2, 1891, defendants appeared by general demurrer. The hearing of the demurrer was continued from time to time, and was finally argued and submitted; and on January 3, 1894, the court made an order sustaining the demurrer, and the order was entered in the minutes of the court. An entry of said order was also made on the register of actions in said cause on the same day, as follows: "Jan. 3. Demurrer sustained." A rule of court allowed ten days to amend pleadings demurred to after ruling thereon, unless otherwise ordered by the court. On June 19, 1897, as appears from an affidavit of plaintiffs' attorney, leave was granted by the court to file an amendment to the complaint, which was filed June 21, 1897; and on June 29, 1897, defendants gave notice of a motion to dismiss said action, and for time in which to plead to the amended complaint, after the motion should be ruled upon, which latter part of said motion was granted July 1, 1897. The motion was heard on the affidavit of J. S. Chapman, an attorney for defendants, and on the affidavits of two of plaintiffs' attorneys, and on the papers and records referred to in the affidavit of Mr. Chapman. The motion was argued and submitted on November 29, 1897, and taken under advisement, and, having fully considered the matter, "the court did on the 26th day of February, 1898, duly make and enter and file its judgment dismissing said action upon the said motion of the defendants therein," neither of plaintiffs nor their attorneys being present at the time. The grounds of the motion were: Want of prosecution. That no proceeding had been taken by plaintiffs for more than three years. That the real attorney of the parties defendant is dead. That the firm of Chapman & Hendrick, the nominal attorneys of record, was dissolved more than two years prior to making the motion, and that the interest of both plaintiffs and defendants in the original subject of the action has been transferred to other parties. It appears from the affidavit of Attorney Chapman that the facts support the grounds of the motion above stated. Richard Dunnigan, one of plaintiffs' attorneys averred in an affidavit that this action is one of several actions similar in character that have been pending for several years, and that Mr. Chapman has been the attorney in said actions ever since their commencement; that no notice of the ruling on plaintiff's demurrer was ever served on affiant or any other attorney in the case, and affiant had no knowledge of the ruling until June 8, 1897, when he was served with a copy of a complaint brought by the San Dimas Land & Water Company against the plaintiff in this action; that he

then caused the records to be searched, and found that the said demurrer had been sustained; that he at once took steps to obtain leave of court to amend said complaint, which leave, it is averred, was granted June —, 1897, and the amendment was filed June 21, 1897; avers that it was plaintiff's intention to prosecute the present suit diligently, and that it is plaintiff's intention, should it lose in the trial of the cause in that (the lower) court, to appeal the cause to the supreme court; avers that plaintiff has always been ready and willing to prosecute the case to final decision; that, in selling and transferring its interest in the property, plaintiff supposed that it would be able to establish its right referred to in the litigation herein; and avers that it is the interest of plaintiff to establish said right, and believes that at the trial plaintiff will establish said right; that, if affiant had been given notice that said demurrer was sustained, he would have proceeded at once on behalf of plaintiff herein to obtain leave to amend the complaint and prosecute said action. Plaintiff's attorney, J. A. Anderson, makes affidavit that the statements made in the affidavit of Attorney Dunnigan are true, except that he (Anderson) "may have heard of the overruling [means, no doubt, sustaining] of said demurrer a short time before June 8, 1897."

So far as we can discover, the principal reason offered for not proceeding with the case after the demurrer was argued and submitted is that plaintiffs had no notice that the demurrer had been sustained until June 8, 1897. The order was made January 3, 1894, nearly three years and a half before plaintiff made any movement towards proceeding with the case, and was entered in the minutes of the court and in the register of actions. The demurrer was filed in 1891, and was not passed upon until in 1894; but hearing thereof had been continued from time to time, at whose motion does not appear. Plaintiff's attorney states that, had he known of the ruling, he would have amended his complaint; thus conceding its insufficiency, and that for over six years the case stood without a good complaint. It was held here to be the duty of the plaintiff, upon the defendant's interposing a demurrer, to see that the demurrer was determined, so that the action could go forward. *Kubli v. Hawzett*, 89 Cal. 638, 27 Pac. 57. The pendency of a suit in this court involving a question similar to a question involved in an action pending in a trial court offers no excuse for delay in prosecuting such case in the trial court to await the decision of the question in this court. *Simmons v. Keller*, 50 Cal. 38. The rule is well established that the exercise of the power to dismiss an action for want of prosecution must necessarily rest in the discretion of the nisi prius court. *Bank v. Nason*, 115 Cal. 626, 47 Pac. 595. The power of the court to dismiss under sections 581, 582, Code Civ. Proc., has often been held to

give the court a general discretion, although the ground of dismissal be not mentioned in those sections. *People v. Jeffers*, 126 Cal. 290, 58 Pac. 704. We do not think the court was precluded from exercising its discretion on the motion to dismiss because it had, shortly before the motion was made, given plaintiff leave to amend. The rights of defendants could not be cut off by such leave alone. We assume that the leave was given, although the record shows no minute of the court to that effect; the fact appearing in the affidavit of plaintiffs' attorney. Appellant cites section 470, Code Civ. Proc., which provides that when a demurrer is sustained or overruled, and time given to amend or answer, "the time given runs from the service of notice of the decision or order." This section relates only to the right to amend or answer, but does not affect the right to move for a dismissal. The question must be decided on the facts relating to plaintiffs' failure to prosecute the case with due diligence, and, in view of the facts as disclosed, we cannot say the court abused its discretion. Respondent argues with some reason that the amendment of the complaint does not materially strengthen plaintiffs' case, and therefore the judgment did not injure plaintiffs. We do not think it necessary to examine that phase of the matter. We advise that the judgment be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

(129 Cal. 222)

SAMPLE v. FRESNO FLUME & IRRIGATION CO. (S. F. 1,311).¹

(Supreme Court of California. July 19, 1900.)
WATERS AND WATER COURSES—IRRIGATION—CONTRACT TO FURNISH—UNCERTAINTY—VALIDITY—EVIDENCE—READINESS TO DELIVER—NONPERFORMANCE—INJUNCTION—PRE-SUMPTIONS—ESTOPPEL.

1. Where an irrigation corporation, to secure means to carry out its purposes, agreed to deliver water rights entitling another to a certain quantity of water, the contracts to be drawn on a certain form attached thereto, and subject to its conditions and agreements, and the water to be furnished subject to all present or future reasonable rules and regulations of the corporation not in conflict with such agreements, it cannot avoid liability thereunder because blanks left in such form for the price of the water rights and annual rent rendered it indefinite and void, since, under a reasonable interpretation of the form in connection with the agreement, the price of the water rights was sufficiently stated in the recited consideration without repetition, and the annual rent was subject to change with circumstances, and only limited in that it must be reasonable.

2. Where the evidence is sufficient to support a finding that an irrigation company's ditches and flumes had been completed to a certain point for nearly three years, and were ready to receive and deliver water which it had contracted, for a paid consideration, to deliver whenever it became ready to deliver water in its ditches at such point, and that it might

have delivered the same by use of reasonable efforts and diligence, a recovery for breach thereof cannot be defeated because an injunction issued in a cause undetermined is still in force, restraining it from diverting waters from its source of supply into its ditches, since such injunction is not a legal excuse for nonperformance, within Civ. Code, § 1511, excusing nonperformance of a contract when prevented by operation of law or irresistible superhuman cause, and, the fair presumption being that the parties understood that the ditches would be completed and waters furnished within a reasonable time, such company cannot refuse or neglect performance, and still retain the consideration.

Department 1. Appeal from superior court, Fresno county.

Action by D. C. Sample against the Fresno Flume & Irrigation Company. From a judgment in favor of plaintiff, and an order denying a new trial, defendant appeals. Affirmed.

L. L. Cory, for appellant. M. K. Harris, for respondent.

VAN DYKE, J. This is an action for damages arising from an alleged breach of a contract concerning water rates. The plaintiff had judgment in the court below for the sum of \$7,200 and costs of suit. The appeal is taken from said judgment, and from the order denying defendant's motion for a new trial.

The first point made by the appellant is that the contract in question is void for uncertainty. The defendant corporation, it seems, was formed for the purpose of acquiring water and water rights, and to divert and use the same by means of flumes, ditches, reservoirs, and other conduits for irrigation, milling, fluming, and other purposes, and the sale, lease, and rent of water and water rights and water works; and, in pursuance of these objects and purposes on its part, the defendant had to secure means to carry the same into execution. On the 10th of June, 1892, it entered into the contract in question, with one Benjamin Kendricks, assignor of the plaintiff, a copy of which is as follows: "Know all men by these presents, that the Fresno Flume and Irrigation Company, a corporation duly organized and existing under and by virtue of the laws of the state of California, for and in consideration of the transfer to it of certain stock and other privileges by Benjamin Kendricks, and other valuable consideration to it in hand paid, the receipt whereof is hereby acknowledged, does hereby promise and agree to and with the said Benjamin Kendricks to make, execute, and deliver to said Benjamin Kendricks, whenever its ditches, flumes, and works are completed to Big Dry creek, at or near section 21 in township 12 south, of range 22 east, Mount Diablo base and meridian, and whenever it is ready to furnish and deliver water therein, and at said place, agreements and water rights, deed or deeds sufficient in form and effect to entitle the said

¹ Rehearing denied August 12, 1900.

Benjamin Kendricks to the use of six (6) cubic feet of water per second. Said water rights to be drawn upon the form adopted by said corporation, hereto annexed, Exhibit B, and subject to each and all of the conditions and agreements thereof; to be signed and executed by each of said parties, or to whichever party the said Benjamin Kendricks may assign his interest in and to any portion of said water. Said water to be furnished in pursuance of said agreement so to be executed, subject to each and all of the reasonable rules and regulations of said corporation which it has adopted or may adopt. Said rules and regulations not to conflict with the provisions of this agreement, and said agreement so to be executed."

The objection seems to go to the form of water rights annexed to the contract, and the particular in which the form seems to be incomplete is that there is a blank left for the price to be paid for the water rights and the amount of the annual rents. In this case, however, the blank in the form in reference to the price to be paid cuts no figure, inasmuch as the full value of the water rights was paid by Kendricks at the time of entering into the contract, by the transfer of certain stocks and other privileges held by him to the defendant corporation. It was altogether unnecessary to repeat this in the form attached to the contract, when it had already been specified in the contract itself, and the two papers have to be read together. The form was evidently prepared by the company to be used in reference to water rights when they were to be sold upon a credit. As to the sum to be charged as annual rent, that is a mere incident to the agreement, and subject to changes as circumstances may require. The only limitation upon the right of the defendant to make changes or fix this annual rent or rate is that it must be reasonable. Taking the two papers together, and having in view the circumstances under which the contract was entered into, the meaning and intention of the parties can be understood with sufficient clearness. The contract should receive a reasonable interpretation, and such that would give it effect, instead of that which would make it void. Civ. Code. §§ 3541, 3542.

It is further contended on the part of the appellant that the company is only required to execute and deliver agreements, water rights, and deeds to entitle the plaintiff, as assignor of Kendricks, to the water mentioned in the contract, whenever it is ready to furnish and deliver the water therein at the place mentioned, and that it is not yet ready to furnish said water. The court finds, however, "that on or about the 1st day of July, 1894, the defendant had completed its flumes and ditches to and beyond said Big Dry creek, at or near said section 21, township 12 south, of range 22 east, M. D. B. and M., and said flumes and ditches ever

since have been and now are in a condition to receive and deliver said water to this plaintiff; and ever since the said 1st day of July, 1894, by the exercise of reasonable and proper efforts and diligence on its part, it has been possible for said defendant to, and it could, have delivered to plaintiff said six cubic feet of water so agreed to be delivered." It is contended, however, as another reason why the defendant is not ready to furnish and deliver water according to said agreement, that it has been enjoined from diverting water, and the injunction still remains in force. It appears that on the 25th day of September, 1894, an action was commenced in the superior court of the city and county of San Francisco by the San Joaquin & Kings River Canal & Irrigation Company, as plaintiff, against said defendant; that an injunction was issued and granted by said court upon the application of said plaintiff in said action, and served upon said defendant, commanding the defendant to desist from diverting, or from doing any act to divert, the waters from Stevenson creek or of the San Joaquin river, and from obstructing by means of dams or other obstructions, the flow of water from Stevenson creek and the San Joaquin river down to the canal and riparian lands of the plaintiff in said action, which canal and lands were situated below the point specified in the memorandum of agreement as the point where the defendant was to deliver water; that said injunction has since remained in full force and effect, except that the same was modified to permit the defendant to divert sufficient water to conduct fluming operations in the county of Fresno. This is not a legal reason or excuse for non-performance of the contract on the part of the defendant. It is not a prevention by operation of law, or by an irresistible superhuman cause. Civ. Code, § 1511. This question was considered in *Klauber v. Car Co.*, 95 Cal. 353, 30 Pac. 555. The court there say: "No case has been cited in which it has been held that interference by a writ sued out by a private litigant will excuse performance of a contract, although it may deprive the contractor of the means of performance. It is not prevention by operation of law. It is the act of an individual, and not of the government. In a certain sense, the property so taken may be in the custody of the law, and yet the seizure may be wrongful, and the suitor held responsible as for a trespass and damages. The law recognizes the fact that these private remedies may be wrongfully—that is, illegally—used, and the litigant is required to give security for any damage that may be caused, if it should be finally decided that the writ was improperly issued. This cannot be called the operation of law, within the meaning of the Civil Code. * * * Nor would it be a defense that the law has rendered it difficult or very expensive to perform. The rule is, if performance is in itself possible,

there is a breach, although the obligor himself may have become wholly unable to perform." "To warrant the application of the principle, the impossibility must consist in the nature of the thing to be done, and not in the inability of the party to do it, or, as it is sometimes termed, be an impossibilitas rei, as distinguished from an impossibilitas facti. If the thing could be accomplished by any one with proper means and the requisite skill and knowledge, the promisor was not less answerable because it was impossible to him. Hare, Cont. 639. The principle deducible from the authorities is that, if what is agreed to be done is possible or lawful, it must be done. Difficulty or improbability of accomplishing the undertaking will not avail a defendant. It must be shown that the thing cannot by any means be effected. Nothing short of this will excuse nonperformance." The Harriman, 9 Wall. 172, 19 L. Ed. 620. As was said in Transportation Co. v. O'Neil, 98 Cal. 5, 32 Pac. 706: "Where a party has expressly undertaken, without qualification, to do anything not naturally or necessarily impossible under all circumstances, and he does not do it, he must make compensation in damages, though the performance was rendered impracticable or even impossible by some unforeseen cause over which he had no control, but against which he might have provided in his contract." The injunction suit referred to, it seems, was commenced September 25, 1894, and yet at the time of the commencement of this action, and also at the trial thereof on the 30th of April, 1897, no steps were shown to have been taken to have said injunction dissolved; nor does it appear that any especial efforts have been made upon the part of the defendant to have the case determined. It does appear, however, that the injunction was modified to permit the defendant to divert sufficient water to conduct the fluming operations in the county of Fresno. Plaintiff, the assignee of the original party to the contract, and for whose benefit, it seems, the contract was made, is shown to own a large body of land necessary to be irrigated; and it is fair to presume that the parties understood at the time of entering into the agreement that the system of irrigation works should be constructed and completed at least within a reasonable period of time, and the fact that the water rights were paid for at the time of entering into the contract furnishes further evidence that such was the understanding. It is not reasonable to suppose that one of the parties to this contract paid a consideration for the water rights and water to be supplied, leaving the question entirely optional with the defendant to comply with the contract, or not, as convenience might dictate. The defendant cannot refuse or neglect to carry out its part of the contract, and still retain the consideration paid for carrying it out. The evidence supports the findings.

Appellant's objections to certain rulings

of the court made during the progress of the trial in reference to the introduction of testimony are not well taken. Judgment and order affirmed.

We concur: HARRISON, J.; GAROUTTE, J.

(129 Cal. 229)

WILLIAMS v. LONG et al. (Sac. 648.)¹

(Supreme Court of California. July 19, 1900.)

MINES—EJECTMENT—INJUNCTION—TRESPASS—
CONTRACT OF SALE—DEFAULT—IM-
PROVEMENTS BY VENDEES.

1. Where defendant in ejectment was in possession of the mine in suit under a contract of sale from plaintiff, on which default had been made in payment, and the complaint alleged that defendants were removing ore from the mine, a temporary injunction against waste was properly granted and continued.

2. A preliminary injunction in ejectment, restraining defendant from entering or trespassing on the premises in suit, cannot be sustained, since one cannot technically enter or trespass on land of which he is in possession.

3. Defendant was in possession of the mine in suit under a contract of sale from plaintiff, which provided that, in case of default in payment, any improvements should revert to plaintiff, with the land. Default being made, plaintiff brought ejectment, and obtained a preliminary injunction restraining defendants from "working" on the premises. Defendants were operating an adjoining mine, to which the only access was through the premises in suit, by means of appliances erected by defendant. Held, that plaintiff's claim under the contract to improvements on the premises did not entitle him to an injunction restraining defendants from working on the premises, since his right to improvements could only be settled on final hearing, and meantime defendants were entitled to use the premises for access to their own property.

Commissioners' decision. Department 1. Appeal from superior court, Tuolumne county.

Ejectment by Henry Williams against one Long and another. From an order refusing to dissolve a preliminary injunction, defendant the Gagnere Mining Company appeals. Injunction modified.

C. C. Hamilton, for appellant. F. P. Otis, for respondent.

SMITH, C. Appeal from an order refusing to dissolve a preliminary injunction restraining the defendants "from entering in and upon the mining claim of the plaintiff [called the "Marryatt Mine"], and from mining and working thereon, and from taking and removing any gold and gold-bearing earth and rock therefrom, and from in any manner trespassing thereon." The injunction was issued without notice on the verified complaint. The complaint is in ejectment, in the ordinary form, but alleges, also, in effect, that the defendants are mining the premises in controversy, and have removed and are removing therefrom gold-bearing earth and rock, and will continue to do so unless restrained. It appears from the affidavits used on the hearing of the motion to dissolve that the defendant corporation

¹ Rehearing denied August 12, 1900.

was in possession of the premises in controversy under a contract of sale made by the plaintiff to the defendant Long, its grantor, and was in default in the payment of one of the installments of the purchase money, and also that it was the owner of an adjoining mine, which it was then engaged in working, and from which the only outlet for removing the ore mined was through the Marryatt mine, by means of appliances constructed therein by defendant, and that the Gagnere mine could not otherwise be worked, except by the construction of a new shaft and appliances, at a heavy expenditure of time and money. Other matters are stated in the affidavits of the defendants, as, e. g., certain facts alleged in excuse for default in payment; the irreparable damage that would be done to the defendant corporation by closing its mine; that it had not taken any ore from the Marryatt mine since its default in payment (which is not denied); and that it had no intention of doing so, etc., but these we do not deem it necessary to consider.

It is quite clear that, upon the facts alleged in the complaint, the court was justified in restraining the defendant "from taking and removing * * * gold and gold-bearing earth and rock" from the mine. Nor was its discretion to maintain the injunction affected by the facts disclosed by the affidavits. 2 Beach, Inj. §§ 1167 et seq., 1171, 1172, 1175. But an injunction, in an ejectment suit, to restrain the defendant "from entering upon" the land sued for, or "from in any manner trespassing thereon," is a contradiction in terms, and therefore meaningless; for, in the technical sense of the words, one cannot enter or trespass on land of which he is already in possession. Nor can the defendants be restrained from "working" thereon, provided they do not commit waste.

The contention of respondent that under the express terms of the contract the land was to revert to him, on default, with all improvements, etc., cannot, on this appeal, be considered. Whether, upon the facts to be disclosed on the trial, the land shall so revert, and whether the plaintiff shall be restored to the possession, are questions to be determined at the final hearing. In the meantime all that plaintiff is entitled to is that the defendants be restrained from extracting and removing ore from the mine or from committing waste. In all other respects they are entitled, pending the suit, to use the mine as their occasions may demand. We advise that the order appealed from be reversed, and the cause remanded, with directions to the court to modify the injunction heretofore issued in the case as indicated in this opinion.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed

from is reversed, and the cause remanded, with directions to the court to modify the injunction heretofore issued in the case as indicated in this opinion.

129 Cal. 239

FARMERS' EXCH. BANK v. MORSE et al.
(L. A. 651.)

(Supreme Court of California. July 19, 1900.)
BILLS AND NOTES—OBLIGATIONS JOINT IN FORM—WHEN JOINT AND SEVERAL.

1. Civ. Code, § 1659, provides that, where all who unite in a promise receive some benefit from the consideration, their promise is presumed to be joint and several. Section 1430 provides that an obligation imposed on several persons may be joint or several or joint and several. *Held*, in the case of a note joint in form, made under an agreement in terms joint, no intention to make the note joint and several appearing, that the presumption of the first statute will not be indulged, but the note will be treated as joint, and hence all parties thereto must be made defendants in an action thereon, under Code Civ. Proc. § 382, requiring all parties united in interest to be joined as plaintiffs or defendants.

2. The fact that a joint note given in consideration of an extension of time for payment of a mortgage was afterwards signed by the assignee of the interest of one of the makers in the mortgaged lands did not change the note to a joint and several obligation.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by the Farmers' Exchange Bank against Mary E. Morse and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Otis, Gregg & Holl, for appellant. Rolfe & Rolfe, Henry Connor, and C. C. Haskell, for respondents.

CHIPMAN, C. Action on promissory note. Defendants demurred to the complaint. The demurrers were sustained, and, plaintiff declining to amend, defendants had judgment, from which plaintiff appeals. The grounds of the demurrers were insufficiency of facts, defect and nonjoinder of parties defendants, and the statute of limitations. The note sued upon was in form the joint note of eight persons. Three of these joint makers, viz. G. E. Drew, H. L. Drew, and Charles J. Perkins, were not made parties to the action. The complaint sets forth a series of agreements contemporaneous with the execution of the note which explain the history of its execution. Plaintiff had caused the foreclosure of certain mortgages against the makers of the note, except as to one maker, Mrs. Atwood, who signed subsequently. The bank also held another mortgage, which it was about to foreclose against these parties. The agreement recites that the bank is desirous of giving these persons further time to pay the sums referred to. It then recites: "We, and each of us, agree, one with the other, in consideration of the extension of time to pay, etc., to sign a joint note, payable to said Farmers' Exchange Bank, for

the aggregate sum total of said judgments, * * * and take said lands so mortgaged, subject to the agreement of the said bank above referred to [an agreement for further time], in the proportions as follows." Then follow the names of the parties, and the proportions, undivided, by which they were to hold the lands. A trustee was chosen to hold the title, and to sell and convey the lands, and pay the proceeds to the bank, and it was provided that when said note (the note in suit) was fully paid the trustee should convey the remaining lands to the parties in the proportions named. This agreement was dated February 20, 1892, and was acknowledged February 24th. As part of the same transaction, an agreement was entered into by the bank and these same parties at the same time by which the bank agreed to bid in the mortgaged property, and assign the certificate of sale to the trustee agreed upon in the former agreement, and the same parties as before agreed "each to sign a joint note for the aggregate amounts above referred to * * * in favor of the Farmers' Exchange Bank," etc.; and it was agreed that the lands should be sold by the trustee, and the bank agreed to credit the proceeds on the note, and the trustee was to convey the remaining unsold lands to the parties in the proportion agreed upon, as already stated. It is alleged that as a part of the same transactions, and contemporaneously therewith, the note in question was executed and delivered. At the same time the parties conveyed to the trustee. On October 22, 1892, the two Drews and Perkins conveyed to Mrs. Jane Atwood a certain portion of their interest in the lands, and she, in turn, agreed to sign the note already referred to, and in the recitals of her agreement the note is referred to as joint and several. At the same time Mrs. Atwood executed, acknowledged, and caused to be recorded a statement that she had been permitted to redeem the interest acquired by her through the Drews and Perkins, in consideration of which she agreed to sign the note referred to, and agreed also to the terms of the former agreements between the various parties, and thereupon signed the note. The complaint then recites several successive sales by the trustee, and the credits of the proceeds on the note, leaving a balance unpaid of \$5,374.52. It is alleged that, prior to the commencement of the action, Perkins was discharged from all his debts as an insolvent debtor, and that Mrs. Kane, one of the makers of the note, not made a defendant by her administrator or otherwise, died before the suit was commenced.

Appellant claims that the suit can be maintained on the note, as joint and several, and that section 1659 of the Civil Code applies, which reads as follows: "Where all the parties who unite in a promise receive some benefit from the consideration, whether past

or present, their promise is presumed to be joint and several." Section 1430, Id., provides: "An obligation imposed upon several persons, or a right created in favor of several persons, may be: (1) Joint; (2) several; or (3) joint and several." Section 1659 was intended to accomplish just what it says; i. e. where all the makers of a note, for example, received some benefit from the consideration, and the fact is made in some way to appear, the law raises the presumption that the promise is joint and several. In this case all the parties did receive some benefit from the consideration, and the presumption follows. But this section of the Code cannot be construed to mean that the parties, though receiving some benefit from the consideration, may not create a joint liability. Section 1430 expressly says they may create such a liability. Where it appears that the parties received some benefit from the consideration, and nothing further is shown from which their intention can be ascertained, the law steps in and makes the promise joint and several. But where it clearly appears that such was not the intention of the parties, and it clearly appears, on the contrary, that the intention was that the promise should be joint, the presumption is overcome, and the promise must be enforced according to its express terms. Appellant cites *Yorks v. Peck*, 14 Barb. 647, where it was said: "Where a note is made by two persons, which in terms is joint only, upon the death of one of the makers the surviving maker only is liable on it, unless it appears by direct proof, or the facts of the case warrant the inference, that the parties intended that it should be joint and several;" citing several cases. The opinion proceeds: "If such an intention is expressly proved, or may be inferred from the transaction, the note will be treated as if it was joint and several, and in that case the personal representatives of the deceased maker are liable for its payment. [Same cases.] In all cases of a joint note given upon a joint loan of money or a joint liability of any kind, it will be presumed it was intended the note should be several as well as joint, and effect will be given to it according to that intention." We think this decision states what our Code provision was intended to mean, namely, that an obligation in form joint must be so treated unless there is direct proof, or there are facts warranting the inference, that the parties intended it should be joint and several. Appellant says in its reply brief: "We concede at once that the phraseology of the contracts and note shows that the obligation is a joint obligation." But it is contended that "it appears from the transactions entered into between the parties, coupled with section 1659 of the Civil Code," that the obligation is several as well as joint. We are unable to discover anything in the complaint from which an inference can be drawn that the parties intended to make the obligation several. On the contrary, the agreements are in terms joint, and in them it is stipulat-

ed that the note shall be joint, and the note is in terms joint. We can see no ground for indulging the presumption of the statute. The recital in the paper acknowledged by Mrs. Atwood long after the other agreements were entered into and the note was executed cannot change the purport of the note. In this same paper she confirmed the previous agreements, and signed the note as we find it. Mr. Pomeroy says: "When the liability is joint, all the persons upon whom it rests must be united as defendants in an action brought upon the contract. This rule is general, and applies to undertakings, obligations, and promises of all possible descriptions." Pom. Rem. § 271. In *Harrison v. McCormick*, 69 Cal. 616, 11 Pac. 456, it was said: "The rule is well settled that several persons contracting together with the same party for one and the same act shall be regarded as jointly, and not as individually or separately, liable, in the absence of any words to show that a distinct as well as entire liability was intended to fasten upon the promisors;" citing sections 1480, 1431, Civ. Code. And it was also there said, "It is well settled that parties to a joint contract must all be made defendants;" citing section 382, Id. The presumption stated in section 1659 of the Civil Code may be regarded in the nature of an exception to the rule where the facts exist therein referred to. But, as we have seen, this presumption does not prevent the parties from entering into a joint obligation; nor does it apply where there is an express joint obligation, in the absence of any facts to show a contrary intention. The judgment should be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

KIRMAN v. POWNING. (No. 1575.)

(Supreme Court of Nevada. Aug. 7, 1900.)

STATUTES—ADOPTION FROM ANOTHER STATE—CONSTRUCTION.

Acts 1897, c. 106, regulating the settlement of the estate of deceased person, is copied mainly from Code Civ. Proc. Cal. tit. 11. The California law does not contain the statutory rule of construction found at section 2369 of the Nevada act (Comp. Laws 1900, § 3055), that it shall be construed liberally. Section 124 (section 2909) invalidates any sale of property of a decedent, unless made under order of the court, except as otherwise provided in this or other acts, while the corresponding section of the California Code (section 11517) limits the exception to the provision of that act. Code Civ. Proc. Cal. § 11569, regulates the application of money derived from a sale made by an administrator of property subject to mortgage or other lien which is a valid lien against the estate and has been presented to the administrator and allowed, while the corresponding section in the Nevada act (section 157; Comp. Laws 1900, § 2943) omits the requirement of presentation and allowance. *Held*, that the differences between the two statutes were such that the construction placed on the California statute by the courts of that state is inapplicable in Nevada.

On petition for rehearing. Denied.
For former opinion, see 60 Pac. 834.

MASSEY, J. The respondent urges in her petition for rehearing, in effect, that, having adopted the provisions of the probate act of California as it existed prior to 1876, we must, under the settled rule of construction, also adopt the construction placed upon those provisions by the court of that state, and cites authorities in which the supreme court of California has held contrary to the rule announced by this court. We considered the California cases cited, but did not deem it necessary to discuss them, as our act of 1897 (chapter 106) and the subsequent amendments thereto contain provisions, not found in the California act, which we believe warranted us in holding as we did. An examination of the California act reveals the fact that it contains no direct statutory rule of construction, as is found in our probate act. It will also be observed that section 148 of the California act forbade the sale of any property of the estate of a deceased person, unless made under an order of a probate court, and under the provision of the act, while section 124 of our act (Comp. Laws 1900, § 2909), which corresponds with the said section 148 of the California act, not only makes valid sales of such property under the provisions of the act, but "other acts," also. A marked difference exists between the provisions of section 157 of our act (Comp. Laws 1900, § 2943), cited in the opinion, and the provisions of the corresponding section of the California act relating to the sale of lands by the executor or administrator subject to mortgage or other lien, the application of the proceeds arising therefrom, and the bar of the statute of limitations pending proceedings for the settlement of the estate. That section of the California act found in volume 2 of the Codes and Statutes of California (1876; § 11,569) contains language not found in section 157 of our act, limiting the provision of the section to mortgage or other liens which have been presented and allowed. Other differences having a direct bearing upon the construction of the statute might be noted, but, being fully satisfied that the differences between the provisions of our act and the California act are so marked that the rule relied upon by the respondent cannot be properly applied to the question considered, and following the established rule that in statutory construction the court will look to the statutes and the language used therein, in order to ascertain the true meaning and intent thereof, we are fully convinced that the decision heretofore announced, determining the rights of the parties under the facts of the record, is amply supported by the provisions of our statute. The petition for a rehearing will therefore be denied.

BONNIFIELD, C. J., and BELKNAP, J., concur.

(10 Kan.App. 413)

WALKER et al. v. SCOTT.

(Court of Appeals of Kansas, Southern Department. E. D. July 25, 1900.)

INJURY TO EMPLOYEE—ASSUMPTION OF RISK—EXPERT EVIDENCE.

1. Notwithstanding his own expressed fears that the walls of the trench in which he was working as an employé of the receivers of a railroad company might fall and do him bodily injury, the plaintiff, a man of very limited experience in that kind of work, continued in the employment, relying upon the assurance of the foreman in charge of the work that the same was entirely safe. *Held*, that all questions as to the defendant's negligence and as to the plaintiff's assumption of the risks of the employment were for determination by the jury.

2. Where the testimony of a witness showed him to be an expert in the matter concerning which he gave his opinion, *held*, that his testimony was properly received as that of an expert, although he, for some unexplained reason, disclaimed being such.

(Syllabus by the Court.)

Error from district court, Osage county; William Thomson, Judge.

Action by L. G. Scott against Aldace F. Walker and John J. McCook, receivers of the Atchison, Topeka & Santa Fé Railroad Company. Judgment for plaintiff, and defendants being error. Affirmed.

A. A. Hurd, O. J. Wood, and W. Littlefield, for plaintiffs in error. Pleasant & Pleasant and Deford & Deford, for defendant in error.

MILTON, J. L. G. Scott, while an employé of the receivers of the Atchison, Topeka & Santa Fé Railroad Company, was injured by the caving in of an embankment of earth. He was at work in a deep trench which extended along the base of an embankment, and between it and the Marais des Cygnes river. The trench was being dug, and then filled with stones to protect the embankment against erosion by the river. On the top of the embankment, and a few feet from its edge, was the railroad operated by the receivers. No precautions had been taken to prevent the bank, which was almost perpendicular, from falling. Scott had worked there about 14 days prior to the date of his injury. The petition alleged that the plaintiff was not familiar with that kind of work; that the foreman in charge thereof was a man of long experience therein, and possessed expert knowledge and skill respecting the same; that no shores or props were used by the defendants or their foreman at any time while the said work was in progress to support the steep and dangerous bank and to prevent the same from falling; that at divers times, but particularly on the 8th and 9th days of October, 1895, the plaintiff called the attention of the said foreman to the condition of the embankment, and expressed "his fear and apprehension that said bank was dangerous, and might at any minute fall on the men at work below," but that the foreman repeatedly, and particularly on the last-named day, assured the plaintiff that the bank was perfectly safe, and there-

upon ordered the plaintiff to go into the trench to work therein, which order the plaintiff promptly obeyed, relying entirely upon the superior knowledge, skill, and experience, and the assurance aforesaid, of the said foreman. The principal defenses stated in the answer were that the risks, if any, incident to the employment, were assumed, with knowledge thereof, by the plaintiff, and that his injury resulted from his own negligence. The evidence on behalf of the plaintiff, and particularly his own testimony, tended to prove the substantial allegations of the petition. It appears that the plaintiff at different times expressed his fear that the bank might cave in, and that on the evening preceding the actual fall of a portion of the bank, which caused the plaintiff's injury, and which happened at a point about 12 feet from the east end of the excavation, the plaintiff had "bet the beer" with Bogardus, the foreman, that the bank would cave in that night. The following morning Bogardus came while the men were pumping out the water which had gathered in the trench during the night, and he claimed that he had won the bet, as the bank had not fallen. Shortly after his arrival Bogardus said to the plaintiff and another man, who worked with the plaintiff in the trench, "Get ready for the mud, boys," meaning that they should put on their water-proof boots and go into the trench. They did so, and had barely begun work when the bank fell, causing severe and perhaps permanent injuries to the plaintiff. The point at which it fell was within a few feet of the place indicated by the plaintiff in speaking of the anticipated fall at the time the bet was made. Before going into the trench that morning the plaintiff remarked that he "rather dreaded that place," and he stated in his testimony that he "rather felt a little afraid of it yet." There was testimony that, to the plaintiff's expression of his fear, Bogardus responded, "Scott, you are foolish, or out of your head." The plaintiff also testified that at another time Bogardus assured him the bank was solid and safe. On cross-examination the plaintiff testified that he had had some experience in quarrying and laying stone, and work of that kind, but which did not require excavating below the depth of 2 feet; that he had dug one well, and assisted in digging others, the deepest of which was not over 25 feet, and which were dug in Franklin county, where the soil was of about the same character as that in which the trench was being made; that he had mined coal in Franklin county, in drift work, at a depth from 15 to 50 feet below the surface (the exact depth not being stated); that he was a man of ordinary observation, and there was nothing to prevent his observing and becoming acquainted with the condition surrounding and affecting the work in the trench. It also appears that there was a difference of opinion among the men engaged in the work in question, respecting its safety. At the conclusion of the evidence on behalf of

the plaintiff, the defendants demurred thereto, and, the demurrer having been overruled, they rested their case without the introduction of evidence, and requested the court to direct the jury to return a verdict in their favor. The request was refused. Verdict and judgment were in favor of the plaintiff in the sum of \$2,000.

One of the findings of fact is as follows: "Q. If you answer question 1 in the affirmative, state whether or not plaintiff sustained any injuries at either or any place to which he had called the foreman's attention as being dangerous. A. Yes." The principal point discussed by counsel for plaintiff in error is thus stated in their brief: "The plaintiff was not entitled to recover, because, by the terms of his employment, he assumed all the risks incident to the business in the manner in which it was conducted; that his injury occurred in the performance of a risk which he assumed at the time of his employment; that no negligence was shown on the part of the defendant; and that the injury was due to his own negligence and want of care on his part." Counsel further say in their argument: "The excavation proper at the time of the injury was from twelve to fifteen feet deep. He [plaintiff] was acquainted and familiar with the entire workings of the trench, having from time to time worked in all parts of it, and assisted in making excavations. From the time of his entrance into the trench he became fearful lest the banks on either side would give away and cave in, and injury occur to him. It appears from his testimony to have been constantly on his mind. He was almost constantly grumbling and complaining about the likelihood or probability of the bank's caving in. It was a subject of almost daily discussion and conversation between the men working in the trenches. He spoke to the foreman, Bogardus, about it, and frequently discussed the matter with fellow employes in the presence of Bogardus. It was his opinion that a cave-in would occur. It was the opinion, however, of Bogardus that there was no danger in that direction."

The foregoing facts, and the admission of counsel for plaintiffs in error, show that a difference of opinion existed among those engaged in doing the work in question concerning the risks incident thereto. The foreman, who possessed expert knowledge in the premises, assured the plaintiff, whose experience in work of that character was extremely limited, that the place of employment was a safe place, and, deriding the plaintiff's expressions of fear, directed him to proceed with the work. In such a state of facts, it was within the province of the jury to pass upon the question as to the alleged negligence of the defendants in carrying on the work of excavating, and the question as to the assumption by the plaintiff of the risks incident to that work, and known to him. This case does not belong to the class called the "Gravel-Pit Cases," where the work is at all times haz-

ardous, and known to be such by all persons of ordinary intelligence. Here minds differed as to the safeness of the employment. The servant had misgivings concerning it, but the master, represented by the foreman, sought to allay those misgivings by positive assurances that the employment was safe and entirely free from danger. The servant, relying on such assurances, continued in the employment. The courts recognize a difference in the position of employer and employe under such circumstances. "Master and servant do not stand on equal footing, even when they have equal knowledge of the danger. The position of a servant is one of subordination and obedience to the master, and he has a right to rely upon the superior knowledge and skill of the master, and is not entirely free to act upon his own suspicions of danger." *Shortel v. City of St. Joseph*, 104 Mo. 114 (syllabus), 16 S. W. 397. The above case cites and follows the decision in *Keegan v. Kavanaugh*, 62 Mo. 230, in which one paragraph of the syllabus reads: "Where a hod carrier engaged at work in an excavation, having manifested some reluctance to descend, was ordered by his employer to go down, and the earth caved in upon and killed him, held, that the order was an implied assurance that there was no danger; that the laborer properly relied upon the superior information of the master, and that the latter was liable; that in such case the question of negligence was for the jury." In the opinion the court said: "In this case the evidence shows that Keegan, the laborer, was not without apprehension, but when one of his employers ordered him to go down he did so promptly, upon the assurance implied in such an order that there was no danger." It should be observed that in the foregoing case assurance of safety is held to have been implied in the order of the employer, while in the present case the assurance was given in most positive terms by the foreman, representing the employer. In the case of *Malcolm v. Fuller* (Mass.) 25 N. E. 83, one paragraph of the syllabus reads: "On the question of the employe's care, it was competent for him to testify that, after the superintendent told him there was no danger in the work, he believed him." In the case of *Miller v. Railway Co.* (C. C.) 12 Fed. 600, 603, the plaintiff had been ordered into a position of danger by the foreman in charge of the work and had obeyed the order, believing it to be safe for him to do so. He was injured, and brought an action to recover damages. In the opinion it is said: "There may be cases in which the court can say, as a matter of law, that a servant receiving an order from his master or from a superior is guilty of negligence in obeying it, but the present is not such a case. The law will rarely declare the act of obedience negligence per se. If the circumstances be such that men of ordinary intelligence may honestly differ as to

the question of negligence, it must be left to the jury." In view of all the foregoing facts and decisions, it must be held that the trial court was warranted in overruling the demurrer to the plaintiff's evidence, and in giving the following instruction, which, although excepted to by the defendants, is not complained of in their brief: "If you find from the evidence that the plaintiff was engaged at the work in the excavation, and that he expressed to Mr. Bogardus, the foreman, his fear or his opinion that there was danger that the earth might fall upon him while working there, and that Mr. Bogardus assured him that there was no danger, and the plaintiff, relying upon the better judgment and superior experience and information of the foreman, continued to work in the trench, and so was injured by the earth falling on him as alleged, you will find for the plaintiff, provided you further find that the defendants' servant in charge of the work was guilty of the negligence charged in the petition, and which occasioned the injury."

Complaint is made of the admission of the testimony of the witness John Dowd, who testified that he was experienced in work like that in question; that, from his experience, he was able to judge as to what was a safe and proper method of doing such work; and that, in his opinion, the work was not being done in a proper manner. He stated that the wall of the excavation should have been made sloping, or should have been shored to prevent its caving in. On cross-examination he stated that his testimony was based upon what he saw, and that he was not testifying as an expert. Thereupon the defendant moved to strike out all his testimony in which he had stated his opinion concerning the character of the work, and the motion was sustained. Further examination of the witness was then made by the counsel for the plaintiff and by the court. Disclaiming to be an expert, he nevertheless stated that he understood that kind of work, and felt confidence in his opinion concerning the same, and that he had special knowledge as to the proper method to be pursued to make the work safe, and that it was not being done in a proper manner. He also testified that his opinion was based upon what he saw, and upon his experience, as a section foreman, in doing work of that character. Thereupon the entire testimony of the witness was again admitted. In admitting the testimony the trial court made a statement, which appears in the record, to the effect that the witness actually testified as an expert in his direct examination, although he seemed to misapprehend the exact meaning of the word. We think the court ruled correctly in this matter. That the witness possessed expert knowledge in the premises is clearly shown by his testimony. Unacquaintance with the meaning of the term "expert" doubtless prevented his viewing himself as being so qualified. There was no dispute that the

banks were not shored, nor that one of them fell upon and injured the plaintiff. The witness having shown a personal acquaintance with the character of the trench and embankment, and with the manner in which the work was being done, as well as expert knowledge respecting that kind of work, it was proper to ask him whether it was being done in a correct and safe manner. The fact that the witness disclaimed being an expert will not preclude his testimony as such, where the evidence or circumstances show that he possessed the requisite qualifications. *Crow v. State*, 33 Tex. Cr. R. 264, 26 S. W. 209.

It is further contended by counsel for plaintiffs in error that the finding of fact hereinbefore set out is contrary to and unsupported by plaintiff's evidence. Since it appears that immediately before going into the trench, and only a few minutes before the injury was sustained, the plaintiff expressed his fears that a cave-in might occur, it must be held that there was some evidence tending to prove that he called the attention of the foreman to the particular place at which the injury occurred, as being a dangerous place. But counsel contend further that, if the finding can be upheld, the general verdict cannot be, since the finding shows both general and particular knowledge on the part of the plaintiff respecting the hazards of the employment. This phase of the matter has already received our attention. We have discovered no reversible error in the record, and the judgment of the district court will be affirmed.

(10 Kan.App. 450)

STATE v. McBEE.

(Court of Appeals of Kansas, Southern Department, E. D. July 25, 1900.)

CRIMINAL LAW—ENTRY OF JUDGMENT—AMENDMENT.

A journal entry of judgment in a criminal case cannot be amended after the sentence, as stated in such journal entry, has been fully served, and the fine and costs paid, by adding thereto a penalty for failure to give the good-behavior bond provided for in the statute.

(Syllabus by the Court.)

Appeal from district court, Elk county; C. W. Shinn, Judge.

Mark McBee was convicted of an illegal sale of intoxicating liquors, and appeals. Reversed.

John Marshall and L. Scott, for appellant. W. A. McCausland, for the State.

SCHOONOVER, J. At the October term of the district court of Elk county, Kan., the defendant was charged, in four counts, with violating the prohibitory law. The defendant, McBee, asked that he be permitted to plead guilty to one count, and the county attorney asked the court to accept the plea, and recommended "that the sentence of the court be the minimum penalty fixed by law.

provided that he save the state from all costs." It was further represented to the court that "the defendant, McBee, is engaged in business in said city of Howard as a druggist, and is so conducting his business as to reflect credit upon himself as an honorable gentleman, and, as I verily believe, has been so conducting said business for a long time prior to this date." Upon this recommendation the district court accepted the plea of guilty to the first count, and the prosecuting attorney dismissed as to the remaining three. At the time the defendant was sentenced the trial judge entered upon his docket the following: "October 3rd. Defendant withdraws his plea of not guilty as to the first count of the indictment, and enters a plea of guilty as charged in the first count of the indictment. Defendant sentenced to confinement in the county jail for thirty days, and pay a fine of one hundred dollars and costs of prosecution, stand committed to the county jail until fine and costs are paid, and to enter into a bond in the sum of five hundred dollars, with sureties, to be approved by the clerk, to be of good behavior for two years, and particularly not to violate any of the provisions of the law regulating the sale of intoxicating liquors. Nolle pros. as to the remaining counts of this indictment entered by the county attorney." From this memoranda made by the court the following journal entry of the sentence and judgment of the court was drawn and recorded, and the defendant committed accordingly: "Now on this 3rd day of October, 1899, comes said plaintiff, by W. A. McCausland, county attorney of Elk county, Kansas, and comes said defendant in his own proper person, and by John Marshall, his attorney, and thereupon said defendant asks leave of the court to withdraw his plea of not guilty as to the first count of the indictment filed herein against him, which leave is by the court granted, and thereupon said defendant withdraws his plea of not guilty as to the first count of the indictment herein, and thereupon said defendant waives an arraignment under the first count of the indictment herein, and enters a plea of guilty as to the first count of said indictment; and thereupon the said W. A. McCausland, county attorney of Elk county, Kansas, asks leave of court to dismiss this action as to the second, third, and fourth counts of the indictment filed herein, which leave is by the court granted. Thereupon said defendant asks that judgment be pronounced upon his plea of guilty as to the first count of the indictment herein, and thereupon said defendant, Mark McBee, was informed by the court that he had pleaded guilty to selling intoxicating liquors contrary to law, as charged in the first count of the indictment filed herein against him, and, being inquired of by the court if he had any legal causes to show why judgment should not be pronounced against him according to law, and said defendant failed to show any cause: It is therefore by the court considered, ordered, adjudged, and sentenced that said defendant,

Mark McBee, be confined in the jail of Elk county, Kansas, for a period of thirty (30) days; that he pay a fine of one hundred dollars (\$100) to the state of Kansas; that he pay the costs of this prosecution, taxed at \$—, and that he be committed until such fine and costs are paid; and that he give bond, with sureties, to be approved by the clerk of this court, in the sum of five hundred dollars (\$500), to be of good behavior for two (2) years, and particularly not to violate any provision of the law regulating the sale of intoxicating liquors. It is by the court further ordered that this action be dismissed as to the second, third, and fourth counts of the indictment herein." It appears that after the defendant had been confined in jail for 30 days, and after he had paid the fine and costs, he demanded of the sheriff that he be released and discharged. The sheriff refused to release him, for the reason that no bond had been given as required by the court. The defendant appealed to the probate court of Elk county for writ of habeas corpus, which was granted, and upon the formal hearing the defendant was discharged. On the 6th of February, 1900, the county attorney filed the following motion to amend and correct the journal entry made on the 3d day of October, 1899: "Now comes the county attorney of Elk county, Kansas, W. A. McCausland, and shows to the court that at the October term of the Elk county district court, 1899, the defendant above named was by the court sentenced to the jail of Elk county, and to pay a fine of one hundred dollars and the costs of prosecution, and that he enter into a bond in the sum of five hundred dollars for the term of two years that he will be of good behavior, especially with reference to the prohibitory liquor law, and that he stand committed to the jail of Elk county, Kansas, till such bond be given; and whereas, the clerk in entering judgment in said case erroneously omitted from the minute docket the following language: 'That the defendant be committed to the jail of Elk county until such bond be given,'—said county attorney now moves the court for permission to correct the journal entry of judgment heretofore filed and recorded in this case, and moves that the defendant now be required to enter into the bond in accordance with the order and judgment of the court at the October term, 1899." Upon the hearing of this motion the journal entry of judgment was corrected, and the defendant ordered committed to jail until such bond be given. From this order the defendant, McBee, appeals.

This record is perplexing. It is alleged in the motion: "The clerk, in entering judgment in said case, erroneously omitted from the minute docket the following language: 'That the defendant be committed to the county jail of Elk county until such bond be given.' In the book denominated the 'Minute Docket' by the clerk on the witness stand, the following is recorded: October 3rd, 1899, Plea of guilty on one count. October 3rd,

1899. Sentenced to county jail of Elk county, Kansas, for a period of thirty days; pay a fine of one hundred dollars and costs; committed until fine and costs are paid, give bond for five hundred dollars to keep the peace, and particularly not violate the provisions of the prohibitory law of Kansas, and stand committed until such bond be given." It appears from the evidence that the words "To keep the peace, and particularly not to violate the provisions of the prohibitory law of Kansas, and stand committed until such bond be given," were added at the suggestion of the judge, on the same day, in the office of the clerk, at about the time or soon after sentence was pronounced. It is contended that the journal entry was drawn by counsel for defendant, McBee, and not submitted to the county attorney for approval. This is true, but no criticism can attach to counsel for defendant. It was the duty of the prosecuting attorney, under the rules of the court, to prepare the journal entry. It appears that the defendant was held by the sheriff for several days without a commitment; that no journal entry was drawn until the sheriff demanded that some authority be given him to hold the defendant. The journal entry was drawn by counsel for defendant, at the request of the county attorney, from the minutes of the court as they appeared in the docket, and in exact conformity therewith, filed with the clerk, and a certified copy delivered to the sheriff. That this defendant was ordered to give bond, and that he has failed to comply with the order of the court, fully appear from the record. He should be punished, but the uncertainty of the record in this case is such that we cannot approve the judgment of the court in the correcting the journal entry, and ordering the defendant committed after the judgment as written in the record had been fully satisfied. All doubts must be resolved in favor of the defendant. The judgment of the district court is reversed, and the defendant discharged.

(10 Kan.App. 435)

CHRISTY v. BEDELL.

(Court of Appeals of Kansas, Southern Department, E. D. July 25, 1900.)

COVENANTS—QUIET ENJOYMENT—OUSTER.

Assertion of adverse title by tenants of the plaintiff after expiration of lease, and recovery of judgment by such tenants, quieting their title as against the plaintiff and his grantor, are *held* to constitute a sufficient ouster of the plaintiff from possession of the land to entitle him to recover upon a covenant for quiet enjoyment.

(Syllabus by the Court.)

Error from district court, Elk county; A. H. Skidmore, Judge.

Action by Cyrus D. Christy against L. M. Bedell. On the death of defendant, H. W. Bedell, administrator, was substituted. Judgment for defendant, and plaintiff brings error. Reversed.

W. A. McCausland and L. Scott, for plaintiff in error. A. D. Neale, for defendant in error.

MILTON, J. L. M. Bedell, the original defendant in this action, purchased a tract of land in Elk county at sheriff's sale, which was made in a foreclosure action brought by J. Curtis Smith, mortgagee, against Jackson Cunningham and Jemima Cunningham, mortgagors. Shortly before the confirmation of the sale, Bedell conveyed the land by a deed of warranty, containing covenants of seisin and for quiet enjoyment, to Cyrus Christy, the plaintiff herein. The proceedings in the case were all apparently regular. The mortgagors being in possession of the land, Christy caused a writ of assistance to be issued to oust them therefrom. While the writ was in the sheriff's hands, and before service thereof, Christy made a written lease of the premises for the period of one year to the mortgagors. After the year expired the latter not only refused to surrender possession of the land upon demand of Christy, but, instead, commenced an action against him and Bedell and the personal representatives of J. Curtis Smith, then deceased, to set aside the sheriff's deed, the deed from Bedell to Christy, the sheriff's sale, and the confirmation thereof, and to quiet the title of the said plaintiffs to the land involved. The action was based on the alleged failure to serve notice on the Cunninghams of the proceedings whereby the foreclosure action was revived in the name of the personal representatives of J. Curtis Smith, deceased. At the trial of that action it was claimed by the defendants that the attorney for the Cunninghams had waived notice of the application for the revivor, and had consented that it be made; but the court found that the attorney had no authority so to do, and gave the Cunninghams judgment as prayed for. That judgment was afterwards reversed by the supreme court. *Smith v. Cunningham*, 53 Pac. 760. The present action was brought by Cyrus Christy against L. M. Bedell to recover for breach of the covenant of warranty in the deed above referred to. The recovery sought was the purchase price of the land, and certain costs and expenses incurred in a suit to obtain possession thereof and in defending the title. Christy properly tendered Bedell a quitclaim deed to the premises. On the trial it appeared that Christy had instituted an action in forcible detainer, and had dismissed the same, evidently because of the fact that the parties reached an agreement under which the lease was made. By virtue of the lease Christy obtained possession of the land, and received a part of the agreed rental in cash. The foreclosure proceedings were apparently regular in all respects, and the judgment in favor of the Cunninghams in the action to quiet title rested upon the sole ground that the revivor in the foreclosure suit was made without

their consent. The trial court entered judgment in favor of Bedell, the defendant. He subsequently died, and the action was revived in the name of the administrator of his estate.

It is clear from the foregoing that Christy was not entitled to recover for breach of the covenant of seisin. The deed, however, contained a covenant for quiet enjoyment. "The covenant of warranty, as well as that of quiet enjoyment, is a covenant which does not necessarily imply the covenantor has a perfect title, but is an agreement to defend the covenantee in his possession." *Clafin v. Case*, 53 Kan. 561, 36 Pac. 1063. "The covenant for quiet enjoyment goes to the possession, and not to the title, and, therefore, to prove the breach, it is ordinarily necessary to give evidence of an entry upon the grantee, or of expulsion from or some actual disturbance in the possession; and this, too, by reason of some adverse right existing at the time of making the covenant, and not of one subsequently acquired." 2 Greenl. Ev. § 243. The facts appearing in the record bring this case within the doctrine stated by Greenleaf. The assertion of an adverse title by the Cunninghams, after their tenancy had expired, deprived Christy, at least temporarily, of the possession of the land. The judgment quieting the title thereto completed the ouster of Christy from possession of the premises, just as effectually as a judgment against him in ejectment would have done. His cause of action upon the covenant for quiet enjoyment was complete as soon as that judgment was entered, and he was entitled to recover upon the facts proven at the trial, but the judgment was against him for costs. The decision of the supreme court in the case of *Smith v. Cunningham*, supra, cannot guide us in the present case. The judgment of the district court will be reversed.

(10 Kan.App. 438)

TULLOSS v. RICHARDSON.

(Court of Appeals of Kansas, Southern Department, E. D. July 25, 1900.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

The evidence before, and the findings of, the referee examined. *Held* sufficient to uphold the judgment of the trial court.

(Syllabus by the Court.)

Error from district court, Chautauqua county; C. W. Shinn, Judge.

Action by M. F. Richardson against J. K. Tulloss. Judgment for plaintiff. Defendant brings error. Affirmed.

H. E. Sadler, for plaintiff in error. T. J. Hudson and W. H. Sproul, for defendant in error.

SCHOONOVER, J. The defendant in error commenced this action in the district court of Chautauqua county, alleging that

J. K. Tulloss was indebted to him in the sum of \$1,885.31. Tulloss filed his answer and cross petition. The answer sets forth the facts constituting the defense at great length. It is, in effect, a general denial, with a further allegation that plaintiff below, Richardson, was indebted to him in the sum of \$17.65 for goods sold and delivered. After the issues were made up, the court, with the consent of both parties, appointed F. J. Fritch referee, to take the testimony and report same to the court, together with his findings. Afterwards the court rendered judgment on the pleadings, evidence, and findings of referee in favor of Richardson, plaintiff below, for \$1,514, and for costs. The defendant below brings the case here.

There is no contention as to the law in the case. If the facts are as contended for by plaintiff in error, the authorities cited are applicable. Our investigation has been confined to the one question, is the evidence sufficient to uphold the findings of the referee and the judgment of the trial court? The record contains over 300 pages, and a synopsis of the evidence would prolong this decision beyond reason. We are satisfied that the findings of the referee and the judgment of the trial court are supported by the evidence. The judgment of the district court will be affirmed.

STREIGHT et al. v. DURHAM, County Treasurer.

(Supreme Court of Oklahoma. June 30, 1900.)

TAXATION—INJUNCTION—EQUALIZATION—MEETING—NOTICE.

1. The organic act and the statutes of this territory require that all property subject to taxation shall be assessed and taxed according to its true cash value; and where a party seeks to enjoin the collection of a tax which he claims is illegal and excessive, arising from the action of the board of equalization in raising the valuation of the property above the returned valuation by the assessor to the board, it devolves upon him not only to allege in his petition, but to prove, that the property was listed and returned for assessment at its true cash value, before a court of equity will interfere and enjoin the collection of the excessive tax.

2. Under section 5620 of the Statutes of 1893, the board of equalization of a city, in exercising its powers and functions of equalizing the various individual assessments, has the undoubted authority to increase the valuation of the property of any individual above the returned valuation by the assessor to the board, where it appears that such property has been assessed below its true cash value, subject to the limitations that the property is uniformly assessed, that no unequal discrimination is made between different kinds of property within the taxing district, and that the property is not raised by the board above its true cash value.

3. The time for the meeting of the board of equalization is fixed by statute, and all persons must take notice of such time; and the action of the board of equalization in raising the assessed value of the property of an individual above the return made to the board by the

assessor does not require that notice shall be given to the taxpayer, to make such action valid; and the want of notice to an individual taxpayer is not in violation of article 14 of the amendments of the constitution of the United States, which forbids the deprivation of any person of life, liberty, or property without due process of law.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; before Justice B. F. Burwell.

Suit by A. T. Streight and G. M. Worthen, partners under the firm name of the Shawnee Hardware Company, against William Durham, treasurer of Pottawatomie county. Judgment for defendant, and plaintiffs bring error. Affirmed.

P. O. Cassidy, for plaintiffs in error. L. G. Pitman, for defendant in error.

HAINER, J. This was an action brought in the district court of Pottawatomie county by the plaintiffs in error against the defendant in error to enjoin the defendant in error from collecting a portion of the taxes for the year 1897. The material allegations in the petition are as follows: "That these plaintiffs duly and truly listed and returned, under oath, all personal property owned by them jointly as such partners in the city of Shawnee, for the year 1897, to the proper assessor of said city, and placed the value thereof at \$1,235, which was the average cash value of all the personal property owned by the Shawnee Hardware Company in said city at the time; and the said assessor at the time assessed and valued all of the personal property of the plaintiffs in the said city of Shawnee at \$1,235, and did at the time so enter it upon the assessment rolls of the city of Shawnee as the property of the Shawnee Hardware Company. But that afterwards, upon the advice of the mayor and the clerk of the city of Shawnee, and other persons unknown to these plaintiffs, the said assessor, without the knowledge or consent of these plaintiffs, increased the valuation of plaintiffs' personal property in said city of Shawnee about sixty-five per cent., viz. \$800, and extended the same upon the assessment rolls. But the said assessor never at any time furnished to or gave to the plaintiffs a copy of the schedule showing such raise or increase of plaintiffs' said personal property, and plaintiffs knew nothing of said increase until they went to pay their taxes to the county treasurer since January 1, 1898. That said increase of the value of plaintiffs' personal property from \$1,235 to \$2,035 was fraudulently and unlawfully done, and is inequitable and out of proportion to the values placed on other personal property in the said city of Shawnee, and is an unjust and unequal discrimination against these plaintiffs, as compared with the values placed upon the personal property of other residents and taxpayers of said city, and unjust, illegal, and void." Upon this petition the probate judge, in the absence of the district court, granted a temporary injunction. To the petition of

the plaintiffs the defendant filed an answer. It was admitted in the answer of the defendant that the city assessor of Shawnee assessed the plaintiffs' property for the year 1897 for \$1,235, and that afterwards said property was raised by the board of equalization of the city of Shawnee to the value of \$2,035; that the increased valuation placed upon the plaintiffs' property was done by the regularly constituted board of equalization of the city of Shawnee, consisting of the mayor, the city clerk, and the city assessor; that in assessing and equalizing the plaintiffs' property there was no irregularity; and that the same was done according to law. The answer further alleges that there was no discrimination made against the plaintiffs, and that said property was assessed and equalized and returned as all other property in the city of Shawnee,—at its actual cash value. Upon the issues thus framed the cause was tried by the court upon affidavits filed in the case, which were by agreement of parties taken as the evidence in the case. The district court held that the evidence was insufficient to sustain plaintiffs' claim of the illegality of said tax, and dissolved the temporary injunction granted by the probate judge, and dismissed the action at the costs of the plaintiffs. From this judgment the plaintiffs appeal.

The only evidence offered by the plaintiffs was the affidavit of G. M. Worthen, which is as follows:

"Territory of Oklahoma, Pottawatomie County—ss.: G. M. Worthen, being duly sworn, on oath deposes and says that he is a member of the Shawnee Hardware Company, the above-named plaintiff, and that in February, 1897, the said plaintiff listed to the assessor of the city of Shawnee, under oath, all the personal property owned by said plaintiff in the said city, and gave in the value thereof at \$1,235, which was the true and fair cash value of said property at the time, as compared by the assessed valuation of other personal property in said city, and the assessor at the time, in the presence of the affiant, duly entered said property on the assessment roll of the said city, and there assessed said property at \$1,235, and so entered it upon the assessment roll, and plaintiff, relying upon the acts of the assessor at the time he assessed said property, and believing that no change could or would be made, increasing the value, without giving said plaintiff notice of said change, and having received none, paid no more attention to the matter until plaintiff went to pay its taxes, after January 1, 1898; and then affiant, for the first time, learned from the county clerk and treasurer that the assessment of plaintiff had been increased from \$1,235 to \$2,035, thereby increasing his taxes from \$90.77, being the tax on the legal assessment, to \$149, making an increase of \$58.23, which plaintiff believed to be illegal, but at the time tendered the full amount of taxes on the legal assessment, which the treasurer refused

to accept. Affiant further says that the plaintiff was never notified of said increase, or any contemplated increase, on the value of its said property. G. M. Worthen.

"Subscribed and sworn to before me this 13th day of February, 1898. Geo. G. Boggs, Notary Public. My commission expires 5/4/99."

We think that the evidence offered by the plaintiffs is wholly insufficient to establish any cause of action against the defendant. There was no evidence to show fraud or irregularity either in the assessment or the raise made by the city board of equalization. Nor was there any evidence offered that the property was listed and assessed at its true or actual cash value. Neither was there any evidence offered to show that the board of equalization had increased the valuation of the property in excess of the actual cash value. Had the property been assessed in excess of its true or actual cash value, that fact could have easily been shown by the plaintiffs. But the only testimony on this point offered by the plaintiffs was "that \$1,235 was the true and fair cash value of said property at the time, as compared with the assessed valuation of other personal property in said city." On the other hand, the defendant offered the testimony of the mayor, the city clerk, and the city assessor, which shows that, after a careful comparison of the personal property owned by the plaintiffs and similar property situated in the city of Shawnee, the board of equalization of said city found and determined that said property was listed and assessed below the average value of personal property as returned by other taxpayers of said city for the year 1897, and that the fair cash value of said property for said year was \$2,035, and that no discrimination was made against the plaintiffs by the board of equalization.

It is contended by the plaintiffs in error that the board of equalization of the city of Shawnee has no power to raise the individual assessments, and that such action by the board of equalization is in contravention of the constitution of the United States, which prohibits the property of any citizen to be taken without due process of law. We think that this contention is clearly untenable. Section 6 of the organic act provides that all property subject to taxation shall be taxed in proportion to its value, and the legislature of this territory has provided that all property shall be assessed according to its actual cash value. Section 5620 of the Statutes of 1893 provides that the city assessor, the mayor, and the city clerk shall compose the board of equalization for cities; that the said board shall meet on the third Monday of April of each year to hear complaints of persons who feel aggrieved of their assessments, and the decision of said board shall be final as to individual assessments. Thus, it will be seen that the organic act and the statutes of this territory require that all property shall be assessed in proportion to its true value or

actual cash value; and the board of equalization of the city of Shawnee, in exercising its powers and functions as such board, has the undoubted authority to increase the valuation of the property of any individual, provided that it is uniform, and no unequal discrimination is made in taxing different kinds of property, and that such increase does not raise the value of the property above its true cash value. On the other hand, if it is shown that the board of equalization has raised the valuation of the property of any individual above its true or actual cash value, and that there was an unequal discrimination made as to different kinds of property within the taxing district, a court of equity will undoubtedly enjoin the tax levied on the excess, and where it is further shown that the amount of the tax due on the actual cash valuation is paid or tendered before the action is brought. The manifest purpose of the board of equalization is to equalize the individual assessments, and to ascertain and determine whether or not all property subject to taxation has been uniformly assessed, and in proportion to its true value, within the taxing district. In *Bardrick v. Dillon*, 7 Okl. 543, 54 Pac. 787, Mr. Chief Justice Burford, in delivering the opinion of the court in that case, said: "The statute points out no manner in which this power is to be executed and duty performed, and there is no limitation upon the manner in which the equalization shall be done, except that the property shall not be valued above its true cash value." In *Martin v. Clay*, 8 Okl. 46, 56 Pac. 715, this court held that "where one seeks to enjoin the collection of a tax on the ground of excessive assessment, arising from the action of the board of equalization in increasing the valuation of the property over the returned valuation, plaintiff must allege that his property was returned for assessment at its true cash value; and a petition for injunction which simply states that the property was returned at a certain value, and that such valuation was reasonable and fair, does not state a cause of action, and will be held bad on demurrer." In *Wallace v. Bullen*, 6 Okl. 17, 52 Pac. 954, this court, speaking, by Mr. Justice Tarsney, of the powers and functions of the several boards and officers charged with the assessment and equalization of assessments for the purposes of taxation, said: "These several officers and boards may be said to comprise the machinery of the law for exercising the taxing powers of government. Each must act within the special scope of his or its authority, and, when so acting, the only limitation that we can discover to the combined authority and jurisdiction of all is that their imposition of taxation must be equal and uniform. In assessing, they must not fix values higher than the true cash value of the property assessed; and, in levying, they must not levy a higher rate than that limited by the law. In other words, the general scope of the jurisdiction and powers of the taxing authorities is to im-

pose taxation upon property assessed at its true cash value, and at a rate not exceeding the maximum fixed by law; and when the authorities have proceeded and acted within the scope of their authority as thus defined, and property has not been valued for taxation beyond its true cash value, or a greater rate of taxation levied upon such value than that authorized by law, the owner has not been injured, and cannot be heard to complain, provided his property has been taxed equally and uniformly with other property in the taxing district."

But it is urged by counsel for the plaintiffs in error that said raise was made by the board of equalization of the city of Shawnee without notice to the plaintiffs in error, and therefore the action of such board was in violation of the constitution of the United States, which forbids the property of a citizen to be taken without due process of law. This contention is untenable, and has been so held by the supreme court of the United States. The time for the board of equalization to meet is fixed by the statute on the third Monday of April of each year. This was notice to the plaintiffs. The statute fixes the day upon which the board shall meet, and no other notice is required. The evidence in this case shows that the board of equalization met on the day fixed by the statute, and there was no evidence whatever offered by the plaintiffs that there was any irregularity or fraud committed by the board in equalizing the assessments. In the case of *Taylor v. Secor* (and known as the "Illinois State Railroad Tax Cases") 92 U. S. 609, 23 L. Ed. 672, Mr. Justice Miller, in delivering the opinion of the court upon this subject, said: "It is charged that the board of equalization increased the estimates of value so reported to the auditor, without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us that, for want of this notice, the whole assessment of the property and levy of taxes is void. It is hard to believe that such a proposition can be seriously made. If the increased valuation of the property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the state, when the value assessed upon it by the local assessor has been increased by the board of equalization. How much tax would thus be rendered void, it is impossible to say. The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high, in reference to the general standard, they may reduce its valuation. If it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice and a special hearing? If a railroad company is by law entitled to such notice,

surely every individual is equally entitled to it. Yet, if this be done, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of the board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong, and, in the business of assessing taxes, this is all that can be reasonably asked. As we do not know on what evidence the board acted in regard to these railroads, or whether they did not act on knowledge which they possessed themselves, and as all valuation of property is more or less a matter of opinion, we see no reason why the opinion of this court or of the circuit court should be better or should be substituted for that of the board, whose opinion the law has declared to be the one to govern in the matter." In *Weyerhaeuser v. Minnesota*, 176 U. S. 550, 20 Sup. Ct. 485, 44 L. Ed. —, a very recent case (decided February 26, 1900), the supreme court of the United States decided that: "The provision in the statute of Minnesota for 1893 (chapter 151) authorizing the governor of the state, when it is made to appear that there has been a gross undervaluation of taxable property by the assessor for any county in the state, to appoint a board to revalue and reassess it, which board shall, after due examination, prepare a list of all such undervalued property, of the year or years in which it was so underassessed, the amount of the assessment, and the actual and true value thereof for which it should have been so assessed, does no violation to the fourteenth amendment to the constitution of the United States, and does not deprive the owner of lands so reassessed at an advanced value of his lands without due process of law." It was contended in this case that no notice of any of said proceedings by any of said persons in making said reassessment or revaluation of said lands, or in extending said taxes against said lands, was ever given, by publication or otherwise, and that such increase of assessment was in violation of article 14 of the amendments to the constitution of the United States, providing that no state shall deprive any person of his property without due process of law. Mr. Justice McKenna, speaking for the court, among other things, said: "The special objections of plaintiffs in error, therefore, cannot be sustained, nor the broader one that the first assessments are final against any power of review or addition by the legislature. We held in the *Winona Case*, supra [159 U. S. 526, 16 Sup. Ct. 83, 40 L. Ed. 247], that the legislature had power to provide for the assessment of property which had escaped taxation in prior years; and, as we have seen, a special man-

ner of assessment was sustained. We agree with the supreme court of the state that a gross undervaluation of property is within the principle applicable to an entire omission of property. If it were otherwise, the power and duty of the legislature to impose taxes and to equalize their burdens would be defeated by the fraud of public officers, perhaps induced by the very property owners who afterwards claim its illegal advantage. If an officer omits to assess property, or grossly undervalues it, he violates his duty, and the property and its owners escape their just share of the public burdens. In *Stanley v. Supervisors*, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000, we held that, against an excessive valuation of the property, its owner had a remedy in equity to prevent the collection of the illegal excess. It would be very strange if the state, against a gross undervaluation of property, could not, in the exercise of its sovereignty, give itself a remedy for the illegal deficiency. And this is the effect of the statute. It 'merely sets in motion new proceedings to collect the balance of the state's claim, and there is no constitutional objection in the way of doing this,' as the supreme court of the state said in its opinion."

Applying these well-settled principles to the case under consideration, we hold that the action of the board of equalization in increasing the assessed value of the property of the plaintiffs in error in excess of the return made to the board does not require that notice be given to the plaintiffs, to constitute the acts of the board valid in raising such assessment, and that the action of the board in raising such assessment without notice to an individual taxpayer is not in violation of article 14 of the amendments to the constitution of the United States, which forbids the deprivation of any person of life, liberty, or property without due process of law, and that the only limitations upon the powers of the board of equalization is that all property subject to taxation shall be uniformly assessed, that no unequal discrimination shall be made as to different kinds of property within the taxing district, and that the assessed valuation of the property shall not be raised above its true cash value.

The only other error complained of by the plaintiffs in error is that the court erred in refusing to allow the plaintiffs to amend their petition after all the evidence was submitted to the court, and before judgment was rendered. We think that the court properly refused to allow the amendment, and that no prejudicial error was committed by reason thereof. There being no error in the record prejudicial to the substantial rights of the plaintiffs in error, the judgment of the district court of Pottawatomie county is affirmed, at the costs of the appellants. All the justices concurring, except BURWELL, J., who tried the cause in the court below, not sitting, and McATEE, J., not sitting.

ROSE v. DURHAM, County Treasurer.

(Supreme Court of Oklahoma. June 30, 1900.)

TAXES—ENJOINING COLLECTION.

Upon the authority of *Streight v. Durham* (decided this term of court) 61 Pac. 1090, the judgment of the district court is affirmed.

(Syllabus by the Court.)

Error from district court, Pottawatomie county; before Justice B. F. Burwell.

Action by Sam Rose against William Durham, treasurer of Pottawatomie county. Judgment for defendant, and plaintiff brings error. Affirmed.

P. O. Cassidy, for plaintiff in error. L. G. Pitman, for defendant in error.

HAINER, J. This was an action brought by the plaintiff in error against the defendant in error in the district court of Pottawatomie county to enjoin the collection of a portion of the tax of 1897, which the plaintiff alleged to be illegal. The petition of the plaintiff alleges, substantially, that he listed and returned under oath all his personal property to the assessor of the city of Shawnee for the year 1897, and placed the valuation thereon at \$2,000, which was the average cash value of all of plaintiff's personal property in said city at the time, and that the said city assessor did at the time assess the value of plaintiff's property at \$2,000; that afterwards the said property was raised by the city assessor from \$2,000 to \$4,000 without the knowledge of or notice to the plaintiff. A temporary injunction was granted by the probate judge in the absence of the district court. The defendant filed an answer alleging, in substance, that plaintiff's property was assessed far below the average value of other personal property in the city of Shawnee, and that the said valuation was raised by the board of equalization of the city of Shawnee, consisting of the mayor, the city clerk, and the city assessor, and not by the assessor of said city, as alleged in plaintiff's petition, and that the property was not raised above its true cash value; that said action of the board of equalization was regular and according to law. Upon the issues thus framed, the cause was tried by the district court upon affidavits filed in said cause, which were received as evidence in the case by agreement of the parties. The only evidence offered on behalf of the plaintiff was his own affidavit, which is as follows:

"Territory of Oklahoma, Pottawatomie County—ss.: Sam Rose, being duly sworn, on oath deposes and says that he is the plaintiff in the above-entitled action; that he is a resident of the city of Shawnee, in said county and territory, and was a resident thereof during all of the year 1897; that he is now, and was in said year 1897, engaged in the clothing and dry-goods business, and that in the year 1897 all the property he owned, of any description, in said

city and county, was his stock of clothing and dry goods, subject to taxation; that in February, 1897, the assessor of the said city of Shawnee came to this affiant's place of business, in the said city of Shawnee, for the purpose of assessing his said stock of clothing and dry goods, and this affiant, after having been duly sworn by said assessor, listed to the said assessor his said stock of clothing and dry goods, which was all the property, either real or personal, that affiant owned in the said city of Shawnee; that, after listing said property as aforesaid, affiant placed the value thereof at \$2,000, being the average cash value of said property, and the said assessor there and then, in the presence of this affiant, duly entered said property upon the assessment roll, and placed the value thereof at \$2,000, and this affiant, believing that the assessor would allow the said value to stand, paid no more attention to said assessment until he went to pay his taxes, after the 1st day of January, 1898, when he ascertained from the county clerk and treasurer that when the said city assessor returned the assessment roll of the city of Shawnee to the county clerk, that the value of affiant's said property had been raised one hundred per cent.; that is, from \$2,000 to \$4,000. And affiant further says that he does not know who increased the value of his said property from that given by him to the assessor, and entered upon the assessment roll at the time by the assessor. And affiant further says that no schedule of the increase or change in the valuation of his said property was ever given to him by the assessor or any one else, and that, believing no change had been made, he paid no further attention to said assessment, and knew of no change until he went to pay his taxes as aforesaid. And further affiant saith not. Sam Rose.

"Subscribed and sworn to before me this 16th day of February, 1898. C. M. Cade, Notary Public. My com. expires Jan. 28, 1899."

It will thus be seen that the only evidence offered, material to the issues involved in this case, by the plaintiff, was that he listed the value of his property at \$2,000, and that it was the average cash value of said property, and that he had no notice or knowledge of the raise made by the city board of equalization. There was no evidence offered to prove either irregularity or fraud on the part of the said city assessor or the board of equalization. There was no evidence introduced by the plaintiff that the actual or true cash value of the property at the time it was listed and returned to the assessor was \$2,000. Nor was there any evidence offered by the plaintiff that the board of equalization had raised the plaintiff's property in excess of its true cash value, and there was no evidence that there was any unequal discrimination made between the plaintiff's property and similar property which was assessed within the taxing district of said city. On the other hand, the defendant offered in evidence the

affidavits of the city board of equalization, consisting of the city assessor, the mayor, and the city clerk. The evidence offered on behalf of the defendant shows that the board of equalization met on the day fixed by the statute, to wit, on the third Monday of April, 1897, for the purpose of equalizing the individual assessments of the various taxpayers of the city of Shawnee; that the board of equalization found and determined that the personal property of the said plaintiff, Sam Rose, was assessed far below the average cash value of other personal property as returned by the various taxpayers of said city for the year 1897; that said assessment was raised by the board of equalization, and not by the city assessor, as alleged in the plaintiff's petition; that no unequal discrimination was made between the plaintiff's property and similar property within the taxing district of said city; and that the fair cash value of said property was \$4,000. The district court found that the evidence introduced was insufficient to sustain the claim of the illegality of said tax, and thereupon dissolved the temporary injunction which was granted by the probate court, and dismissed the action at the costs of the plaintiff. From this judgment the plaintiff appeals.

We think that the plaintiff has wholly failed to plead or prove facts sufficient to constitute a cause of action against the defendant. This case was submitted on the same briefs as were filed in the case of *Streight v. Durham* (No. 976) 61 Pac. 1096, and the identical questions are involved in this case. Hence, upon the authority of *Streight v. Durham* (decided at this term of court) 61 Pac. 1096, the judgment of the district court is affirmed, at the costs of the appellant. All the justices concurring, except BURWELL, J., who tried the cause in the court below, not sitting, and McATEE, J., not sitting.

DECKER v. CAHILL.

(Supreme Court of Oklahoma. June 30, 1900.)
PROBATE COURTS—QUESTIONS OF LAW AND
FACT—APPEAL—TO WHAT COURT TAKEN.

All appeals from final judgments of probate courts shall be allowed and taken to the supreme court of the territory in the same manner as appeals are taken from the district court, and with like effect, when only questions of law are involved in the appeal, irrespective of the amount involved; but if one desires to appeal from a final judgment of a probate court, and have questions of fact retried in the appellate court, then he must appeal to the district court of the county in the same manner and form as appeals are taken from judgments of justices of the peace, without regard to the amount involved; and an appeal from a final judgment of a probate court, which involves only a question of law, cannot be taken to the district court of the county, but must be taken and prosecuted by petition in error, either by bill of exceptions and transcript or case-made, to the supreme court of the territory.

(Syllabus by the Court.)

Error from district court, Logan county; before Chief Justice John H. Burford.

Action by S. D. Cahill against Henry R. Decker. From the judgment, defendant appealed to the district court, which dismissed the appeal, and defendant appeals. **Affirmed.**

Lawrence & Huston, for plaintiff in error.
Dale & Blerer, for defendant in error.

BURWELL, J. The only question in this case which we feel called upon to decide is as to whether or not an appeal will lie from the probate court to the district court in a case where only a question of law is involved, and the appellant is not asking to have any question of fact retried in the appellate court. In this case the defendant in error, Cahill, recovered a judgment in the probate court against the appellant for \$32, for \$2.65 costs on an attachment, for \$8.25 other costs, and for an attorney's fee of \$10. From this judgment the defendant below prosecuted an appeal, by bill of exceptions and transcript, to the district court of Logan county. The district court dismissed the appeal for want of jurisdiction, and from this order Decker appealed to this court.

Section 9 of the organic act of Oklahoma provides that justices of the peace shall have original jurisdiction of certain civil causes where the amount involved is not in excess of \$100, and vests probate courts with probate jurisdiction. Subsequently the territorial legislature attempted to enlarge the jurisdiction of the probate courts of the territory by conferring upon them the ordinary powers of justices of the peace, and also certain other jurisdiction concurrent with the district courts. This act of the legislature was ratified by congress, which gave to the act all the force and effect of an original act of that body. The law referred to is article 15, c. 18, St. Okl. 1893. Section 1 is as follows: "Probate courts in their respective counties shall in addition to the powers conferred upon them by the probate chapter of the territory, have and exercise the ordinary powers and jurisdiction of justices of the peace, and shall in civil cases have concurrent jurisdiction with the district courts in all civil cases in any sum not exceeding one thousand dollars exclusive of costs, and in action of replevin where the appraised value of the property does not exceed that sum; and the provisions of the chapter on Civil Procedure relative to justices of the peace and to practice and proceedings in the district court shall apply to the proceedings in all civil actions, prosecuted before said probate courts: provided, the probate courts shall not have jurisdiction: First. In any action for malicious prosecution. Second. In any action against officers for misconduct in office, except where like proceedings can be had before justices of the peace. Third. In actions for slander and libel. Fourth. In actions upon contracts for sale of real estate. Fifth. In any matter wherein the title or boundaries of land may be in dispute, nor to order or decree

the sale or partition of real estate." It is pretty generally conceded, but, we think, without due consideration, that a probate judge is ex officio a justice of the peace; but a careful reading of the section just quoted will show that this view is incorrect. All of the powers of a justice of the peace are not conferred upon probate courts. The act confers upon probate courts only the "ordinary powers and jurisdiction of justices of the peace," and not "all of the powers" of such officer, and in addition thereto the probate courts have concurrent jurisdiction with the district court in all cases in any sum not exceeding \$1,000, exclusive of costs, and in action of replevin where the appraised value of the property does not exceed that sum; and the provisions of the chapter on "Civil Procedure" relative to justices of the peace and to practice and proceedings in the district court are made to apply to the proceedings in all civil actions prosecuted before the probate courts. Section 2 provides: "In all cases commenced in said probate courts wherein the sum exceeds the jurisdiction of justices of the peace, the pleadings and practice and proceedings in said court both before and after judgment shall be governed by the chapter on Civil Procedure of the territory governing pleading and practice and proceedings in the district court. In all cases commenced in said probate courts that are within the jurisdiction of justices' courts, the practice and proceedings and pleadings both before and after judgment provided for in justices' procedure of the territory shall be applicable to the practice, pleadings and proceedings of said probate courts." This section makes no provision for an appeal from the probate court of any county on questions of either law or fact. It only provides the practice, proceedings, and pleadings in each class of cases "in the probate court" both before and after judgment, but fails to provide for an appeal from the judgments of such courts. The right of appeal is granted by section 5 of the same article, which clearly covers the entire question of appeal: "Sec. 5. Appeals from the final judgment of said probate courts shall be allowed and taken to the supreme court of this territory in the same manner as from the district courts, and with like effect when only questions of law are involved in the appeal. If questions of fact are to be retried in the appellate court the appeal shall be taken to the district court of the county in manner and form as appeals are taken from judgments of justices of the peace." The question of appeals from judgments of probate courts has been before this court several times, and we are inclined to the opinion that the rule heretofore announced should be modified to conform to what we now, after careful consideration, believe to be a correct interpretation of the statute. Section 1 extends the jurisdiction of the probate court; section 2 provides for the practice, proceedings, and pleadings in the probate courts both before and after judgment,

which includes the preparation of the record for appeal; and section 5 designates the respective courts to which appeals may be taken. One desiring to appeal from a judgment of a probate court has the legal right to determine for himself as to whether he will appeal on a question of law alone, or on questions of both law and fact, and demand a trial de novo in the appellate court. When questions of law, only, are involved in the appeal, it must be taken to the supreme court in the same manner as appeals are taken from the district court, and this is true without regard to the amount involved in the action; and an appeal, by bill of exceptions, writ of error, or case-made, which presents purely a question of law, will not lie to the district court from a final judgment of a probate court, rendered while exercising the ordinary jurisdiction of a justice of the peace, or while exercising concurrent jurisdiction with the district court, but if any question of fact has been tried in the probate court, and the party appealing desires to have such question or questions retried, he must appeal to the district court, regardless of the amount involved.

A number of authorities are cited by both the appellant and the appellee in support of their respective positions, but we find them of little assistance to us, as the statute here construed is peculiar to itself, and none of the authorities cited seem to have any particular bearing upon the proper construction of it, except the decisions of our own court; and all of these decisions which are in conflict with the rule herein expressed are hereby modified to conform herewith. As to what is "ordinary" jurisdiction of justices of the peace, and what is meant by "concurrent jurisdiction with the district court," we will not at this time express an opinion, but will reserve the consideration of these two expressions until a case comes before us in which they are necessarily involved. For the reasons herein given, the appeal was properly dismissed, and the judgment of the trial court should be affirmed at the costs of the appellant. All of the justices concurring, except BURFORD, C. J., who presided at the trial in the court below.

(10 Okl. 398)

RANDOLPH v. HUDSON.

(Supreme Court of Oklahoma. June 30, 1900.)
APPEAL FROM PROBATE COURT — JURISDICTION OF DISTRICT COURT.

The district court has jurisdiction of causes appealed from the probate court, when questions of fact are to be retried, whether the case be one within the jurisdiction of a justice of the peace or of the district court.

(Syllabus by the Court.)

Error from district court, Garfield county; before Justice John L. McAtee.

Action by John Hudson against N. Randolph. Judgment for plaintiff was appealed to the district court. From a judgment dismissing the appeal, defendant brings error. Reversed.

Frank Purcell, for plaintiff in error. O. D. Hubbell and W. S. Denton, for defendant in error.

BURFORD, C. J. This action was commenced before the probate court of Garfield county to recover the sum of \$275, and accrued interest, upon a promissory note. The plaintiff, Hudson, recovered judgment against Randolph for the sum of \$384.50 and costs. Randolph appealed to the district court upon both questions of law and fact. In the district court the appeal was dismissed on motion of Hudson, and cause remanded to the probate court. The record shows that the ground upon which the trial court dismissed the appeal was that no appeal will lie from the probate court to the district court in causes wherein the two courts have concurrent jurisdiction. From the judgment dismissing the appeal the plaintiff in error brings the cause to this court for review.

The question involved in this case was fully considered and passed upon in the case of Decker v. Cahill (decided at the present term) 60 Pac. 1101. In that case it is held that when a judgment is rendered in the probate court in a civil cause the defeated party may elect whether he will have the case retried on questions of fact on appeal, or whether he will have it reviewed on questions of law only. If questions of fact are to be retried on appeal, although questions of law are also involved, the cause must be appealed to the district court; but if questions of law, only, are to be reviewed, the case must be taken to the supreme court. The court to which the appeal is to be taken is not determined by the amount involved, but by the questions to be tried. On the authority of Decker v. Cahill, and the former cases decided by this court, the judgment of the district court of Garfield county is reversed, and cause remanded for further proceedings, at the costs of defendant in error. All concur, except McATEE, J., who tried the cause below, not sitting.

(22 Utah, 211)

STANDARD STEAM LAUNDRY v. DOLE.

(Supreme Court of Utah. July 21, 1900.)

ACTION TO REDEEM FROM MORTGAGE SALE—SPECIAL PROCEEDING—JURISDICTION—CONDITIONAL SALE OF PERSONALTY—VALIDITY—ASSIGNMENT BY VENDOR—CLAIM FOR LIEN—SUBSEQUENT CONTRACT—ADDITIONAL SECURITY—WAIVER OF LIEN.

1. Although a judgment debtor, or his successor in interest, may institute a special proceeding, under section 3267, Rev. St. 1898, to redeem real estate sold under a mortgage, and to compel an accounting of the rents and profits of such estate, and have the right to insist that the trial be limited to the special purpose for which the suit was brought, yet if he seeks by his complaint for an accounting of the rents, issues, and profits of personal property not sold with the realty, and prays for general relief, the defendant has a right to file his counterclaim which grew out of transactions relating to the same property; and plaintiff cannot be heard to complain if all issues thus

before it are heard and determined by the trial court.

2. A conditional sale of personal property, it being stipulated in good faith that the title is not to pass until full payment of the purchase price by the vendee, is valid, and binds the vendee, his creditors and vendees.¹

3. A vendor of personal property may assign his claim to such property, sold conditionally; and his assignee acquires the same rights therein as the vendor had, and the vendor loses all interest in the property.

4. The taking, by a vendor in a conditional sale, of a subsequent contract from the vendees and another, which contract amounts simply to additional security, is not a waiver of the rights of the vendor under the contract of sale, and does not destroy those rights or the vendor's lien.

(Syllabus by the Court.)

Appeal from district court, Salt Lake county; Ogden Hiles, Judge.

Action by the Standard Steam Laundry against C. A. Dole. Judgment for defendant, and plaintiff appeals. Affirmed.

The plaintiff filed a complaint for a general accounting and equitable relief, asking that the defendant be compelled to account for certain rents, issues, and profits of certain real and personal property employed in conducting a laundry business, and that the amount found due be credited as redemption money, to be paid to redeem the real estate from foreclosure sale under a mortgage. In the answer certain things of the complaint were admitted, others denied, and a counterclaim set up, in which it was averred that the defendant, by purchase and assignment, was the owner and holder of certain notes executed and delivered to the Troy Laundry Machinery Company, Limited, by O. A. and E. T. Wooley, for the purchase price of the laundry machinery described in the complaint; that the notes provided that the title to the machinery was not to pass until they were paid in full; that, to prevent the taking of the laundry machinery, the defendant was compelled to purchase them and pay the balance due on them, neither the plaintiff nor the makers having paid them; and that he also paid certain taxes and expenditures for repairs on the property. The prayer was that an accounting be had, and that the defendant be decreed a lien on the machinery for the amount paid by him on the notes, and on the real estate for the taxes and expenditures paid by him, and that, in case the court decreed a redemption of the real estate, the plaintiff be ordered to pay the several sums covered by such lien, in addition to the amount paid by the defendant for the real property under the foreclosure sale. The plaintiff in its replication denied these averments of the answer, alleged that the notes were paid under a certain agreement of defendant, and concluded as follows: "Wherefore plaintiff prays that it be decreed to be the owner of the prop-

erty specified in paragraph 9 of plaintiff's complaint, free from all incumbrances and liens held by defendant, of whatever nature; that the plaintiff have and recover from the defendant the rents, issues, and profits received for the reasonable use and occupation of said property specified in plaintiff's complaint, both real and personal; that the same be credited upon the redemption money to be paid said defendant,—and for such other and further relief as the court shall deem just and equitable in the premises, and for costs of this action." Under these pleadings it was shown, as appears, that the plaintiff was organized as a corporation in 1893, under the laws of Utah, with a capital stock of 12,000 shares, of which shares Oscar F. Hunter owned 600, and Orson A. Wooley and Alice, his wife, and George E. Wooley owned 600. Certain real estate and laundry machinery in question herein were conveyed to the corporation in full payment of the capital stock of the incorporation. At the time of the conveyance the real estate was incumbered with a mortgage which had been executed to one Mulvey by Orson A. and Alice Wooley to secure the payment of \$2,500 and interest. The laundry machinery had been purchased from the Troy Laundry Machinery Company, Limited, by O. A. and E. T. Wooley, conditionally, as provided in five notes executed by the vendees to the vendor, each of which notes contained the agreement "that the title or ownership of said machinery does not pass from the Troy Laundry Machinery Company, Limited, until the notes shall have been paid in full." There remained due on these notes the sum of \$1,500 principal on April 17, 1894, when the defendant purchased the stock owned by Oscar F. Hunter. This purchase was evidenced by a contract in writing between the defendant and Hunter, wherein it appears that the consideration for the transfer of the stock was the conveyance of certain real estate situate in Salt Lake City by Dole to Hunter, and the performance of certain agreements contained in the contract, one of which was a covenant that Dole should pay for Hunter the notes given by Wooley to the Troy Laundry Machinery Company. "when the said Wooley causes the real property of said corporation" which was covered by the mortgage above mentioned "to be released from the lien of the mortgage"; such debt "being the individual debt of Orson A. Wooley," and not of the corporation. At the time of the purchase of the stock from Hunter, Dole and O. A. and E. T. Wooley entered into a contract with the Troy Laundry Machinery Company for the purpose of procuring an extension of time for the payment of the balance due on the notes, in which contract Dole, "for himself, assures and guarantees the payment" of such balance, which was \$1,500, and O. A. and E. T. Wooley also "jointly guaranty the payment thereof." The last

¹ *Lippincott v. Rich*, 56 Pac. 806, 19 Utah, 140; *Hirsch v. Steele*, 36 Pac. 49, 10 Utah, 19; *Russell v. Harkness*, 7 Pac. 865, 4 Utah, 197; *Harkness v. Russell*, 7 Sup. Ct. 51, 118 U. S. 663, 30 L. Ed. 285.

clause of the contract reads: "The said parties of the second part agree that, when the property of the Standard Steam Laundry Company is released from all incumbrances, that the said C. A. Dole shall deposit with Wells, Fargo and Company, to secure the balance due to the said party of the second part, one-half of the capital stock of the said steam laundry company. On the deposit of the said stock the party of the second part will, and does hereby, release the said O. A. Wooley and E. T. Wooley from the payment of the said notes." Afterwards Dole paid the amount due on the notes to the payee, to protect Hunter and the laundry machinery against the vendor's lien, had them assigned to himself, and became the owner and holder of them. No part of the amount of the notes has been paid by the Wooleys. There was no consideration for the assumption of Dole to pay the notes. Dole also paid certain sums for repairs and taxes on the property. Soon after the purchase of the 600 shares of stock from Hunter, about July, 1894, Dole leased of the Wooleys their undivided one-half interest in the laundry, including premises, building, and machinery, at a weekly rental of \$7.50, and, in addition thereto, agreed to do the washing for the families of the lessors. The property has ever since been in the possession of the lessee, and the rent was paid to the lessors and accepted by them until one week after the sale of the premises, under foreclosure of the Mulvey mortgage, which sale occurred on February 27, 1898, the mortgage not having been paid. The lease was to continue until terminated by notice. The lessee became the purchaser at the mortgage sale, and has continued in the possession of the premises to the present time, and has always been ready and willing to pay the rent, but since a week after the sale the lessors have refused to accept the same. The lessors made demand in writing before the bringing of suit, upon the lessee, for an accounting for the use and occupation of the real estate, and for the use of the building and laundry machinery, but the lessee failed and refused to make the same. Thereupon this action was instituted to compel such accounting and to redeem the property. At the trial the court entered a decree allowing the defendant a lien on the laundry machinery for the amount of the notes paid by him, and on the real estate for the certain sums paid by him for taxes and repairs, and for a certain sum, with interest, paid by him as purchase money for the premises under the foreclosure sale, and held that the plaintiff was entitled to redeem the property upon payment of such several sums, aggregating \$4,230.50, less the rental of the premises at the rate of \$64 per month from February 28, 1898, to January 5, 1900. The plaintiff thereupon appealed from the decree and judgment.

N. V. Jones, for appellant. King, Burton & King, for respondent.

A statement of the case as above having been made, BARTON, C. J., delivered the opinion of the court.

The first question to be determined is whether this is a special action under the statute to redeem real estate after foreclosure sale, or a general equitable action to determine all matters in controversy between the parties. The appellant contends that it is a special statutory proceeding to redeem its real estate from the mortgage sale, and that the only burdens which can be imposed upon the judgment debtor, or his successor in interest, as a condition precedent to his right to redeem, are the repayment to the purchaser of the amount of the purchase price, with interest, and any tax or assessment paid after the purchase, with interest thereon. This contention is warranted neither by the pleadings nor by the theory upon which the case was tried. Undoubtedly a judgment debtor, or his successor in interest, may institute a special proceeding, as provided in section 3267, Rev. St., to redeem real estate sold under a mortgage, and to compel an accounting of the rents and profits of such real estate; and, if this be done, the plaintiff has the right to insist that the trial be limited to the special purpose for which the suit was brought. In this case, however, the complainant did not see fit to confine his complaint to the terms of the statute by alleging a cause of action for the redemption of real estate sold under the mortgage, and an accounting for the rents and profits thereof, but it went further, and set up a cause, and made a demand for an accounting for rents, issues, and profits of personal property not sold with the real estate, and also asked for general relief. Having thus brought a suit to determine the whole controversy between the parties, the defendant had the right to file his counterclaim which grew out of transactions relating to the same property. This right the plaintiff must have recognized, for it seems it made no attempt to strike out the counterclaim, but, instead, filed a replication admitting some things, denying others, and making a similar demand to that in the complaint, and then, without objection, as appears, permitted the cause to be tried upon the theory that all matters in controversy between the parties relating to the laundry business should be determined. It was therefore proper for the court to decide all the issues raised in the pleadings and tried before it, and the appellant is in no position to complain that burdens were thus imposed upon it, in its efforts to redeem its property, which were not contemplated by the statute.

Nor, under these pleadings, did the court err in admitting the notes of O. A. and E. T. Wooley given to the Troy Laundry Machinery Company, Limited, for the purchase price of the laundry machinery, in evidence. Such

evidence, under the general accounting for the rents, issues, and profits of property not sold under the Mulvey mortgage, but used in the laundry business, demanded in the complaint, and under the issue raised in the counterclaim, was proper. Nor, under the general character of the pleadings and the evidence, did the court err in finding that the plaintiff leased the laundry property to the defendant.

The appellant also insists that the court erred in finding that the defendant, upon payment of the Wooley notes and taking an assignment of them to himself, became the owner and holder thereof, and was subrogated to the rights of the payee. We are of the opinion that the character of the pleadings and evidence was such as to justify the court in making this finding. Counsel for the appellant, however, maintains that it is doubtful whether the doctrine of conditional sale exists in Utah. We think its validity is no longer an open question in this state. A conditional sale of personal property, it being stipulated in good faith that the title is not to pass until full payment of the purchase price by the vendee, is valid, and binds the vendee, his creditors and vendees. There is no general principle of law which prevents an honest intention of the parties that the vendee shall not have the ownership of the chattels until he has paid for them in full from being effectual. In the absence of fraud, therefore, such a sale will be upheld, and effect given the condition imposed. *Hirsch v. Steele*, 10 Utah, 19, 36 Pac. 49; *Russell v. Harkness*, 4 Utah, 197, 7 Pac. 865; *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285. The conditional sale of the machinery being valid, and the respondent, in order to save the property from being retaken by the vendor, having paid the balance of the purchase price, he had the right to have the notes assigned to him. By such payment and assignment he became the owner and holder, and was subrogated to the rights of the vendor. "The vendor may assign his claim to the property sold conditionally, and his assignee acquires the same rights therein as the vendor had, and the vendor in such case loses all his interest in the property." 6 Am. & Eng. Enc. Law (2d Ed.) 485; *Foundry Co. v. Pascagoula Ice Co.*, 72 Miss. 608, 18 South. 364; *W. W. Kimball Co. v. Mellon*, 80 Wis. 133, 48 N. W. 1100; *Myres v. Yaple*, 60 Mich. 339, 27 N. W. 536; *Rodgers v. Bachman*, 109 Cal. 552, 42 Pac. 448.

Nor did the taking of the contract of April 17, 1894, between the defendant, Dole, and the Wooleys and the Troy Laundry Machinery Company, wherein Dole, for himself, assured and guaranteed the payment of the notes, divest the vendor or its assignee of the right to insist on the terms of the conditional sale. Under that contract, which was made to secure an extension of time for payment of the debt, the Wooleys were not released. They were still bound by their contract to pay the notes. The contract amounted simply

to an additional security, and its taking was not a waiver of the rights of the vendor under the contract of sale, and did not destroy those rights or the claim. 6 Am. & Eng. Enc. Law (2d Ed.) 477; *Pettyplace v. Manufacturing Co.*, 103 Mich. 153, 61 N. W. 266; *Cherry v. Arthur*, 5 Wash. 787, 32 Pac. 744.

Nor did the court commit an error in finding that the contract of April 17, 1894, formed no part of the consideration for the purchase of the 600 shares of the capital stock of the plaintiff corporation by the respondent from Hunter. There is no provision that Dole becomes a guarantor in consideration of the purchase of the stock. Hunter, the vendor, was not a party to that contract, and the contract of March 28, 1894, between the respondent and Hunter, shows the real, and an entirely different, consideration for the stock. So, under the pleadings and the evidence, the court properly decided in favor of the respondent as to the several sums paid by him for taxes, and for expenditures in repairs upon the laundry property.

Other points have been presented in the record, and, although they have not escaped our notice, yet we do not deem a discussion of them important. We find no reversible error in the record. The judgment is affirmed, with costs.

MINER and BASKIN, JJ., concur.

SANGUINETTI v. GIANELLI. (Sac. 723.)

(Supreme Court of California. July 31, 1900.)

APPEAL AND ERROR—REVERSIBLE ERROR—CONFLICT OF EVIDENCE—PRESUMPTIONS—ACTS OF ADMINISTRATOR.

1. Where, in an action for an accounting, brought by a widow against the administrator of the estate of plaintiff's husband, the evidence is conflicting as to whether defendant paid certain claims with his own money, or out of the funds of the estate of plaintiff's husband, a judgment disallowing defendant's claim will not be disturbed.

2. Code Civ. Proc. § 1963, subds. 19, 20, providing that the law presumes "that private transactions have been fair and regular," and "that the ordinary course of business has been followed," are not applicable to the dealings of an administrator with an estate and its funds.

Commissioners' decision. Department 1. Appeal from superior court, San Joaquin county.

Action by Mary Sanguinetti against B. Gianelli for an accounting. From a judgment for plaintiff, defendant appeals. Affirmed.

Louttit & Middlecoff, for appellant. Ansel Smith, for respondent.

CHIPMAN, C. Action for an accounting. The court found that within the past two years plaintiff sold and consigned to defendant goods, wares, and merchandise, and deposited with and paid to defendant money, at his instance, amounting to \$1,206.73, and that during the same period defendant sold

and delivered to plaintiff, and she received from him, goods, wares, and merchandise from the store of defendant, and also money paid, amounting to \$793.34; that on May 27, 1898, there was due plaintiff from defendant, as balance of the account between them, the sum of \$413.39, for which amount plaintiff had judgment. Defendant appeals from the order denying his motion for a new trial.

The only question presented by the appeal relates to an item for \$700 claimed by defendant, but disallowed by the court. Plaintiff is the widow of G. Sanguinetti, who died in November, 1896. At her request, defendant was appointed administrator of her husband's estate. At his death Sanguinetti was farming a small tract of land (about 70 acres), under a lease from one Weber, which, I infer from the evidence, includes the year ending September, 1897, inasmuch as Weber presented a claim against the estate for the rental, \$700, and the claim was allowed. There were numerous items in the mutual accounts as to which the evidence was not brought up. Defendant claimed that plaintiff desired to rent the place from Weber for the year 1897-98, commencing at the close of the rental year for which the \$700 claim was allowed, but that Weber refused to rent to her unless the rent for the last year was paid, namely, the year covered by the claim against the estate; that plaintiff came to defendant and stated this fact, and requested him personally to pay Weber, and promised that she would repay defendant; that pursuant to her request he paid Weber, and charged the money to plaintiff's personal account at his store; and at the hearing he asked its allowance. Defendant testified to facts supporting this view of the transactions. But he was flatly contradicted by plaintiff, and she testified that defendant told her he had paid Weber out of the proceeds of the barley raised on the leased premises for that year, amounting to \$868.25. A stepdaughter of plaintiff testified for defendant, and to some extent her testimony supported the testimony of defendant as to the promise to repay him; but on cross-examination she testified that she understood that the Weber claim was to be paid out of the proceeds of the barley belonging to the estate. Defendant received the money for the barley August 18, 1897, and the evidence tends to show that he had funds in his hands as administrator sufficient to pay the Weber claim. On the cross-examination of defendant it appeared that in the bill of items of account presented by him to plaintiff there occurred the following: "Cash paid for assignment of claim of Weber estate to G. Gianelli, and to secure lease for current year,—claim and lease held as security,—seven hundred dollars." Defendant made no satisfactory explanation of this entry. His books showed the payment on November 3, 1897, while the receipt given by Weber was dated January 12, 1898; and defendant was unable to state when the

claim was in fact paid, or to explain what was meant by "Paid for assignment of claim of Weber estate to G. Gianelli." The receipt runs to G. Gianelli, brother and partner of defendant, and defendant's evidence was that he paid the money to his brother, to be by him paid to Weber, and that he knew that whatever was paid was on account of the claim proven in the Sanguinetti estate. An examination of defendant's testimony, direct and on cross-examination, would suggest a strong probability that the trial judge did not give full credence to defendant's statements on the witness stand. Appellant calls to his aid subdivisions 19 and 20 of section 1963, Code Civ. Proc.: "That private transactions have been fair and regular," and "that the ordinary course of business has been followed." These presumptions cannot avail defendant. He was acting in a highly fiduciary character, in his dealings with the estate and its funds. The presumptions referred to do not relate to the dealings of a trustee with trust funds. The evidence is conflicting upon the question as to whether he paid Weber out of the estate funds, or with his own money. The court must have found that defendant paid the claim as administrator and out of estate money, and we think there is sufficient evidence to warrant the court in so finding. The case is not similar to *Lewis v. Burns*, 122 Cal. 358, 55 Pac. 132, cited by appellant, where this court held the findings to be unsupported by the evidence. The order should be affirmed.

We concur: HAYNES, C.; SMITH, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order is affirmed.

120 Cal. 415

DANIELS v. JOHNSON et al. (L. A. 676.)
(Supreme Court of California. July 31, 1900.)
MORTGAGES—STATUTE OF LIMITATIONS—NEW
PROMISE—HARMLESS ERROR.

1. Where the note and mortgage in a suit became due February 3, 1893, and the premises were conveyed to defendant on December 21, 1895, defendant assuming the mortgage, an action to foreclose the mortgage begun June 9, 1897, was not barred by the four-years statute of limitations, since the assumption of the mortgage by defendant was a new promise in writing, which started the limitation running anew, and of which the mortgagee could avail himself.

2. Appellant objected to parol evidence to prove the contents of certain written extensions of a note and mortgage, tending to show them not barred by the statute of limitations. On other, unobjectionable evidence, the court held the action not barred by the statute. *Held*, that any error of admitting the evidence objected to was harmless.

Commissioners' decision. Department 1. Appeal from superior court, San Bernardino county.

Action by H. H. Daniels against Alfred K. Johnson and wife and others. From a judgment for plaintiff, and from an order deny-

ing a new trial, defendants Johnson appeal. Affirmed.

Otis & Gregg, for appellants. E. R. Annable and Chas. E. Truesdell, for respondent.

CHIPMAN, C. Foreclosure. On February 23, 1892, one Wilson made his promissory note to plaintiff, payable February 3, 1893, and to secure its payment he executed his mortgage, of even date with the note, to foreclose which this action was brought on June 9, 1897. Defendant Hammond made default, and plaintiff dismissed the action as to defendants Wilson, Howe, and Hogan. Plaintiff had judgment, and defendants Johnson and wife appeal from the judgment and the order denying their motion for a new trial. The only defense is the four-year statute of limitations (section 337, Code Civ. Proc.). On its face the note was barred, but the complaint averred an express renewal of the note and mortgage, and certain acknowledgments of the debt, and new promises to pay. It appeared from the evidence that Wilson, the mortgagor, conveyed the mortgaged premises by deed to defendant Howe on September 28, 1892, containing the following: "This deed is given subject, nevertheless, to one certain mortgage dated February 2, 1892, given by grantor herein to H. H. Daniels, for the sum of seven hundred and fifty dollars, and which said mortgage is of record in Book 42 of Mortgages, at page 351 thereof, said San Bernardino county records, and which said mortgage the grantee herein assumes and agrees to pay." On January 28, 1893, Howe conveyed the premises by deed to defendant Hogan, the deed containing a provision identical with that just quoted. On December 21, 1895, Hogan conveyed the premises by deed to defendant Alfred Johnson, the deed containing the provision: "Subject, however, to a certain mortgage of seven hundred and fifty dollars, dated February 2, 1892, upon which has been paid fifty dollars. The party of the second part hereby assumes the payment of the above mortgage." Appellant contends that the above provisions found in the deeds do not constitute a promise of defendant Johnson to pay the note, but that they amount to nothing more than an agreement on his part to discharge the mortgage lien. It is also contended that a mortgage cannot be renewed or extended except as provided by section 2922, Civ. Code.

The effect of the condition in the deed was more than an agreement to discharge the lien. It was, in our opinion, an agreement to pay the note secured by the mortgage, for in no other way could the mortgage be paid. It was said in *Stuyvesant v. Investment Co.*, 22 Colo. 28, 43 Pac. 144: "While the language of an agreement is that the plaintiff shall pay the mortgage, the real meaning of the covenant is that plaintiff shall pay the note which the mortgage secures, for the discharge of the note is the

only way to pay the mortgage; the latter being only the incident, the note being the principal thing." The effect of the deed from Wilson to Howe, executed as it was while the note was a subsisting obligation, or, in other words, before it was barred by the statute of limitations, was to waive so much of the period of limitations as had run in favor of Wilson, the mortgagor, and established a continuing contract, and not a new contract. There was no merger of the old debt in the new, but merely a continuation of the original liability for a longer term. There was no renewal of the lien, and no occasion for its renewal. It was not extended, nor was it extinguished, but continued for the period during which the note, as continued, had to run. *Southern Pac. Co. v. Prosser*, 122 Cal. 413, 55 Pac. 145; *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818. And this result differs, as is pointed out in the case just cited, from the result which would follow where the original obligation is renewed after the bar of the statute has occurred, which was the case of *Wells v. Harter*, 56 Cal. 342. The same may be said of the effect of the deed from Howe to Hogan of January 28, 1893, which was within four years from the maturity of the note. And so, also, when Hogan conveyed to Johnson, December 21, 1895, more than four years had not elapsed from the maturity of the note.

As between the parties to the deed, *Southern Pac. Co. v. Prosser*, supra, is authority for holding that the mortgage lien was not barred, and the only question is whether the agreement of Johnson is available to the mortgagee. It was said in *Bank v. Madden*, 109 Cal. 312, 41 Pac. 1092: "It may be that there is no such privity of contract between the mortgagee and the grantee of the mortgagor, resulting from the acceptance of the deed, nor any such promise for the benefit of the mortgagee, as would sustain an action at law against him * * *; yet in equity the creditor is entitled to the benefit of all securities or collateral obligations that his debtor may have acquired for the payment of the debt, and the creditor may, in his action to foreclose the mortgage, treat the mortgagor's grantee, who has assumed payment of the debt, as a principal debtor, and hold him liable for any deficiency for which the mortgagor would be liable on his express promise,"—citing *Williams v. Naftzger*, 103 Cal. 438, 37 Pac. 411. See, also, *Hopkins v. Warner*, 109 Cal. 133, 41 Pac. 868; *Roberts v. Fitzallen*, 120 Cal. 482, 52 Pac. 818. "A purchaser who assumes the mortgage becomes as to the mortgagor the principal debtor, and the mortgagor a surety; but the mortgagee may treat both as principal debtors, and may have a personal decree against both." *Jones, Mortg.* § 741. We entertain no doubt of the right of the mortgagee to look to the grantee in a case such as the present one. We do not question the proposition that when the debt is

barred the remedy under our system is lost. It was so held at an early day by this court (Lord v. Morris, 18 Cal. 482), and many times since. But the very question here is, was not the statute avoided as to the debt as well as to the mortgage by the agreement in the deed referred to? And this question, we think, must be answered in the affirmative.

It was alleged in the complaint, and found by the court to be true, as to Hogan, that plaintiff did, at the special request of Howe and Hogan, by an instrument in writing subscribed by the plaintiff, and by him delivered to Howe and Hogan, extend said note and mortgage for the period of one year from February 22, 1893, to wit, until February 2, 1894, and that defendant Johnson did, within four years before the commencement of the action, by an instrument in writing signed by him and delivered to plaintiff, promise to pay the said note and mortgage. Appellant objected to the evidence offered to prove a part of these allegations on the ground that it was secondary, the written evidence not having been sufficiently accounted for to entitle plaintiff to make the proof by parol. It is not necessary to examine these objections, nor whether the findings upon this branch of the case were justified by the evidence. The judgment finds support in the agreements found in the deeds, conceding that the findings as to the other agreements are unsupported. If it was error to admit the evidence in support of these findings, it was not prejudicial. The judgment and order should be affirmed.

We concur: GRAY, C.; COOPER, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

123 Cal. 516; 6 Cal. Unrep. 493

WILLS v. PORTER et al. (PIERPONT et al., Interveners. L. A. 697).

(Supreme Court of California. July 31, 1900.)

CONTRACT OF CORPORATION—RESCISSION—RETURN OF CONSIDERATION—UNNECESSARY DELAY—PROOF OF INJURY—PLEADING.

1. Civ. Code, § 1601, provides that one party cannot rescind a contract without the consent of the other party unless he restores to the latter everything of value which he has received from him thereunder. A corporation which owed \$46,650 to its principal stockholder borrowed money from a bank, and, in consideration of his guarantying its note, paid its indebtedness to him before maturity. *Held*, in an action by other stockholders to compel repayment to the corporation, that the action could not be maintained without releasing the principal stockholder from his guaranty.

2. Civ. Code, § 1601, provides that a party entitled to rescind a contract must do so promptly. A corporation which owed \$46,650 to its principal stockholder borrowed money from a bank, and, in consideration of his guarantying its note, paid its indebtedness to him before maturity. *Held*, that an action brought by other stockholders two years thereafter to

compel repayment to the corporation could not be maintained, no excuse being shown for the delay.

3. Where the complaint in an action to compel repayment of money paid by a corporation to its principal stockholder alleged that complainants had no knowledge thereof at the time, but did not allege when they obtained knowledge, it will be presumed on appeal that they obtained knowledge at least by the day following the transaction.

4. Where a corporation pays a debt due its principal stockholder before maturity, as a consideration for his guarantying its note, repayment to the corporation will not be enforced by a court of equity at the suit of other stockholders, without a showing that the corporation or its stockholders were injured in some way.

Department 1. Appeal from superior court, Los Angeles county.

Action by William L. Wills against George K. Porter and another (Mary Pierpont and others, interveners). From a judgment in favor of plaintiff and interveners, and from an order denying a new trial, defendants appeal. Reversed.

H. W. O'Melveny and J. H. Shanklin (J. S. Chapman, of counsel), for appellants. Winder & Davis, for respondent. Smith, McNutt & Hannon, for interveners.

PER CURIAM. This action was brought by plaintiff, as a stockholder of the Porter Land & Water Company, a corporation, for the purpose of annulling a certain resolution passed by the board of directors of said corporation, and of recovering of defendant Porter \$46,650, and interest thereon; the said sum having been paid to Porter under the authority of the board of directors, and by virtue of said resolution. A complaint in intervention was filed by certain other stockholders. A demurrer was interposed to the complaint and to the complaint in intervention, and overruled, and answers filed. After trial, findings were filed, and judgment entered thereon in favor of plaintiff and the interveners. A motion for a new trial was made and denied, and this appeal is from the judgment and order denying the motion.

We think the demurrer to the amended complaints should have been sustained. The complaints, as amended, allege, in substance, that on the 23d day of April, 1887, the defendant Porter entered into a written contract with one McFarland, by the terms of which the corporation defendant was to be formed, and Porter was to convey to it, for the considerations therein named, 16,000 acres of land of the ranch Ex-Mission San Fernando. Porter then supposed the ranch contained 18,000 acres, and under the contract he was to retain 2,000 acres for his own use, and to convey just 16,000 acres to the corporation, and if, upon a survey being made of the ranch, there proved to be less than 18,000 acres, the amount reserved by Porter should be diminished, and the full 16,000 acres conveyed to the corporation. The corporation was formed as provided for

in said contract, and a survey made of the ranch, by which it was found that the ranch contained 18,734 acres, or 734 acres more than the number of acres to be conveyed to the corporation after reserving 2,000 acres for Porter. The corporation, after its formation, duly adopted the contract so made by Porter with McFarland, and after the survey of the said ranch it entered into a supplemental contract with Porter in regard to the 734 acres. This supplemental contract recited that the original contract was for the conveyance of 16,000 acres, and that there was 16,734 acres, and that it was impracticable to segregate the 734 acres from the 16,000 acres. It then provided that Porter should convey the 734 acres to the corporation by the same conveyance and with the 16,000 acres. It was further provided, as the consideration for the 734 acres, that the corporation should improve, subdivide, and sell it, with the 16,000 acres, and out of the proceeds, after paying expenses and commissions pro rata, to account for and pay to Porter the sum of \$40 per acre for each and every acre of the said surplus, and all sums above \$40 per acre to be retained by the corporation as compensation for improving and selling it. It was further provided that the payment to Porter for the 734 acres should be made whenever dividends on the capital stock should be declared, and should in all cases be in the proportion of money on hand when the dividends are declared that 734 bears to 16,734, less the proper proportion of costs, expenses, and commissions. These payments to Porter were to bear interest from the 16th of August, 1887, at the rate of 6 per cent. per annum; but Porter was to have no interest, except as a stockholder, in whatever interest might be realized upon the profits of the sales of the 734 acres. The said Porter, in pursuance of the contracts, duly executed a deed to the corporation of the 16,734 acres, and certain personal property also included in the agreement. The capital stock of the corporation consisted of 524 shares, of which defendant Porter owns 336, the plaintiff 5, and the remaining shares by the interveners and others named in a list attached to the complaint. The directors of the corporation were, at all times named in the complaint, Yarnell, Threlkeld, Graves, Forrester, Witmer, Hubbard, and Cochran; and, of these directors, it is alleged that Yarnell, Threlkeld, Witmer, and Graves hold each one share only, conveyed to them respectively by Porter to qualify them to serve as directors, and that they have at all times acted in the interest of Porter, and as his agents and trustees. On the 29th day of March, 1895, the corporation was indebted, over and above its indebtedness to Porter, in the sum of about \$50,000; and on said date, at a meeting of the directors of the corporation, for the alleged purpose of concentrating all the indebtedness, a resolution was passed to borrow from the Los Angeles Savings Bank the

sum of \$100,000, and that the corporation execute its note and mortgage for the amount, with interest at the rate of 7 per cent. per annum net. And the board of directors further adopted the following resolution: "In consideration of the guaranty by Geo. K. Porter of this company's note to the Los Angeles Savings Bank for \$100,000, resolved, that this corporation pay to said Geo. K. Porter the amount due him under the contract of date June 29, 1887, at this time, out of money borrowed this day, instead of waiting until the same can be paid out of the proceeds of land sales, the amount now due being \$46,650 or thereabouts; the said Geo. K. Porter to rebate interest on the amount paid him, at the rate of one per cent. per annum, until said loan of \$100,000 is paid off." It is further alleged that in pursuance of the said resolution the said loan was effected, and that the said note and mortgage of \$100,000, and some interest thereon, still remain due and unpaid; that the agreement of Porter to guaranty the payment to the Los Angeles Savings Bank was without substantial value; and that Porter received \$46,650 of the said money so borrowed by the corporation. It is alleged that in the passage of the said resolution a majority of the directors were acting under the influence of Porter and for his interest, and under his direction and control; that the resolution was procured by the undue influence of Porter, and was the result of a fraudulent contrivance and combination between the said directors and Porter "in order to pay the debt of the said Porter, that was not due, and that would come due only upon the sales of land." It is further alleged that on the 19th day of March, 1897, the plaintiff demanded in writing of the directors of said corporation "to take steps at once to procure the rescission of said contract, and to compel the said Porter to account to the said corporation for the money received by him as aforesaid, or, upon his refusal, to take the proper legal proceedings to compel him to do so"; that the directors refused to take any such steps or to institute any legal proceedings, and for this reason the plaintiff, as a stockholder, brings this suit, and makes the corporation a defendant. The prayer of the complaint is that the resolution of March 29, 1895, be rescinded and set aside, and also the contract thereby made between the said corporation and the said Porter, and that Porter be required to pay the said sum of \$46,650, with interest thereon at the legal rate, to the corporation, or that the same be credited and paid upon the note and mortgage held by the Los Angeles Savings Bank.

The complaint was filed some two years after the resolution complained of and after the note and mortgage had been executed, and guarantied by Porter. There is no allegation that any interest has been paid upon the note and mortgage, and we must therefore assume that the note, and interest there-

on since the 29th day of March, 1895, still remains due and unpaid, and guaranteed by Porter. The complaint expressly alleges that the guarantee by Porter of the \$100,000 note was made in consideration that the corporation pay to Porter the \$46,850, and that the money was paid to him. While the corporation still has the loan secured by the guaranty of Porter, it is sought to recover back the consideration for which the guaranty was given and still hold Porter as guarantor. Relief is asked as to that portion of the resolution that is injurious to the corporation, while the benefit that was given by Porter in consideration of the resolution is to be still retained. No offer is made to pay the \$100,000, note and interest, and nothing to show any intention to release the defendant Porter therefrom. The plaintiff and the interveners, as stockholders, come into a court of equity, and invoke its aid to protect the corporation from what is claimed to have been an unjust and inequitable transaction. He who seeks equity must do equity. Plaintiff cannot ask the aid of the court to be relieved of the burdens of a contract, and at the same time adopt and retain the benefits. If the circumstances are such that the plaintiff cannot do equity, he cannot come into a court of equity for relief. His prayer is to have the resolution and contract declared null and void and rescinded, but there is no offer to place the defendant Porter in statu quo. It is provided in section 1691, Civ. Code, that "rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: (1) He must rescind promptly, upon discovering the facts which entitle him to rescind, if he is free from duress, menace, undue influence or disability, and is aware of his right to rescind; and (2) he must restore to the other party everything of value which he has received from him under the contract; or must offer to restore the same, upon condition that such party shall do likewise, unless the latter is unable or positively refuses to do so." In this case the corporation received from Porter the guaranty of its promissory note for \$100,000, which guaranty is presumed to be valuable. It has in no way attempted to release him from this guaranty. Before a party has the right to rescind a contract, he must restore the other party to the condition in which he was before the contract was made. *Watts v. White*, 13 Cal. 821; *Vineyard Co. v. Tuohy*, 107 Cal. 254, 40 Pac. 386. If it becomes impossible to place the parties in statu quo, there can be no rescission. *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868; *State v. McCauley*, 15 Cal. 430; 21 Am. & Eng. Enc. Law, tit. "Rescission," p. 89; 2 Para. Cont. p. 678. The plaintiffs and interveners do not appear to have used due diligence or to have acted promptly in bringing this action. Civ. Code, § 1691; 2 Para. Cont. p. 680; *Barfield v.*

Price, 40 Cal. 542. In the case of *Marten v. Wine Co.*, 99 Cal. 355, 33 Pac. 1107, it was held that a delay of three months in an offer to rescind a purchase of stock, after discovery of the facts constituting fraud in the purchase, was fatal to a rescission. In *Bailey v. Fox*, 78 Cal. 389, 20 Pac. 868, it was held that a delay of four months after the discovery of fraud in a partnership contract was fatal to the right to rescind. In this case there was a delay of two years, with no excuse for the delay. During all this time the defendant Porter has been held on his guaranty, and is still so held. The property has been in the possession and control of the corporation. Porter has been lulled into letting the matter rest, thinking the land had been fully paid for. The complaints, as amended, allege that when said resolution was passed and said acts consummated the complainants had no notice thereof, and no knowledge that any such acts had been consummated. They do not say when they obtained knowledge thereof, and we must presume that they had such knowledge at least the day after, to wit, March 30, 1895.

Again, it does not appear that the resolution and acts complained of were beyond the authority of the board of directors, or that they injured the corporation or the stockholders in any way. The land had been deeded to the corporation, and it may have been, and may now be, of great value, as the complaint does not state to the contrary. The interest on the amount to become due Porter ceased after he was paid. It is not claimed that the amount was not the amount of \$40 per acre, and interest thereon up to the time of the resolution. The corporation might have been in a condition to pay off the \$100,000 mortgage within a short time after its execution. If so, it would be free from the claim of interest by Porter. The acts complained of must appear from the complaint to have been injurious to the plaintiff, before he can invoke the aid of a court of equity. *Board v. Younger*, 29 Cal. 172; *Purdy v. Bullard*, 41 Cal. 447; *Marriner v. Dennison*, 78 Cal. 211, 20 Pac. 386; 21 Am. & Eng. Enc. Law, p. 84, note 2, tit. "Rescission." In this case the resolution provided that Porter was to rebate interest on the amount paid him at the rate of 1 per cent. per annum until the \$100,000 loan was paid off. This arrangement made the interest to be paid by the corporation upon the purchase price of the 734 acres no greater than 6 per cent. per annum,—the amount it had agreed to pay Porter. It does not appear to us how it could injure the corporation merely to change its creditor. A complaint must be measured by its language, and in the face of a demurrer the court cannot presume any facts outside of those alleged in the complaint. The facts stated must be such that, if proven, they would entitle plaintiff to judgment. The judgment and order are reversed.

129 Cal. 251

METHVIN v. FIDELITY MUT. LIFE ASS'N OF PHILADELPHIA, PA. (L. A. 720.)

(Supreme Court of California. July 19, 1900.)

INSURANCE — POLICY — DELIVERY — PREMIUMS — WHEN DUE — NONPAYMENT — FORFEITURE — DENIAL OF LIABILITY.

1. Defendant issued to plaintiff a life insurance policy, which was signed at Philadelphia on July 30, 1895, and provided for the payment of quarterly dues on the 30th of July, October, January, and April in each year; and a receipt for the first quarterly premium was signed at Philadelphia by the president and treasurer of the company on July 30, 1895, but was not receipted and countersigned by the local agent until September 3, 1895, and stated that it covered dues until October 30, 1895. The policy provided that it should not be binding until delivered during the lifetime and good health of the applicant, and also for the forfeiture of the policy if the premiums were not paid when due. Assured died after October 30, 1895, without paying the second quarterly premium. *Held*, that the policy became void prior to the death of the assured, since the second quarterly premium became due October 30, 1895, and not December 3, 1895.

2. Where the president of a life insurance company on April 22, 1896, in answer to a letter of plaintiff's attorney, denied liability under the policy issued to plaintiff's intestate, and in a letter of September 22, 1897 to another firm of attorneys employed by plaintiff, the president denied the liability the same as in the previous letter, a finding that the defendant company did not deny its liability prior to September 27, 1897, was contrary to the evidence.

In bank. Reversed.

For opinion in department, see 58 Pac. 387.

R. L. Horton, for appellant. E. S. Pillsbury and F. D. Madison, amici curiæ. McKinley & Grah, for respondent.

VAN DYKE, J. The defendant appeals from the judgment and from the order denying a new trial. In support of its appeal it is contended on behalf of the appellant—First, that some of the material findings of fact are unsupported by the evidence; second, that the court erred in deducing erroneous conclusions from the facts found. The action is based upon a policy of life insurance. The policy recites that the said company, in consideration of the application and the payment of a premium of \$24.96 "on or before the 30th day of July, October, January, and April in every year, for the period of twenty years from the date hereof, does hereby receive Theodule Robert, of Los Angeles, county of Los Angeles, state of California, as a member of said association, and issues this policy of insurance, and hereby promises to pay the sum of three thousand dollars to his wife, Ida Robert: * * * provided, any moneys required to be paid under this policy during the continuance of this contract must be actually paid when due to the said association, and no dues or premiums on this policy shall be considered paid unless a receipt shall be given therefor, signed by the president and treasurer, and countersigned by the agent or person to whom payment is made, as evidence of such payment to him; otherwise, this policy shall be ipso facto null and void,

and all moneys paid hereon, except as hereinafter provided, shall be forfeited to said association." The said policy is signed at the company's office at Philadelphia the 30th day of July, 1895, and provides: "The same shall not be binding until delivered during the lifetime and good health of the applicant, and until the first payment due hereon has been made." The said policy, together with a receipt for the first payment, signed by the president and treasurer of said defendant company at Philadelphia, were forwarded to the local agent at Los Angeles. This receipt, produced in evidence by the plaintiff, is as follows: "Received from Theodule Robert, of Los Angeles, Calif., owner of policy No. 060,809, \$24.96, in payment of quarterly dues, payable and due on the 30th day of July, 1895, which pays such dues up to the 30th day of October, 1895." This receipt was countersigned at Los Angeles on the 3d day of September, 1895, by Frank Lerch, agent.

The court finds that said policy of insurance was issued on the 3d day of September, 1895, and the premium paid on said policy was paid for the period of three months from the 3d day of September, 1895. This finding is not supported by the evidence, but is in direct conflict with it. The policy was executed, as appears on its face, July 30, 1895. Necessarily some little time must elapse between its execution in Philadelphia and delivery in Los Angeles, which both parties to the contract, of course, well understood; and, without the provision contained in the policy, that it would not be binding until delivered, the same result would have followed. "A contract in writing takes effect upon its delivery to the party in whose favor it is made, or to his agent." Civ. Code, § 1626. If it were not delivered until September 3d, the date when the receipt was countersigned by the local agent, that would not alter the case. The payments are expressly specified in the policy to be due and payable on or before the 30th day of July, October, January, and April every year. The first payment, under the terms of the policy, ran from the 30th of July to the 30th of October, and this payment was received and receipted for by the company, and therefore the company cannot complain that it was not paid before the time at which it was received. As further evidence that there could be no misunderstanding as to when the second payment became due under the terms of the policy, the receipt given to Robert for the first payment expressly declares that the same "pays such dues up to the 30th day of October, 1895." In addition to the plain declaration in the policy, and also in the receipt, as to the time when the payments are to be made, the evidence shows that Robert well understood the same. A notice was sent to him by the company through its local agent, September 30, 1895, calling his attention to the quarterly premium stipulated in the policy, which would become due October 30, 1895, and also a receipt, executed in the usual form, sent to the Merchants' National Bank, in Los

Angeles, to be delivered to him on payment of such premium. The second premium not having been paid when due, October 30, 1895, the local agent called upon Robert in reference to the matter. He testified: "I went to see him with Mr. Morgan, a friend of mine, who was well acquainted with him, in order to induce Robert to reinstate the policy. I then asked him whether he was going to pay the premium that had now been past due for a few days. I called his attention to the fact that the receipt was still here, and could be paid upon signing a health certificate. He said, 'No,' because the policy had been misrepresented to him. I then asked him to read the policy, and asked him what his objections to it were. It seems he thought that at the end of three years he would get the amount of paid-up interest that the policy expressed in cash. I explained to him in the presence of Mr. Morgan, and showed him how it would be utterly impossible for any company to pay that in cash at the end of so short a time, but at the end of twenty years he would have the cash that the premium provided for. He seemed to be satisfied with the policy then, and said he would reinstate it, but did not have the money at that time. He also called my attention to the fact that my agent, St. John, owed him something,—some eight or ten dollars,—in that neighborhood. I told him that St. John still had a commission interest in the policy, and, if he paid the premium, I would hold St. John's money, and I would allow him the amount he owed him. * * * He made no objection that his premium was not due at that time. After that I met him once on Spring street, I think, in front of the Wilson Block. That was probably a few days before his death, and I spoke to him again. I said: 'Mr. Robert, you ought to reinstate that policy, because you don't know when you might need it.' He says: 'Why, look at me. I do not look as if I am going to die?' 'No,' I said, 'lots of strong and healthy men die. You had better come down with me. I will take your note and give you a chance to pay it off.' He said: 'You wait until the 1st of December.' Every time I approached him about it he said he would have some money, and he probably would reinstate. He made no objection at that time that his premium was not due." Mr. Morgan, who accompanied said agent, corroborates him in reference to the interview with Robert. Mrs. Robert, after the death of her husband, supposed that the second premium, due October 30th, had been paid. She employed Blake & Doane as attorneys to correspond with the company in reference to a blank form upon which to make formal proof of death. Their letter was dated April 10, 1896, to which the president of the defendant company replied under date of April 22, 1896, that: "In the regular course of business, notice was sent to the insured September 30, 1895, requesting him to make payment of the second quarterly premium to the Merchants' National Bank. The receipt for the same

was sent to the Merchants' National Bank for collection, and was returned by said bank, no payment having been made. We understand an attempt was subsequently made by Mr. Lerch to induce Mr. Robert to make payment, execute a health certificate as required by the terms of the policy, etc., but he declined to do it. The policy does not only require and make it a condition precedent to recovery to show that the insured is dead, but also to show justice of claim." Subsequently, it appears, Mrs. Robert employed other attorneys, to wit, Hanna & Davis, and on September 21, 1897, nearly a year and a half after the first correspondence by Blake & Doane, these new attorneys wrote to the company. In their letter they call attention to the letter written by Blake & Doane, and the answer thereto by the president of the defendant association, and say: "In this last letter you intimated that Mrs. Robert, the beneficiary under said policy, was not entitled to payment of the same by reason of the fact that Mr. Robert declined to make payment of the quarterly premium to the Merchants' National Bank. * * * This matter has recently been placed in our hands, having been taken out of the hands of Messrs. Blake & Doane, and we write to renew the request that you send us blank proofs, so that we make a proof as to the death of Mr. Robert; and we will say further that, as a matter of fact, Mr. Robert did pay the second quarterly premium which was due to the company, although not to the Merchants' National Bank, but was paid to Mr. St. John, the soliciting agent for your company, who was also the agent and had authority to make collections for Mr. Lerch, your general agent here." The president of the company replied to this last letter under date of September 27, 1897, repeating substantially what he had written in the first letter, and that, in consequence of the failure of Robert to pay the premium when due, the policy, by its terms, became null and void. Up to this time, therefore, it was well understood that the first payment did not extend beyond the 30th of October, 1895, but shortly thereafter the plaintiff became the assignee of Mrs. Robert, and this suit was commenced. On the trial it was conceded that the second payment was not made, but it was contended that the payment of the first premium ran three months from the 3d day of September, instead of from July 30, 1895, as plainly declared both in the policy and the receipt for the first payment delivered with it.

McConnell v. Society, 34 C. C. A. 663, 92 Fed. 709, decided by the circuit court of appeals of the Sixth circuit, is very much like the case at bar. The policy there contained similar terms and conditions with the one here. It was dated April 27, 1893, but was not delivered, nor did it become effective, until May 9, 1893; the first quarterly premium being then paid. The next quarterly premium was payable, according to the policy, July 27, 1893. The insured did not pay

the second premium, but died July 28th, one day thereafter. This shows a very extreme case, but the court there, speaking through Judge Taft, the other members of the court concurring, held: "There was a failure to pay a quarterly installment on the day fixed. As a consequence, the policy became forfeited, and all liability thereon ceased." *Bryan v. Association* (R. I.) 42 Atl. 513, was also a case very similar to the one under consideration. There an application had been made on the 18th of the month, and the policy had been issued on the 22d, requiring monthly premiums to be paid on the 15th of each month in advance. The court held that the pay days specified in the policy must control, saying: "Payment being required in advance, the payment made at its issue would go until the next pay day should come. The fact that this would be three days less than a month does not affect the case, since payments, being part of a fixed total, were not payments for a month, but payments due on a particular day of a month." See, also, *Insurance Co. v. McMasters*, 30 O. C. A. 532, 87 Fed. 63. In this case an application was made to the company under date of December 12, 1893, and the policy was dated December 18, 1893. It was afterwards delivered to the insured, and the premium paid on delivery. The policy provided that it should be void if the second premium was not paid within thirty days after December 12, 1894. This premium was not paid, and the insured died six days after his right under the policy had lapsed. The beneficiary filed a bill in equity to have the policy reformed so that the second premium should be made payable on December 18th, one year from the date of the policy, instead of December 12th. This would have extended the validity of the policy for six days after it became void according to its terms, and would have covered the death of the insured. The court, however, held that the policy could not be reformed, that the rights of the insured had lapsed by failure to pay the premium on the day provided for in the policy, and that plaintiff could not recover upon the policy either at law or in equity. The court might as well undertake to release the insured from the payment of premiums altogether, as to relieve him from forfeiture of his policy in default of punctual payment. The company is as much entitled to the benefit of one stipulation as the other, because both are necessary to enable it to keep its own obligations. As said in *Insurance Co. v. Stratham*, 93 U. S. 24, 23 L. Ed. 780: "All the authorities agree that the time for payment is material,—is of the essence of the contract,—and nonpayment at the day appointed involves absolute forfeiture, when, as in the present case, such are the express terms of the contract." And again it is said: "Promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They

not only calculate on the receipt of premiums when due, but upon compounding interest upon them. It is upon this basis that they are enabled to offer insurance at the favorable rates they do. Forfeiture for nonpayment is a necessary means of protecting themselves from embarrassment. Delinquency cannot be tolerated or redeemed except at the option of the company." See, also, *Cook, Ins.* 174; *Bliss, Ins.* 273. The policy in this case became void, prior to the death of Robert, for nonpayment of the premium as stipulated. The finding of the court that Theodule Robert and Ida Robert duly performed all the conditions of said policy on their part to be performed, and paid all amounts required to be paid thereunder to the defendant, is contrary to the evidence; also, the finding that the defendant did not deny its liability on said policy prior to the 27th of September, 1897. The evidence shows that it disputed its liability from the first, on the ground that the second payment had not been made as stipulated in the policy. The judgment and order denying a new trial are reversed.

We concur: BEATTY, C. J.; McFARLAND, J.; TEMPLE, J.; HARRISON, J.; GAROUTTE, J.

129 Cal. 364

PEOPLE v. GARNETT. (Cr. 610.)

(Supreme Court of California. July 30, 1900.)
CRIMINAL LAW—GRAND LARCENY—ACCESSORY
—ELEMENTS OF OFFENSE—INDICTMENT.

1. Under Pen. Code, § 32, providing that "all persons who after full knowledge that a felony has been committed conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessories," mere silence, after knowledge of the commission of a felony, is not sufficient to constitute one an accessory, without some affirmative act looking towards the concealment of the crime.

2. To constitute one an accessory, under Pen. Code, § 32, for harboring and protecting a "person charged" with felony, there must have been a formal complaint, information, or indictment filed against the criminal.

3. Under an indictment charging that defendant, after full knowledge that a felony had been committed by L., did willfully then and there conceal said felony from the magistrate, and harbor and protect said L. by aiding and assisting her in escaping from the county, and by harboring and protecting her from the officers, and protecting her from arrest and punishment for the commission of said crime, but containing no allegation that L. was charged with a felony, the submission to the jury of evidence in support of the charge that defendant harbored and protected L. is reversible error.

Department 1. Appeal from superior court, Fresno county.

Len. Garnett was indicted for the offense of being an accessory to the crime of grand larceny, and from a judgment of conviction he appeals. Reversed.

F. H. Short, W. D. Crichton, and Lewis H. Smith, for appellant. Atty. Gen. Ford, for the People.

GAROUTTE, J. Defendant has been convicted of being an accessory to the crime of grand larceny. Section 32 of the Penal Code, under which he has been convicted, reads as follows: "All persons who after full knowledge that a felony has been committed conceal it from the magistrate, or harbor and protect the person charged with or convicted thereof, are accessories." The aforesaid section is not as plain and explicit as it might be, by any means. At the same time the word "conceal," as here used, means more than a simple withholding of knowledge possessed by a party that a felony has been committed. This concealment necessarily includes the element of some affirmative act upon the part of the person tending to or looking towards the concealment of the commission of the felony. Mere silence after knowledge of its commission is not sufficient to constitute the party an accessory. Again, the word "charged," as used in the section, means a formal complaint, information, or indictment filed against the criminal, or possibly an arrest without warrant might be sufficient. Mere general rumors and common talk that a party has committed a felony are wholly insufficient to fill the measure required by the word "charged."

Passing the consideration of other matters found in the information, we find it charging that one Lewis committed the crime of grand larceny, and that defendant, Garnett, "did, after full knowledge that the said felony had been committed as aforesaid, willfully * * * then and there conceal said felony from the magistrate, and harbor and protect said Laura Trixie Lewis by aiding and assisting said Laura Trixie Lewis in escaping from the county of Fresno, state of California, and by harboring and concealing said Laura Trixie Lewis from the officers, and protecting her from arrest and punishment for the commission of said crime, with the intent and purpose then and there on the part of said Len. Garnett to conceal the crime committed by the said Laura Trixie Lewis from the magistrate, with full knowledge at that time that said Laura Trixie Lewis had committed said crime in the aforesaid manner, and that said crime was a felony." We find no allegation in the aforesaid information that Lewis was charged with a felony. Hence that branch of the information which charges the defendant, Garnett, with harboring and protecting her, amounts to nothing. Neither is there any evidence tending to show that Lewis was charged with a felony. By reason of the failure to make this allegation, all evidence tending to support this branch of the information should have been kept from the jury, and the case tried on the theory alone that the defendant concealed the commission of the felony from the magistrate. Upon the contrary, evidence was submitted upon both branches of the information, and both branches thereof were considered by the jury. This fact is evidenced by the instructions of the court. For these reasons, the case must be remanded

for a new hearing. It is impossible to say from the verdict but that the defendant was convicted of being an accessory by reason of his harboring and protecting Trixie Lewis.

This case, in principle, is identical with *People v. Mitchell*, 92 Cal. 590, 28 Pac. 597, and the reasoning of that case is conclusive here. While there the information was defective in both branches, still the principle discussed and decided has equal force and bearing. We do not deem it necessary to consider the various other questions raised by counsel for appellant. For the foregoing reasons, the judgment and order are reversed, and the cause remanded for a new trial.

We concur: VAN DYKE, J.; HARRISON, J.

120 Cal. 337

BRITTON v. BOARD OF ELECTION
COM'RS OF CITY AND COUNTY OF
SAN FRANCISCO et al. (S. F. 1,999.)

(Supreme Court of California. July 28, 1900.)

CONSTITUTIONAL LAW—RIGHT OF ASSEMBLY—
UNIFORMITY OF GENERAL LAW—RIGHTS RE-
SERVED TO PEOPLE—PRIMARY ELECTION
LAW.

1. St. 1899, p. 47, known as the "Primary Election Law," providing an exclusive scheme, controlling political parties in holding their conventions for the nomination of candidates to public office, but denying the benefits of the act to all political parties which did not cast at the next preceding election at least 3 per cent. of the total vote, is in conflict with Const. art. 1, §§ 10, 11, 21, giving the people the right to freely assemble together to consult for the common good, and providing that no citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens, and that all laws of a general nature shall have a uniform operation, since it not only discriminates between political parties and the members thereof, but works the disfranchisement of voters, or compels them, if they vote at all, to vote for representatives of a political party other than that to which they belong.

2. St. 1899, p. 47, requiring the primary elections of all political parties to be held at the same time, and under the control of the county board of election commissioners, and providing for the use of but one ticket at such an election, which is received by the intending voter without question as to his political affiliations, and taken into the privacy of a booth, where he may name such delegates as he desires to the political convention of one or another of the political parties, whether he is a member of that party or not, is an unwarranted invasion of the rights of political parties, and an innovation of the rights reserved to the people by Const. art. 1, § 23, providing that the rights enumerated in the constitution shall not be construed to impair or deny others retained by the people.

Beatty, C. J., and Garoutte, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco.

Action by one Britton against the board of election commissioners of the city and county of San Francisco and others to restrain the expenditure of the public moneys in the execution of the primary election law. From an order sustaining a general demurrer to the complaint, plaintiff appeals. Reversed.

Myrick & Deering and L. A. Gibbons, for appellant. Franklin K. Lane, Gavin McNab, and M. M. Estee, for respondents.

HENSHAW, J. By an act approved March 3, 1899 (St. 1899, p. 47), the legislature added certain sections to the Political Code, providing thereby an exclusive scheme controlling political parties in holding their conventions for the nomination of candidates to public office. The act is known as the "Primary Election Law," and for convenience may be so designated. Plaintiff, a resident and taxpayer of the city and county of San Francisco, by his complaint sought an injunction against the defendants, constituting the board of election commissioners of the county of San Francisco, to restrain them from expending the public moneys of the city and county of San Francisco under the terms of this law, alleging it to be unconstitutional and void. Defendants' general demurrer to the complaint was sustained, and plaintiff, declining to amend, appeals from the judgment against him which followed.

Conventions of political parties, consisting of representatives of the voters of such parties, assembled to deliberate and place in nomination their candidates for various public offices, have long been known in the history of this country. Heretofore the methods which political parties might adopt for the selection of delegates to such nominating conventions have usually been left to party organization, and the legislature has contented itself, when it has seen fit to act at all, with conservative, tentative, and permissive acts, such as found expression in the earlier primary law of this state (St. 1865-66, p. 438), popularly called the "Porter Primary Law." In 1897 the legislature made its first essay in mandatory and compulsory legislation touching the holding of primary elections. St. 1897, p. 115. That law was declared unconstitutional, as imposing limitations and conditions upon the right of suffrage other than such as were named in the constitution itself; and grave doubt was expressed as to the power of the legislature to prescribe a voting test, and impose it upon political parties and their members as a prerequisite to their right to participate in party affairs. *Spier v. Baker*, 120 Cal. 370, 52 Pac. 659. In this law the legislature has omitted certain obnoxious features present in the earlier act, but has introduced others which go to the essence of the legislation, and which we are earnestly told, in argument, are violative of the constitutional rights of the people, both express and implied.

That a compulsory primary law, such as this, forms a part of the general election laws of the state, is not, we think, debatable, and has been distinctly decided. *Spier v. Baker*, supra. At the outset the law declares that all delegates to conventions of political parties for the purpose of making

nominations of candidates for public offices shall be elected at elections conducted under the regulations in the act provided. There is at once to be perceived an express limitation upon the powers of political parties, which heretofore they have freely exercised, of adopting their own modes for the selection of their representatives. It is a part of the political history of this state and of the United States that such powers, whether resting in right, or merely in the permissive silence of the legislature, have been freely enjoyed. In some instances political parties have had recourse to primary elections, under such regulations and tests as the executive managers of the party might prescribe. In others, resort was had to the organization of precinct or district political clubs, with an enrolled membership; the members thus duly entered having alone the right to select delegates to the nominating conventions. But we will not now stop to consider whether political parties have heretofore enjoyed these privileges as of right, or merely under permission. We have referred to the matter only as illustrating the bold innovation of this legislation, and thus of an added necessity for a careful scrutiny and consideration of its terms. This much, however, we think will be freely conceded by advocate as well as by antagonist of the law: That, if the legislature takes unto itself the regulation and control of these internal affairs of political parties, it must do so without discrimination, and with equal consideration and benefit to all. With the wisdom or the policy of the law this court, of course, can have nothing to do; but, if the law be wise and beneficent, every organized political party must come under its cloak. If, upon the other hand, the law be unwise or inexpedient, none the less every political party must equally suffer the burden and bear the consequences. But here we are confronted with a provision in this law denying its rights and privileges to all political parties which did not cast at the next preceding election at least 3 per cent. of the total vote. In other words, no matter how well organized a political party may be, no matter how devoted its adherents may be to its tenets, they are denied a representation upon the primary ballot, cut off from all benefits of the law, prohibited from holding a nominating convention (because only under the provisions of this law can such a convention be held), and are thus absolutely debarred from the privileges and protections accorded to other political parties. This is not the case where the state, as matter of regulation when called upon to print ballots at public expense, restricts the names to be printed thereon to the parties polling a certain percentage of the votes. Even upon this question there has been a division in the courts; some holding it to be a mere matter of regulation, and not an interference with the right of suffrage, and others maintaining that it confers a special

privilege upon the stronger of the political parties. But where such laws have been upheld the right of the voter freely to express his preference has always been preserved, as in this state, by blank spaces wherein he may write the names of the candidates of his choice. This law contains no such provision. Minor political parties are denied any right of representation upon the ballot, and are in effect forbidden to hold political conventions under the protection of the law. It is no answer to this to say that they may still cause the names of their nominees to be placed upon the election ballot by petition. The objection is not that they may not in some way preserve this important right, but that they are denied the means to accomplish this result by the holding of a convention; that they are denied the right freely to assemble under the protection of the law,—a right preserved to them both by the constitution of the United States and of the state of California,—while other political parties, no differently situated, saving that they are numerically stronger, are given this right, and protected by all of the machinery of the law in its exercise. Political conventions are, after all, but public assemblages of the people, having for their end the discussion of ways and means for the public good. By the declaration of rights of the constitution of this state the people have the right to freely assemble together to consult for the common good, to instruct their representatives, and to petition the legislature for redress of grievances. Article 1, § 10. No citizen or class of citizens shall be granted privileges or immunities which upon the same terms shall not be granted to all citizens (section 21), and all laws of a general nature shall have a uniform operation (section 11). How can it be said that a law which protects by legislation a certain number of citizens, forming one political party, and deprives a fewer number of citizens, forming another political party, of the same protection, is not violative of these provisions? Or how shall it be said that a man belonging to a party holding certain political principles may not participate in a primary election, when his neighbor, of different political faith, is accorded the right so to do? Moreover, if the legislature may deny the protection of its laws to a political party which has cast less than 3 per cent. of the votes, why may it not deny the same right to a party which has cast 49 per cent. of the votes? This is not a mere matter of regulation, as in the case of the election ballot. It is the deprivation of the one party, and the conferring upon another, of certain important political privileges, and answer to it cannot be made by saying that the 3 per cent. limit is reasonable, while a 49 per cent. limitation would be unreasonable. It is a question of power. Either the legislature has or has not the constitutional power so to do. If it has the power, the question of reasonableness or unreasonableness is for

the legislature alone, and a court would no more be justified in overthrowing the law because it believed a 49 per cent. limitation to be unreasonable, than, in the absence of such power, it would be warranted in upholding a 3 per cent. limitation because it might believe it to be reasonable. And upon this we think that, under the express limitations upon the power of the legislature in the sections of the constitution above adverted to, the legislature has not such power; for the effect of its act here under consideration is not only to discriminate between political parties and the members thereof, but absolutely to work the disfranchisement of voters, or to compel them, if they vote at all, to vote for representatives of political parties other than that to which they belong. The deprivation of the right of selection is a deprivation of the right of franchise.

It is further contended against this law that in its present state it works an unwarranted invasion of the rights of political parties, and this contention merits more than a passing notice. No one can be so ignorant as not to appreciate the value—indeed, the necessity—of opposing political parties in a government such as ours. No one, it would seem, can be so thoughtless as not to realize that government by the people is a progressive institution, which seeks to give expression and effect to the wisest and best ideas of its members. No expression is needed in the declaration of rights to the effect that electors holding certain political principles in common may freely assemble, organize themselves into a political party, and use all legitimate means to carry their principles of government into active operation through the suffrages of their fellows. Such a right is fundamental. It is inherent in the very form and substance of our government, and needs no expression in its constitution. Says Judge Cooley, in discussing this general subject (Const. Llm. p. 174): "It does not follow, however, that in every case the courts, before they can set aside a law as invalid, must be able to find in the constitution some specific inhibition which has been disregarded, or some express command which has been disobeyed. Prohibitions are only important when they are in the nature of exceptions to a general grant of power, and, if the authority to do an act has not been granted by the sovereign to its representatives, it cannot be necessary to prohibit its being done. * * * The right of local self-government cannot be taken away, because all our constitutions assume its continuance as the undoubted right of the people, and as an inseparable incident to republican government. The bills of rights in the American constitutions forbid that parties shall be deprived of property except by the law of the land, but, if the prohibition had been omitted, a legislative enactment to pass one man's property over to another would nevertheless be void. * * * There is no difficulty in saying that any such act which, under pre-

tense of exercising one power, is usurping another, is opposed to the constitution and void. It is assuming a power which the people, if they have not granted it at all, have reserved to themselves." As early as 1798 the supreme court of the United States, speaking through Mr. Justice Chase, in *Calder v. Bull*, 3 Dall. 386, 1 L. Ed. 648, said: "I cannot subscribe to the omnipotence of a state legislature, or that it is absolute and without control, although its authority should not be expressly restrained by the constitution or fundamental law of the state. The people of the United States erected their constitutions or forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty, and to protect their persons and property from violence. The purposes for which men enter into society will determine the nature and terms of the social compact, and, as they are the foundation of the legislative power, they will decide what are the proper objects of it. The nature and ends of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments,—that no man should be compelled to do what the laws do not require, nor to refrain from acts which the laws permit. There are acts which the federal or state legislature cannot do without exceeding their authority. There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power,—as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government is established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority." And in *Association v. Topeka*, 20 Wall. 665, 22 L. Ed. 455, that same tribunal declared: "It must be conceded that there are such rights in every free government beyond the control of the state. * * * There are limitations on such power which grow out of the essential nature of all free governments,—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

Active political parties—parties in opposition to the dominant political party—are, as has been said, essential to the very existence of our government. The right of any number of men holding common political beliefs or governmental principles to advocate their views through party organization cannot be denied. As has been said, "Self-preservation is an inherent right of political parties as well as of individuals." *Whipple v. Broad*, 25 Colo. 407, 55 Pac. 172. A law which will destroy such party organization, or permit it fraudulently to pass into the hands of its political enemies, cannot be upheld. The procedure of political parties may be regulated,

and the wisdom of the legislature may well be exercised in devising methods to check political corruption and fraud; but the legislature itself, under the guise of regulation, cannot be permitted to throw open the doors to these very abuses. A law authorizing or even permitting the opponents of an organized political party to name the delegates to the nominating convention of that party would not for a moment be countenanced. Yet that, in effect, is precisely what the act under consideration does permit. It provides that the primary election of all political parties shall be held at the same time. To the intending voter at such primary one ticket is given. No question may be permitted touching his political affiliations,—past, present, or future. The voter takes the ticket, retires into the privacy of the booth, and there, secretly, and not in violation of any law, but in strict accordance with the law, names such delegates as he desires to the political convention of one or another of the parties, whether he is a member of that party or not,—whether he ever intends to become such a member or not. The result is apparent. The control of the party and of its affairs, the promulgation and advocacy of its principles, are taken from the hands of its honest members, and turned over to the venal and corrupt of other political parties, or of none at all. Masquerading thus under the name of one of the great political parties might be a convention of men authorized by this law to represent it and place upon the general election ballot, as its candidates, those whom they might select,—a body of men whose sole purpose might be the disruption and destruction of the party whose representatives this law declared them to be. It is expressly declared in the declaration of rights that the enumeration therein contained shall not be construed to impair or deny others retained by the people. Article 1, § 23. A law which thus permits the disruption and misrepresentation of a political party is an innovation of these reserved rights. For the foregoing reasons, the judgment of the trial court is reversed, with directions that it overrule the demurrer of defendants.

We concur: VAN DYKE, J.; McFARLAND, J.

I dissent: BEATTY, C. J.

TEMPLE, J. I concur in the judgment on the second ground discussed by Mr. Justice HUNSHAW, and for the following additional reasons: The act itself recognizes the necessity of political parties, and they are in fact the instrumentalities through which the people govern. A political party is an association of citizens who agree on certain lines of policy, and the purpose for which it exists is to impose that policy upon the government. This can only be done by electing to office those who are in favor of such policy. It is for this that conventions are held and

candidates selected. To do this, it is absolutely necessary that the party shall be able to exclude from its conventions, and from controlling positions in the party, those who are not in accord with its principles. It must have the power to prescribe its own tests. It is the test that determines what the party shall be. To deprive the party of this power is to destroy it. No one would contend that the legislature can prescribe what the test shall be. If it could do this, it could prescribe what parties shall exist. And then parties sometimes divide on great public questions. In such case the party retaining the old name would have the right, by proper tests, to exclude those formerly affiliated with it, but who now differ. Unless a party can do all these things, it has no security that the candidates put forth in its name represent its principles. And then the management and control of its organization may be taken out of its hands and given to its enemies. All this right of self-control the primary election law takes from the party organization. The party is destroyed, or may be, and the members practically denied the right of free suffrage. And then there may happen to be a new party which did not exist at the previous election. Why should it, or, indeed, other political parties polling less than 3 per cent. of the votes, be denied the benefit of the protection of this law, if it be a protection?

HARRISON, J. I concur in the above opinion.

GAROUTTE, J. I dissent. In the Australian ballot law a declaration is found defining what constitutes a political party within the purview of the act, and then it is further declared that those parties are entitled to hold political conventions and nominate candidates for office. The vital element going to make up a political party under that act is that it shall have polled 3 per cent. of the entire vote cast at the last election. The primary law does not attempt to define the phrase "political parties," but declares that only those political parties which polled 3 per cent. of the total vote cast at the last election shall participate in primary elections. In other words, this is a declaration that only those political parties which are entitled to hold conventions and nominate candidates for office under the Australian ballot law are entitled to hold primary elections. It is thus apparent that the primary law refers to a great class of political parties. And, if that class of political parties declared and recognized by the Australian ballot law forms a constitutional class, then the primary law in dealing with the same class of political parties is likewise constitutional. While the question has never been decided in this state, it has been decided in other states, and held that a classification of parties upon the basis of a certain percentage of the total vote cast at the last election is not violative of consti-

tutional provisions. Indeed, it seems to me that the declaration of the state found in the Australian ballot law as to what shall constitute a political party within the meaning of that act is constitutional legislation. For these reasons, I do not deem the 3 per cent. clause of the primary election law obnoxious to the constitution of this state. It may be further suggested that, as the Australian ballot law does not recognize an organization as a party which failed to poll 3 per cent. of the total vote cast at the last election, no substantial benefits could be derived by such a party in participating in primary elections, for the nominees of a convention composed of delegates selected at the primary election by such party would not be entitled to a place upon the ballot. It must be borne in mind that the primary law in this regard is not dealing with voters as individuals, but with political parties as such. It may be further suggested that under the present law, the ballot being entirely secret, and every voter being allowed to cast his vote for the delegates of any party represented upon the ballot, the result is that Democratic voters may elect delegates to Republican conventions, and Republican voters may elect delegates to Democratic conventions, and thereby absolutely own and control the conventions of opposing political parties. I am not prepared to say that the existence of these conditions clearly renders a law unconstitutional which permits it. But I am prepared to say that a law of that character presents a most anomalous state of affairs. And a remedy for the evil should be found at the first session of the legislature.

129 Cal. 323

CLARK v. OYHARZABAL. (L. A. 709, 729.)

(Supreme Court of California. July 25, 1900.)
JUDGMENTS—DEFAULT—MOTION TO SET ASIDE
—SUFFICIENCY OF SHOWING.

Upon motion to set aside a default and judgment entered after the overruling of a demurrer to the complaint, it appeared that notice of the overruling of the demurrer and of time to answer was sent by mail, and addressed to an individual partner, instead of to the firm of attorneys representing defendant, and that the same was not received by the partner addressed; nor did he know, nor did the firm know, of the overruling of the demurrer until after the entry of judgment by default. Held, that a motion to set aside the default and judgment should have been granted.

Department 1. Appeal from superior court, Orange county.

Action by W. H. Clark against D. Oyharzabal. From an order denying a motion to set aside a default and judgment, defendant appeals. Reversed.

Hazard & Harpham, for appellant. Z. B. Stuart, for respondent.

PER CURIAM. Appeal by the defendant from an order denying a motion to set aside his default, and the judgment entered against

him after his demurrer to the complaint had been overruled. After the court had denied this motion the defendant took an appeal from the judgment, and also took a separate appeal from the order; the appeal from the judgment being case No. 709, and that from the order being No. 729. Although these appeals are presented in different records, they were submitted together, and have been considered together. Notice of overruling the demurrer and of time to answer was given by mail, and was regular in all respects, except that it was addressed to George E. Harpham, instead of to Hazard & Harpham, who were the attorneys for the defendant. The motion to set aside the default was made on the affidavit of Harpham, in which he stated that neither he nor the firm of Hazard & Harpham, or the defendant, had any notice of the overruling of the demurrer until the 9th of December, and "that affiant did not receive the notice alleged to have been mailed to him, * * * and did not know, * * * and the firm of Hazard & Harpham did not know, that the court had passed on said demurrer until December 9, 1898, and did not receive any notice thereof." The motion was also supported by a proper affidavit of merits. This affidavit of Harpham was uncontradicted, and, assuming it to be true, as we must, it shows that defendant's attorneys were not in fact notified of the order of the court overruling their demurrer. The motion to open the default should therefore have been granted. As, under this determination, the superior court will set aside the default and judgment thereon, it is unnecessary to consider the appeal from the judgment. The order appealed from in case No. 729 is reversed, and the superior court is directed to enter an order as of December 30, 1898, setting aside and vacating the judgment theretofore entered, and permitting the defendant to answer the complaint. Case No. 709 is remanded for further proceedings consistent therewith.

129 Cal. 380

In re BUCHANAN. (Cr. 607.)

(Supreme Court of California. July 28, 1900.)

INSANE PERSONS—INSANITY PENDING CRIMINAL PROCEEDINGS—COMMITMENT—DISCHARGE—HABEAS CORPUS.

Under Pen. Code, §§ 1370, 1372, providing that a defendant in a criminal case who is pronounced insane pending trial shall be committed to the state insane asylum, and that upon his becoming sane the superintendent must give notice of that fact, and thereupon the sheriff shall take defendant into custody until he is brought to trial or judgment, a defendant who has been thus committed to the asylum is to be deemed sane, within the meaning of the statute, when his memory is unimpaired, and he is in possession of every faculty requisite to the defense of the accusation against him, although suffering from a chronic and latent disease of the brain, which, under the excitement of intoxicating drink, to which he is predisposed, will lead him to the commission of criminal acts.

McFarland, J., dissenting.

In bank. Application of Hugh Buchanan for a writ of habeas corpus, directed to Dr. A. M. Gardner, as superintendent of the Napa State Hospital for the Insane. Writ granted.

Theodore A. Bell, E. L. Webber, and Henry C. Gesford, for petitioner.

BEATTY, C. J. Hugh Buchanan was brought to trial in Yuba county upon an information charging him with the crime of murder. After the trial had been several days in progress, it was suspended, upon a suggestion that the prisoner was then insane, and a special jury was formed for the trial of that issue. This jury, after hearing evidence and the instructions of the court, brought in a verdict to the effect that the defendant was insane, upon which he was committed to the insane asylum at Napa, now known as the "Napa State Hospital," where he is still confined by Dr. A. M. Gardner, the medical superintendent of that institution, without other authority than said commitment. The proceedings in the superior court following the suggestion of the prisoner's insanity were those prescribed in sections 1367 to 1373 of the Penal Code, and the commitment conformed to the statute, in directing the detention of the defendant in the insane asylum only until he should be sane (section 1370), in which event it would become the duty of the superintendent to give immediate notice to the sheriff of Yuba county, and of the sheriff to return the prisoner without delay to the proper custody, in order that the court might proceed with his trial (section 1372). It is now claimed in behalf of the prisoner that he has been for several years past entirely restored to sanity, and that his retention at the asylum has become unlawful. It is not claimed that he should be set at liberty, but that he should be returned, as the law provides, to the proper custody of the sheriff of Yuba county, and that he should have a speedy trial upon the charge of murder there pending against him. There is no controversy, and none is possible, as to the soundness of this conclusion, if the prisoner has really become sane; but it is strongly insisted in behalf of the officers of the asylum not only that he is not sane, but that he can never become so, and this is the sole question now to be determined upon the voluminous record of conflicting evidence submitted at the hearing upon the return to our writ of habeas corpus.

A number of the more important questions originally pertaining to this controversy were finally determined in the case of Gardner v. Jones, 126 Cal. 614, 59 Pac. 126. That was an original application to this court by the superintendent of the insane asylum for a writ of prohibition to the judge of the superior court to prevent the hearing of a petition in behalf of Buchanan for the same relief sought in the present proceeding. It was there contended that the insanity law of 1897 (St. 1897, p. 311) has made the superintendent

of the asylum the sole and final judge, in a case of this kind, whether the prisoner has become sane, and that the courts no longer have the power to conduct the inquiry by habeas corpus or otherwise. It was held, against this contention, that the question of unlawful restraint of the liberty of a citizen is, and must be as long as our present constitution endures, a judicial question, to be determined by the courts, and that the statute referred to would be unconstitutional if it required the construction contended for. The statute, however, was construed to mean nothing more than this: That it is the duty of the superintendent to send back a prisoner committed under sections 1367-1372 of the Penal Code as soon as he becomes sane, in order that the court may proceed to trial or judgment in his case, but, if he does not do so, the prisoner may assert his right to a speedy trial by means of the writ of habeas corpus, and that if the court, after a hearing, concludes that the prisoner is sane, it has the power, and it is its duty, to order him into the custody of the court where the charge against him is pending, in order that that court may bring him to trial or pronounce judgment. In consequence of this decision the superior judge proceeded with the hearing upon return to the writ of habeas corpus issued by him, and, having concluded upon the evidence that Buchanan was still insane, made an order remanding him to the custody of Dr. Gardner. Thereupon the present proceeding was commenced in this court, and upon the same evidence submitted to the superior judge, and some additional testimony, we must now decide the question of fact whether Buchanan has become sane.

The question, however, is not whether he has become sane in every sense of the word, but whether he has become sane in the sense of the statute, which requires a suspension of the proceedings in a criminal cause whenever it is found that the defendant is presently insane. In other words, if there is a difference between the medical view of insanity and the view upon which the statute is founded, the question of sanity or insanity is to be determined with reference to the latter, as contradistinguished from the former, view. That there is such a difference is notorious, and is clearly illustrated by the testimony in the present case, when compared with the origin and reason of the statutory provisions. These provisions establish nothing new in criminal procedure. They merely put in statutory form a well-known regulation of the common law,—a regulation applicable to lunatics or madmen. Blackstone, in his Commentaries, after stating the rule that idiots and lunatics are not chargeable with their own acts, continues as follows: "Also, if a man in his sound memory commits a capital offense, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he

shall not be tried, for how can he make his defense? If, after he be tried and found guilty, he loses his senses before judgment, judgment shall not be pronounced, and if, after judgment, he becomes of nonsane memory, execution shall be stayed, for, peradventure, says the humanity of the English law, had the prisoner been of sound memory he might have alleged something in stay of judgment or execution." 4 Bl. Comm. p. 24. This short quotation shows what all the books and treatises and decisions on the subject show,—that the true and only reason why an insane person should not be tried is "that he is disabled by the act of God to make a just defense, if he have one." When the rule became a part of the common law, modern views of insanity were unknown. No sort of insanity was recognized except that which manifested itself in mental deficiency or in mental derangement. A congenital idiot or a raving lunatic was understood to be insane, but in the absence of any sensible loss of memory or material impairment of the intellectual faculties a man was counted sane. If he could remember events and could reason logically, he was not within the letter or the reason of the rule which suspended proceedings against a madman or a lunatic. And, if he was not within the common-law rule, neither is he within the rule of the statute, which merely re-enacts the common law, and has no other purpose than to suspend proceedings against a defendant who is by reason of mental infirmity incapable of making his defense. A similar provision in the law of New York was very thoroughly considered in the case of *Freeman v. People*, 4 Denio, 9, where the court, upon an elaborate review of the authorities, stated its conclusion as follows: "The statute is in affirmance of the common-law principle, and the reason on which the rule rests furnishes a key to what must have been the intention of the legislature. If, therefore, a person arraigned for a crime is capable of understanding the nature and object of the proceedings against him; if he rightly comprehends his own condition in reference to such proceedings, and can conduct his defense in a rational manner,—he is, for the purpose of being tried, to be deemed sane, although on some other subjects his mind may be deranged or unsound."

If this is the true construction of the New York statute, as I have no doubt it is, it is equally the true construction of our own; and it is very plain from the evidence before us that Buchanan is not now, and has not been for several years, insane, in the sense of the statute. The evidence all shows that he is in possession of every faculty requisite to the defense of the accusation against him. His memory is unimpaired, and his reasoning faculties, although they may not be equal to the promise of his youth, are far above those of the average man. His insanity is of a character which does not manifest itself in any apparent weakness of intellect or failure of memory,

but may be best described as a sort of chronic and latent disease of the brain, which, under the excitement of intoxicating drink, to which he is predisposed, will lead him to the commission of criminal acts. To be more specific, it appears that until he was about 20 years of age he was particularly intelligent and precocious, and distinguished by many amiable traits of character. About that time he began to indulge in the excessive use of intoxicating drink, the consequence of which was a serious illness, which undoubtedly affected his brain. Upon his recovery, or partial recovery, after a protracted period of convalescence, it was discovered that his character was greatly changed. He had lost all ambition to excel in his chosen profession, he had become aimless and trifling, his moral character had deteriorated, he was alienated from his family and took up the life of a wanderer, going about from place to place, and supporting himself by menial employments. At frequent intervals his appetite for intoxicants became uncontrollable, and when drinking he was disposed to acts of violence, besides being subject to occasional temporary delusions. The medical testimony based upon these facts is that his brain or its integument was permanently injured by the sickness above mentioned, and that his condition has been such ever since, and will so remain as long as he lives; that, if set at liberty, he will inevitably take to drinking; and that under the influence of intoxicants he will be dangerous. There is a very strong preponderance of expert testimony to this effect, and we cannot doubt that the medical gentlemen who have so testified are competent to decide such matters. But this is a species of insanity which the statute governing this case does not contemplate. It is not such insanity as would disable him to make his defense. The same witnesses that testify that he is insane admit that during his long stay at the Napa asylum he has exhibited no symptoms of insanity. He reasons as other men do. He has no delusions. He is more than ordinarily intelligent. His memory is unimpaired. He appreciates exactly the nature of the criminal charge against him, and his relations to the proceeding. As far as mental operations are concerned, he is sane as men are ordinarily. According to the testimony of Dr. Smith, under whose care he was at Napa, if he had to judge alone by what he saw of him there he would be obliged to discharge him; and this testimony is strongly corroborated by all the other evidence, both professional and unprofessional, as to his behavior at the asylum. But the most conclusive evidence on this point is the testimony of Buchanan himself. He was not sworn as a witness, but he offered himself as an exhibit; and not only by his statement, but by his appearance and bearing, both in the superior court and in this court, he showed a perfect possession of his faculties, and complete ability to con-

duct his defense. He gave a connected and rational account of his whole life. He showed that he understood his position with respect to the criminal charge pending against him, and that, so far as his conduct is defensible or mitigable, he is master of his defense. He sustained a long and searching cross-examination with perfect self-possession, and was not betrayed into the slightest inconsistency of statement. This being so, he claims the right—and the law clearly sustains him in his claim—to a trial upon the criminal charge. If he is innocent, he is entitled to have his innocence established. If he is guilty, there is nothing in his present condition to screen him from punishment. If, being found not guilty and discharged from custody, it is thought he should be put under restraint as a person dangerous to be at large, the law affords the means of having that fact adjudicated in a proper proceeding. So far there never has been a proceeding in which his dangerous lunacy has been or could be adjudicated. All that was tried, or could be tried, in the proceeding in the superior court, was the question whether he was then deprived of his reason to such an extent that he could not make his defense to the charge of murder. The finding of the jury and the order of the court there made are conclusive upon that issue, but, if the prisoner is to be kept under restraint his whole life long as a dangerous lunatic, some of the methods provided by law for determining that question must first be resorted to. It is ordered that Hugh Buchanan be returned to the custody of the sheriff of Yuba county, that his trial in the superior court may be proceeded with.

We concur: TEMPLE, J.; VAN DYKE, J.; HENSHAW, J.

McFARLAND, J. I dissent. Leaving out of view, for the present, all questions of law arising in the case, I think that the preponderance of evidence is to the point that the sanity of the petitioner has not been restored. To say nothing of any consideration to be given to the conclusion of a jury, a superior court and the superintendent of the asylum, the evidence introduced in the present proceeding, in my opinion, preponderates against his restoration to sanity. The statutory provision in question says nothing about different kinds of insanity, and certainly a man not sane should not be put on his trial for murder.

GAROUTTE, J. (concurring). I have no doubt but that, under the evidence disclosed by the record in this case, the petitioner is insane, within the meaning of that word as used in the law applicable to our state hospitals. But, conceding that to be his mental condition, still it is not necessarily a bar to his prosecution for the commission of a crime. The insanity which demands that a person at large should be confined in an asy-

lum is not the same insanity which bars the prosecution of that person for the commission of a felony. While the petitioner is insane within the law applicable to state hospitals, I think him sane to the extent that he should be tried upon the charge pending against him in Yuba county. I concur in the order.

129 Cal. 356

MALLOBY et al. v. SEE et al. (L. A. 727.)
(Supreme Court of California. July 30, 1900.)

NEW TRIAL—NOTICE—TIME FOR FILING—
WRITTEN OR ORAL—WAIVER.

1. Under Code Civ. Proc. § 659, requiring notice of intention to move for a new trial to be filed within ten days after notice of a decision, the time for filing such notice of intention is not limited to the six months within which an appeal will lie from a judgment.

2. Under Code Civ. Proc. § 1010, requiring all notices to be in writing, the notice of intention to move for a new trial required by section 659 must be written.

3. Under Civ. Code, § 3513, providing that any one may waive the advantage of a law intended solely for his benefit, the fact that plaintiffs' attorneys knew of the court's decision, and agreed as to the terms to be embodied in the written decision and judgment, did not constitute a waiver of their right to the written notice thereof required by Code Civ. Proc. § 659, from service of which the time to serve a notice of intention to move for a new trial commences to run.

Commissioners' decision. Department 1. Appeal from superior court, San Luis Obispo county.

Action by Henry T. Mallory and others against Rachel J. See and others. From an order striking from the files a notice of intention to move for new trial, plaintiffs appeal. Reversed.

Graves & Graves and John A. Kimball, for appellants. Venable & Goodchild, for respondents.

SMITH, C. Appeal from order striking from files notice of intention to move for new trial. Respondent contends that the notice of intention was too late—First, because filed more than six months after judgment; and, secondly, because filed more than ten days after actual notice of the decision.

1. On the first point it is contended that by the expiration of the time allowed for appeal a judgment becomes final, and can no longer be reviewed, either directly or indirectly by motion for new trial. Hence it is claimed the time allowed by section 659, Code Civ. Proc., for filing the motion is to be regarded as limited to the period of six months allowed for appeal from the judgment. Numerous sections of the Code of Civil Procedure and several cases are cited in support of this contention, but do not seem to sustain it. Nor is there anything in the section itself to indicate such intention. We must hold, therefore, that, unless by the general principles of the law, in cases of laches, there is no limit of time for filing the notice, other than that expressed in the section.

2. No written notice of the filing of the decision was given, but it is claimed that the notice of intention was filed "more than ten days after appellants had actual notice of the decision." Two affidavits were filed in support of this contention,—one, by one of the defendants, to the effect that she had informed one of the plaintiffs that judgment had been entered, and that thereupon "both plaintiffs and defendants commenced to use the water" in controversy, under, and as prescribed by, said judgment; the other, by one of defendants' attorneys, to the effect that after the judge had decided that plaintiffs were entitled to the use of the water in suit for four, and defendants for three, days in each week, an agreement was made between him and one of plaintiffs' attorneys that "plaintiffs' time should commence, and defendants' time end, at noon of each Sunday," and that under this agreement the conclusions of law and judgment so provided. These allegations are not denied. It can hardly be doubted, if we apply to the case the ordinary rules of evidence, that the plaintiffs had actual notice or knowledge of the decision; that is to say, not necessarily of the date, but of the fact. Plaintiffs' attorneys were informed of the judge's decision, and agreed upon terms to be embodied in the written decision and judgment about to be filed, and which were filed accordingly, and immediately thereafter all the parties commenced to use the water as prescribed in the judgment. If, therefore, the rule is as claimed by respondents,—that is to say, if the time prescribed by section 659, Code Civ. Proc., commences to run from the time of actual notice or knowledge to the party moving for new trial,—we would have to sustain the order appealed from. But to hold this would be to go beyond any case yet decided, and, we think, beyond the intention not only of the statute, but of any of the decisions. The notice prescribed in section 659, Code Civ. Proc., is, by an express provision of the Code, a notice "in writing." Section 1010, Id.; *Forni v. Yoell*, 99 Cal. 176, 83 Pac. 887; *Biagi v. Howes*, 66 Cal. 470, 6 Pac. 100. The provisions of the Code are therefore essentially identical with those of the old practice act, which prescribed "written notice," and hence the decisions under the latter apply here. *Sawyer v. City and County of San Francisco*, 50 Cal. 870; *Roussin v. Stewart*, 33 Cal. 208; *Burnett v. Stearns*, Id. 468; *Carpentier v. Thurston*, 30 Cal. 123; *Borland v. Thornton*, 12 Cal. 446. The last case refers to a notice to dissolve an injunction, of which it is said: "When the statute speaks of notice, it means written notice, or notice in open court, of which a minute is made by the clerk." The others refer to notices of filing of decision, and all hold that the notice prescribed by the statute is written notice. The provision in section 659, Code Civ. Proc., must therefore be read as though the terms were "after written notice of the decision of the court," as is in fact held in the two cases first cited supra.

But this provision of the statute is subject to the rule, universal in its application, that "any one may waive the advantage of a law intended solely for his benefit." Civ. Code, § 8513; *Forni v. Yoell*, supra. And, "when a party acts as if he had formal notice of a decision, such acts constitute a waiver of such formal notice." *Gray v. Winder*, 77 Cal. 527, 20 Pac. 47. In the case cited the plaintiffs, who afterwards moved for new trial, were present in court, objected to the findings, and asked for further findings, which were thereupon made and filed, which was held to be a waiver. The same rule was held to apply in the following cases namely: *O'Neil v. Donahue*, 57 Cal. 231, where defendant, who afterwards moved for new trial, served the plaintiff with notice of decision; *Barron v. Deleva*, 58 Cal. 97, where "appellant waived his right to a written notice [of ruling on demurrer] by applying to the court for leave to answer"; *Thorne v. Finn*, 69 Cal. 254, 10 Pac. 414, where defendants had given a previous notice of intention to move for new trial; *Mulhally v. Society*, 69 Cal. 560, 11 Pac. 215, a similar case; *Forni v. Yoell*, 99 Cal. 175, 33 Pac. 887, where defendants had moved to dismiss the action because the findings had been filed more than six months without the entry of judgment; and *Improvement Co. v. Barotau*, 116 Cal. 137, 47 Pac. 1018, where appellant had moved to modify and set aside the findings of fact and conclusions of law. In all the cases cited, which, with exceptions to be noted presently, include all the cases on the subject that have been brought to our attention, the decision was put upon the ground that written notice of the filing of the decision had been waived; and in every case the waiver was evidenced by some act or acquiescence of the party in open court or in the proceedings in the case, appearing from the records, files, or minutes. The rule would therefore seem to be that written notice of filing of decision is in all cases required, unless waived by facts appearing in the records, files, or minutes of the court; and it follows that actual notice or knowledge, other than by written notice, is insufficient in any case unless it appears, from facts thus evidenced, that written notice was waived. This is, in effect, held to be the rule in *Forni v. Yoell*, supra, where the distinction between actual notice and waiver is pointed out and explained. The only case in which this principle has been departed from is that of *Dow v. Ross*, 90 Cal. 563, 27 Pac. 409, where actual knowledge, appearing from the affidavit of the moving party, was held to be sufficient to dispense with written notice, though in fact there was no evidence of waiver. But to adopt this rule would be to substitute for the written evidence prescribed by the statute, or the record evidence hitherto allowed by the court, the less satisfactory evidence of affidavits of interested parties, and thus to defeat the obvious intent of the statute. We have cited the case of *Blagi v. Howes*, 66 Cal. 470, 6 Pac. 100, on the point that the notice

prescribed by section 659, Code Civ. Proc., is "notice in writing," and hence that the party intending to move for a new trial has a right to wait for such notice. To this extent the case has never been overruled, and it is, as we have said, in effect affirmed by the decision in *Forni v. Yoell*, though, of course, the written notice prescribed may be waived. We therefore advise that the order of the court below striking from the files of the court plaintiffs' notice of intention to move for a new trial be reversed, and the cause remanded for further proceedings.

We concur: CHIPMAN, C.; HAYNES, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order of the court below striking from the files of the court plaintiffs' notice of intention to move for a new trial is reversed, and the cause remanded for further proceedings.

(129 Cal. 361)

KERN COUNTY v. LEE et al. (L. A. 893.)¹
(Supreme Court of California. July 30, 1900.)
COUNTY RECORDERS—ACCOUNTING FOR FEES.

It being the duty of the county recorder, under St. 1897, p. 484, § 120, to record writings "permitted" by law to be recorded, and the recording of notices of mining locations and proofs of labor thereon being authorized by Civ. Code, § 1159, as amended by St. 1897, p. 97, the recorder must account for the fees therefor.

Commissioners' decision. Department 1. Appeal from superior court, Kern county.

Action by the county of Kern against Charles A. Lee and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Laird & Packard, for appellants. J. W. Ahern, for respondent.

HAYNES, C. This action was brought by the county of Kern against Charles A. Lee, the county recorder of said county, and the sureties on his official bond, to recover \$828.60, alleged to have been received by said recorder for recording notices of mining locations and proofs of labor thereon between the first day of July, 1899, and the commencement of this action, viz. October 3, 1899; the complaint further alleging that he had retained and appropriated the same to his own use. The defendants demurred upon the ground that the complaint did not state a cause of action. The demurrer was overruled, and, the defendants declining to answer, judgment was entered against them, and they appeal.

Appellants contend that between the dates covered by the complaint there was no law either authorizing or requiring notices of mining locations, or proofs of the performance of work thereon, to be recorded, and therefore the recording of them was voluntary and no part of the recorder's official duty. If this be true, the demurrer should have been sustained, under the authority of

¹ Rehearing denied August 22, 1900.

San Bernardino Co. v. Davidson, 112 Cal. 503, 44 Pac. 650, cited by appellants. The state mining law of 1897 required notices of mining locations and proofs of the performance of labor to be recorded in the county recorder's office, and declared that no record of a mining claim or mill site thereafter made in the office of the recorder of a mining district should be valid. St. 1897, p. 214, § 7. On March 20, 1899, the act of 1897 was repealed, and the repealing act was given immediate effect. St. 1899, p. 148. The act of 1897 prescribed what the preliminary notice of location and the certificate of location should respectively state, and after the repeal of that act we had no state law prescribing what a notice of location should contain. It has, however, from the inception of mining in this state, been the common practice of the locators of mines to make written notices of locations; and this was recognized by the subsequent act of congress (Rev. St. U. S. § 2324) permitting miners of a district to make regulations governing, among other things, the "manner of recording" their claims; but, it is true, the act of congress did not, in terms, make the recording of location notices compulsory, and it has been repeatedly held that, in the absence of a state or district requirement, the failure to record notices of location does not affect the validity of the location. *Carter v. Bacigalupi*, 83 Cal. 188, 23 Pac. 361. It is therefore conceded that during the time covered by the complaint there was no law requiring these notices and proofs of labor to be recorded; but it is contended by respondent that the law authorized them to be recorded, and, if that be true, the option whether they be recorded or not was with the mine owner, and not with the recorder, and it was the recorder's official duty to record them when presented, upon payment of the fees prescribed by law. The question, therefore, is whether the law authorized or permitted these notices and proofs to be recorded. The county government act (St. 1897, p. 484, § 120), prescribing the duties of the county recorder, provides: "He must, upon the payment of his fees for the same, record, separately: * * * (12) Such other writings as are required or permitted by law to be recorded." Section 1159 of the Civil Code, as amended March 9, 1897 (St. 1897, p. 97), provides: "Judgments affecting title to real property, * * * and notices of location of mining claims, may be recorded, without acknowledgment, or certificate of acknowledgment, or further proof. * * * Affidavits showing work or posting of notices upon mining claims may also be recorded in the recorder's office of the county where such mining claims are situated." It is not necessary to pass upon the validity or invalidity of these records as evidence of title or notice of claim, since the duty of the recorder to record them, or any other instrument, does not depend upon the validity of the instrument offered for record, or the effect of

the record, but upon the statute prescribing what may be recorded. The article in which said section occurs is devoted solely to "what may be recorded," and not to the validity or effect of the instrument, or of the record of it. The case of *County of San Bernardino v. Davidson*, supra, upon which appellants rely, was decided in this court in 1896, prior to said amendment of said section, and the decision was based upon the fact that "the statute concerning county recorders makes no provision for the recording of notices of location of mining claims." That decision was right, as the statute then stood, and is not in conflict with our conclusion that the judgment here appealed from should be affirmed.

We concur: COOPER, C.; CHIPMAN, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment appealed from is affirmed.

120 Cal. 322

KRUG et al. v. F. A. LUX BREWING CO.
(S. F. 1,201.)

(Supreme Court of California. July 24, 1900.)

FINDINGS OF FACT.

Findings of fact that all the allegations of the complaint are true, and all the allegations of the answer, "so far as they are inconsistent with the allegations of said complaint," are not true, are insufficient to support a judgment.

Department 2. Appeal from superior court, city and county of San Francisco.

Action by Fritz Krug and others against the F. A. Lux Brewing Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Otto Tum Suden, for appellant. Hotelling & Spencer, for respondents.

McFARLAND, J. This action is based on a promissory note alleged to have been made by the corporation defendant to the plaintiffs. The answer contains specific denials of certain averments of the complaint, and also certain affirmative allegations, which, if true, constitute a defense to the action. Judgment went for the plaintiffs, and the defendant appeals from the judgment.

The defendant contends that the findings do not support the judgment, and this contention must be sustained. The only findings made by the court are as follows: "That all the allegations of plaintiffs' complaint in said action are true. That all the allegations of defendant's answer in said action, so far as they are inconsistent with the allegations of said complaint, are not true." It has been established by a long line of decisions in this state that such a finding is insufficient to support a judgment. *Ladd v. Tully*, 51 Cal. 277; *Johnson v. Squires*, 53 Cal. 37; *Harlan v. Ely*, 55 Cal. 340, 344; *Bank v. Treadwell*, Id. 379; *Goodnow v.*

Griswold, 68 Cal. 599, 9 Pac. 837. Of course, as was held in *Williams v. Hall*, 79 Cal. 606, 21 Pac. 965, and in many other cases, a finding that "all the allegations of the complaint are true, and all the averments of the answer are untrue," is sufficient; but the findings in the case at bar, that the allegations of defendant's answer, "so far as they are inconsistent with the allegations of said complaint, are not true," leave entirely undecided what allegations of the answer are inconsistent with the allegations of the complaint. The case at bar cannot be distinguished from *Harlan v. Ely*, supra, where the court, having made some special findings, then found generally that all the allegations of the answer are untrue, "except only in so far as the same accord with the foregoing facts." This court, in reversing that case, said: "The court below should have assumed the labor of comparing the allegations of the answer with the facts by it found. As it is, we are not informed which allegations of the answer were, in the opinion of the court below, true, which untrue. We cannot assume the function of determining for the first time the truth or falsity of any of them, either by reference to the testimony, or to the facts actually found. A finding that all the 'material' averments of a pleading are true or untrue is insufficient. *Ladd v. Tully*, 51 Cal. 277. See *Johnson v. Squires*, 53 Cal. 37. But the fifth finding is no more certain than a finding which refers only to material allegations." In *Bank v. Treadwell*, supra, this court said: "The court found 'that all the allegations of the complaint are true, and all the allegations and denials of the answer contradicting the complaint in any respect are untrue.' This is not a finding upon the issue tendered by the answer as above given. The judgment must therefore be reversed for want of sufficient finding." In *Ladd v. Tully*, supra, the finding was that all the "material" facts stated in the complaint are true, and this court said: "But we have no means of determining what facts the court deemed 'material,' and have no information from the findings upon this point. So loose a method of finding the facts cannot be tolerated, and would lead to most serious perplexities." In *Goodnow v. Griswold*, supra, the finding was that "the several allegations of said complaint not in conflict with the foregoing findings are true," and this court said: "We are not informed which of the other findings were, in the opinion of the court below, in conflict with the findings referred to as the 'foregoing facts';" and the court said, quoting the language of *Harlan v. Ely*, "We cannot assume the function of determining for the first time the truth or falsity of any of them, 'either by reference to the testimony,' or to the facts actually found." The case at bar is clearly within the foregoing decisions, and we cannot disregard the established law in order to meet the exigencies of a particular case. We have heretofore

called attention to the fact that the announcement of a trial court of its intention to decide a case a particular way does not end the case, but that care must be taken, under our system, in preparing findings which will support the judgment that is to be rendered. The judgment is reversed.

We concur: TEMPLE, J.; HENSHAW, J.

129 Cal. 244

CARPY v. DOWDELL et al. (S. F. 1,220.)
(Supreme Court of California. July 19, 1900.)

COSTS—MOTION FOR RETAXATION.

Code Civ. Proc. § 1033, provides that a party may, within five days after notice of filing of a bill of costs, file a motion for taxation thereof. Prior to amendment by act of March 24, 1874, section 1033 did not require service of the bill of costs on the adverse party, and made no provision for relief against improper items in the bill, but the practice had been settled that relief should be had by motion to retax. Defendant served proper notice of motion for retaxation, and made the motion orally, which the court refused to hear because not in writing. *Held* error, since the amendment was only declaratory of existing law as defined by the practice of the court, except in fixing the time and place for the motion, and an oral motion is a substantial compliance with the statute.

Department 1. Appeal from superior court, Napa county.

Action by Charles Carpy against James Dowdell and others. From an order refusing to hear a motion for taxation of costs, defendants appeal. Reversed.

Rodgers & Paterson and F. E. Johnson, for appellants. Daniel Titus, for respondent.

VAN DYKE, J. This is an appeal from an order refusing to hear the motion of the defendants to tax the cost bill filed by the plaintiff. The defendants within the proper time served on the plaintiff a notice that they were dissatisfied with the cost bill filed by the plaintiff, and that they would move the court to strike out certain items therein, and to retax said costs. The hearing of the matter was continued from time to time by stipulation of counsel, and on October 25, 1897, in open court, counsel for defendants applied orally to the court for an order as prayed for in the notice of motion to strike out and to tax said cost bill. Counsel for plaintiff thereupon objected to the reading of the notice of motion, or to the hearing of any application to tax costs, or to strike out the memorandum of costs, on the ground that no written motion had been presented or filed, and the court sustained the objection made by counsel for plaintiff on said ground. The action of the court in refusing to act upon defendants' motion is based upon a literal construction of that portion of section 1033, Code Civ. Proc., which reads as follows: "A party dissatisfied with the costs claimed may, within five days after notice of the filing of the bill of costs, file

a motion to have the same taxed by the court in which the judgment was rendered, or by the judge thereof at chambers." The practice, however, has been quite general, after a written notice of motion has been given of intention to strike out or to amend or retax a cost bill, to make the motion according to the notice before the court orally, and no good reason appears why a separate motion should be filed. A statute may be construed contrary to its literal meaning when a literal construction would result in an absurdity or inconsistency. *Suth. St. Const.* § 323; *Bank v. Casaccia*, 103 Cal. 645, 37 Pac. 648. In seeking the object which section 1033, Code Civ. Proc., was intended to accomplish, it may be proper to look at the law as it existed before this section was amended. The section, as found in the first edition of the Codes of 1873-74, is the same as section 510 of the old practice act. As it then stood, it did not provide for service of the memorandum of costs on the adverse party, and there was nothing providing the manner in which a party dissatisfied with the cost claimed might obtain relief. The practice, however, had been determined by the decisions of the courts. Thus, in *Meeker v. Harris*, 23 Cal. 236, it was said, "If they [the plaintiffs] have included in their bills of costs items to which they are not legally entitled, the remedy of the defendants is by motion to retax the costs and to strike out the objectionable items." But there was no time fixed within which the motion should be made, nor where it should be made,—whether before the court, or the judge at chambers. This section of the Code, however, was amended at the next session of the legislature by the act of March 24, 1874. By the amendment the time of filing the memorandum of costs was enlarged from two to five days, a provision for the service of the memorandum of costs upon the adverse party was added, and a final paragraph, prescribing how relief might be had against the insertion of improper items in the memorandum, was enacted as a new provision. It was new, however, only in the sense of being a provision provided by statute, because, as already shown, the remedy to retax was in existence under the practice as defined by the court. All that was new was in fixing a definite time within which the motion should be made, and a provision that it might be made either before the court or in chambers. The reason and intention of the lawgiver will control the strict letter of the law in interpreting the same, when to adhere to the strict letter would lead to injustice or absurdity. The substance of the law as it stands is that the party who is dissatisfied with the bill of costs as filed must within a certain time make his objection known, and the grounds on which he will move the court to correct or strike out the cost bill. When this is done by the proper notice in writing, served and filed, specifying the time when the application to the court or judge

will be made, the object of the law would seem to have been complied with; and no useful purpose would be subserved by requiring the motion to be committed to writing, instead of being made orally to the court or judge in the usual manner. It is one of the maxims of the law that it respects form less than substance. *Civ. Code*, § 3528. We think the court below erred in refusing to hear the motion to retax the costs on the ground that said motion was not made in writing, and the order to that effect is reversed.

We concur: HARRISON, J.; GAROUTTE, J.

TALLMADGE v. HOOPER.

(Supreme Court of Oregon. Aug. 13, 1900.)

Petition for rehearing. Denied.

For former opinion, see 61 Pac. 349.

PER OURIAM. The two questions of fact argued in the petition for rehearing were fully considered by the court before the case was decided. We then concluded that the evidence did not show a subsequent parol modification of the written contract set out in the complaint, nor a subsequent parol waiver of the time stipulated for the \$1,000 payment. A re-examination of the record has confirmed us in this view. The petition for rehearing is therefore denied.

RADER v. BARN.

(Supreme Court of Oregon. Aug. 15, 1900.)

Petition for rehearing. Decree modified and petition denied.

For former opinion, see 61 Pac. 1027.

WOLVERTON, J. Since the rendition of the opinion and entry of decree herein, the respondent has filed a petition for rehearing, by which it is urged that the cause ought to have been dismissed, instead of being remanded. In this we cannot concur, but, as the respondent has virtually prevailed in this court, the appellant should pay the costs of the appeal. The decree will therefore be modified accordingly, and the petition for rehearing denied.

LADD et al. v. CHAMBER OF COMMERCE et al.

(Supreme Court of Oregon. Aug. 15, 1900.)

SURETY—ENFORCEMENT OF CONTRIBUTION.

Though a surety might in some instances, without payment, compel a co-obligor to pay his portion of a common obligation, the remedy is not available if the person to whom payment should be made is not a party to the action, since he could not be compelled to accept payment.

Petition for rehearing. Denied.

For former opinion, see 60 Pac. 713.

PER CURIAM. The able and forcible petition for rehearing, as well as the importance of the case, has impelled us to re-examine the questions involved with the utmost care, notwithstanding which we are constrained to adhere to the former opinion. A surety may in some instances, in a proper proceeding, without payment, compel his principal to pay, and the creditor to receive, the debt for which he has made himself liable. 7 Am. & Eng. Enc. Law (2d Ed.) 345. But such remedy is not available here. The Chamber of Commerce is not a party to, nor is it liable to pay, the Green note; and, moreover, neither the owner nor holder of that or the Breck note is a party to the suit. So, also, one joint obligor may, under special circumstances,—as where the debt has been reduced to judgment, and the liability of the judgment debtors as between themselves is unascertained and undetermined, as in *Thompson v. Dekum*, 32 Or. 506, 52 Pac. 517, 755,—without having actually paid the debt, proceed in equity to ascertain the rights of the parties, and compel a co-obligor to pay his portion of the common obligation. But this case presents no special features to take it out of the general rule. Indeed, on the whole, it is difficult to conceive what decree the court could make if it should entertain jurisdiction and find the defendant Hughes liable on the Green and Breck notes. It could not require the owner and holder of the notes to accept payment, because he is not a party to the suit; and, if he were, the court could not compel him to accept partial payment, or prevent him from enforcing collection from any of the joint makers, if he so chose; nor could we order Hughes to pay his portion of the debt to the plaintiff, for the plaintiff could not give him a discharge, nor has he yet paid more than his proportion of the obligation. So we are of the opinion that, on the record, the court ought not to entertain jurisdiction, so far as the Green and Breck notes are concerned. The other matters are sufficiently considered in the former opinion. There is no difference in principle, so far as we can see, between Hughes' liability on the notes given directly to the contractors and those given for money borrowed to aid in the construction of the building. In either case his liability depends upon the interpretation of the bond given by the Chamber of Commerce to the New York Life Insurance Company, and we have sufficiently indicated our views upon that question. The petition for rehearing is therefore denied.

STATE v. SAVAGE.

(Supreme Court of Oregon. Aug. 13, 1900.)

CRIMINAL LAW—HARMLESS ERROR.

Where a witness on direct examination by defendant was permitted to give testimony which had been refused on his prior cross-examination, error in refusing the testimony was cured.

Petition for rehearing. Denied.

For former opinion, see 60 Pac. 610.

MOORE, J. In reviewing the decision in this cause upon defendant's petition for rehearing, we find that in referring to the testimony of Samuel Simmons the opinion improperly states that: "This witness, on his direct examination for the state, made no statement tending to show by whose authority he went to the premises of Samuel Klein to search for the money;" the bill of exceptions showing that: "Pending the examination of witnesses in said case, one Samuel Simmons was called on behalf of the state, and testified, among other things, in his direct examination, that he found \$4,800 of the money alleged to have been stolen in the yard of Mr. Samuel Klein, father of the defendant Frank Klein. [This defendant, Frank Klein, claimed to have turned state's evidence, and was a witness against the defendant Otis Savage on this trial.] That he searched for and found the money in pursuance of directions and information given him by said Frank Klein." This statement was inadvertently overlooked when the opinion was written; the writer being misled by what purported to be a copy of the witness' testimony, given on his direct examination, in which he made no statement whatever tending to show by whose direction he went to the premises of Samuel Klein to search for the money. The court having refused to permit Simmons to answer the questions propounded to him on his cross-examination, defendant's counsel called him as their witness, and on his direct examination secured the information which they sought; and this presents the question whether, if it be assumed that an error was committed in the first instance, it was not cured in the manner indicated. Judge Thompson, in his work on Trials (section 707), in commenting upon this subject, says, "An error of the court in excluding the evidence of a witness does not injure a party, if the witness is afterwards permitted to testify fully in respect of the matter excluded." In *State v. Biggerstaff*, 17 Mont. 510, 43 Pac. 709, it was held that where a witness, when called by the state, gives evidence which was excluded when called by the defense, there is no error of which the defendant can complain. In *State v. Coates* (Wash.) 61 Pac. 726, it was held that where a defendant in a prosecution for burglary was erroneously denied the privilege of cross-examining the state's witness, who was an accomplice, as to what he did with stolen money, and as to his connection with burglaries, the fact that he was thereafter permitted to go into the matter fully rendered the error harmless. We think that defendant's counsel, by making Simmons their witness, and proving by him on his direct examination the fact which they were prevented from showing on his cross-examination, thereby waived the error of which they now complain, and hence the petition for a rehearing is overruled.

STITES et al. v. McGEE et al.

(Supreme Court of Oregon. Aug. 13, 1900.)

DECREE BY CONSENT—POWER TO VACATE—REVIEW.

1. Hill's Ann. Laws, § 102, provides that the court may relieve a party from a judgment, order, or other proceeding taken against him through his mistake or excusable neglect. Plaintiffs, claiming ownership of 160 inches of water from a certain creek, sued to enjoin defendants from interfering with their use thereof. Before issue was joined the parties stipulated in writing that plaintiffs were entitled to 140 inches, and that a decree should be entered accordingly. Thereafter defendants moved that the decree be set aside because the stipulation was made, and consent to the decree given, under a mutual mistake. *Held*, that the motion should be denied, since the decree itself was entered with defendants' express consent.

2. Where a court had no power to set aside a decree, its order attempting to do so was void, and therefore subject to review on appeal.

Appeal from circuit court, Josephine county; H. K. Hanna, Judge.

Action by W. C. Stites and another against James O. McGee and others. From a judgment in favor of defendants, plaintiffs appeal. Reversed.

In August, 1896, the plaintiffs, claiming to be the owners by prior appropriation of 160 inches of water from Munger creek, in Josephine county, brought a suit to enjoin the defendants from interfering with their use thereof. Before an answer had been filed or issue joined, the parties, for the purpose of settling the controversy, stipulated in writing that the plaintiffs are the owners and entitled to the prior use of 140 inches of the waters of the stream, measured under a 6-inch pressure, to be delivered in the channel 16½ feet below McGee's dam, through a box on a grade of one-fourth inch to the rod, to be constructed and maintained by the defendants, and that a decree be entered accordingly. Thereafter, and on the 30th of September, 1896, the respective parties appeared in court by their attorneys, and, "consenting and agreeing" thereto, a decree was duly entered in accordance with the stipulation, which was recorded in full in the journal, and made a part of the decree. At a subsequent term, but within a year after the rendition of the decree, the defendants moved to set it aside, and for permission to answer, on the ground that the stipulation was made, and their consent to the decree given, under a mutual mistake of the parties as to the actual quantity of water flowing in the channel of the creek at the defendants' dam. This motion was allowed, and the plaintiffs appeal.

G. W. Colvig and Davis Brower, for appellants. J. R. Neil, for respondents.

BEAN, C. J. (after stating the facts). In support of the ruling of the court below it is argued that this case is governed by section

102 of the statute (Hill's Ann. Laws), which provides that the court may, "in its discretion, and upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect." The decree in question, however, was not taken against the defendants through any of the causes enumerated in the statute, but was rendered with their knowledge and by their express consent, and hence does not come within the provisions of the section referred to. True, it is alleged that the stipulation or contract which forms the basis of the decree was entered into through the mutual mistake of the parties, but it is not claimed that there was any mistake or inadvertence about the decree itself. Whether the stipulation expresses the true and actual intent and agreement of the parties is a question which can be determined only in a proper proceeding instituted for that purpose, and upon testimony given in the regular way. It is certainly not a proper subject of inquiry on an *ex parte* motion to vacate the decree. Indeed, a consent decree is not, in a strict, legal sense, a judicial sentence or judgment of the court, but is in the nature of a solemn contract between the parties. When a decree is made by the consent of the parties, the court does not inquire into the merits or equities of the case. The only questions to be determined by it are whether the parties are capable of binding themselves by consent, and have actually done so. These two facts appearing, the court orders a decree to be entered, and when thus entered, showing on its face that it is by consent, it is absolutely conclusive upon the consenting parties. It cannot be amended or varied in any way without the consent of all the parties affected by it; nor can it be reheard, vacated, or set aside by the court rendering it, especially after the expiration of the term; nor can it be appealed from or reviewed upon a writ of error. The only way it can be attacked or impeached after the expiration of the term, whatever the rule may be during the term, is by an original bill, on the ground of fraud or mutual mistake. 5 Enc. Pl. & Prac. 960; Gib. Suit in Ch. § 558; 2 Beach, Mod. Eq. Prac. § 853b; 2 Daniell, Ch. Prac. (6th Am. Ed.) *974; Stump v. Long, 84 N. C. 616; Elder v. Bank, 12 Kan. 242; Thompson v. Railway Co., 95 U. S. 391, 24 L. Ed. 481; Manion v. Fahy, 11 W. Va. 482; Morris' Adm'r v. Peyton's Adm'r, 29 W. Va. 201, 11 S. E. 954; Attorney General v. Tomline, 7 Ch. Div. 388. The court below therefore had no power or authority to set aside or vacate the decree on motion after the expiration of the term, and its order attempting to do so is consequently void and reviewable on appeal. Deering & Co. v. Quivey, 26 Or. 556, 38 Pac. 710. The decree of the court below is reversed.

MEMORANDUM DECISIONS.

LOWER KINGS RIVER WATER-DITCH CO. v. EMIGRANT DITCH CO. (Sac. 637.) (Supreme Court of California. July 20, 1900.) Department 1. Appeal from superior court, Kings county. Action by the Lower Kings River Water-Ditch Company against the Emigrant Ditch Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed. L. L. Cory and Stanton L. Carter, for appellant. Bradley & Farnsworth and Short & Irwin, for respondent.

PER CURIAM. The facts in this case are the same as those presented in *Last Chance Water-Ditch Co. v. Emigrant Ditch Co.* (Sac. 636, just decided) 61 Pac. 960, and upon the authority of that case the order appealed from is affirmed.

PEOPLE'S DITCH CO. v. EMIGRANT DITCH CO. (Sac. 638.) (Supreme Court of California. July 20, 1900.) Department 1. Appeal from superior court, Kings county. Action by the People's Ditch Company against the Emigrant Ditch Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed. L. L. Cory and Stanton L. Carter, for appellant. Bradley & Farnsworth and Short & Irwin, for respondent.

PER CURIAM. The facts in this case are the same as those presented in *Last Chance Water-Ditch Co. v. Emigrant Ditch Co.* (Sac. 636, just decided) 61 Pac. 960, and upon the authority of that case the order appealed from is affirmed.

In re PICHOR'S ESTATE. (S. F. 2018.) (Supreme Court of California. May 16, 1900.) In bank. Appeal from superior court, city and county of San Francisco. Petition by the assessor of the city and county of San Francisco against the estate of Henry Pichor, deceased, for an order directing the payment of certain taxes. From a judgment allowing the demand, the estate appeals. Reversed. Garber, Boalt & Bishop, Garber, Creswell & Garber, and Smith & Pringle, for appellant. Franklin K. Lane, for respondent.

PER CURIAM. The assessor of the city and county of San Francisco filed a petition in the court below in the matter of the estate of Henry Pichor, deceased, praying an order directing the executor of the will of said deceased to pay certain taxes for the fiscal year of 1899-1900, which had been assessed by said assessor against the personal property of said estate. The executor answered, and for partial defense showed that the property assessed included a considerable valuation of the bonds of sundry railroad and other quasi public corporations in this state, which bonds are secured by mortgage or deed of trust on the properties, respectively, of the several corporations issuing the same, and that the incumbered property has been or will be in each instance assessed to the owner thereof without deduction on account of the mortgage debt. The executor claimed that he should not be required to pay the tax assessed on said bonds. The court sustained a demurrer to his answer, and ordered the executor to pay the full amount of the taxes demanded by the assessor. The question involved is the same as that considered in the opinion rendered in

Germania Trust Co. v. City and County of San Francisco (S. F. 2,031, this day filed) 61 Pac. 178, and for the reasons there stated the order is reversed, with directions to the court below to overrule the demurrer to the executor's answer.

SPOONER v. STEARNS RANCHOS CO. et al. (L. A. 619.) (Supreme Court of California. June 4, 1900.) Department 1. Appeal from superior court, Riverside county. Action by L. Spooner against the Stearns Ranchos Company and others. From a judgment in favor of defendants, plaintiff appeals. Affirmed. John G. North, for appellant. E. W. McGraw, for respondents.

PER CURIAM. This is an appeal from a judgment in favor of defendants. The issues and questions discussed are practically the same as in *Weidenmueller v. Stearns Ranchos Co.* (L. A. 618, opinion filed May 23, 1900.) 61 Pac. 374. Upon the authority of that case the judgment is affirmed.

BELT v. BELT. (Supreme Court of Kansas. July 7, 1900.) Error from district court, Jewell county; R. M. Pickler, Judge. Suit by Sophia C. Belt against M. C. Belt for divorce. Decree refusing divorce, and awarding custody of children and alimony. Defendant brings error. Affirmed. R. W. Turner, for plaintiff in error. T. S. Kirkpatrick, for defendant in error.

PER CURIAM. This was an action of divorce, in which the plaintiff below charged the defendant with extreme cruelty, and the defendant below filed a cross petition making like charges against the plaintiff. Much testimony was heard at the trial on both sides of the controversy, at the conclusion of which the court found that both parties were in fault, and that neither was entitled to a divorce. Thereupon the plaintiff below was awarded the care and custody of one, and the defendant the care and custody of two, of the minor children, and a further decree was entered that the defendant pay plaintiff the sum of \$120 per annum in equal quarterly installments, making the same a lien on real estate of the defendant. The order concerning the custody of the children and the division of the property was authorized by section 64 of chapter 96 of the General Statutes of 1897. We have discovered no error in the record sufficient to justify a reversal. The judgment of the court below will be affirmed.

CASE v. CHEROKEE LANYON SPELTER CO. (Supreme Court of Kansas. June 9, 1900.) Error from district court, Crawford county; W. L. Simons, Judge. Action between George A. Case and the Cherokee Lanyon Spelter Company. From the judgment, Case brings error. Affirmed. S. E. Cheeseman, J. R. Sapp, and B. S. Gaitskill, for plaintiff in error. Morris Cliggett, for defendants in error.

PER CURIAM. The facts of this case and the legal questions arising thereon are identical with those just considered and decided in *Case v. Spelter Co.*, 61 Pac. 406, and therefore the judgment of the court below will be affirmed.

CHICAGO, R. I. & P. RY. CO. v. FERNIE. (Supreme Court of Kansas. July 7, 1900.) Error from court of appeals, Southern department, Central division. Action by John Fernie against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff was reversed by the court of appeals (58 Pac. 492), and defendant brings error. Judgment of court of appeals reversed, and of district court affirmed. M. A. Low and W. F. Evans, for plaintiff in error. D. H. Martin, for defendant in error.

PER CURIAM. An examination of the record shows that the questions raised for decision herein are identical with those determined in *Railway Co. v. Nyce*, 61 Kan. —, 59 Pac. 1040, and for the reasons there given the judgment of the court of appeals will be reversed, and the judgment of the district court will be affirmed.

DELAPLANE v. MARSHALL et al. SMITH v. FLUKER et al. (Supreme Court of Kansas. June 9, 1900.) First case: Error from district court, Lyon county; Charles B. Graves, Judge. Second case: Error from district court, Franklin county; S. A. Riggs, Judge. Actions by Thomas Marshall and others against J. D. Delaplane and by Grace Fluker and others against C. W. Smith. Judgments for plaintiffs, and defendants bring error. Affirmed. Attorneys in first case: J. A. Smith, for plaintiff in error. Buck & Spencer, for defendants in error. Attorneys in second case: J. A. Smith, for plaintiff in error. Buck & Spencer, and Madden Bros., for defendants in error.

PER CURIAM. The only question in these cases is the one decided in *Bank v. Prescott*, 60 Kan. 490, 57 Pac. 121, in which, as to the matter of practice in the district courts, it was held "that a voluntary appearance is made by the defendant signing a paper, entitled in the cause, waiving service of summons and entering an appearance in the action, whether the same is filed with the petition or afterwards in term time or vacation." The judgments of the courts below in both cases are therefore affirmed.

PORTSMOUTH SAV. BANK v. HARDMAN. (Supreme Court of Kansas. July 7, 1900.) Error from court of appeals, Northern department, Western division. Action by the Portsmouth Savings Bank against Martha J. Hardman for foreclosure of a mortgage. A judgment for plaintiff decreeing foreclosure was reversed by the court of appeals. 61 Pac. 984, and plaintiff brings error. Affirmed. Ira E. Lloyd and F. D. Turck, for plaintiff in error. H. J. Harwi and W. M. Roberts, for defendant in error.

PER CURIAM. The question in this case relates to the effect upon the homestead rights of a wife of an extension of the time of payment of a mortgage indebtedness upon the homestead made by the husband alone, the legal title to the land being in his name. Was such an extension of time binding upon the wife in respect to her homestead right, she not having been a party to it? Might she, upon the foreclosure of the mortgage the time of payment of which had been thus extended, treat it as a new mortgage made without her consent? and might she also plead the statute of limitations to a foreclosure of it as though the time of payment had not been extended by her husband? The court of appeals held that the extended mortgage was void as to her, and that, conceiving it to be in effect the old mortgage, the statute of limitations

was available as a defense to it. Our judgment accords with that of the court of appeals, though its reasons were not in all particulars what we might have given. The judgment is affirmed.

SHADDUCK et al. v. STOTTS. (Supreme Court of Kansas. July 7, 1900.) Error from court of appeals, Southern department, Central division. Action by R. B. Shadduck and Martha L. Shadduck against E. Stotts. Judgment for defendant was affirmed by the court of appeals (59 Pac. 39), and plaintiffs bring error. Affirmed. W. H. Lewis, W. M. Whitelaw, and F. A. Whitelaw, for plaintiffs in error. H. Fierce, and Prigg & Williams, for defendant in error.

PER CURIAM. We have examined the entire record, as well as the opinion of the court of appeals, and have arrived at the opinion that the case was properly decided by the court of appeals. For the reasons given by that court (59 Pac. 39) its decision and judgment will be affirmed.

WERNER v. WERNER et al. (Supreme Court of Kansas. June 9, 1900.) Error from district court, Sedgwick county; D. M. Dale, Judge. Action by Rosa Werner and others against Emil Werner. Judgment for plaintiffs. Defendant brings error. Affirmed. Dyer & Davis, for plaintiff in error. Stanley, Vermillion & Evans, for defendants in error.

PER CURIAM. A judgment of nullity of a marriage contract between the parties hereto was rendered in the court below. In the same proceeding a division of property between them was ordered. This judgment was affirmed by this court. *Werner v. Werner*, 59 Kan. 399, 53 Pac. 127. Pending the proceedings in this court Emil Werner, the plaintiff in error in that case and also the plaintiff in error in this one, retained possession of the property which had been set apart to Rosa Werner. After the affirmation of the judgment in this court she sued Emil Werner to recover the rents and profits of her property. Judgment was rendered by the court below in her favor. Emil Werner has prosecuted error to this court. His sole complaint is that he was not allowed to introduce evidence that he had made repairs upon the property during the time he was in the occupancy of it. He says that such evidence bore upon the rental value of the property, by showing that it was not in good repair, and therefore would not bring as much in the way of rents as though it had been in good repair. The fact is, however, as stated by his counsel at the time the evidence was offered, that the amount expended for repairs was claimed as an offset against the plaintiff's demand for rents. Neither theory—the one upon which the evidence was offered, nor the one upon which it was argued in this court—is tenable, and the judgment of the court below is therefore affirmed.

BANK OF SANTA FE v. DREW, County Treasurer. (Court of Appeals of Kansas, Southern Department, W. D. June, 1900.) Application by the Bank of Santa Fé, by R. S. Liggett, receiver, for a writ of mandamus against C. H. Drew, treasurer of Morton county, Kan. Alternative writ granted, and peremptory writ ordered by full bench. The above case was brought by the above-named plaintiff against the above-named defendant to compel the application of funds to the payment of county orders on the treasurer of Morton county, Kan. The only defense urged was that more than five years had elapsed since not only the issuance of the orders, but since their presentation for payment and their reg-

istration for nonpayment for want of funds. The plaintiff contended that the statutes of limitation in connection with chapter 249, Laws Kan. 1891, did not begin to run until there were funds in the treasury raised by taxation with which to pay said orders, and that the five-year clause of the statutes of limitation and the period thereunder did not become effective, so as to bar the relief demanded, until five years had elapsed after the county treasurer had published in the official county paper his call for the redemption of such warrants, and also contended, as funds raised by taxation under the laws of Kansas must be held sacred to the payment of the obligations for which they were levied, that if, through inadvertence or misapprehension of duty, the county treasurer made payment of such funds to the payment of subsequent orders, the rule would not be changed, but that, in the absence of any other defense than the pretended defense of the statutes of limitations, that a mandamus would lie against the county treasurer compelling him as a disbursing officer to pay such orders as were legally drawn upon the funds in his hands subject to the payment of such orders. Milton Brown, for plaintiff. G. Porter Craddock, Co. Atty., for defendant.

PER CURIAM. Peremptory writ ordering county treasurer to pay said orders out of funds in his hands granted.

BLACKBURN v. BALANCE et al. (Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.) Error from court of common pleas, Wyandotte county; William G. Holt, Judge. Action by Mary Blackburn against Benjamin Balance and Alma A. Balance. From an order setting aside a judgment by default, plaintiff brings error. Affirmed. Hutchings & Kephlinger, for plaintiff in error. Henry McGrew and J. O. Fife, for defendants in error.

PER CURIAM. This proceeding in error is brought to review an order of the trial court setting aside a judgment by default, and granting a new trial, on petition therefor under the Code. The assignment of error is that the court erred in vacating the judgment rendered upon the defendants' default, and sustaining the defendants' petition for a new trial. The contention is that the evidence does not warrant the action of the court therein. The evidence is contradictory. The trial court, in our judgment, gave the evidence its proper consideration, and reached a just and proper conclusion. After a careful scrutiny of the statements of both the parties, we are impressed with the truthfulness of the defendants in their statements, and, upon the contrary, of an entire lack of candor on the part of the plaintiff and her husband. The judgment is affirmed.

DAVIS v. BURR, County Treasurer. (Court of Appeals of Kansas, Southern Department, W. D. June 19, 1900.) Action by A. L. Davis against J. H. Burr, county treasurer. Writ of mandamus granted. W. A. Frush and H. F. Mason, for plaintiff in error. T. A. Scates, for defendant in error.

PER CURIAM. This action is brought by plaintiff to compel the county treasurer of Seward county, Kan., to accept from plaintiff, as the holder and owner of a tax-sale certificate covering the S. W. $\frac{1}{4}$ of section 12, and the N. W. $\frac{1}{4}$ of section 13, in township 32, range 33, Seward county, payment of the taxes for the year 1898, and indorse such payment upon the certificate. The defendant contends that the sale upon which the certificates are based was erroneous. He further contends that the county commissioners have made an order, under paragraph 6999 of the General Stat-

utes of 1889, for the refunding of the money paid for them. From our examination of the facts, we are satisfied that peremptory writs, as prayed for, should be granted. It is so ordered.

DOUGLASS v. BRANCH et al. (Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.) Error from district court, Leavenworth county; Louis A. Myers, Judge. Action by John C. Douglass against Louis Branch and Lewis Branch. Judgment for defendants, and plaintiff brings error. Reversed. John C. Douglass, for plaintiff in error. John H. Atwood and W. W. Hooper, for defendants in error.

PER CURIAM. This action was brought for the recovery of the possession of real estate in the city of Leavenworth, and for the value of the rent therefor. The plaintiff below offered evidence tending to show that the patent title vested in him, as well as whatever title was conveyed by a certain tax deed to A. A. Higinbotham, of date August 11, 1871, and that as late as January 24, 1898, the defendant paid said Higinbotham rent thereon. An action on plaintiff's claim was begun in August, 1887, and dismissed, without prejudice, May 9, 1893. On November 29, 1893, this action was begun. The plaintiff in error has filed a very short brief of less than four pages, and the defendant in error none at all. From the oral argument of the case and the brief filed, together with the record, it appears to us that there was sufficient evidence to go to the jury, and it was reversible error to sustain the demurrer to the evidence. The judgment of the district court is reversed, and a new trial of the case directed.

DOUGLASS v. BRANDON et al. (Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.) Error from district court, Leavenworth county; Louis A. Myers, Judge. Action by George Brandon and others against John C. Douglass. Judgment for plaintiff. Defendant brings error. Dismissed as to heirs of George Brandon, deceased. John C. Douglass, in pro. per. J. H. Gilpatrick and John H. Atwood, for defendants in error.

PER CURIAM. This case is before the court on motion of David Atchison and John W. Brandon to dismiss the proceedings in error for the reason that, after the trial and judgment in the district court, on the 2d day of June, 1898, George Brandon died, and that no proceeding has been had to revive the action in the name of his heirs at law or legal representatives. Authorities are submitted in support of the motion. However, the plaintiff in error moves the court to dismiss without prejudice his action against Brandon, deceased, his heirs and legal representatives. For the present, the motion of David Atchison is overruled. The motion of plaintiff in error is sustained, and the action dismissed as to George Brandon, deceased, his heirs and legal representatives. The case is continued for further proceedings.

ESTREL v. DEIHL et al. (Court of Appeals of Kansas, Northern Department, C. D. June 18, 1900.) Error from district court, Saline county; R. F. Thompson, Judge. Proceeding by John Estrel against Henry Deihl and others to set aside a certain survey. The survey was affirmed, and plaintiff brings error. Reversed. R. A. Lovitt, for plaintiff in error. R. W. Blair and Z. C. Millikin, for defendants in error.

PER CURIAM. This is a proceeding in error, originally instituted in the district court of Saline county, to set aside a certain survey of section 6, township 14, range 5 W., made

by the county surveyor of said county. The survey was affirmed by the district court, and the case is here for review. The government monuments were found at the northeast and northwest corners of said section, and also at the centers of the east and west lines thereof. At the center of the north line it was also found permanent in the ground, and, while there was some doubt cast upon its being in the original location, the presumption is that it was, and from the record we are unable to say that such presumption was overcome, or that the county surveyor erred in recognizing it as being in its original place. None of the monuments on the south line were found in the ground, and before the section could be subdivided their location was necessary. Not one of these were established, as shown by the record, in the manner required by law. Section 9, c. 29, Gen. St. 1897, gives the rule to be followed in re-establishing section and quarter section corners; and, as it is evident that the rule was not complied with, any subdivision of the section would necessarily be erroneous. The judgment of the district court is reversed, and said court directed to render judgment in favor of the plaintiff in error, and to set aside and annul said survey.

GRIBLING et al. v. RHODD. (Court of Appeals of Kansas, Northern Department, E. D. June 15, 1900.) Error from district court, Brown county; R. M. Emrey, Judge. Action by Elizabeth Rhodd against Philip Gribbling and Simon Frazer. Judgment for plaintiff. Defendants bring error. Affirmed. A. S. Brewster, and S. M. Brewster, for plaintiffs in error. C. D. Walker, for defendant in error.

PER CURIAM. It is claimed by the plaintiffs in error in this case that the evidence does not sustain the verdict, that the verdict is contrary to law, and that the court erred in rendering judgment against the defendant. An examination of the record convinces us that there was sufficient evidence to sustain the verdict, and there was no valid reason why it should be set aside, and judgment was properly rendered thereon. The judgment of the district court is affirmed.

HATCHER v. MYERS. (Court of Appeals of Kansas, Southern Department, E. D. June 13, 1900.) Error from district court, Montgomery county. Action between Kate J. Hatcher and L. W. Myers, administrator. From the judgment, Hatcher brings error. Affirmed. J. W. Sutherland and P. C. Young, for plaintiff in error. Clark & Clark, for defendant in error.

PER CURIAM. This is a controversy over certain moneys belonging to an estate. The case is submitted upon the case-made and brief of plaintiff in error. We have examined the record and authorities cited, but find no error sufficient to require a reversal of the case. The judgment of the district court is affirmed.

LEWIS et al. v. PROVIDENT LOAN & TRUST CO. (Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.) Error from district court, Morris county; O. L. Moore, Judge. Action by the Provident Loan & Trust Company against Charles A. Lewis and Elizabeth Lewis. Judgment for plaintiff. Defendants bring error. Affirmed. E. G. Wilson, for plaintiffs in error. Jas. V. Humphrey, for defendant in error.

PER CURIAM. The complaint of the plaintiffs in error is that the case was assigned for trial, and tried, at a term which commenced before the pleadings were all filed, and before issues were joined, and that the court erred

in overruling their motion to set aside the judgment for that reason, and grant them a new trial. Upon the authority of *Rice v. Hodge*, 26 Kan. 168, the judgment must be affirmed.

MACKEY et al. v. WYCKOFF. (Court of Appeals of Kansas, Southern Department, W. D. June 19, 1900.) Error from district court, Lyons county; W. A. Randolph, Judge. Action by W. H. Wyckoff against W. H. Mackey and J. E. Clemens. Judgment for plaintiff, and defendants bring error. Affirmed. J. V. Humphrey, for plaintiffs in error. Chas. B. Graves, for defendant in error.

PER CURIAM. The only contention presented by counsel for plaintiffs in error in his brief is that the court erred in permitting, over objection, a leading and material question to be asked of and answered by the defendant in error, plaintiff below, while the latter was testifying in his own behalf. The record shows that the question was not objected to as leading, and that practically the same question had just been asked of the witness, and answered without objection, and that the two answers were identical. The contention must therefore be overruled, and the judgment of the trial court affirmed.

MALLORY et ux. v. PARKER. (Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.) Error from district court, Shawnee county; Z. T. Hazen, Judge. Action by Albert Parker against D. F. Mallory and wife. Judgment for plaintiff. Defendants bring error. Affirmed. E. G. Wilson, for plaintiffs in error. A. Bergen, for defendant in error.

PER CURIAM. The defendant in error, who was the plaintiff in district court, filed a petition setting up the execution on November 1, 1887, of a promissory note from Pompey Edmonds and Mary Edmonds to Levi P. Parker for \$150, payable in four years, with 10 per cent. per annum interest payable semiannually, and that said indebtedness was secured by a mortgage on real estate in Topeka, and setting up copies of said note and mortgage; that before July 22, 1897, said Levi P. Parker died testate, and that G. A. Edson was duly appointed and qualified as his executor; that on July 22, 1897, said executor assigned said mortgage and the debt thereby secured to the plaintiff therein; that several payments had been made and indorsed on said note, the last of which was on November 3, 1894; that the defendants D. F. Mallory and wife were now the owners of said property, subject to said mortgage,—and said petition prayed for a foreclosure thereof. The defendants Mallory filed a motion to make the petition more definite and certain, which was overruled, and thereafter they answered, admitting the execution of the note and mortgage sued on, and that said defendants are now the owners of the mortgaged property, and denying every other allegation of said petition, and expressly denying that they had made any payments on said note, or that any had been made thereon, since June 29, 1892, and pleading the five-years statute of limitations. Said answer was verified as to the denial of payments only. The plaintiff, in reply, filed a general denial, and upon the issues thus joined a trial was had before the court; certain special questions being submitted to a jury. The jury, upon the special questions submitted, found that the defendant Mallory did make a payment on the mortgage indebtedness within five years before the commencement of this suit, and that the mortgage in suit was a part of the purchase money in the conveyance from Bradbury to Mallory, and thereupon judgment was rendered

foreclosing said mortgage. The main ground of contention in this case was settled adversely to the plaintiffs in error in *McLane v. Allison*, 60 Kan. 441, 56 Pac. 747, and we see nothing in the other alleged errors requiring special comment. The plaintiffs in error do not call our attention to any injury sustained by them by overruling the motion to make the petition more definite and certain, and we see none. The appointment of the executor, being pleaded, and not denied under oath, was admitted. The assignment of the mortgage was its own proof of execution. The issues in the case did not entitle the parties to a jury trial, the jury was correctly instructed upon the questions submitted to them, and their finding upon the only material controversy in the case was sustained by competent evidence, and under that finding no other judgment could have been rendered than the one that was rendered. The judgment of the district court is affirmed.

OSBORN et al. v. RUSSELL et al. (Court of Appeals of Kansas, Southern Department, W. D. June 19, 1900.) Proceeding in mandamus by Hattie N. Osborn and others against A. Russell and others. Writ denied. F. J. Oyler and H. F. Mason, for plaintiffs in error. Reeves & Kirkpatrick, for defendants in error.

PER CURIAM. This is an original proceeding in mandamus to compel the defendants, the superintendent and board of education of the public schools of Dodge City, Kan., to admit the plaintiffs to the public schools of the city. The plaintiffs claim that they are residents of Dodge City and are of school age, and that they have been refused admittance to the schools by the superintendent and board of education for the reason that they have not been vaccinated. They allege that they are not infected with smallpox or other contagious disease, and that no smallpox exists in the city or in that community. The defendants allege that the plaintiffs have not been vaccinated, that the city is at all times in imminent danger of an outbreak of smallpox, that the city board of health has ordered that children be not admitted to the public schools without being vaccinated, that said city is in daily communication with other cities and places where smallpox exists, and that great numbers of people are passing backward and forward between said cities and places and Dodge City. After considering the questions involved in the case, we are satisfied that plaintiff's application for a peremptory writ should be denied. In a recent decision of the supreme court of Utah (*State v. Board of Education of Salt Lake City*, 60 Pac. 1013) the questions involved in the case at bar are fully considered, and in the conclusions there reached, as well as in the reasoning of the court, we fully concur.

STATE v. PUTZE. (Court of Appeals of Kansas, Northern Department, E. D. July 11, 1900.) Appeal from district court, Douglas county; Samuel A. Riggs, Judge. Emil Putze was convicted of selling liquors, and appeals. Dismissed. Barker, McWilliams & Clarke, for appellant. A. A. Goddard, Atty. Gen., and W. B. Brownell, for the State.

PER CURIAM. The appellant, Emil Putze, was convicted upon three counts of an information charging him with the unlawful sale of intoxicating liquors, and upon one count with keeping and maintaining a nuisance under the prohibitory law, and sentenced to imprisonment in the county jail for a term of four months and to pay a fine of \$500 and the costs of the prosecution, and that he stand committed to the jail until the fine and costs are paid. The appellant, defendant in the trial court, filed his motion for a new trial, which was overruled.

He appeals, and presents the record to this court for review. The case was not argued orally, nor has the appellant served or filed any printed briefs, as required by the rules of practice. There are, therefore, no errors in the record pointed out. The appeal will be dismissed.

THORPE et ux. v. HOOPEES et al. (Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.) Error from district court, Pottawatomie county; William Thomson, Judge. Action between Martin Thorpe and wife against Elwood Hoopes and others. From the judgment Thorpe and wife bring error. Dismissed. Codding & Challis, for plaintiff in error. Hick & Badgley, Geo. B. Smith, and Wheeler & Switzer, for defendants in error.

PER CURIAM. The motion to dismiss in this case must be sustained, upon the ground that the action was not begun within one year from the date of the judgment complained of.

WILLIAM W. KENDALL BOOT & SHOE CO. v. GOLDMAN. (Court of Appeals of Kansas, Northern Department, E. D. June 6, 1900.) Error from court of common pleas, Wyandotte county; W. G. Holt, Judge. Action by the William W. Kendall Boot & Shoe Company against Bessie Goldman. From a judgment discharging the attachment, plaintiff brings error. Affirmed. Karnes, New & Krauthoff and Bruno Hobbs, for plaintiff in error. Hale & Craig, for defendant in error.

PER CURIAM. The only question for consideration in this case is: Did the trial court err in discharging the attachment issued therein? The evidence was mostly oral, and is quite long, and from it different minds could easily arrive at different conclusions. Such being the case, we cannot say that if we had heard the evidence as it fell from the lips of the witnesses, and observed their appearances of honesty or venality, as the trial court did, what our decision of the question would have been. We are unable to say that the trial court erred. The judgment will be affirmed.

DELLINGER v. VINEYARD et al. (Supreme Court of Montana, May 22, 1900.) Appeal from district court, Deer Lodge county; Theo. Brantly, Judge. Action by Daniel N. Dellinger against Gordon O. Vineyard and others to apply homestead property to payment of a judgment. From a judgment in favor of defendants, plaintiff appeals. Affirmed. Wm. H. De Witt and E. Scharnikow, for appellant. H. R. Whitehill, for respondents.

PER CURIAM. This appeal is from a judgment entered in favor of the defendants and against the plaintiff on the 23d day of February, 1898. The questions presented in the case at bar have been decided by the opinion just handed down in *Vincent v. Vineyard*, 61 Pac. 131. Upon the authority of that case the judgment is affirmed.

BRANTLY, C. J., being disqualified, took no part in the foregoing decision.

HELENA & L. SMELTING & REDUCTION CO. v. LYNCH et al. MAHONEY v. BUTTE HARDWARE CO. BOUCHER v. BARSALOU et al. TEAGUE v. JOHN CAPLICE CO. (Supreme Court of Montana, June 1, 1900.) The first case is appealed from district court, Jefferson county; M. H. Parker, Judge. The second, third, and fourth cases are appealed from district court, Silverbow county; John Lindsay, Judge. Actions by the Helena & Livingston Smelting & Reduction Company

against John Lynch and another, by Edward L. Mahoney against the Butte Hardware Company, by Frank Boucher against Joseph Barsalou and another, and by Thomas Teague against the John Caplice Company. From all the judgments appeals were taken, and respondent in each action moves for a dismissal for ambiguity in the appeal bond. Motions denied. Attorneys in first case: Cullen, Day & Cullen, for appellants. McHattan & Cotter, for respondents. Attorneys in second case: F. T. McBride and Bernard Noon, for appellants. McHattan & Cotter, for respondents. Attorneys in third case: Robt. McBride and W. J. Naughton, for appellants. McHattan & Cotter, for respondents. Attorneys in fourth case: Jesse B. Roote, for appellant. W. W. Dixon and McHattan & Cotter, for respondent.

PER CURIAM. The respondent in each of these cases moves a dismissal of the appeals upon the ground that the undertaking in each is void for ambiguity. The appeals are from judgments and orders refusing new trials. Each undertaking is in form and substance like the undertaking considered in *Watkins v. Morris*, 14 Mont. 354, 36 Pac. 452, and *Ramsey v. Burns* (Mont.) 61 Pac. 129. Upon the authority of *Watkins v. Morris*, and *Ramsey v. Burns*, supra, the motions must be denied, and it is so ordered. Denied.

TERRITORY v. RICHARDSON. (Supreme Court of Oklahoma. June 30, 1900.) Error from district court, Kay county; before Justice Bayard T. Hainer. T. M. Richardson, Jr., was indicted for crime. From a judgment discharging defendant, the territory brings error. Affirmed. Harper S. Cunningham, Atty. Gen., A. R. Museller, Co. Atty., and S. H. Harris, for the Territory. H. H. Howard, J. L. Pancoast, and James B. Diggs, for defendant in error.

McATEE, J. The facts in this case are identical with those in No. 920 (60 Pac. 244), and it will be held here, as in that case, that a pardon is an act of grace proceeding from the powers intrusted with the execution of the laws, which exempts the individual upon whom it is bestowed from the punishment which the law inflicts for the commission of a crime. It is a remission of guilt, and a declaration of record by the authorized authority that a particular individual is to be relieved from the legal consequences of a particular crime. The power and authority to grant pardons for offenses against the laws of this territory is by the organic act committed to the governor, and is complete in him. The power to grant pardons is exclusive of the judicial and legislative authority. It is conferred by the United States, and it cannot be lessened by any act of the territorial legislature. When a full and absolute pardon is granted to one by the governor of this territory, it exempts the individual upon whom it is bestowed from the punishment which the law inflicts upon the crime which he has committed, and the crime is forgiven and remitted. A pardon extends to every offense known to the law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency,

or after conviction and judgment. After a pardon has been granted, it is thenceforward and at all times final, notwithstanding the fact that it may not have been granted in pursuance of the regulations provided for in the statutes of the territory. The territorial legislature has no power to impose limitations upon the manner in which the pardoning power shall be used, set up, alleged, or called to the notice of the court as a defense. All that is requisite is that the attention of the court shall be called judicially to the fact that a full and absolute pardon has been granted, and the court before whom the matter is pending will itself determine whether the evidence is sufficient; and when, as in this case, there is no contention on the subject, but the pardon is admitted, it is the duty of the court to discharge the defendant, and dismiss the proceeding against him. In order to impeach a pardon for fraud, it must be done in a direct, and not in a collateral, manner, such as the present proceeding; and the fact that a pardon has been granted is available as a protection from any further proceeding in respect to the crime for which the pardon has been extended, at any time or stage of the proceedings before the execution of the sentence. The appeal will be dismissed, and the judgment of the trial court affirmed. All the justices concur, except HAINER, J., who presided below.

WILLIS v. BOOTH. (Supreme Court of Oregon. July 23, 1900.) Appeal from circuit court, Marion county.

PER CURIAM. The motion to advance in this case must be denied. It is a civil action, involving no question of public importance, and, under rule 16 (37 Pac. viii.), must come up for argument in the order of its entry on the trial docket. An early hearing is no doubt important to the immediate parties litigant, but the same is probably true of the other cases entitled to precedence over it, and it would be unjust to them to advance it out of its order.

MORSE v. ELY et al. (Supreme Court of Washington. Sept. 13, 1899.) Appeal from superior court, Island county; James G. McClinton, Judge. Action by Mary Morse against Jerome Ely and others. Allen Weir, for appellant. McCutcheon & Gilliam, for respondents.

PER CURIAM. The record in this cause is incomplete in that it fails to show: (1) The amended application of Mary Morse, upon which the cause was tried in the court below. (2) Exhibit C of Mary Morse, being an abstract of title of the uplands lying between the county road and the meander line shown between the letters D and E upon Ely & Maylor's Exhibit 1. (3) Ely & Maylor's Exhibit 3, being certified copy of deed from Jerome Ely and wife to J. R. and J. H. Maylor. If the counsel for the respective parties will stipulate to supply the record in the particulars above mentioned, and cause said record to be supplied by filing the omitted part with the clerk of this court before the 15th day of October, 1899, the case will be taken for further consideration; otherwise, the same will stand affirmed.

